Fifty-State Compilation of Subrogation-Related Laws for Property Claims

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Note, re: Statute of Limitations
Except for Colorado, Florida, Iowa, Louisiana, Massachusetts, Mississippi, Ohio (Consumer Transactions), Oklahoma, South Carolina and Wisconsin, all jurisdictions impose a four-year statute of limitations for contracts arising from the sale of goods under Section 2-725 of the Uniform Commercial Code.

For claims based on improvements to real property and/or brought by condominium associations related to construction defects, there may be separate notice/limitations periods. Check the statutes identified in the applicable section entitled *Right to Repair/Notice Statutes – Construction Cases.*

ALABAMA

Anti-Subrogation Rule: Subrogation by Insurer Against Insured
"No right of subrogation can arise in favor of the insurer against its own insured, since by definition, subrogation exists only with respect to rights of the insured against third persons to whom the insurer owes no duty." Moring v. State Farm Mutual Auto. Ins. Co., 426 So.2d 810 (Ala. 1982) (prohibited subrogation in aftermath of single car accident, where same insurer covered driver and injured passenger under separate policies).

Comparative/Contributory Negligence
Strict Contributory. To establish contributory negligence, the defendant bears the burden of proving that the plaintiff: 1) had knowledge of the dangerous condition; 2) had an appreciation of the danger under the surrounding circumstances; and 3) failed to exercise reasonable care, by placing himself in the way of danger. Norfolk Southern Ry. Co. v. Johnson, 75 So.3d 624 (Ala. 2011).

Contribution and Implied Indemnity
Contribution: Alabama does not allow contribution between joint tortfeasors. Consolidated Pipe & Supply Co. v. Stockham Valves & Fittings, Inc., 365 So. 2d 968 (Ala. 1978).

Implied Indemnity: Implied indemnity is generally not allowed unless an exception applies. Crigler v. Salac, 438 So. 2d 1375 (Ala. 1983). Implied indemnity is permitted where a joint tortfeasor is only technically or constructively at fault, or where both parties are at fault but the fault of the party from whom indemnity is claimed is the efficient cause of the injury. J.C. Bradford & Co. v. Calhoun, 612 So.2d 396 (Ala. 1992); cf. Capital Assurance Co. v. Johnson, 578 So.2d 1263 (Ala. 1991) (master, whose liability is based on *respondeat superior*, can pursue servant for indemnification). A right to indemnity does not arise until payment. Ala. Kraft Co. v. Southeast Ala. Gas District, 569 So. 2d 697 (Ala. 1990). A non-contractual indemnity claim is a tort claim, and the two-year statute of limitations in tort actions applies. Precision Gear Co. v. Cont'l Motors, Inc., 135 So. 3d 953 (Ala. 2013) (applying Ala. Code § 6-2-38). An indemnification action against an architect or engineer related to an improvement to real property is subject to a 2-year statute of limitations and a 6-year statute of repose. Ala. Code § 6-5-221(c).

Damages - Measure of Damages to Property
Real Property: The difference between the fair market value of the property immediately before the damage and the fair market value immediately after the damage. Birmingham Coal & Coke Co., Inc. v. Johnson, 10 So.3d 993 (Ala. 2008). For trespass actions, if the trespass is permanent, the measure of damages is the difference in the fair market value of the property before and after the trespass, based on the plaintiff's use of the property or adaptability of the property to a particular use. Borland v. Sanders Lead Co., 369 So.2d 523 (Ala. 1979). If the trespass is continuous, a plaintiff can recover for the use of his property or its fair rental value. Borland. A plaintiff may also be able to recover the cost of restoration if this, plus the rental value, is less than the diminution in value. Borland.

Personal Property: Generally, the difference between the reasonable market value of the property immediately before it was damaged and the reasonable market value immediately after it was damaged. However, when the property had no market value, the courts may consider other

evidence, including the cost of repair or replacement. MAT Systems, Inc. d/b/a Corporate Design Systems v. Atchison Properties, Inc., 54 So.3d 371 (Ala. Civ. App. 2010).

Experts - States Following the Daubert/Kumho Doctrine

With respect to scientific evidence, follows Daubert in civil cases (other than domestic relations, child support, juvenile and probate cases), effective Jan. 2012. Ala. Code § 12-21-160; Ala. R. Evid. 702(b). With respect to technical, non-scientific evidence, still follows Frye. Ala. R. Evid. 702(a); Swanstrom v. Teledyne Continental Motors, Inc., 43 So.3d 564 (Ala. 2009); but cf. Mazda Motor Corp. v. Hurst, 2017 Ala. LEXIS 66 (2017) (suggesting that the trial court has discretion to admit the testimony of an expert qualified based on his knowledge and experience).

Interest - Pre & Post Judgment

Prejudgment

Contract Actions

Rate: If there is no written contract, 6% per year. Otherwise, use the rate in the contract, but not to exceed 8% per year. Ala. Code § 8-8-1; Miller & Co. v. McCown, 531 So.2d 888 (Ala. 1988). Interest can be awarded where an amount is certain or can be made certain as to damages at the time of breach. Miller & McCown.

Accrual Date: From the date of the breach. Ala. Code § 8-8-8.

Tort Actions

Rate: 6%. "[P]rejudgment interest is allowable at the legal rate in noncontract cases where the damages can be ascertained by mere computation, or where the damages are complete at a given time so as to be capable of determination at such time in accordance with known standards of value." Nelson v. AmSouth Bank, N.A., 622 So 2d 894 (Ala. 1993); Ala. Code § 8-8-1.

Accrual Date: Date of injury if the property destroyed or injured has an ascertainable money value. Atlanta and Birmingham Air Line Railway v. Brown, 48 So. 73 (Ala. 1908).

Post-Judgment

Rate: Judgments for the payment of money bear the contract rate of interest, if stated in the contract. All other judgments bear the rate of 7.5% per annum, the provisions of § 8-8-1 notwithstanding. Code of Ala. § 8-8-10; Mayo v. Lawter, 974 So.2d 312 (Ala. Civ. App. 2007).

Accrual Date: Date of judgment. Ala. Code § 8-8-10.

Joint and Several Liability

Joint and several liability. A tortfeasor whose negligent act or acts proximately contribute in causing an injury may be held liable for the entire resulting loss. Holcim (US), Inc. v. Ohio Cas. Ins. Co., 38 So.3d 722 (Ala. 2009).

Judgment Liens

A judgment is valid for ten years. Ala. Code § 6-9-1. It may be revived after that, although there is a presumption the judgment has been satisfied. Ala. Code § 6-9-191. A judgment cannot be revived after 20 years. Ala. Code § 6-9-190.

Landlord-Tenant Subrogation ("Sutton Doctrine")
No case directly on point. Case law suggests, however, that tenants are not implied co-insureds on a landlord's insurance policy. See McGuire v. Wilson, 372 So.2d 1297 (Ala. 1975) (allowing a builder's risk insurer to subrogate against a purchaser occupying property pursuant to a lease provision in a real estate sales contract); McCay v. Big Town, Inc., 307 So.2d 695 (Ala. 1975) (enforcing a waiver of subrogation/exculpatory clause in a lease).

Made Whole Doctrine
In the absence of express terms to the contrary, the insured is entitled to be made whole before the insurer may recover any portion of the recovery from the tortfeasor. International Underwriters/Brokers, Inc. v. Liao, 548 So.2d 163 (Ala. 1989). Insurer may bring subrogation action before insured is made whole. Ex parte State Farm Fire & Cas. Co., 764 So. 2d 543 (Ala. 2000).

Professional Malpractice Filing Requirements (Affidavit of Merit)
No certificate requirement.

Restitution - Crime Victims Restitution Statutes
Discretionary. Court may award full, partial, or nominal payment of pecuniary damages to the victim or to its equivalent. Ala. Code
§ 15-18-66(3). The court may consider, among other things, the financial resources and burden on both defendant and victim and the ability of the defendant to pay. Ala. Code § 15-18-68(a). The person injured is not barred from recovering damages from the defendant in a civil action, but the court shall credit any restitution paid against any judgment in favor of the victim in the civil action. Id. at 68(c). A restitution order may be enforced in the same manner as a civil judgment. Ala. Code § 15-18-78. An insurance company may recover restitution. Hagler v. State, 625 So.2d 1190 (Ala. Ct. App. 1993).

Right to Repair/Notice Statutes – Construction Cases
None found.

Spoliation – Remedies for Spoliation
A third party has no general duty to preserve evidence; however, such a duty may arise if: 1) the third party voluntarily assumes the duty to preserve evidence; 2) the third party agrees with the plaintiff that it will preserve the evidence; or 3) the plaintiff makes a specific request to the third party to preserve the evidence.

In addition to proving a duty, a breach, proximate cause, and damage, the plaintiff in a third-party spoliation case must also show: (1) that the defendant spoliator had actual knowledge of pending or potential litigation; (2) that a duty was imposed upon the defendant through a voluntary undertaking, an agreement, or a specific request; and (3) that the missing evidence was vital to the plaintiff's pending or potential action. Once all three of these elements are established, there arises a rebuttable presumption that but for the fact of the spoliation of evidence the plaintiff would have recovered in the pending or potential litigation; the defendant must overcome that rebuttable presumption or else be liable for damages.

The plaintiff must offer to bear the burden/cost of preserving the evidence, unless the third party holding the evidence offers or agrees to do so. After the agreement, the third party may later decline responsibility for preservation, thereby shifting the burden back to the plaintiff. Killings v. Enterprise Leasing Co., Inc., 9 So.3d 1216 (Ala. 2008).

When a party destroys evidence, the appropriate sanction depends upon five factors: (1) the importance of the evidence destroyed; (2) the culpability of the offending parties; (3) fundamental fairness; (4) alternative sources of information; and (5) the possible effectiveness of sanctions other than dismissal. Vesta Fire Ins. Corp. v. Milam & Co. Construction, Inc., 901 So.2d 84 (Ala. 2004). Sanctions can range from a jury instruction, Southeast Environmental Infrastructure, L.L.C. v. Rivers, 12 So.3d 32 (Ala. 2008), to dismissal of a case. Capitol Chevrolet, Inc. v. Smedley, 614 So.2d 439 (Ala. 1993).

Statutes of Limitation and Repose*

Statutes of Limitation

Tort: 2 years for negligence and wantonness. Ala. Code § 6-2-38; Capstone Building Corp., 96 So.3d 77 (Ala. 2012). 6 years for some intentional torts. Ala. Code § 6-2-34.

Contract: 6 years. Ala. Code § 6-2-34.

Improvements to Real Property: As to actions in tort, contract or otherwise against architects or engineers for faulty design, or against contractors relying on those designs: 2 years from date upon which the cause of action accrues. Ala. Code § 6-5-221. A cause of action for latent damage arises when the damage or injury should have been discovered. Ala. Code § 6-5-220(e); see Dickinson v. Land Developers Constr. Co., 882 So.2d 291 (Ala. 20003) (stating that the discovery rule applies to both tort and contractual actions).

State Government: Written notice on prescribed form to be filed with Board of Adjustment within 1 year, generally (2 years for wrongful death). Ala. Code §§ 41-9-65, 41-9-66.

Local Government: Municipalities: for torts, 6 months from accrual of claim; for all other claims, 2 years. Ala. Code § 11-47-23.

Statutes of Repose

Products: None; Ala. Code § 6-5-502(c), imposing a 10-year repose period, was held unconstitutional in Lankford v. Sullivan, Long & Hagerty, 416 So.2d 996 (Ala. 1982).

Improvements to Real Property: As to actions against architects or engineers for faulty design, or against contractors relying on those designs: 7 years from substantial completion of the improvement. Ala. Code § 6-5-221. The 7-year statute of repose does not apply where, prior to its expiration, the architect, engineer or builder had actual knowledge of the defect and failed to disclose it to the person with whom the defendant contracted to perform such services. Id. Where a cause of action accrues during the 7th year after completion, an action may be brought within 2 years after accrual even though this extends beyond the 7-year period. Ala. Code § 6-5-225(d).

* For UCC Claims and claims based on improvements to real property and/or claims brought by condominium associations related to construction defects, see the notes at the end of the Table of Contents.

Subrogating in the Insured's Name – Real Party in Interest

A subrogated insurer may sue in the insurer's own name, or in the name of the insured for the use of the insurer. Adams v. Queen Ins. Co. of America, 88 So.2d 331 (Ala. 1956).

ALASKA

Anti-Subrogation Rule: Subrogation by Insurer Against Insured
An insurer cannot subrogate against its own insured, or negligent third parties if that party is an additional insured under the policy for which payments were made. Graham v. Rockman, 504 P.2d 1351 (Alaska 1972). When claimant and tortfeasor are covered under the same policy, the insurer's payment of a loss cannot serve as a basis for subrogation against the tortfeasor. Baugh-Belarde Const. Co. v. College Utilities Corp., 561 P.2d 1211 (Alaska 1977). It is unsettled whether Alaska would apply the prohibition to subrogation against an insured covered under a separate liability policy. See, e.g., Maynard v. State Farm Mut. Auto. Ins. Co., 902 P.2d 1328 (Alaska 1995) (observing that all cases prohibiting subrogation against insureds involved subrogor and target covered by same policy).

Comparative/Contributory Negligence
Pure Comparative. Alaska Stat. §§ 09.17.060; 09.17.080.

Contribution and Implied Indemnity
Contribution: Statutory contribution abolished by voter initiative in 1989 but common law contribution based on proportional fault is still available. See McLaughlin v. Lougee, 137 P.3d 267 (Alaska 2006). Fault must be apportioned among all persons – defendants, third-party defendants, persons released, and others identified as potentially responsible – in a single action. Alaska Stat. § 09.17.080; Alaska R.C.P. 14(c). See also Cabales v. Morgan, 2015 WL 999100 (D. Alaska 2015). Non-settling defendants are entitled to offset the plaintiff's damages in proportion to the settling party's proportionate share of fault. Petrolane Inc. v. Robles, 154 P.3d. 1014 (Alaska 2007).

Implied Indemnity: An indemnitee jointly liable in tort or in an implied contract with the indemnitor may recover indemnity only if the indemnitee is not in any degree also jointly at fault. Fairbanks North Star Borough v. Kandik Construction, Inc., 823 P.2d 632 (Alaska 1991). A strictly liable retailer or lessor may obtain indemnity from a product manufacturer. Koehring Mfg. Co. v. Earthmovers of Fairbanks, 763 P.2d 499 (Alaska 1988). In addition, a vicariously liable party who has no independent liability to the injured party can seek indemnification from the party for whom it is vicariously liable. AVCP Reg. Housing Auth. v. R.A. Vranckaert Co., 47 P.3d 650 (Alaska 2002). The party seeking indemnity must extinguish the liability of the indemnitor by release or otherwise. Id. The statute of limitations begins to run with judgment or settlement. Alaska Gen. Alarm v. Grinnell, 1 P.3d 98 (Alaska 2000).

Damages - Measure of Damages to Property
Real Property: In the case of temporary damage to real property: (A) Diminution in value or, at the plaintiff's election, (B) the reasonable cost of restoration, as long as the restoration cost is not disproportionate to diminution *and* there is a reason personal to the owner for restoring the land to its original condition. Galipeau v. Bixby, 476 P.3d 1129 (Alaska 2020); Osborne v. Hurst, 947 P.2d 1356 (Alaska 1997). In the case of a permanent injury to land, measure is diminution in value. G & A Contractors, Inc. v. Alaska Greenhouses, Inc., 517 P.2d 1379 (Alaska 1974). If destruction of land is total, the owner may recover the entire value of the land. Ostrem v. Alyeska Pipeline Service Co., 648 P.2d 986 (Alaska 1982).

Personal Property: The lesser of (A) the reasonable repair cost, plus the diminution in value after the repair or (B) the diminution in value of the unrepaired property. ERA Helicopters, Inc. v. Digicon Alaska, Inc., 518 P.2d 1057 (Alaska 1974); City of Seward v. Afognak Logging, 31 P.3d 780 (Alaska 2001). The plaintiff may also recover for loss of use of equipment during the period required to make repairs. Burgess Constr. Co. v. Hancock, 514 P.2d 236 (Alaska 1973). The rental value is one permissible standard for measuring damages for loss of use. Burgess.

Experts - States Following the Daubert/Kumho Doctrine

Daubert partially followed. Expert testimony based strictly on scientific knowledge is generally subject to Daubert's reliability and relevance requirements, but experience-based expert testimony does not need to meet Daubert's requirements. Instead it is admissible when the expert witness has substantial experience in the relevant field and the testimony might help the jury. Thompson v. Cooper, 290 P.3d 393 (Alaska 2012); see Alaska R. Evid. 702(a); see also Alaska Stat. § 09.20.185 (expert qualifications in professional negligence cases).

Interest - Pre & Post Judgment

Prejudgment

Prejudgment interest is not permitted for future economic damages, future noneconomic damages, or punitive damages. Alaska Stat. § 09.30.070.

Contract Actions

Rate: The rate in the contract as long as it does not exceed the state's legal rate of 10.5% and the rate is set out in the judgment or decree. If there is no rate in the contract, 3% above the 12th Federal Reserve District discount rate in effect on January 2 of the year in which the judgment is entered. Alaska Stat. § 09.30.070.

Accrual Date: Unless the parties have agreed otherwise, whichever date is earlier: (i.) the date the defendant receives written notification that an injury has occurred and that a claim may be brought; or (ii.) the date the defendant is served with process. Alaska Stat. § 09.30.070.

Tort Actions

Rate: 3% above the 12th Federal Reserve District discount rate in effect on January 2 of the year in which the judgment is entered. Alaska Stat.
§ 09.30.070.

Accrual Date: Unless the parties have agreed otherwise, whichever date is earlier: (i.) the date the defendant receives written notification that an injury has occurred and that a claim may be brought; or (ii.) the date the defendant is served with process. Alaska Stat. § 09.30.070.

Post Judgment

Contract Actions

Rate: The rate in the contract as long as it does not exceed the state's legal rate of 10.5% and the rate is set out in the judgment or decree. If there is no rate in the contract, 3% above the 12th Federal Reserve District discount rate in effect on January 2 of the year in which the judgment is entered. Alaska Stat. § 09.30.070.

Accrual Date: Date of judgment. Alaska Stat. § 09.30.070.

Tort Actions
Rate: 3% above the 12th Federal Reserve District discount rate in effect on January 2 of the year in which the judgment is entered. Alaska Stat. § 09.30.070.
Accrual Date: Date of judgment. Alaska Stat. § 09.30.070.

Joint and Several Liability
Several liability. The court shall enter judgment against each party liable on the basis of several liability in accordance with that party's percentage of fault. Alaska Stat. § 09.17.080(d).

Judgment Liens
Judgments are valid until satisfied or discharged; however, when a period of five years lapses, the judgment holder must file a motion with the court and prove sufficient cause for failure to obtain a writ of execution. Alaska Stat. § 09.35.020. A recorded judgment lien may issue but not for more than 10 years. Alaska Stat. § 09.30.10; see Alaska Stat. § 09.10.040. For judgments against boroughs and cities, creditor has10 years from the date of judgment to collect. Alaska Stat. § 09.30.040.

Landlord-Tenant Subrogation ("Sutton Doctrine")
When a landlord covenants to carry fire insurance on the leased premises, the insurance is, absent an express provision in the lease establishing the tenant's liability, for the mutual benefit of both parties and the tenant is a co-insured of the landlord, barring a subrogation claim by the landlord's insurer. Alaska Ins. Co. v. RCA Alaska Communications, Inc., 623 P.2d 1216 (Alaska 1981) (discussing a commercial lease). In contrast, "a landlord is a co-insured under a tenant's fire insurance policy only if the policy expressly so provides." Great American Ins. Co. v. Bar Club, Inc., 921 P.2d 626 (Alaska 1996).

Made Whole Doctrine
No case on point. However, in *dictum*, the Supreme Court of Alaska acknowledged the general proposition that an insured must be fully compensated before subrogation may be pursued. McCarter v. Alaska Nat. Ins. Co., 883 P.2d 986 (Alaska 1994) (holding that under the workers' compensation statute, an insurance carrier is entitled to receive reimbursement from an insured who fully recovers from a third-party tortfeasor).

Professional Malpractice Filing Requirements (Affidavit of Merit)
In actions against health care providers, if the parties have not agreed to submit any claim to arbitration, the claim must be routed to an expert advisory panel for review, unless the court decides that an expert advisory opinion is not necessary. Discovery may not be undertaken in a case until the report of the expert advisory panel is received or 60 days after selection of the panel, whichever occurs first. Alaska Stat. § 09.55.536.

Restitution - Crime Victims Restitution Statutes
Mandatory, unless the victim declines. Alaska Stat. § 12.55.045. The court shall consider the financial burden on the victim and shall not consider the defendant's ability to pay. Id. A restitution order is enforceable as a civil judgment. Id. The court shall value property at market value at the time and place of the crime or, if the market value cannot reasonably be ascertained,

the cost of replacement within a reasonable time after the crime. Id. Restitution reduces civil liability to the victim. Hagberg v. State, 606 P.2d 385 (Alaska 1980). Insurers may recover restitution. Lonis v. State, 998 P.2d 441 (Alaska Ct. App. 2000); Maillelle v. State, 276 P.3d 476 (Alaska Ct. App. 2012).

Right to Repair/Notice Statutes – Construction Cases
Alaska Stat. §§ 09.45.881 to 09.45.899 *Action for Dwelling Design, Construction or Remodeling Claims.*

Spoliation – Remedies for Spoliation
If evidence is destroyed or is concealed until all remedies have expired, the affected party may recover in tort if the spoliating party intentionally interfered with the other party's ability to bring a civil cause of action and if the affected party had a valid underlying cause of action which was prejudiced by the destruction. Punitive damages are available in such a claim. Allstate Ins. Co. v. Dooley, 243 P.3d 197 (Alaska 2010). Spoliation damages are recoverable in first-party and third-party cases. Hibbits v. Sides, 34 P.3d 327 (Alaska 2001). Alaska also recognizes the tort of fraudulent concealment, the elements of which are: (1) the defendant concealed evidence material to plaintiff's cause of action; (2) plaintiff's underlying cause of action was viable; (3) the evidence could not reasonably have been procured from another source; (4) the evidence was withheld with the intent to disrupt or prevent litigation; (5) the withholding caused damage to the plaintiff from having to rely on an incomplete evidentiary record; and, (6) the withheld evidence was discovered at a time when the plaintiff lacked another available remedy. Allstate v. Dooley. When a defendant negligently spoliates evidence, the burden shifts to it to prove the non-existence of the fact presumed. Sweet v. Sisters of Providence in Washington, 895 P.2d 484 (Alaska 1995).

Statutes of Limitation and Repose[*]
Statutes of Limitation

Tort: Real property, 6 years. Alaska Stat. § 09.10.050. Personal property, 2 years. Alaska Stat. § 09.10.070. Personal injury, 2 years. Alaska Stat. § 09.10.070. Claims against Home Inspectors, 1 year. Alaska Stat. § 08.18.085. For claims against construction professionals for defects in the design, construction or remodeling of a dwelling, at least 90 days' written notice must be given prior to the commencement of an action. Alaska Stat. § 09.45.881. Notice must be given within one year of discovery of the defect, and the claim is also subject to the statute of repose. Alaska Stat. § 09.10.054.
Contract: 3 years, for express or implied contracts. Alaska Stat. § 09.10.053.
State and Local Government: No separate limitation statutes apply. Alaska Stat. §§ 09.50.250, 09.65.070.

Statutes of Repose

Improvements to Real Property: 10 years from the date of substantial completion of construction, or the last act alleged to have caused the damage, whichever is earlier. Exceptions apply, including in cases of hazardous waste, intentional acts, gross negligence,

[*] For UCC Claims and claims based on improvements to real property and/or claims brought by condominium associations related to construction defects, see the notes at the end of the Table of Contents.

fraud, misrepresentation, breach of express warranty, defective product, breach of trust or fiduciary duty, intentional concealment and contractual waiver. Alaska Stat. § 09.10.055.

Subrogating in the Insured's Name – Real Party in Interest

Alaska's preference is unclear, although Alaska seems to prefer subrogated insurers suing in their name rather than in the insureds'. "The pleadings should be made to reveal and assert the actual interest of the plaintiff, and to indicate the interests of any others in the claim." Truckweld Equipment Co. v. Swenson Trucking & Excavating, Inc., 649 P.2d 234 (Alaska 1982).

ARIZONA

Anti-Subrogation Rule: Subrogation by Insurer Against Insured
No right of subrogation can arise in favor of an insurer against its own insured since, by definition, subrogation exists only with respect to rights of the insurer against third persons to whom the insurer owes no duty. Industrial Indem. Co. v. Beeson, 647 P.2d 634 (Ariz. Ct. App. 1982).

Comparative/Contributory Negligence
Pure Comparative. Ariz. Rev. Stat. § 12-2505.

Contribution and Implied Indemnity
Contribution: Authorized by the Arizona Uniform Contribution Among Tortfeasors Act. Ariz. Rev. Stat. § 12-2501. If not decided in the underlying plaintiff's action, contribution may be enforced by separate action. Ariz. Rev. Stat. § 12-2503. Contribution is permitted for settling joint tortfeasors who pay more than their pro rata share of liability, based on their relative degrees of fault, as long as the settlement also extinguishes the liability of the other tortfeasors and is reasonable. Ariz. Rev. Stat. §§ 12-2501(D), 12-2502. A settling tortfeasor seeking contribution must discharge by payment the common liability and commence the contribution action within one year after payment or judgment. Ariz. Rev. Stat. § 12-2503.

Implied Indemnity: A plaintiff subject to derivative or imputed liability pursuing an implied indemnity action must show that: (1) it discharged a legal obligation owed to a third party; (2) for which the indemnity defendant was also liable; and (3) as between the two, the obligation should have been discharged by the indemnity defendant. KnightBrook Ins. Co., v. Payless Car Rental System, Inc., 409 P.3d 293 (Ariz. 2018). A party has a right to indemnity when there is an implied contract for indemnity or when justice demands there be the right. INA Ins. Co. v. Valley Forge Ins. Co., 722 P.2d 975 (Ariz. Ct. App. 1986). There is no duty of indemnity unless the payment discharges the primary obligor from an existing duty. Id. The tortfeasor seeking implied indemnity must be proven not negligent to make a claim. Herstam v. Deloitte & Touche, LLP, 919 P.2d 1381 (Ariz. Ct. App. 1996). The statute of limitations is 4 years. Ariz. Rev. Stat. § 12-550; Northstar Brokerage Advisory Servs., LLC v. Collingwood, 2015 Ariz. App. Unpub. LEXIS 720 (Ariz. Ct. App.). Although contractual indemnity claims related to improvements to real estate are subject to the construction-related statute of repose, common law indemnity claims are not. Evans Withycombe, Inc. v. Western Innovations, Inc., 159 P.3d 547 (Ariz. Ct. App. 2006).

Damages - Measure of Damages to Property
Real Property: Where damage can be repaired, the cost of replacing such property and its loss of use during a reasonable time for repairs. City of Globe v. Rabogliatti, 210 P. 685 (Ariz. 1922). The cost of restoration, however, cannot exceed diminution in value. A.I.D. Ins. Serv. v. Riley, 541 P.2d 595 (Ariz. App. 1975). A landowner whose vegetation has been destroyed by a trespass may receive damages based on restoration costs, even exceeding diminution in market value of the real property on which the vegetation grew, if the vegetation had intrinsic value to the landowner. Dixon v. City of Phoenix, 845 P.2d 1107 (Ariz. App. 1992).

Personal Property: Permanent Damage: Diminution in value. S. A. Gerrard Co. v. Fricker, 27 P.2d 678 (Ariz. 1933); State v. Brockell, 928 P.2d 650 (Ariz. Ct. App. 1996). If goods have no market value, their actual worth to the owner is the test. Articles used in furnishing a home have a value when so used that is not fairly estimated by their value as secondhand goods on the market. Devine v. Buckler, 603 P.2d 557 (Ariz. Ct. App. 1979).

Repairable Damage: (A) Diminution in value or (B) if the property is repaired or restored, the reasonable cost of repair or restoration, with allowance for any difference between the original value and the value after repairs, plus loss of use during the repairs. Oliver v. Henry, 260 P.3d 314 (Ariz. Ct. App. 2011). An automobile owner can also recover for any proven residual diminution in value. Farmers Ins. Co. of Arizona v. R.B.L. Inv. Co., 675 P.2d 1381 (Ariz. App. 1983).

Experts - States Following the Daubert/Kumho Doctrine
Follows Daubert and Kumho Tire. See Ariz. R. Evid. R. 702; see Ariz. Rev. Stat. § 12-2203; State v. Salazar-Mercado, 325 P.3d 996 (2014).

Interest - Pre & Post Judgment
Prejudgment
A court can award interest on a liquidated claim whether based on contract or tort. Alta Vista Plaza v. Insulation Specialists Co., 919 P.2d 176 (Ariz. Ct. App. 1995); cf. Marco Crane & Rigging Co. v. Greenfield Prods., LLC, 2022 U.S. App. LEXIS 21193 (9th Cir.) (if damages are liquidated and unliquidated, a court can award interest on the liquidated portion). A court cannot award prejudgment interest for any unliquidated, future, punitive or exemplary damages. Ariz. Rev. Stat. § 44-1201.

Contract Actions
Rate: The lesser of 10% per year or 1% plus the prime rate (as published by the board of governors of the federal reserve system in statistical release H.15 or any publication that may supersede it on the date that the judgment is entered). Ariz. Rev. Stat. § 44-1201.
Accrual Date: Interest should be calculated from the date the claim becomes due. Gemstar Ltd. v. Ernst & Young, 917 P.2d 222 (Ariz. 1996). Where no definite time for payment is stated, from the time of demand for payment. Fairway Builders v. Malouf Towers Rental Co., 603 P.2d 513 (Ariz. Ct. App. 1979).

Tort Actions
Rate: The lesser of 10% per year or 1% plus the prime rate (as published by the board of governors of the federal reserve system in statistical release H.15 or any publication that may supersede it on the date that the judgment is entered). Ariz. Rev. Stat. § 44-1201.
Accrual Date: Date of demand for a sum certain, not from the date of loss. Demand can be made by filing a complaint or by demanding payment. Alta Vista Plaza.

Offer of Judgment
An offer of judgment can affect the recovery of interest. See Ariz. R. Civ. P. 68.

Post Judgment

A court may not award interest on future, punitive or exemplary damages. Ariz. Rev. Stat. § 44-1201.

Contract and Tort Actions

Rate: The lesser of 10% per year or 1% plus the prime rate (as published by the board of governors of the federal reserve system in statistical release H.15 or any publication that may supersede it on the date that the judgment is entered). Ariz. Rev. Stat. § 44-1201.

Accrual Date: Date of Judgment. Employer's Mut. Casualty Co. v. McKeon, 821 P.2d 766 (Ariz. Ct. App. 1991).

Joint and Several Liability

Several liability. Each defendant is liable only for the amount of damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be entered against the defendant for that amount. Ariz. Rev. Stat. § 12-2506(A). Exceptions: each defendant is responsible for the fault of another person if the two were acting in concert to commit an intentional tort, if the other person was acting as agent or servant of the party, or the party's liability for the fault of another person arises out of a duty created by the federal employers' liability act. Ariz. Rev. Stat. § 12-2506(D).

Judgment Liens

A judgment may be filed in each county where the judgment creditor desires the judgment to become a lien. Ariz. Rev. Stat. § 33-961. A judgment holder may have a writ of execution issued within ten years after the entry of judgment and within ten years after any renewal. Ariz. Rev. Stat. § 12-1551(B).

Landlord-Tenant Subrogation ("Sutton Doctrine")

A tenant's liability depends on the parties' intent as expressed in the lease. General Acc. Fire & Life Assur. Corp. v. Traders Furniture Co., 401 P.2d 157 (Ariz. 1965).

Made Whole Doctrine

No case on point.

Professional Malpractice Filing Requirements (Affidavit of Merit)

At the same time as filing a claim against any professional licensed by the state, the claimant's attorney shall certify whether an expert opinion is necessary to prove the professional standard of care or liability for the claim. If the attorney certifies that expert opinion is necessary, the claimant shall serve a preliminary expert opinion affidavit with the claimant's initial disclosures. The affidavit shall state the expert's qualifications to provide the opinion; the factual basis for the claim; the acts which constitute a breach of the standard of care; and how the breach caused the claimant's damages. Ariz. Rev. Stat. §§ 12-2602, 2603.

Restitution - Crime Victims Restitution Statutes

Mandatory for the full amount of the economic loss. Ariz. Rev. Stat. § 13-603. The amount of restitution must equal the economic losses that flow directly from the defendant's criminal conduct, without the intervention of additional causative factors, State v. Wilkinson, 39 P.3d 1131 (Ariz. 2002), and shall not consider the defendant's economic

circumstances. Ariz. Rev. Stat. § 13-804. The court shall order restitution for an insurer once the victim has been made whole. Id. A criminal restitution order may be recorded and enforced as any civil judgment. Ariz. Rev. Stat. § 13-805. A civil award must be reduced by the amount of restitution paid. Ariz. Rev. Stat. § 13–807. The amount of restitution should be reduced by any civil awards which compensate the victim for economic losses. State v. Iniguez, 821 P.2d 194 (Ariz. Ct. App. 1991).

Right to Repair/Notice Statutes – Construction Cases
Ariz. Rev. Stat. §§ 12-1361 to 12-1366 *Purchaser Dwelling Actions.*

Spoliation – Remedies for Spoliation
Independent tort of spoliation of evidence not recognized. Trial court may instruct the jury that it may infer that destroyed evidence would have been unfavorable to the position of the offending party. McMurtry v. Weatherford Hotel, Inc., 293 P.3d 520 (Ariz. Ct. App. 2013).

Statutes of Limitation and Repose*
Statutes of Limitation

Tort: 2 years, for injuries to persons and property. Ariz. Rev. Stat. § 12-542. For purchaser dwelling actions, the statute of limitations and repose may be tolled for limited time periods. See Ariz. Rev. Stat. § 12-1363(F) and (G).

Contract: Oral, 3 years. Ariz. Rev. Stat. § 12-543. Written, 6 years. Ariz. Rev. Stat. § 12-548. For purchaser dwelling actions, the statute of limitations and repose may be tolled for limited time periods. See Ariz. Rev. Stat. § 12-1363(F) and (G).

State and Local Government: 1 year. Ariz. Rev. Stat. § 12-821. Notice must be filed within 180 days of when the damaged party realizes he or she has been damaged and knows or reasonably should know the cause, source, act, event, instrumentality or condition which caused or contributed to the damage. Ariz. Rev. Stat. § 12-821.01.

Statutes of Repose

Products: The 12-year limitation set forth in Ariz. Rev. Stat. § 12-551 was held unconstitutional in Hazine v. Montgomery Elevator Co., 861 P.2d 625 (Ariz. 1993).

Improvements to Real Property: 8 years after substantial completion, with respect to a person who develops or develops and sells real property, or performs or furnishes the design, specifications, surveying, planning, supervision, testing, construction or observation of construction of an improvement to real property. If the injury occurs or is discovered during the 8th year, an action may be brought within one year of the injury/discovery, as long as the action is not filed more than 9 years from substantial completion. Ariz. Rev. Stat. § 12-552. For purchaser dwelling actions, the statute of limitations and repose may be tolled for limited time periods. See Ariz. Rev. Stat. § 12-1363(F) and (G). The statute does not bar claims of negligence even if the parties were in a contractual relationship. Fry's Food Stores of Arizona, Inc. v. Mather and Associates, Inc., 900 P.2d 1225 (Ariz. Ct. App. 1995).

* For UCC Claims and claims based on improvements to real property and/or claims brought by condominium associations related to construction defects, see the notes at the end of the Table of Contents.

Subrogating in the Insured's Name – Real Party in Interest

"Rule 17 requires that suits be brought by the real party in interest. It is well settled in Arizona that a partially reimbursing insurer is one real party in interest and the partially reimbursed insured another." Tri-City Property Management Services, Inc. v. Research Products Corp., 721 P.2d 144 (Ariz. Ct. App. 1986). One real party in interest may bring suit in its name on its behalf and on behalf of the other real party in interest. Id. If the insurer has paid the entire amount of the loss, only the insurer is the real party in interest and must sue in its name. A loan receipt agreement will not alter this rule. Hamman-McFarland Lumber Co. v. Arizona Equipment Rental Co., 492 P.2d 437 (Ariz. Ct. App. 1972).

ARKANSAS

Anti-Subrogation Rule: Subrogation by Insurer Against Insured
An insurer may not subrogate against its own insured, or against a co-insured under the same policy, but when party claiming to be co-insured is merely a loss payee to which no liability coverage is afforded, subrogation is permitted. Dalrymple v. Royal-Globe Ins. Co., 659 S.W.2d 938 (Ark. 1983). See also Wal-Mart Stores, Inc. v. RLI Ins. Co., 292 F.3d 583 (8th Cir. 2002).

Comparative/Contributory Negligence
Modified Comparative – 49%. Ark. Code Ann. § 16-64-122.

Contribution and Implied Indemnity
Contribution: Authorized by the Arkansas Uniform Contribution Among Tortfeasors Act. Ark. Code Ann. § 16-61-201, *et. seq.* A joint tortfeasor is not entitled to a money judgment for contribution until he has by payment discharged the common liability or has paid more than his pro rata share of the common liability. Ark. Code Ann. § 16-61-202(b). A settling joint tortfeasor is not entitled to recover contribution from another joint tortfeasor whose liability to the injured person is not extinguished by the settlement. Ark. Code Ann. § 16-61-202(d). A release of a joint tortfeasor, whether before or after judgment, does not discharge the other joint tortfeasor unless the release states that the other joint tortfeasor is released. Ark. Code Ann. § 16-61-204(a). A release given to one joint tortfeasor does not relieve that tortfeasor from liability for contribution claims unless (a) the release is given before the right of the other tortfeasor to secure a money judgment for contribution has accrued and (b) it provides for a reduction, to the extent of the pro rata share of the released tortfeasor, of the injured person's damages recoverable against all other tortfeasors. Ark. Code Ann. § 16-61-204(b). The non-releasing defendants are entitled to a jury determination of the released joint tortfeasor's pro rata share of responsibility. Ark. Code Ann. § 16-61-204(d). Where the issue of contribution is not resolved in the plaintiff's action, a joint tortfeasor can sue for contribution in a separate action. Ark. Code Ann. § 16-61-207. The statute of limitations is three years from the date that the joint tortfeasor pays more than his pro-rata share of the common liability. Ark. Code Ann. § 16-56-105; Halford v. Southern Capital Corp., 650 S.W.2d 580 (Ark. 1983).

Implied Indemnity: Arkansas common law recognizes an implied indemnity claim. An implied indemnity claim is a derivative or conditional action that must be brought by the tortfeasor who is compelled to pay money that should be paid by another. Taylor v. City of Fort Smith, 441 S.W.3d 36 (Ark. Ct. App. 2014). Although implied indemnity may arise based on the relationship between the parties, the implied indemnification principal is based upon equitable principles of restitution, which permit one who is compelled to pay money which in justice ought to be paid by another, to recover the sums paid unless the payor, himself, is barred by the wrongful nature of his own conduct. Larson Machine, Inc. v. Wallace, 600 S.W.2d 1 (Ark. 1980). The 3-year statute of limitations begins to run when payment is made. J-McDaniel Constr. Co. v. Dale E. Peters Plumbing Ltd., 436 S.W.3d 458 (Ark. 2014); Certain Underwriters at Lloyds v. Regions Ins., Inc., 613 F. Supp. 2d 1050 (E.D. Ark. 2009); Ark. Code Ann. § 16-56-105.

Damages - Measure of Damages to Property

Real Property: Temporary/Repairable Damage: Cost of restoration or repair, even if exceeding diminution in value. Felton Oil Co., L.L.C. v. Gee, 182 S.W.3d 72 (Ark. 2004). Permanent/Not Repairable: The difference in market value before and after the injury. State v. Diamond Lakes Oil Co., 66 S.W.3d 613 (Ark. 2002).

Personal Property: The difference in the fair market value of the property immediately before and immediately after the occurrence. Southwestern Bell Telephone Co. v. Harris Co. of Fort Smith, 109 S.W.3d 637 (Ark. 2003). With automobiles, difference in market value may be established by cost of repairs, but only when other competent proof of market value is absent and the cost of repairs is the best available evidence of market value. McDaniel v. Linder, 990 S.W.2d 593 (Ark. Ct. App. 1999). Loss of use damages are also allowed in automobile cases. Ark. Code Ann. § 27-53-401; see Southwestern Bell (stating that, generally, loss of use damages are not allowed in cases involving personal property). The proper measure of damages for the conversion of a personal item is its fair market value at the time and place of the conversion. Allen v. Sargent, 2022 Ark. App. 14 (Ark. Ct. App. 2022).

Experts - States Following the Daubert/Kumho Doctrine

Follows Daubert and Kumho Tire. Ark. R. Evid. 702; Farm Bureau Mut. Ins. Co. v. Foote, 14 S.W.3d 512 (Ark. 2000); Dundee v. Horton, 477 S.W.3d 558 (Ark. Ct. App. 2015); but cf. Dundee (suggesting that courts need not engage in a Daubert reliability analysis in all cases).

Interest - Pre & Post Judgment

Prejudgment

Prejudgment interest only permitted when the amount of damages is definitively ascertainable by mathematical computation, or if the evidence furnishes data that makes it possible to compute the amount of damages without reliance on opinion or discretion. Woodline Motor Freight v. Troutman Oil Co., 938 S.W.2d 565 (Ark. 1997).

Contract Actions

Rate: 6% if no interest rate specified in the contract. Ark. Code Ann. § 4-57-101(d) (eff. Aug. 2013); Mo. & N. Ark. R.R. v. Entergy Ark., Inc., 2013 U.S. Dist. LEXIS 139204 (E.D. Ark. Sept. 27, 2013).

Accrual Date: Date of Loss. Reynolds Health Care Servs. v. HMNH, Inc., 217 S.W.3d 797 (Ark. 2005).

Tort Actions

Rate: 6% if no interest rate specified in the contract. Ark. Code Ann. § 4-57-101(d) (eff. Aug. 2013); Mo. & N. Ark. R.R.; Wooten v. McLendon, 612 S.W.2d 105 (Ark. 1981).

Accrual Date: Date of Loss. Reynolds Health Care.

Post Judgment

Judgments against a county shall not bear interest. Ark. Code Ann. § 16-65-114.

Contract Actions

Rate: The rate in the contract or a rate equal to the Federal Reserve primary credit rate in effect on the date on which the judgment is entered plus two percent (2%), whichever is greater. Ark. Code Ann. § 16-65-114.

Accrual Date: Date of judgment. Ark. Code Ann. § 16-65-114; Jameson v. Johnson, 33 S.W.3d 140 (Ark. 2000).

Tort Actions

Rate: Equal to the Federal Reserve primary credit rate in effect on the date on which the judgment is entered plus two percent (2%), not to exceed maximum rate permitted under Ark. Const. Amend. 89. Ark. Code Ann. § 16-65-114.

Accrual Date: Date of Judgment. Ark. Code Ann. § 16-65-114; Jameson.

Joint and Several Liability

Several liability. In any action for personal injury, medical injury, property damage, or wrongful death, the liability of each defendant for compensatory or punitive damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of damages allocated to that defendant in direct proportion to that defendant's percentage of fault. A separate, several judgment shall be rendered against that defendant for that amount. Ark. Code Ann. § 16-55-201.

Judgment Liens

Judgments must be acted upon within ten years. Ark. Code Ann. § 16-56-114. Any payment made towards the judgment or writ of execution on the judgment will toll the statute. Id. Judgments in the Arkansas Supreme Court, Arkansas Circuit Court, United States district courts or United States Bankruptcy courts are a lien on real estate owned by the defendant in the county of the judgment. Ark. Code Ann. § 16-65-117. Judgment liens on land can only be revived by *scire farcias* as outlined in Ark. Code Ann. § 16-65-501.

Landlord-Tenant Subrogation ("Sutton Doctrine")

A landlord's insurer can pursue subrogation against a tenant unless the terms of the lease establish that the insurance was purchased for the mutual benefit of the parties. Page v. Scott, 567 S.W.2d 101 (Ark. 1978).

Made Whole Doctrine

The general rule is that an insurer is entitled to subrogation after the insured has been made whole for his loss. Southern Farm Bureau Cas. Ins. Co. v. Tallant, 207 S.W.3d 468 (Ark. 2005).

Professional Malpractice Filing Requirements (Affidavit of Merit)

In an action against medical professionals, an affidavit of merit by an expert is required, stating the expert's familiarity with the standard of care, qualifications, opinion on how the standard of care was breached, and an opinion on how the breach resulted in injury/death. Ark. Code Ann. § 16-114-209. The statute's requirement that the affidavit be filed within 30 days after the complaint was held unconstitutional in Summerville v. Thrower, 253 S.W.3d 415 (Ark. 2007). Even if the case is not one against a medical professional, Rule 11 - discussing signing pleadings and other papers - requires consultation with at least one expert, believed competent under Ark.

R. Evid. 702, when a party's claim or affirmative defense may only be established in whole or in part by expert testimony. Ark. R. Civ. P. 11(b)(5).

Restitution - Crime Victims Restitution Statutes
Discretionary. The court shall make a determination of actual economic loss suffered. In determining the method of payment, the court shall take into account the defendant's ability to pay. The amount ordered is enforceable as a civil judgment. Amounts paid are to be credited against a judgment in a civil action. Ark. Code Ann. § 5-4-205. Investigation costs are not actual economic loss. Tumlison v. State, 216 S.W.3d 620 (Ark. Ct. App. 2005). The amount of damage to which defendant pleads guilty does not control the amount of restitution ordered. Nix v. State, 925 S.W. 2d 802 (Ark. 1996), overruled on other grounds, Spires v. State, 2013 Ark. 6. Insurance companies are considered victims eligible to recover restitution. Ark. Code Ann. § 5-4-205; Singleton v. State, 357 S.W. 3d 891 (Ark. 2009).

Right to Repair/Notice Statutes – Construction Cases
None found.

Spoliation – Remedies for Spoliation
Third-party and first-party causes of action for tortious spoliation not recognized. Downen v. Redd, 242 S.W.3d 273 (Ark. 2006); Goff v. Harold Ives Trucking Co., Inc., 27 S.W.3d 387 (Ark. 2000). An aggrieved party can request that a jury be instructed to draw a negative inference against the spoliator, can request discovery sanctions or can seek to have a criminal prosecution initiated against the party who destroyed relevant evidence. Goff.

Statutes of Limitation and Repose*
Statutes of Limitation

Tort: Personal injury, personal property and real property, 3 years. Ark. Code Ann. §§ 16-56-105; 16-116-203 (arising from products).

Contract: Oral, 3 years. Ark. Code Ann. § 16-56-105. Written, 5 years. Ark. Code Ann. § 16-56-111; Chalmers v. Toyota Motor Sales, USA, Inc., 935 S.W.2d 258 (Ark. 1996).
Medical Malpractice: Except as otherwise provided in Ark. Code Ann. § 16-114-203, 2 years. Ark. Code Ann. § 16-114-203(a).
State Government: Claims against the state may be filed with the Arkansas State Claims Commission within the statute of limitation applicable to private persons for the type of action. Ark. Code Ann. § 19-10-209.
Local Government: Political subdivisions are exempt from tort liability except to the extent of insurance. Ark. Code Ann. § 21-9-301. Each subdivision is authorized to provide for a hearing and settle tort claims against it; check local codes. Ark. Code Ann. § 21-9-302.

* For UCC Claims and claims based on improvements to real property and/or claims brought by condominium associations related to construction defects, see the notes at the end of the Table of Contents.

Statutes of Repose

Improvements to Real Property: For property damage in contract, 5 years from substantial completion; for personal injury in tort or contract, 4 years from substantial completion. For personal injury occurring in the fourth year after substantial completion, an action may be brought within one year after the date of injury, up to 5 years from substantial completion. Parties may not agree to toll the statute. Statute does not apply in cases of fraudulent concealment or to persons in control of the improvement at the time of the injury. Ark. Code Ann. § 16-56-112; Dooley v. Hot Springs Family YMC*A*, 781 S.W.2d 457 (Ark. 1989) (correcting statute as to 4th year exception). Section 16-56-112 does not apply to tort/negligence claims alleging property damage. Platinum Peaks, Inc. v. Bradford, 473 S.W.3d 70 (2015) (distinguishing Okla Homer Smith Furniture Mfg. Co. v. Larson and Wear, Inc., 646 S.W.2d 696 (Ark. 1983)), rehrg. granted, 2015 Ark. App. LEXIS 767 (2015); but see Okla Homer Smith Furniture Mfg. Co. (correcting statute as to property damage actions in tort).

Medical Malpractice: 2 years from the date of the wrongful act. In case of a foreign object left inside the body which is not discovered and could not reasonably have been discovered within 2-year period, 1 year from the date of discovery or the date the foreign object reasonably should have been discovered, whichever is earlier. Other exceptions for minors. Ark. Code Ann. § 16-114-203. Except for foreign objects, statute not extended if malpractice could not have been discovered within 2 years. Harris v. Ozment, 117 S.W.3d 647 (Ark. Ct. App. 2003).

Subrogating in the Insured's Name – Real Party in Interest

Where an insurance company has only partially reimbursed an insured for his loss, the insured is the real party in interest and can maintain the action in his own name for the complete amount of his loss. Where the insured has a deductible interest, he is the real party in interest and the action *must* be brought in his name for his own benefit. The insured stands as trustee to the insurer as to any amount recovered; the insurer is not a necessary party. Farm Bureau Ins. Co. v. Case Corp., 878 S.W.2d 741 (Ark. 1994). However, if it desires, the insurer may join as a plaintiff in an action filed in the insured's name. Dowell, Inc. v. Patton, 257 S.W.2d 364 (Ark. 1953). An insured who has been paid in full for a loss by his insurer is not the real party in interest and cannot maintain an action in his (the insured's) name. Ark-Homa Foods, Inc. v. Ward, 473 S.W.2d 910 (Ark. 1971).

CALIFORNIA

Anti-Subrogation Rule: Subrogation by Insurer Against Insured

When claimant and tortfeasor are covered under the same policy, the insurer's payment of a loss cannot serve as a basis for subrogation against the tortfeasor. Longoria v. Hengehold Motor Co., 191 Cal.Rptr. 439, 142 Cal.App.3d 1059 (1983); St. Paul Fire & Marine Ins. Co. v. Murray Plumbing & Heating Corp., 135 Cal.Rptr. 120, 65 Cal.App.3d 66 (1976). However, if the single policy does not cover the insured for a particular loss or liability, that party is open to subrogation. McKinley v. XL Speciality Ins. Co., 33 Cal.Rptr.3d 98, 131 Cal.App.4th 1572 (2005) (airplane renter who crashed plane open to owner's subrogation claim because owner's policy only covered her for liability to third parties). The anti-subrogation rule applies in the case of separate policies as well as in the case of single policies. Nat'l Union Fire Ins. Co. of Pitt., Pa. v. Engineering-Science, Inc., 673 F.Supp. 380 (N.D. Cal. 1987). If the defendant's policy does not cover the type of risk at issue, subrogation is permitted against the defendant. White v. Allstate Ins. Co., 1996 WL 601476 (9th Cir. 1996) (house painter with Allstate auto policy not protected from subrogation claim by Allstate, which coincidentally insured house which painter damaged).

Comparative/Contributory Negligence

Pure Comparative. Diaz v. Carcamo, 253 P.3d 535 (Cal. 2011); Li v. Yellow Cab Co. of California, 532 P.2d 1226 (Cal. 1975).

Contribution and Implied Indemnity

Contribution: Authorized by the Contribution Among Joint Judgment Debtors statute. Cal. Civ. Pro. Code § 875, *et. seq.* Available where a money judgment is rendered jointly against two or more defendants. Cal. Civ. Pro. Code § 875(a). A contribution claim can be enforced after one tortfeasor has, by payment, discharged the joint judgment or has paid more than his pro rata share of the judgment. Cal. Civ. Pro. Code § 875(c). The pro rata share of each tortfeasor judgment debtor is determined by dividing the judgment equally among the tortfeasors. Cal. Civ. Pro. Code § 876(a). A contribution cause of action can be filed as a cross-complaint in the plaintiff's action or, if necessary, enforced in a separate lawsuit. See Caterpillar Tractor Co. v. Teledyne Indus., Inc., 126 Cal. Rptr. 455 (Cal. Ct. App. 1975). A judgment of contribution may be entered by one tortfeasor judgment debtor against another upon 10-days notice and a hearing. Cal. Civ. Pro. Code § 878. When the plaintiff releases, dismisses or gives a covenant not to sue or enforce judgment to a joint tortfeasor in good faith, before verdict or judgment, it shall have the following effect: a) it shall not discharge other joint tortfeasors unless its terms so provide, but it shall reduce the claims against others in the amount stipulated or in the amount of the consideration paid, whichever is greater; and b) it shall discharge the released party from all liability for any contribution to other parties. Cal. Civ. Pro. Code § 877. However, this rule shall not apply to co-obligors who have expressly agreed in writing to an apportionment of liability. Id. A court must determine whether the settlement was made in good faith. L.C. Rudd & Son, Inc. v. Super. Ct., 60 Cal. Rptr. 2d 703 (Cal. Ct. App. 1997); Cal. Code Civ. Pro. § 877.6. Sliding scale recovery agreements are subject to the procedural requirements of Cal. Civ. Pro. Code § 877.5. A contribution claim is subject to a 2-year statute of limitations. Cal. Civ. Proc. Code

§ 339. The claim accrues when the party seeking contribution has paid more than its fair share. Smith v. Parks Manor, 243 Cal. Rptr. 256 (Cal. Ct. App. 1987).

Implied Indemnity: There are only two basic types of indemnity: express indemnity and equitable indemnity. Implied contractual indemnity is now viewed simply as a form of equitable indemnity. Prince v. Pacific Gas & Electric Co., 202 P.3d 1115 (Cal. 2009). Although equitable indemnity once operated to shift the entire loss to the indemnitor, the doctrine is now subject to allocation-of-fault principles and comparative equitable apportionment of loss. Id. A named defendant can file a cross-complaint against any person, whether a party or not, from whom it seeks to obtain total or partial indemnity. American Motorcycle Ass'n v. Superior Court of Los Angeles County, 578 P2d 899 (Cal. 1978). The claim must be brought within 2 years of the date the party seeking indemnity paid all or a portion of the damages awarded. Cal. Civ. Pro. Code § 335.1; Preferred Risk Mut. Ins. Co. v. Reiswig, 980 P.2d 895 (Cal. 1999) (discussing former § 340(3)). California's 10-year statute of repose related to construction improvements applies to indemnification claims. FNB Mortgage Corp. v. Pac. General Corp., 90 Cal. Rptr. 2d 841 (Cal. Ct. App. 1999). A cross-complaint for indemnity may be filed in an action brought by the plaintiff within the statute of repose period. Cal. Civ. Proc. Code § 337.15(c).

Damages - Measure of Damages to Property

Real Property: The plaintiff can recover either the cost of repair or diminution in value, but not both. Safeco Ins. Co. v. J & D Painting, 21 Cal.Rptr.2d 903 (Cal. Ct. App. 1993); see Kelly v. CB & I Constructors, Inc., 102 Cal.Rptr.3d 32 (Cal. Ct. App. 2009). Ordinarily, it is the lesser of the two measures, unless there is a personal reason to repair the loss and the plaintiff can show that the repairs will actually be made. Safeco Ins. Co.

Personal Property: If not wholly destroyed: The lesser of (A) depreciation in value and loss of use, or (B) reasonable cost of repairs and loss of use during the repairs. If wholly destroyed: The market value of the property. Hand Electronics, Inc. v. Snowline Joint Unified School Dist., 26 Cal.Rptr.2d 446 (Cal. Ct. App. 1994). If after repairs, the property cannot be completely repaired: The difference in the fair market value of the property immediately before the accident and its fair market value after the repairs have been made plus the reasonable cost of making the repairs. Merchant Shippers Assn. v. Kellogg Express & Draying Co., 170 P.2d 923 (Cal. 1946).

See also Cal. Civ. Code § 3300, *et seq.*, on the measure of damages for certain types of claims.

Experts - States Following the Daubert/Kumho Doctrine

Rejects Daubert and follows Frye. People v. Leahy, 882 P.2d 321 (Cal. 1994); People v. Kelly, 549 P.2d 1240 (Cal. 1976); Cal. Evid. Code § 801; see Cal. Evid. Code § 801.1 (medical causation) (eff. Jan. 1, 2024).

Interest - Pre & Post Judgment

Prejudgment

Contract Actions

Rate: The rate in the contract will be applied. For contracts entered after January 1, 1986, if the contract does not state a rate of interest, the court will apply interest at 10% per year. Cal. Civ. Code § 3289.

Accrual Date: Date of breach if ascertainable on that date. Otherwise, on the date ascertainable. Cal. Civ. Code §§ 3287; 3289. If unliquidated, at the court's discretion but no earlier than the date the action was filed. Cal. Civ. Code § 3287.

Tort Actions:
Rate: 7%. Cal. Const. Art. XV, §1.
Accrual Date: If ascertainable, from the date ascertainable. Levy-Zentner Co. v. S. Pac. Transp. Co., 142 Cal. Rptr. 1 (Cal. Ct. App. 1977) (property damage case); Cal. Civ. Code § 3287. Otherwise, at the discretion of the jury. Cal. Civ. Code § 3288.
Personal Injury Tort Actions Where Offer to Compromise was Made: Except for actions against public entities and their employees, if a plaintiff in a personal injury action makes an offer of compromise that is rejected, a plaintiff is entitled to interest if the judgment is greater than the offer of compromise. Cal. Civ. Code § 3291.
Rate: 10% per year. Cal. Civ. Code § 3291.
Accrual Date: Date of the offer of compromise. Cal. Civ. Code § 3291.

Post Judgment

Contract and Tort Actions
Rate: Unless lowered by the Legislature, 10% per year. Cal. Code Civ. Proc. § 685.010.
Accrual Date: Date of judgment. Cal. Code Civ. Proc. § 685.020(a); but see Cal. Civ. Code § 685.020(b) (installment payments).

Joint and Several Liability

Modified joint and several liability. In any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, tortfeasors are held jointly liable for economic damages and severally liable for non-economic damages. The term "economic damages" means objectively verifiable monetary losses including medical expenses, loss of earnings, burial costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, loss of employment and loss of business or employment opportunities. The term "non-economic damages" means subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation. Cal. Civ. Code § 1431 and 1431.2. However, in strict liability cases involving only damage caused by a defective product, where all of the defendants are in the same chain of distribution, defendants are jointly responsible for all the plaintiff's damages, reduced only by the plaintiff's comparative fault. Bostick v. Flex Equip. Co., Inc., 54 Cal. Rptr. 3d 28 (Cal. Ct. App. 2007); but see Romine v. Johnson Controls, Inc., 169 Cal. Rptr. 3d 208 (Cal. Ct. App. 2014) (recognizing a split of authority over the apportionment statute's application to strict liability cases).

Judgment Liens

A judgment and any lien created by an execution on the judgment expires ten years after the date of the entry of the judgment. Cal. Civ. Proc. Code § 683.020.

Landlord-Tenant Subrogation ("Sutton Doctrine")
A tenant's liability is generally resolved on a case-by-case basis and depends on the parties' reasonable expectations in light of the particular lease terms. Fire Ins. Exchange v. Hammond, 99 Cal. Rptr.2d 596 (Cal. Ct. App. 2000).

Made Whole Doctrine
An insurer may not recover from any third party until the insured has been fully compensated for his or her injuries unless there is clear and specific contract language to the contrary. 21st Century Ins. Co. v. Superior Court, 213 P.3d 972 (Cal. 2009) (citing Sapiano v. Williamsburg Nat. Ins. Co., 33 Cal. Rptr. 2d 659 (Cal. Ct. App. 1994)).

Professional Malpractice Filing Requirements (Affidavit of Merit)
A certificate of merit must be filed on or before date of service of the complaint or cross-complaint in every action arising from professional negligence of an architect, engineer, or land surveyor. A certificate shall be executed by the attorney for the plaintiff or cross-complainant declaring one of the following: that the attorney has reviewed the facts of the case, that the attorney has consulted with and received an opinion from at least one architect, professional engineer, or land surveyor who is licensed to practice and practices in this state or any other state, who the attorney reasonably believes is knowledgeable in the relevant issues involved in the particular action, and that the attorney has concluded on the basis of this review and consultation that there is reasonable and meritorious cause for the filing of this action. Cal. Civil Proc. Code § 411.35.

Restitution - Crime Victims Restitution Statutes
Discretionary. Cal. Penal Code § 1202.4(f). Factors to be considered include the value of the stolen or damaged property at replacement cost or cost of repair, when repair is possible; medical expenses; mental health counseling expenses; lost wages or profits; 10% interest per annum and attorney's fees. Id. However, the court should usually order full restitution. Id.; People v. Pierce, 184 Cal.Rptr.3d 607 (Cal. Ct. App. 2015). A restitution order is enforceable as a civil judgment. Cal. Penal Code § 1202.4(a)(3)(B). Other judgments for the same crime are to be credited by the amount of restitution collected. Cal. Penal Code § 1202.4(j). Only direct victims, and not insurers, may receive restitution. People v. Runyan, 279 P.3d 1143 (Cal. 2012); People v. Birkett, 980 P.2d 912 (Cal. 1999).

Right to Repair/Notice Statutes – Construction Cases
Cal. Civ. Code §§ 895 to 945.5 *Requirements for Actions for Construction Defects.*

Cal. Civ. Code §§ 6000 to 6150 *Common Interest Developments – Construction Defect Litigation.* (Cal. Civ. Code § 6000 inoperative effective July 1, 2024; repealed January 1, 2025).

Spoliation – Remedies for Spoliation
No tort cause of action will lie against a party to litigation, or against a non-party, for the intentional destruction or suppression of evidence when the spoliation was or should have been discovered before the conclusion of the litigation. Temple Community Hospital v. Superior Court, 976 P.2d 223 (Cal. 1999); Cedars–Sinai Medical Center v. Superior Court, 954 P.2d 511 (Cal. 1998). No cause of action exists for negligent spoliation either. Strong v. State, 137

Cal.Rptr.3d 249 (Cal. Ct. App. 2011). A cause of action may exist for the breach of an express agreement to preserve evidence. Cooper v. State Farm Mut. Auto. Ins. Co., 99 Cal.Rptr.3d 870 (Cal. Ct. App. 2009). The affected party may seek an inference that evidence suppressed by a party was unfavorable to the suppressing party, discovery sanctions, disciplinary sanctions against the spoliating/suppressing attorney and criminal sanctions. Temple Community; Cedars-Sinai; but see Cal. Civ. Code § 916(b) (discussing a builder's pre-litigation inspection); Cal. Civ. Code § 922 (discussing observation and recording of a builder's repair).

Statutes of Limitation and Repose*

Statutes of Limitation

Tort: Personal injury, 2 years. Cal. Civ. Proc. Code § 335.1. Property damage, 3 years. Cal. Civ. Proc. Code § 338; but cf. Cal. Civ. Proc. Code § 337.1(a) (patent deficiencies in improvements to real property – 4 years); Slavin v. Trout, 18 Cal. App. 4th 1536 (Cal. Ct. App. 1993) (stating that Cal. Civ. Proc. Code § 339 (related to actions not founded on an instrument of writing) and its 2-year statute commonly applies to professional negligence actions). Home Inspector's 4 years. Cal. Bus & Prof Code § 7199.

Contract: Oral, 2 years. Cal. Civ. Proc. Code § 339. Written, 4 years. Cal. Civ. Proc. Code § 337.

Warranty – For breach of implied warranty claims related to consumer goods pursuant to the Song-Beverly Consumer Warranty Act, the breach of an implied warranty must occur within one year following the sale of new goods. See Cal. Civ. Code § 1791.1(c); Tanner v. Ford Motor Co., 2019 U.S. Dist. LEXIS 204510 (N.D. Cal.); Mexia v. Rinker Boat Co., 95 Cal. Rptr. 3d 285 (Cal. Ct. App. 2009). However, the four-year statute of limitations in California Commercial Code § 2725 still applies. Tanner. The Song-Beverly Act prevails over conflicting provisions of the UCC. Cal. Civ. Code § 1790.3; Mexia.

Medical Malpractice: 3 years from injury or 1 year from discovery, whichever occurs first. Cal. Code Civ. Proc. § 340.5.

State and Local Government: Claims for personal injury, death or damage to personal property to be filed with a state or local public entity within six months after accrual of the cause of action. Cal. Gov't Code § 911.2. Written application for leave to file a late claim may be considered up to 1 year from accrual of the cause of action. Cal. Gov't Code § 911.4. Claims for other causes of action to be filed within 1 year after accrual of the cause of action. Cal. Gov't Code § 911.2. The public entity is to issue notice of decision within 45 days. If the public entity does not issue notice within 45 days, rejection is presumed. Cal. Gov't Code § 912.4. If the public entity gives notice, action must be filed within 6 months of the notice. If the public entity does not give notice, action must be filed within 2 years of accrual of the cause of action. Cal. Gov't Code § 945.6.

Statutes of Repose

Improvements to Real Property: 10 years from substantial completion. Statute does not apply in case of fraudulent concealment or to persons in control of the improvement at the

* For UCC Claims and claims based on improvements to real property and/or claims brought by condominium associations related to construction defects, see the notes at the end of the Table of Contents.

time of the injury. Cal. Civ. Proc. Code § 337.15 (latent deficiencies). 4 years for any patent deficiency. Id.; Cal. Civ. Proc. Code § 337.1.

Subrogating in the Insured's Name – Real Party in Interest

A subrogation action may be brought by the subrogee in the name of the subrogor. Fort Bragg Unified School Dist. v. Solano County Roofing, Inc., 124 Cal.Rptr.3d 144 (Cal. Ct. App. 2011). A subrogee may also sue in its own name. Hausmann v. Farmers Ins. Exchange, 29 Cal.Rptr. 75 (Cal. Ct. App. 1963). However, an insurer does not have standing to represent an insured's uninsured losses, such as deductibles. Pacific Gas and Elec. Co. v. Superior Court, 50 Cal.Rptr.3d 199 (Cal. Ct. App. 2006). When an insurer sues in its own name, the better practice is to coordinate with the insured or join the insured as an involuntary coplaintiff so as not to preclude any separate, uninsured claims by the insured. Malibu Broadbeach, L.P. v. State Farm General Insurance Co., 2008 WL 588998 (Cal. Ct. App. 2008) (citing Intri-Plex Technologies, Inc. v. Crest Group, Inc., 499 F.3d 1048 (9th Cir. 2007)). A subrogation receipt transferring the insured's entire causes of action to the insurer allows the insurer to recover in the insured's name for the entire loss, not just to the extent of its payment. Shifrin v. McGuire & Hester Const. Co., 48 Cal.Rptr. 799 (Cal. Ct. App. 1966).

COLORADO

Anti-Subrogation Rule: Subrogation by Insurer Against Insured
An insurer cannot subrogate against its own insured, including implied co-insured parties covered by same policy. 1700 Lincoln Ltd. v. Denver Marble and Tile Co., Inc., 741 P.2d 1270 (Colo. App. 1987). Colorado recognizes the "no coverage" exception to the anti-subrogation rule. "If an insurer pays on behalf of one insured for damage caused by a second insured, under a policy that does not cover the second insured for the loss, the insurer may recover from the second insured by subrogation." Continental Divide Ins. Co. v. Western Skies Mgmt. Inc., 107 P.3d 1145 (Colo. App. 2004). An insurer may not subrogate against another insured where the amount sought to be recovered is in excess of the coverage provided. Id.

Comparative/Contributory Negligence
Modified Comparative – 49%. Colo. Rev. Stat. § 13-21-111.

Contribution and Implied Indemnity
Contribution: Authorized by the Uniform Contribution Among Tortfeasors Act. Colo. Rev. Stat. 13-50.5-101, *et seq.* Although joint and several liability has been abolished by statute, Colo. Rev. Stat. 13-21-111.5, contribution remains available because UCATA permits contribution from parties which were only severally liable. Graber v. Westaway, 809 P.2d 1126 (Colo. App. 1991). A settling tortfeasor must make a reasonable settlement and extinguish the liability of the tortfeasor from whom he or she seeks contribution. Colo. Rev. Stat. 13-50.5-102(4). Joint tortfeasors are responsible for contributing their pro rata shares as determined by their relative degrees of fault. Colo. Rev. Stat. 13-50.5-103; Brochner v. Western Ins. Co. 724 P.2d 1293 (Col. 1986). Contribution only exists for a tortfeasor who has paid more than his pro rata share of liability and his total recovery is limited to the amount paid by him in excess of such share. Colo. Rev. Stat. 13-50.5-102(2). A claim for contribution may be brought in the underlying action or as a separate action. Colo. Rev. Stat. 13-50.5-104. If a separate action is filed, the contribution suit must be commenced within one year after the judgment. Colo. Rev. Stat. 13-50.5-104(3). If there is no judgment, contribution is barred unless the tortfeasor seeking contribution discharges the common liability within the applicable limitations period and initiates a contribution action within one year of payment. Colo. Rev. Stat. 13-50.5-104(4). For construction cases involving architects, contractors, builders, engineers, inspectors, etc., claims are timely if they are brought during the underlying construction defect litigation or within 90 days after the date of settlement or judgment, whichever comes first. Colo. Rev. Stat. 13-80-104(I)(b)(II); Goodman v. Heritage Builders, Inc., 390 P.3d 398 (Colo. 2017).

Implied Indemnity: With the adoption of the Uniform Contribution Among Tortfeasors Act, recovery under common law indemnity was essentially abolished, but it should be available to a principal who, without fault, is vicariously liable for his agent's tort. Brochner; Serna v. Kingston Enters., 72 P.3d 376 (Colo. App. 2002). The statute of limitations is generally two years from accrual. Colo. Rev. Stat. 13-80-102. A cause of action for indemnity does not arise until the liability of the party seeking indemnification either pays a sum clearly owed or the injured party obtains an enforceable judgment. Serna. For construction cases involving architects, contractors, builders, engineers, inspectors, etc., claims are timely if they are brought

during the underlying construction defect litigation or within 90 days after the date of settlement or judgment, whichever comes first. Colo. Rev. Stat. 13-80-104(I)(b)(II); Goodman.

Damages - Measure of Damages to Property

Real Property: The general rule is diminution in market value. Board of County Comm'rs of Weld County v. Slovek, 723 P.2d 1309 (Colo. 1986). However, the proper measure of damages in tort is a matter of discretion for the trial court and there may be instances where, in order to reimburse the plaintiff for the actual loss suffered, the repair or restoration cost may be a more appropriate measure of damages. Board of County Comm'rs of Weld County (citing three examples); see Vista Resorts, Inc. v. Goodyear Tire & Rubber Co., 117 P.3d 60 (Colo. App. 2004) (allowing post-repair stigma damages).

Personal Property: Total Loss: Fair market value of the property at the time it was destroyed. Bullerdick v. Pritchard, 8 P.2d 705 (Colo. 1932). The court may deviate from fair market value and award whatever damages will reasonably "make the plaintiff whole." Bullerdick; Duggam v. Board of County Comm'rs of County Weld, 747 P.2d 6 (Colo. App. 1987) (allowing consequential, loss of use damages). Partial Loss: Diminution in fair market value from immediately before to immediately after the damage occurred. Goodyear Tire & Rubber Co. v. Holmes, 193 P.3d 821 (Colo. 2008). If fair market diminution does not adequately compensate the plaintiff, the courts may, at their discretion, award different damages to ensure adequacy. Goodyear.

Experts - States Following the Daubert/Kumho Doctrine

Follows a Daubert-like analysis. Colo. R. Evid. 702; People v. Rector, 248 P.3d 1196 (Colo. 2011) (stating that under the test set forth in People v. Shreck, 22 P.3d 68 (Colo. 2001), a court may, but is not required to, consider the factors mentioned in Daubert).

Interest - Pre & Post Judgment

Prejudgment

Contract Actions

Rate: The rate in the contract will be applied. When there is no rate in the contract, the court will apply an interest rate of 8% per year compounded annually. Colo. Rev. Stat. § 5-12-102.

Accrual Date: The date that money is "wrongfully withheld." Colo. Rev. Stat. § 5-12-102(1); Goodyear Tire & Rubber Co. v. Holmes, 193 P.3d 821 (Colo. 2008) (money is wrongfully withheld on the date of breach).

Tort Actions

Property Damage

Rate: Where there is no agreement on the rate, 8% per annum, compounded annually. Colo. Rev. Stat. § 5-12-102; Goodyear.

Accrual Date: The date of "wrongful withholding," Colo. Rev. Stat. § 5-12-102, i.e., at the time plaintiff's injury is measured. Goodyear. Where diminution in value is the measure of damages, interest accrues on the date of the tort. Goodyear. Where the plaintiff recovers repair or replacement cost damages, interest accrues from the date the plaintiff incurs the repair or replacement costs. Goodyear; Ferrellgas, Inc. v. Yeiser, 247 P.3d 1022 (Colo. 2011) (accrual date for property damage cases).

Personal Injury

Rate: 9% per year. Colo. Rev. Stat. § 13-21-101; Rodriguez v. Schutt, 914 P.2d 921 (Colo. 1996).

Accrual Date: Date action accrues. Colo. Rev. Stat. § 13-21-101. Interest compounded annual from date action is filed. Id.; Francis v. Dahl, 107 P.3d 1171 (Col. App. 2005).

Post Judgment

Contract Actions:

Rate: The rate in the contract will be applied. When there is no rate in the contract, 2% above the discount rate, subject to an 8% floor, compounded annually. Colo. Rev. Stat. §§ 5-12-102; 5-12-106.

Accrual Date: Date of judgment. Colo. Rev. Stat. §§ 5-12-102; 5-12-106.

Tort Actions

Property Damage

Rate: Where there is no agreement on the rate, 2% above the discount rate, subject to an 8% floor, compounded annually. Colo. Rev. Stat. §§ 5-12-102; 5-12-106.

Accrual Date: Date of judgment. Colo. Rev. Stat. §§ 5-12-102; 5-12-106.

Personal Injury

Rate: 9% if no appeal. 2% above the discount rate if appeal Colo. Rev. Stat. § 13-21-101; Rodriguez.

Accrual Date: Date of judgment. See Colo. Rev. Stat. § 13-21-101(1); Sperry v. Field, 186 P.3d 133 (Colo. App. 2008). However, if judgment debtor appeals, from the date the action accrued. Colo. Rev. Stat. § 13-21-101.

Joint and Several Liability

Modified joint and several liability. In tort actions for death or injury to person or property, no defendant shall be liable for an amount greater than its percentage of the negligence. If two or more individuals conspire to commit a tort, there is joint and several liability, but only up to the degree of fault attributed to the co-conspirator(s). Colo. Rev. Stat. § 13-21-111.5.

Judgment Liens

A judgment may be revived within twenty years. Colo. R. Civ. P. 54. Any revived judgment may itself be revived in the same manner. Id; see Colo. Rev. Stat. § 13-52-102(2)(a) (twenty years to execute unless revived); but see Colo. Rev. Stat. § 13-52-102(2)(b)(I) and (II) (referencing 6 years to execute a county court judgment and restitution judgments that can be executed on at any time until paid). Generally, a lien of judgment expires six years after the entry of judgment unless revived. Colo. Rev. Stat. § 13-52-102(a).

Landlord-Tenant Subrogation ("Sutton Doctrine")

A landlord's insurer has a right of subrogation unless the terms of the lease circumscribe that right. U.S. Fidelity & Guar. Co. v. Let's Frame It, Inc., 759 P.2d 819 (Colo. App. 1988).

Made Whole Doctrine
In UM cases, the made whole doctrine applies and a clause in an insurance policy cannot change the made whole doctrine. Kral v. Am. Hardware Mut. Ins. Co., 784 P.2d 759 (Colo. 1989). In personal injury cases, the doctrine applies, and cannot be changed by contract. Colo. Rev. Stat. § 10-1-135(3)(a)(I). In other contexts, the law is unsettled. However, in *dictum* the court in DeHerrera v. American Family Mut. Ins. Co., 219 P.3d 346 (Colo. App. 2009) stated that there is no Colorado authority holding that the insurer has no right to subrogation unless the insured was made whole by the underlying settlement. According to the court, a "made whole" policy would discourage settlements.

Professional Malpractice Filing Requirements (Affidavit of Merit)
Within sixty days of the filing of a complaint against a licensed professional, plaintiff's counsel must file a certificate of review with the court. Colo. Rev. Stat. §§ 13-20-601, 13-20-602. For construction defect claims, the claimant must serve the construction professional (architect, contractor, subcontractor, developer, builder, builder vendor, engineer, or inspector performing or furnishing the design, supervision, inspection, construction, or observation of the construction of any improvement to real property) with written notice of the claim at least 75 days before filing suit (90 days for commercial properties). Colo. Rev. Stat. § 13-20-801, *et seq.*

Restitution - Crime Victims Restitution Statutes
Mandatory unless the court finds that the victim suffered no pecuniary loss. For a non-felony conviction, the court may not order restitution for amounts compensable by the defendant's liability insurer. Other than for the victim's deductible, the court may not order restitution for which the victim is entitled to receive benefits from an insurance policy. The defendant also owes 12% interest from the date of the restitution order and reasonable attorney fees and costs incurred in collecting due to the defendant's nonpayment. A restitution order is recoverable as a civil judgment by the victim. Amounts paid in restitution are to be set off against any amount recoverable as damages in a civil action. Colo. Rev. Stat. § 18-1.3-603. The term "victim" includes an insurer. Colo. Rev. Stat. § 18-1.3-602.

Right to Repair/Notice Statutes – Construction Cases
Colo. Rev. Stat. §§ 13-20-801 to 13-20-808 *Construction Defect Actions for Property Loss and Damage*.

Colo. Rev. Stat. § 38-33.3-303.5 *Management of the Common Interest Community: Construction defect actions – disclosure – approval by unit owners – definitions – exemptions.*

Spoliation – Remedies for Spoliation
No cause of action exists for spoliation of evidence. Johnson v. Liberty Mut. Fire Ins. Co., 653 F.Supp.2d 1133 (D.Colo. 2009). The affected party may seek an adverse inference instruction from the court. Aloi v. Union Pacific Railroad Corp., 129 P.3d 999 (Colo. 2006).

Statutes of Limitation and Repose*

Statutes of Limitation

Tort: 2 years, including strict liability and failure to instruct or warn. Colo. Rev. Stat. § 13-80-102. 4 years for vehicular homicide with leaving accident scene. Id. Products, 2 years. Colo. Rev. Stat. § 13-80-106. Arising from motor vehicle generally, 3 years. Colo. Rev. Stat. § 13-80-101. Fraud, misrepresentation, concealment or deceit, 3 years. Colo. Rev. Stat. § 13-80-101.

Contract: 3 years. Colo. Rev. Stat. § 13-80-101. No separate statute for sale of goods. Colo. Rev. Stat. § 4-2-725.

Medical Malpractice: 2 years from date injury and cause are known or should be known. Colo. Rev. Stat. § 13-80-102.5.

Other State: If the cause of action arises in another state and is barred by other state's statute of limitation, the cause of action is barred in Colorado also. Colo. Rev. Stat. § 13-80-110.

State and Local Government: Written notice must be filed with the attorney general or the local government within 182 days after the date of the discovery of the injury. An action may not be filed until the public entity denies the claim or 90 days from the filing of the written notice, whichever is earlier. The statute of limitation applicable to the type of action governs. Colo. Rev. Stat. § 24-10-109.

Statutes of Repose

Products: Against manufacturers, sellers or lessors of new manufacturing equipment, 7 years from date when the product was first put to use. Colo. Rev. Stat. § 13-80-107.

Improvements to Real Property: 6 years after substantial completion. If the cause of action arises during the 5th or 6th year after substantial completion of the improvement to real property, the action shall be brought within 2 years after the date upon which said cause of action arises. Statute does not apply to persons in control of the improvement at the time of the injury. Colo. Rev. Stat. § 13-80-104.

Medical Malpractice: 3 years from the act or omission. Colo. Rev. Stat. § 13-80-102.5.

Subrogating in the Insured's Name – Real Party in Interest

Every action shall be prosecuted in the name of the real party in interest. Colo. R. Civ. Pro. 17. An insured who has no uncompensated losses, through any combination of payments by his insurer and/or by a responsible party, is not a real party in interest. British America Assur. Co. v. Colorado & S. Ry. Co., 125 P. 508 (Colo. 1912).

* For UCC Claims and claims based on improvements to real property and/or claims brought by condominium associations related to construction defects, see the notes at the end of the Table of Contents.

CONNECTICUT

Anti-Subrogation Rule: Subrogation by Insurer Against Insured
Someone who has contributed to the payment of the premium of a policy of property insurance and who would have no reasonable expectation of subrogation is exempt from a subrogation claim. Allstate Ins. Co. v. Palumbo, 994 A.2d 174 (Conn. 2010) (unmarried cohabitant who negligently installed heat pump but who was long-term resident of house protected from subrogation even though not an insured). In Palumbo, the court made clear that "same-policy" subrogation was prohibited. In citing to Home Ins. Co. v. Pinski Bros., Inc., 500 P.2d 945 (Mont. 1972), the court hinted that separate-policy subrogation might also be prohibited, but it did not directly address the issue.

Comparative/Contributory Negligence
Negligence: Modified Comparative – 50%. Conn. Gen. Stat. § 52-572h.
Products Liability: Pure Comparative. Conn. Gen. Stat. § 52-572o.

Contribution and Implied Indemnity
Contribution: For negligence claims, contribution is generally not applicable because Connecticut applies several liability, in which a defendant is only responsible for its respective share of liability. Conn. Gen. Stat. § 52-572h. However, where the original plaintiff is unable to collect a portion of his damages from a defendant, the uncollectable share of damage may be reapportioned among the other defendants in the same proportion as their share of liability and, in such cases, a separate action for contribution is permitted, if filed within two years of the payment in excess of a party's proportional share of judgment. Conn. Gen. Stat. § 52-572h(h). If one defendant enters into a settlement agreement with the original claimant, that defendant is discharged from all liability for contribution, but it does not discharge the other defendants (unless the release in fact releases all defendants). Conn. Gen. Stat. § 52-572h(n). However, the total damages awarded are reduced by the amount of the released person's percentage of negligence. Id. Contribution claims are subject to Connecticut's 7-year statute of repose related to the construction of improvements to real property. Conn. Gen. Stat. § 52-584a; but see Conn. Gen. Stat. § 52-584c (contribution actions by state or a political subdivision arising out of construction). Because joint-and-several liability applies to products liability claims, a defendant who pays more than its proportionate share of a judgment is entitled to contribution. Conn. Gen. Stat. § 52-572o. A party seeking contribution can file a separate lawsuit or implead the prospectively liable third party in the existing lawsuit. Malerba v. Cessna Aircraft Co., 554 A.2d 287 (Conn. 1989). If a product seller impleads a third party who is or may be liable for all or part of the claimant's claim, it must serve the third-party defendant within one year from the filing of the original cause of action. Malerba; Conn. Gen. Stat. § 52-577a(b). If the contribution claim is filed in a separate action, the statute of limitations is one year from judgment or settlement. Malerba; Conn. Gen. Stat. § 52-572o(e).

Implied Indemnity: A plaintiff in an action for indemnification not based on a statute or express contract, who had been a codefendant in a prior action with a joint tortfeasor, can recover indemnity from that codefendant only by establishing four separate elements: (1) that the other tortfeasor was negligent; (2) that his negligence, rather than the plaintiff's, was the direct, immediate cause of the accident and injuries; (3) that he was in control of the situation to the

exclusion of the plaintiff; and (4) that the plaintiff did not know of such negligence, had no reason to anticipate it, and could reasonably rely on the other tortfeasor not to be negligent. Kyrtatas v. Stop & Shop, 535 A.2d 357 (Conn. 1988). When all potential parties are included in a product liability action, indemnification does not apply; instead, Conn. Gen. Stat. § 52-572o applies, and the court allocates liability. Id. If the plaintiff in a product liability action did not include all potential parties, the defendants may implead a third party that may be liable for all or part of the claim. Smith v. Dynamic Cooking Sys., 887 A.2d 966 (Conn. Super. Ct. 2005). A court may also imply an agreement to indemnify from the conduct of two parties in the absence of an express contract. Sandella v. Dick Corp., 729 A.2d 813 (Conn. App. Ct. 1999). An action for indemnification must be filed within 3 years from either judgment or settlement of the underlying claim. Conn. Gen. Stat. § 52-598a. Indemnification claims for improvements to real property are subject to Connecticut's 7-year statute of repose. Conn. Gen. Stat. § 52-584a; but see Conn. Gen. Stat. § 52-584c (contribution actions by state or a political subdivision arising out of construction).

Damages - Measure of Damages to Property

Real Property: Generally, the diminution in fair market value from immediately before to immediately after the damage occurred. However, the diminution in value may be determined by the cost of repairing the damage provided that the cost of repair does not exceed the pre-injury value of the property and does not enhance the value of the property over its pre-injury value. The selection of the repair measure of damages is a matter within the court's discretion. The measures are alternative measures of damages. Therefore, the plaintiff need not introduce evidence of both. Willow Springs Condo. Ass'n, Inc. v. Seventh BRT Dev. Corp., 717 A.2d 77 (Conn. 1998).

Personal Property: Total Loss: Fair market value of the property at the time it was destroyed. Allstate Ins. Co. v. Palumbo, 952 A.2d 1235 (Conn. App. Ct. 2008), rev'd on other grounds, 994 A.2d 174 (Conn. 2010). Partial Loss: Diminution in fair market value from immediately before to immediately after damage occurred. Youngset, Inc. v. Five City Plaza, 237 A.2d 366 (Conn. 1968). Generally, cost of repairs is considered adequate proof to demonstrate the diminution in fair market value caused by damage. Littlejohn v. Elionsky, 36 A.2d 52 (Conn. 1944).

Experts - States Following the Daubert/Kumho Doctrine

Follows Daubert. Conn. Code of Evid. § 7-2; State v. Porter, 698 A.2d 739 (Conn. 1997).

Interest - Pre & Post Judgment

Prejudgment

Contract:

Rate: Maximum rate of 10% per year (precise percentage at discretion of court) based upon equitable principles. Conn. Gen. Stat. § 37-3a; Riley v. Travelers Home & Marine Ins. Co., 163 A.3d 1246 (Conn. App. Ct. 2017).

Accrual Date: Date money is "wrongfully withheld." Paulus v. Lasala, 742 A.2d 379 (Conn. App. Ct. 1999); Conn. Gen. Stat. § 37-3a (date money becomes payable).

Tort Actions

Absent an offer of compromise, prejudgment interest not allowed in negligence actions seeking to recover damages for injury to a person, or real or personal property. Muckle v. Pressley, 197 A.3d 437 (Conn. App. Ct. 2018) (discussing Conn. Gen. Stat. § 37-3a(a)).

Offer of Compromise:

Rate: 8% per year, if plaintiff recovers an amount equal or greater than the sum specified in the plaintiff's offer of compromise. Conn. Gen. Stat. § 52-192a(c); see Conn. Gen. Stat. § 42-158s (construction contracts).

Accrual Date: If the offer of compromise was filed within 18 months of filing the complaint, interest is calculated from the date the complaint was filed. If the offer of compromise was filed later than 18 months from the filing of the complaint, interest is calculated from date the offer of compromise was filed. Conn. Gen. Stat. § 52-192a(c).

Post Judgment

Contract Actions:

Rate: Maximum rate of 10% per year (precise % at discretion of court). Conn. Gen. Stat. § 37-3a; Ballou v. Law Offices Howard Lee Schiff, P.C., 39 A.3d 1075 (Conn. 2012).

Accrual Date: Date of judgment. Conn. Gen. Stat. § 37-3a; Ballou.

Tort Actions:

Negligence Actions

Rate: Maximum rate of 10% per year. Conn. Gen. Stat. § 37-3b.

Accrual Date: Computed from 20 days after the date of judgment or the date that is 90 days after the date of verdict, whichever is earlier. Conn. Gen. Stat. § 37-3b.

If plaintiff appeals, see Conn. Gen. Stat. § 37-3b(b).

Other Tort Actions

Rate: Maximum rate of 10% per year (precise percentage at discretion of court). Conn. Gen. Stat. § 37-3a; Ballou.

Accrual Date: Date of judgment. Conn. Gen. Stat. § 37-3a.

Joint and Several Liability

Generally: Several liability. **In negligence actions,** each party against whom recovery is allowed shall be liable to the claimant only for such party's proportionate share of the damages. If a plaintiff is unable to collect from a liable tortfeasor, the court shall reallocate the uncollectable share among the remaining tortfeasors in proportion to their percentage of liability, Conn. Gen. Stat. § 52-572h(c), (g). Products liability: common-law joint and several liability. Conn. Gen. Stat. § 52-572o; Allard v. Liberty Oil Equip. Co., Inc., 756 A.2d 273 (Conn. 2000) (stating that § 52-572h's apportionment principles do not apply to complaints based on principles other than negligence).

Judgment Liens

A judgment lien expires twenty years after the judgment was rendered, unless the party claiming the lien commences an action to foreclose. Conn. Gen. Stat. § 52-380a.

Landlord-Tenant Subrogation ("Sutton Doctrine")
Absent an express agreement, a landlord's insurer has no right of subrogation against a tenant. DiLullo v. Joseph, 792 A.2d 819 (Conn. 2002).

Made Whole Doctrine
An insurer generally is entitled to recover the amount it paid to the insured only if the amount of damages awarded exceeds the difference between the amount the insurer paid and the insured's actual damages. Wasko v. Manella, 849 A.2d 777 (Conn. 2004); Fireman's Fund Ins. Co. v. TD Banknorth Ins. Agency, Inc., 72 A.3d 36 (Conn. 2013). The equitable doctrine does not, however, apply to deductibles. Fireman's Fund.

Professional Malpractice Filing Requirements (Affidavit of Merit)
In any action alleging injury or wrongful death caused by a health care provider, a certificate of good faith must be filed with the complaint. The certificate shall provide a detailed written opinion by a similar health care provider in support of the belief that evidence of medical negligence appears to exist. Conn. Gen. Stat. § 52-190a.

Restitution - Crime Victims Restitution Statutes
Discretionary, depending on factors including the financial resources of the offender and the burden restitution will place on other obligations of the offender, the offender's ability to pay based on installments or other conditions, and the rehabilitative effect on the offender of the payment of restitution and the method of payment. A restitution order is enforceable as a civil judgment. The statute does not address whether subrogated insurers may recover restitution. Conn. Gen. Stat. § 53a-28.

Right to Repair/Notice Statutes – Construction Cases
Conn. Gen. Stat. § 47-261f *Management of Common Interest Communities – Litigation involving declarant.* See also Conn. Gen. Stat. § 47-244(b)(2) *Management of Common Interest Communities – Powers and duties of unit owners' association.*

Spoliation – Remedies for Spoliation
The tort of intentional spoliation of evidence by a party defendant consists of the following essential elements: (1) the defendant's knowledge of a pending or impending civil action involving the plaintiff; (2) the defendant's destruction of evidence; (3) in bad faith, that is, with intent to deprive the plaintiff of his cause of action; (4) the plaintiff's inability to establish a prima facie case without the spoliated evidence; and (5) damages. Rizzuto v. Davidson Ladders, Inc., 905 A.2d 1165 (Conn. 2006). The tort extends to spoliation by non-parties. The non-party must not only be aware of the pending or potential action but must intentionally, in bad faith, destroy the evidence. Diana v. NetJets Services, Inc., 974 A.2d 841 (Conn. Super. Ct. 2007).

An adverse inference may be drawn against a party who has destroyed evidence only if: (1) the spoliation was intentional; (2) the destroyed evidence was relevant to the issue or matter for which the party seeks the inference; and (3) the party who seeks the inference acted with due diligence with respect to the spoliated evidence. If the jury is the trier of fact, it must be instructed that it is not required to draw the inference that the destroyed evidence would be

unfavorable but that it may do so upon being satisfied that these conditions have been met. Beers v. Bayliner Marine Corp., 675 A.2d 829 (Conn. 1996).

Statutes of Limitation and Repose*

Statutes of Limitation

Products: 3 years after injury is first sustained, discovered or should have been discovered. Conn. Gen. Stat. § 52-577a; Conn. Gen. Stat. § 52-572m; Conn. Gen. Stat. § 52-572n(a); but see Conn. Gen. Stat. § 42a-2-725 (UCC claims).

Tort: Negligence, misconduct or malpractice: 2 years from the date when the injury is first sustained or discovered or should have been discovered. Conn. Gen. Stat. § 52-584. See also, Tort Statute of Repose noted below. CUTPA action: 3 years. Conn. Gen. Stat. § 42-110g(f). Common Interest Ownership Act – breach of warranty claims under §§ 47-274 or 47-275, 3 years. Conn. Gen. Stat. § 47-277(a). Implied warranty on new homes - 3 years from the date the certificate of occupancy is issued. Conn. Gen. Stat. § 47-121.

Improvements to Real Property: Claims against architects and engineers are subject to a 7-year limitation period, beginning to run upon substantial completion of the improvement. Grigerik v. Sharpe, 721 A.2d 526 (Conn. 1998) (citing Conn. Gen. Stat. § 52-584a); Plato Assocs., LLC v. Envtl. Compliance Servs., 9 A.3d 698, 702 n.11 (Conn. 2010).

Contract: Oral and written, if one party has fully performed its obligations (i.e., executed contracts): 6 years. Conn. Gen. Stat. § 52-576. Oral and written, if neither party has fully performed its obligations (i.e., executory contracts): 3 years. Conn. Gen. Stat. § 52-581. Tierney v. American Urban Corp., 365 A.2d 1153 (Conn. 1976); John H. Kolb & Sons, Inc. v. G and L Excavating, Inc., 821 A.2d 774 (Conn. App. Ct. 2003).

State Government: 1 year from when the injury is sustained or discovered or should have been discovered. Conn. Gen. Stat. § 4-148.

Local Government: Municipalities: 2 years after the cause of action arose, provided that within 6 months after the cause of action arose, written notice of the incident and of the intent to commence an action was filed with the clerk of the municipality. Conn. Gen. Stat. § 7-101a.

Statutes of Repose

Products: Generally: 10 years after the product left the defendant's possession/control. In cases not involving worker's compensation, the 10-year period does not apply, provided that the claimant can establish that the harm occurred during the useful safe life of the product. The 10-year period is extended to the period of an express written warranty, if longer than 10 years. In cases of asbestos: 80 years from plaintiff's last exposure for personal injury; 30 years for property damage. Conn. Gen. Stat. § 52-577a.

Tort: Negligence, misconduct or malpractice: 3 years from the date of the act or omission complained of. Conn. Gen. Stat. § 52-584. Other torts: 3 years from the date of the act or omission complained of. Conn. Gen. Stat. § 52-577.

Improvements to Real Property: Actions against architects, professional engineers and land surveyors limited to 7 years after substantial completion. Actions for injuries occurring

* For UCC Claims and claims based on improvements to real property and/or claims brought by condominium associations related to construction defects, see the notes at the end of the Table of Contents.

within the seventh year may be brought within eight years of substantial completion. Conn. Gen. Stat. § 52-584a.

Actions Brought by a State or Political Subdivision Arising Out of Construction-Related Work: Subject to the exceptions stated in Conn. Gen. Stat. § 52-584c(e), for improvements substantially completed on or after October 1, 2017**,** no action shall be brought by the state or any political subdivision more than 10 years after the date of substantial completion. Conn. Gen. Stat. § 52-584c. For improvements completed prior to October 1, 2017, no action shall be brought after October 7, 2027.

State Government: 3 years from the act or event complained of. Conn. Gen. Stat. § 4-148.

Subrogating in the Insured's Name – Real Party in Interest

"An action may be brought in all cases in the name of the real party in interest, but any claim or defense may be set up which would have been available had the plaintiff sued in the name of the nominal party in interest." Practice Book § 9-23. In the typical subrogation action brought in the insured's name, the plaintiff acts on behalf of the real party in interest, his insurer. Best Friends Pet Care, Inc. v. Design Learned, Inc., 823 A.2d 329 (Conn. App. Ct. 2003). An insurance company, as subrogee of an insured's rights, is a real party in interest and as such may also sue in its own name to enforce those rights. Old Republic Nat. Title Ins. Co. v. Garrell, 2004 WL 3105938 (Conn. Super. Ct. 2004).

DELAWARE

Anti-Subrogation Rule: Subrogation by Insurer Against Insured
No right of subrogation exists against the insured, co-insured, or where the wrongdoer is an insured under the same policy. Lexington Ins. Co. v. Raboin, 712 A.2d 1011 (Del. Super. Ct. 1998).

Comparative/Contributory Negligence
Modified Comparative – 50%. Del. Code Ann. tit. 10, § 8132.

Contribution and Implied Indemnity
Contribution: Authorized by the Uniform Contribution Among Tortfeasors Act. Del. Code Ann. tit. 10, §§ 6301 - 6308. A joint tortfeasor is only entitled to contribution after either (i) he has discharged by payment common liability or (ii) paid more than his pro rata share of liability. Del. Code Ann. tit. 10, § 6302. A settling joint tortfeasor is not entitled to recover contribution from a joint tortfeasor whose liability to the injured person was not extinguished by the settlement. Id. A release given to one joint tortfeasor does not relieve that tortfeasor from liability for contribution claims unless (a) the release is given before the right of the other tortfeasor to secure a money judgment for contribution has accrued and (b) it provides for a reduction, to the extent of the pro rata share of the released tortfeasor, of the injured person's damages recoverable against all other tortfeasors. Del. Code Ann. tit. 10, § 6304. Separate lawsuits are generally not permitted so long as the contribution claim can be resolved in the original lawsuit through third-party practice. Del. Code Ann. tit. 10, § 6306. The statute of limitations for contribution claims is 3 years, accruing when the joint tortfeasor seeking contribution has by payment discharged the common liability or has paid more than his pro rata share. Del. Code Ann. tit. 10, § 8106(a); Reddy v. PMA Ins. Co., 20 A.3d 1281 (Del. 2011). Contribution claims in non-residential construction cases are subject to a 6-year statute of repose. Del. Code Ann. tit. 10, §§ 8127(a)(5), 8127(b).

Implied Indemnity: A person who, without fault, is compelled to pay damages is entitled to recover indemnity where, as between the parties to the indemnity action, the defendant is primarily liable and the plaintiff is only secondarily liable; i.e., technically or constructively liable to the injured party, or where his liability is based on a legal or contractual relationship with the defendant. Cook v. Delmarva Power & Light Co., 1985 Del. Super. LEXIS 1218; Cumberbatch v. Board of Trustees, 382 A.2d 1383 (Del. Super. Ct. 1978). Indemnification claims in non-residential construction cases are subject to a 6-year statute of repose. Del. Code Ann. tit. 10, §§ 8127(a)(5), 8127(b). A cause of action for indemnity does not arise until the indemnitee suffers loss or damage through payment of a claim after judgment or settlement. Chesapeake Utilities Corp. v. Chesapeake & Potomac Tel. Co., 401 A.2d 101 (Del. Super. Ct. 1979). The statute of limitations is 3 years. O'Brien v. IAC/Interactive Corp., 2009 Del. Ch. LEXIS 154 (2009).

Damages - Measure of Damages to Property
Real Property: Generally, the diminution in fair market value from immediately before to immediately after the damage occurred. Brandywine 100 Corp. v. New Castle County, 527 A.2d 1241 (Del. 1987). In an appropriate case, where the cost of repair is not disproportionate to the

probable loss in value, the reasonable cost of restoration may be recovered. Brandywine 100 Corp.

Personal Property: Generally, the diminution in fair market value from immediately before to immediately after the damage occurred. Alber v. Wise, 166 A.2d 141 (Del. 1960).

Experts - States Following the Daubert/Kumho Doctrine
Follows Daubert and Kumho Tire. Del. R. Evid. 702; M.G. Bancorporation, Inc. v. LeBeau, 737 A.2d 513 (Del. 1999).

Interest - Pre & Post Judgment
Prejudgment

Contract Actions
Rate: 5% over the Federal Reserve discount date including any surcharge as of the time from which interest is due, or the rate identified in the contract if less than 5% over the Federal Reserve Discount Rate. Del. Code Ann. tit. 6, § 2301.
Accrual Date: Due date under the contract. United States ex rel. Endicott Enters. v. Star Bright Constr. Co., 848 F. Supp. 1161 (D. Del. 1994); Del. Code Ann. tit. 6, § 2301.

Tort Actions
Rate: 5% over the Federal Reserve discount rate. Del. Code Ann. tit. 6, § 2301.
Accrual Date: The date of injury, provided that prior to trial the plaintiff had extended to defendant a written settlement demand valid for a minimum of 30 days in an amount less than the amount of damages upon which the judgment was entered. Del. Code Ann. tit. 6, § 2301; see Cumberland Ins. Group v. KCL Enters., 2003 Del. Super. LEXIS 500 (Aug. 26, 2003) (in subrogation cases, the date of injury is the date of each insurance payment).

Post Judgment

Contract and Tort Actions
Rate: 5% over the Federal Reserve discount rate including any surcharge thereon or the contract rate, whichever is less. Del. Code Ann. tit. 6, § 2301; see Payne v. Home Depot, Inc., 2009 Del. Super. LEXIS 129 (Apr. 7, 2009)
Accrual Date: Date of judgment. Id.

Joint and Several Liability
Joint and several liability. Plaintiffs may collect the full amount of a judgment from any joint tortfeasor. Del. Code Ann. tit. 10, § 6301; Christiana Care Health Services, Inc. v. Crist, 956 A.2d 622 (Del. 2008); Leishman v. Brady, 3 A.2d 118 (Del. Super. Ct. 1938).

Judgment Liens
A judgment lien expires after 10 years unless renewed for a further 10-year term. Del. Code Ann. tit. 10, § 4711.

Landlord-Tenant Subrogation ("Sutton Doctrine")
Absent a clearly expressed lease provision, a residential tenant is an implied insured under his or her landlord's fire insurance policy and shielded from subrogation claims. Lexington Ins. Co. v. Raboin, 712 A.2d 1011 (Del. Super. Ct. 1998).

Made Whole Doctrine
Case law suggests that Delaware courts will apply the made whole doctrine in first-party property cases. See Phillips v. Liberty Mutual Ins. Co., 253 A.2d 502 (Del. 1969) (concluding that, because the insureds stipulated to their property damages, they had been made whole and the insurer could pursue its subrogation claim). The question of whether a property insurance policy's subrogation clause modifies the doctrine is undecided.

Professional Malpractice Filing Requirements (Affidavit of Merit)
An affidavit of merit must be filed along with the complaint in any negligence action against a health care provider. Del. Code Ann. tit. 18, § 6853. An affidavit of merit is not necessary if the complaint alleges a rebuttable inference of medical negligence, including when an object is left in the patient's body or surgery is performed on the wrong body part. A review panel may be used in medical malpractice claims but is not required prior to filing the complaint. Del. Code Ann. tit. 18, § 6803, *et seq.*; see Del. Super. Ct. Civ. R. 71.2.

Restitution - Crime Victims Restitution Statutes
Discretionary. The court is to order restitution for the loss of property unless it states its reason on the record for not ordering restitution. Insurance companies may receive restitution but only after individuals are fully compensated. A civil verdict shall be reduced by the amount of restitution paid. Del. Code Ann. tit. 11, § 4106. Insurers are "victims" entitled to restitution. Pratt v. State, 486 A.2d 1154 (1983).

Right to Repair/Notice Statutes – Construction Cases
Del. Code Ann. tit. 25, § 81-321 *Management of the Common Interest Community – Litigation involving declarant.*

Spoliation – Remedies for Spoliation
No tort cause of action exists for intentional or negligent spoliation of evidence. Lucas v. Christiana Skating Center, Ltd., 722 A.2d 1247, 1250 (Del. Super. Ct. 1998). A party may ask the trial court to instruct the jury that the spoliated evidence would have been adverse to the spoliator only in instances in which the alleged spoliator acted intentionally or recklessly. Before giving such an instruction, the trial court must first make a preliminary finding of intentional or reckless conduct. No adverse inference is available in cases of negligent spoliation. Sears, Roebuck & Co. v. Midcap, 893 A.2d 542 (Del. 2006).

Statutes of Limitation and Repose[*]

Statutes of Limitation

Tort: Personal Injury: 2 years. Del. Code Ann. tit. 10, § 8119. Wrongful death or injury to personal property: 2 years. Del. Code Ann. tit. 10, § 8107. Other actions for trespass: 3 years. Del. Code Ann. tit. 10, § 8106.

Contract: 3 years, or for contracts of at least $100,000, the period specified by the contract, not to exceed 20 years. Del. Code Ann. tit. 10, § 8106.

Local or State Government: No separate statutes of limitation. However, plaintiff must give written notice of action against the City of Wilmington within 1 year of injury. Del. Code Ann. tit. 10, § 8124. Other political subdivisions may impose similar requirements. Del. Code Ann. tit. 10, § 4013.

Statutes of Repose

Improvements to Real Property: 6 years from substantial completion of non-residential property. Del. Code Ann. tit. 10, § 8127.

Subrogating in the Insured's Name – Real Party in Interest

An insurer's subrogation suit must be brought in the name of the insured. Catalfano v. Higgins, 188 A.2d 357 (Del. 1962); but cf. Super. Ct. R. 17 (stating that, with limited exceptions, "[e]very action shall be prosecuted in the name of the real party in interest"); Insurance Co. of N. America v. Stuller, 1979 WL 184079 (Del. Super. Ct. 1979) (stating that the no-fault statute, Del. Code Ann. tit. 21, § 2118(a)(2), changed the rule, and recognized that the insurer was the real party in interest); Murray v. James, 326 A.2d 122 (Del. Super. Ct. 1974) (stating that a subrogated insurer may proceed in its own name in a no-fault/PIP case).

[*] For UCC Claims and claims based on improvements to real property and/or claims brought by condominium associations related to construction defects, see the notes at the end of the Table of Contents.

DISTRICT OF COLUMBIA

Anti-Subrogation Rule: Subrogation by Insurer Against Insured
No case on point.

Comparative/Contributory Negligence
Generally, Strict Contributory. Massengale v. Pitts, 737 A.2d 1029 (D.C. 1999); Wingfield v. People's Drug Store, Inc., 379 A.2d 685 (D.C. 1994). For pedestrians and bicyclists involved in collision with a motor vehicle: Modified Comparative – 50%. D.C. Code § 50-2204.52.

Contribution and Implied Indemnity
Contribution: Contribution has been established by common law rather than by statute. D.C. v. Wash. Hosp. Center, 722 A.2d 332 (D.C. 1998). Joint liability must be discharged and either adjudicated or stipulated, George Washington University v. Bier, 946 A.2d 372 (2008), and must be apportioned by equal shares. D.C. v. Wash. Hosp. Center. A second action for contribution by a settling tortfeasor against a nonsettling tortfeasor is barred if such a claim could have been asserted in the original, underlying action filed by the injured party. Paul v. Bier, 758 A.2d 40 (D.C. 2000). When judgment is entered, a nonsettling defendant is entitled to a proportional credit for the liability of a settling defendant. Id. Because contribution is an equitable remedy, no statute of limitations applies, but an action may be time-barred even if filed within an analogous limitations period. George Washington University.

Implied Indemnity: A duty to indemnify may arise from an express contract provision or, in the absence of a contract, to prevent injustice. Where there is no express contract provision, an obligation to indemnify may be implied in fact on an implied contract theory or implied in law in order to achieve equitable results. Quadrangle Development Corp. v. Otis Elevator Co., 748 A.2d 432 (D.C. 2000). For indemnity claims arising under an implied contract rather than under equitable principles, the statute of limitations for an indemnity claim is three years. D.C. Code § 12-301(7).

Damages - Measure of Damages to Property
Real Property: The general rule is that where the damaged property can be restored to the condition it was in prior to the injury, without cost disproportionate to the actual injury, the cost of restoration is the measure of damages. However, where that is impracticable, the correct measure of damages is the difference between the value of the property before and after the injury. Wentworth v. Air Line Pilots Ass'n, 336 A.2d 542 (D.C. 1975).

Personal Property: The basic measure of damages is the diminution in fair market value from immediately before to immediately after damage occurred. Where personal property is repairable, an alternative measure of damages is the reasonable cost of repairs necessary to restore the property to its former condition unless the cost of repairs exceeds the gross diminution in value. If a plaintiff can prove that the value of damaged property after its repair is less than the property's worth before the injury, the plaintiff can recover for both the reasonable cost of repair and the residual diminution in value after repair, provided that the award does not exceed the gross diminution in value. American Service Center Associates v. Helton, 867 A.2d 235 (D.C. 2005).

Experts - States Following the Daubert/Kumho Doctrine
Follows Daubert. Motorola Inc. v. Murray, 147 A.3d 751 (D.C. 2016) (adopting Fed. R. Evid. 702).

Interest - Pre & Post Judgment
Prejudgment

Contract Actions

Rate: 6% if not specified by the contract. D.C. Code § 28-3302; see D.C. Code § 15-109. For liquidated damages, the rate fixed by the contract. D.C. Code § 15-108.
Accrual Date: From the date needed to make the plaintiff whole. D.C. Code § 15–109; see House of Wines, Inc. v. Sumter, 510 A.2d 492 (D.C. 1986) (award of interest discretionary). If damages are liquidated, interest is payable from the time when due and payable. D.C. Code § 15-108.

Tort Actions

Prejudgment interest is neither authorized nor forbidden by statute. Duggan v. Keto, 554 A.2d 1126 (D.C. 1989) (conversion action). However, a court may award interest, in its discretion, if needed to make the plaintiff whole. Id.; Burke v. Groover, Christie & Merritt, P.C., 26 A.3d 292 (D.C. 2011).

Post Judgment

Rate: If not specified by contract, "70% of the rate of interest set by the Secretary of the Treasury pursuant to section 6621 of the Internal Revenue Code of 1986 . . . rounded to the nearest full percent, or if exactly 1/2 of 1%, increased to the next highest full percent; provided, that a court of competent jurisdiction may lower the rate of interest under this subsection for good cause shown or upon a showing that the judgment debtor in good faith is unable to pay the judgment." D.C. Code § 28-3302. Interest on judgments against the District of Columbia, or its officers/employees, is at the rate not exceeding 4%. D.C. Code § 28-3302.
Accrual Date: The date of judgment. D.C. Code § 15-109; Bell v. Westinghouse Elec. Co., 507 A.2d 548 (D.C. 1986).

Joint and Several Liability
Joint and several liability. When two tortfeasors jointly contribute to harm to a plaintiff, both are potentially liable to the injured party for the entire harm. National Health Laboratories, Inc. v. Ahmadi, 596 A.2d 555 (D.C. 1991).

Judgment Liens
A final judgment is enforceable for twelve years. D.C. Code § 15-101. An order of revival extends the effect of the judgment for another twelve years from the date of the revival order. D.C. Code § 15-103.

Landlord-Tenant Subrogation ("Sutton Doctrine")
No case on point.

Made Whole Doctrine
As a default rule, an insurer cannot recover via subrogation unless the insured has been fully compensated for its loss. However, the parties may contract around the doctrine, "provided they do so with sufficient clarity." Dist. No. 1 – Pac. Coast Dist. v. Travelers Cas. and Sur. Co., 782 A.2d 269 (D.C. 2001).

Professional Malpractice Filing Requirements (Affidavit of Merit)
No certificate requirement.

Restitution - Crime Victims Restitution Statutes
Discretionary. The court may impose an order of reasonable restitution, taking into considerate the number of victims, the "actual damage" for each, the defendant's resources, the defendant's ability to earn, the defendant's support obligations and any other pertinent matters. D.C. Code § 16-711. "Actual damage" includes known liquidated damages, such as medical expenses, lost wages, and other expenses that are readily measurable. Sloan v. United States, 527 A.2d 1277 (D.C. 1987). The issue of whether an insurer may seek restitution has not been addressed. As to juvenile defendants, a restitution order is discretionary. A juvenile may be ordered to pay restitution to a third-party payor including an insurer but payments to the victim have priority. D.C. Code § 16-2320.01.

Right to Repair/Notice Statutes – Construction Cases
None found.

Spoliation – Remedies for Spoliation
The elements of an independent cause of action for negligent or reckless spoliation of evidence against a non-party are: (1) existence of a potential civil action; (2) a legal (*i.e.*, existence of a special relationship) or contractual duty to preserve evidence which is relevant to that action; (3) destruction of that evidence by the duty-bound defendant; (4) significant impairment in the ability to prove the potential civil action; (5) a proximate relationship between the impairment of the underlying suit and the unavailability of the destroyed evidence; (6) a significant possibility of success of the potential civil action if the evidence were available; and (7) damages adjusted for the estimated likelihood of success in the potential civil action. Holmes v. Amerex Rent-A-Car, 710 A.2d 846 (D.C. 1998).

When with gross indifference or reckless disregard, a party destroys evidence, the trial court must submit the issue of lost evidence to the trier of fact with corresponding instructions allowing an adverse inference. However, if the destruction was merely negligent, it is within the trial court's discretion not to instruct on missing evidence. Battocchi v. Washington Hospital Center, 581 A.2d 759 (D.C. 1990).

Statutes of Limitation and Repose*
Statutes of Limitation

Tort: Real or personal property; personal injury: 3 years. D.C. Code § 12-301.

* For UCC Claims and claims based on improvements to real property and/or claims brought by condominium associations related to construction defects, see the notes at the end of the Table of Contents.

Contract: 3 years. D.C. Code § 12-301.
Government: Written notice of the injury or damage must be given to the Mayor's office within 6 months of the incident. D.C. Code § 12-309. Written notice of a claim for money damages must also be presented to the District, and the District must be permitted six months to act on the claim before suit can be filed. D.C. Code § 2-413. Thus, at the latest, written notice of the claim must be sent six months before the end of the three-year limitation period; i.e., 2 ½ years after the injury.

Statutes of Repose

Improvements to Real Property: 10 years from the date of substantial completion. D.C. Code § 12-310.

Subrogating in the Insured's Name – Real Party in Interest

In cases of partial subrogation both insured and insurer own portions of the substantive right, should appear in the litigation in their own names, and either may sue. Where only one sues, the defendant may upon timely motion compel the joinder of the other. Llanes v. Allstate Ins. Co., 136 A.2d 586 (D.C. 1957).

FLORIDA

Anti-Subrogation Rule: Subrogation by Insurer Against Insured
An insurer cannot maintain a subrogation action against its own insured. Ins. Co. of N. Am. v. Nezelek, 480 So.2d 1333 (Fla. Dist. Ct. App.1985). This same protection will apply where a contract requires a policy holder to obtain an insurance policy for the benefit of a third party. Id.

Comparative/Contributory Negligence
Modified Comparative – 50%. Fla. Stat. § 768.81; but see Fla. Stat. § 768.81(6) (re: personal injury or wrongful death from medical negligence).

Contribution and Implied Indemnity
Contribution: Although Florida's Uniform Contribution Among Tortfeasors Act, Fla. Stat. § 768.31 remains on the books, because Florida has abolished joint and several liability in negligence actions, third-party complaints for contribution by a defendant in an underlying tort case are essentially obsolete. T&S Enterprises Handicap Accessibility, Inc. v. Wink Indus. Maintenance & Repair, Inc., 11 So.3d 411 (Fla. Dist. Ct. App. 2009); Mortgage Contr. Servs., LLC v. J & S Prop. Servs. LLC, 2018 U.S. Dist. LEXIS 109967 (M.D. Fla. 2018). Contribution remains actionable for parties who are jointly and severally liable for torts other than negligence. BIC Corp. v. Fla. Distributors, Inc., 2018 U.S. Dist. LEXIS 175314 (S.D. Fla. 2018); see Fla. Stat. § 768.31(2)(e) (liability insurers seeking subrogation). An action for contribution is still available after a tortfeasor pays more than its pro rata share of the liability outside of suit. Liberty Mut. Fire Ins. Co. v. Wal-Mart Stores E., LP, 269 F. Supp. 3d 1254 (M.D. Fla. 2017). A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury is not extinguished by the settlement or in respect to any amount paid in a settlement which is in excess of what was reasonable. Fla. Stat. § 768.31(2)(d). If there is no judgment against the tortfeasor seeking contribution, the tortfeasor's right of contribution is only permitted when he has either: (1) discharged by payment the common liability within the statute of limitations applicable to the claimant's underlying action and has commenced his contribution action within 1 year after payment; or (2) agreed to discharge the common liability while the underlying action is pending against him and, within 1 year after the agreement, paid the liability and commenced his action for contribution. Fla. Stat. § 768.31(4)(d). To allocate any fault to a nonparty, a defendant must affirmatively plead a non-party's fault and prove it at trial by a preponderance of the evidence. T&S Enterprises; Fla. Stat. § 768.81. In construction cases, counterclaims, crossclaims, and third-party claims that arise out of the conduct, etc. set forth in the original pleading may be commenced up to 1 year after the original pleading is served. Fla. Stat.
§ 95.11(3)(c).

Implied Indemnity: For a party to prevail on a claim of common law indemnity, it must satisfy a two-prong test. First, the party seeking indemnity must be without fault, and its liability must be vicarious and solely for the wrong of another. Second, indemnity can only come from a party who was at fault. Additionally, Florida courts have required a special relationship between the parties. Dade County Sch. Bd. v. Radio Station WQBA, 731 So.2d 638 (Fla. 1999). If a settling party pursues indemnity in a subsequent lawsuit, the settling party must establish that the settlement was related to claims for which it was vicariously liable and that the settlement was

reasonable. Metro. Dade County v. Fla. Aviation Fueling Co., 578 So.2d 296 (Fla. Dist. Ct. App. 1991). The statute of limitations does not begin to run until the litigation against the third-party plaintiff has ended or the liability has been settled or discharged by payment. Castle Constr. Co. v. Huttig Sash & Door Co., 425 So.2d 573 (Fla. Dist. Ct. App. 1982). In construction cases, counterclaims, crossclaims, and third-party claims that arise out of the conduct described in the original pleading may be commenced up to 1 year after the original pleading is served. Fla. Stat. § 95.11(3)(c).

Damages - Measure of Damages to Property

Real Property: Where injury to land is of a more or less permanent nature, the measure of damages is usually the difference between the value of the land before and after the injury. Atlantic Coast Line R. Co. v. Saffold, 178 So. 288 (Fla. 1938). If damaged property can be restored, the cost of repairs or restoration is generally the measure of damages unless the cost of restoring the property would exceed the value thereof in its original condition, or the depreciation in the value thereof, or the actual damages sustained, or where restoration is impracticable. Davey Compressor Co. v. City of Delray Beach, 639 So.2d 595 (Fla. 1994).

Personal Property: Total Loss: Fair market value of the property at the time it was damaged. Allied Van Lines, Inc. v. McKnab, 331 So.2d 319 (Fla. Dist. Ct. App. 1976). If item has personal intrinsic value but no market value, other sources may be used to determine its value for measurement of damages. Carye v. Boca Raton Hotel and Club Ltd. Partnership, 676 So.2d 1020 (Fla. Dist. Ct. App. 1996). Partial Loss: Reasonable cost of repairs plus damages for loss of use. Florida Drum Co. v. Thompson, 668 So.2d 192 (Fla. 1996).

Experts - States Following the Daubert/Kumho Doctrine

Follows Daubert. In re Amendments to the Fla. Evidence Code, 278 So. 3d 551 (Fla. 2019) (the Supreme Court of Florida adopted the "Daubert Amendments" outlined in Fla. Stat. § 90.702).

Interest - Pre & Post Judgment

Prejudgment

Contract Actions

Rate: The rate of interest established in the contract, if any. Fla. Stat. § 55.03. If no rate is established, the rate established by the State's Chief Financial Officer pursuant to Fla. Stat. § 55.03.

Accrual Date: Pre-judgment interest runs from the due date under the contract. Lumbermens Mut. Cas. Co. v. Percefull, 653 So. 2d 389 (Fla. 1995).

Tort Cases

Rate: Same. See Fla. Stat. § 687.01.

Accrual Date: "[W]hen a verdict liquidates damages on a plaintiff's out-of-pocket, pecuniary losses, plaintiff is entitled, as a matter of law, to prejudgment interest at the statutory rate from the date of loss." Argonaut Ins. Co. v. May Plumbing Co., 474 So.2d 212 (Fla. 1985) (subrogation claim based on negligence). For property damage cases, interest accrues

from the date of loss. Ariz. Chem. Co., LLC v. Mohawk Indus., 197 So.3d 99 (Fla. Dist. Ct. App. 1st Dist. 2016). Prejudgment interest is not available on personal injury awards. Parker v. Brinson Constr. Co., 78 So.2d 873 (Fla. 1955); but cf. id. (discussing wrongfully withheld workers compensation awards); Alvarado v. Rice, 614 So.2d 498 (Fla. 1993) (exception applies if the plaintiff suffered the loss of a vested property right, such as by paying out-of-pocket medical expenses).

Post Judgment

Rate: The rate of interest established in the contract, if any. Fla. Stat. § 55.03. If no rate is established, the rate established by the State's Chief Financial Officer pursuant to Fla. Stat. § 55.03.

Accrual: The date judgement is filed with the court clerk. Fla. Stat. § 55.03; Amerace Corp. v. Stallings, 823 So.2d 110 (Fla. 2002).

Joint and Several Liability

Several liability for negligence actions, including strict liability, products liability, and professional malpractice. For these actions, the court shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability. In a negligence action to which Fla. Stat. § 768.81 applies (other than personal injury and wrongful death actions arising out of medical negligence pursuant to chapter 766) any party found to be greater than 50% at fault for his/her own harm may not recover any damages. Joint and several liability for intentional acts and for economic damages caused by pollution. Fla. Stat. § 768.81.

Judgment Liens

A judgment lien on real or personal property expires after 20 years. Fla. Stat. § 55.081.

Landlord-Tenant Subrogation ("Sutton Doctrine")

A tenant's liability depends on the parties' intent, as expressed in the lease. State Farm Florida Ins. Co. v. Loo, 27 So.3d 747 (Fla. Dist. Ct. App. 2010) (confirming a case-by-case approach); Continental Ins. Co. v. Kennerson, 661 So.2d 325 (Fla. Dist. Ct. App. 1995).

Made Whole Doctrine

The insured must be fully indemnified before an insurer may subrogate to the rights of its insured. McCabe v. Florida Power & Light Co., 68 So. 3d 995 (Fla. Dist. Ct. App. 2011). However, the doctrine should only apply in limited funds situations, where the tortfeasor lacks adequate funds or insurance. See Schonau v. GEICO Gen. Ins. Co., 903 So.2d 285 (Fla. Dist. Ct. App. 2005). The insurer is not obligated to reimburse the insured for the deductible; the insured can sue the tortfeasor independently to recover. Schonau ("Florida law does not appear to recognize an affirmative right or cause of action by an insured against its insurer to be 'made whole' beyond the payment of insurance policy proceeds.")

Professional Malpractice Filing Requirements (Affidavit of Merit)

In a medical negligence case, the complaint or initial pleading shall contain a certificate of counsel that a reasonable investigation gave rise to a good faith belief that grounds exist for an

action against each named defendant. The limitation period may be delayed up to 90 days to permit the required investigation upon payment of a filing fee. Fla. Stat. § 766.104.

Restitution - Crime Victims Restitution Statutes
Discretionary. A "court shall order the defendant to make restitution to the victim . . . unless it finds clear and compelling reasons not to order such restitution." Fla. Stat. § 775.089. An order of restitution may be enforced by a victim named in the order to receive the restitution in the same manner as a judgment in a civil action. While a restitution order does not preclude a civil remedy, a subsequent civil judgment is offset by the amount of the restitution award. Id.; Sebastiano v. Sclafani, 984 So.2d 673 (Fla. Dist. Ct. App. 2008). Insurance companies are entitled to seek restitution via subrogation. L.S. v. State, 593 So. 2d 296 (Fla. 1992). A defendant's ability to pay should be considered when a restitution order is being enforced, not when restitution is being imposed. Del Valle v. State, 80 So.3d 999 (Fla. 2011). A juvenile's ability to pay is considered when restitution is imposed. Fla. Stat. § 985.437; L.W. v. State, 163 So.3d 598 (Fla. Dist. Ct. App. 2015).

Right to Repair/Notice Statutes – Construction Cases
Fla. Stat. §§ 558.001 to 558.005 *Construction Defects – Notice and opportunity to repair.*

Spoliation – Remedies for Spoliation
When a party spoliates evidence, there is no independent cause of action for tortious spoliation. If the defendant intentionally spoliates, discovery sanctions may apply and a jury may infer that the evidence would have indicated the defendant's negligence. If the defendant's spoliation was negligent, a rebuttable presumption of negligence applies, shifting the burden of proof to the defendant. Martino v. Wal-Mart Stores, Inc., 908 So.2d 342 (Fla. 2005).

To establish a claim for spoliation by a non-party, the plaintiff must prove six elements: (1) existence of a potential civil action, (2) a legal or contractual duty to preserve evidence which is relevant to the potential civil action, (3) destruction of that evidence, (4) significant impairment and the ability to prove the lawsuit, (5) a causal relationship between the evidence destruction and the inability to prove the lawsuit, and (6) damages. Gayer v. Fine Line Construction & Electric, Inc., 970 So.2d 424 (Fla. Dist. Ct. App. 2007). An employee may sue his employer for spoliation if the employer destroys evidence that would have been material to the employee's action against a third party. Depending on the appellate district, that cause of action may arise only if the employee has specifically requested that the evidence be preserved, Perez v. La Dove, Inc., 964 So.2d 777 (Fla. Dist. Ct. App. 2007), or it may arise even if no such request was made, because the request is presumed. Builder's Square, Inc. v. Shaw**,** 755 So.2d 721 (Fla. Dist. Ct. App. 1999). A worker's compensation insurer is not entitled to recover its payments from the employee's settlement in such an action. Shaw v. Cambridge Integrated Services Group, Inc., 888 So.2d 58 (Fla. Dist. Ct. App. 2004). Liability for spoliation does not arise until the underlying action is completed. Yates v. Publix Super Markets, 924 So.2d 832 (Fla. Dist. Ct. App. 2005).

Statutes of Limitation and Repose*

Statutes of Limitation

Tort: Negligence. 2 years. Fla. Stat. § 95.11(4)(a) (actions accruing after Mar. 24, 2023; 4 years for actions accruing before – see HB 837). Products not permanently incorporated into an improvement: 4 years. Fla. Stat. § 95.11(3)(d); see Fla. Stat. § 95.11(3)(g) (3 years for actions for taking, detaining or injuring personal property). Improvements to real property: 4 years from the date of the issuance of a temporary certificate of occupancy, or a certificate of completion or the abandonment of the work, whichever is earliest. Fla. Stat. § 95.11(3)(c). Professional malpractice and wrongful death: 2 years from the date of the incident or the date incident is discovered or should have been discovered. Fla. Stat. § 95.11; but cf. Am. Auto. Ins. V. FDH Infrastructure Servs., LLC, 364 So. 3d 1082 (Fla. Dist. Ct. App. 2023) (construction-based malpractice actions governed by 4-year statute of limitations).

Contract: Written: 5 years. Fla. Stat. § 95.11. Oral: 4 years. Id. Property insurance contract: 5 years. Id. No separate statute for the sale of goods.

Medical Malpractice: 2 years. Fla. Stat. § 95.11(4)(c).

State and Local Government: Written notice of claim must be filed within three years of the date of the incident. Suit may be filed within 4 years of the date of the incident only after written notice of the claim has been filed and the government agency has denied the claim. If a joint tortfeasor seeks contribution: within 6 months of judgment or settlement. The government's liability is limited to $200,000 per person or $300,000 per incident. Recovery of judgments in excess of those amounts may be pursued with the state legislature. Fla. Stat. § 768.28. Excess claims must be presented to the legislature within 4 years of the date the cause for relief accrued. Fla. Stat. § 11.065.

Statutes of Repose

Products: 12 years after the delivery of the product to the first purchaser, if the product has an expected useful life of 10 years or less. All products are presumed to have an expected useful life of 10 years or less, with certain exceptions: aircraft, locomotives, escalators, elevators, and products specifically warranted to have an expected useful life exceeding 10 years. Fla. Stat. § 95.031.

Improvements to Real Property: 7 years after the date of the issuance of a temporary certificate of occupancy, a certificate of completion or the abandonment, whichever is earliest. Irrespective of the 7-year limit, a party defending a claim related to improvements to real property may file a counter-, cross- or third-party claim up to 1 year from service of the original complaint. For a newly constructed single-dwelling residential building used as a model home, 1 year from when the deed is recorded. If there are multiple buildings, each building must be considered its own improvement. If the authority having jurisdiction deemed the structure complete, correcting defects or doing repair work does not extend the period of time to commence an action. Fla. Stat. § 95.11.

Subrogating in the Insured's Name – Real Party in Interest

Every action may be prosecuted in the name of the real party in interest. Fla. R. Civ. P. 1.210. The rule is permissive, not mandatory. A subrogee has the right as real party in interest to

* For UCC Claims and claims based on improvements to real property and/or claims brought by condominium associations related to construction defects, see the notes at the end of the Table of Contents.

prosecute the action in its name or in the name of its insured, for the insurer's use and benefit. Holyoke Mut. Ins. Co. v. Concrete Equipment, Inc., 394 So.2d 193 (Fla. Dist. Ct. App. 1981). An insurer who issues a subrogation receipt to its insured is not a real party in interest. Rosenthal v. Scott, 150 So.2d 433 (Fla. 1961).

GEORGIA

Anti-Subrogation Rule: Subrogation by Insurer Against Insured
An insurer cannot subrogate against the insured or a co-insured. E. C. Long, Inc. v. Brennan's of Atlanta, Inc., 252 S.E.2d 642 (Ga. Ct. App. 1979).

Comparative/Contributory Negligence
Modified Comparative – 49%. Ga. Code § 51-12-33(g). However, if the plaintiff by ordinary care could have avoided the consequences of the defendant's negligence, he is not entitled to recover. Ga. Code § 51-11-7; Weston v. Dun Transportation & Stringer, Inc., 695 S.E.2d 279 (Ga. Ct. App. 2010).

Contribution and Implied Indemnity
Contribution: Contribution is not permitted among co-defendants when fault is apportioned by the trier of fact because each party is only responsible for its respective proportionate share of liability. Ga. Code
§ 51-12-33(b); McReynolds v. Krebs, 725 S.E.2d 584 (Ga. 2012). A defendant who settles a claim with the claimant can still be pursued for contribution from co-defendants if their liabilities were not apportioned by the trier of fact. Zurich American Ins. Co. v. Heard, 740 S.E.2d 429 (Ga. Ct. App. 2013). The statute of limitation is 20 years (Ga. Code § 9-3-22) and does not begin to run until judgment is entered against the third-party plaintiff or a settlement of the underlying claim is made. Independent Mfg. Co., Inc. v. Automotive Products, Inc., 233 S.E.2d 874 (Ga. Ct. App. 1977). Contribution claims arising from defective improvements to real property are subject to Georgia's 8-year statute of repose for construction defect cases. R. Larry Phillips Constr. Co. v. Muscogee Glass, 691 S.E.2d 372 (Ga. Ct. App. 2010).

Implied Indemnity: Common law indemnity is available when a party is vicariously liable for the tort committed by another and the other's negligence is imputed to him. District Owners Ass'n v. AMEC Envtl. & Infrastructure, Inc., 747 S.E.2d 10 (Ga. Ct. App. 2013). However, if an indemnitee who settles a tort action had a defense available which would have defeated the action but failed to assert it, he cannot recover common law indemnity. U.S. Lawns, Inc. v. Cutting Edge Landscaping, LLC, 716 S.E.2d 779 (Ga. Ct. App. 2011). The statute of limitations for non-contractual indemnity claims is 20 years (Ga. Code § 9-3-22) and begins to run when the claimant pays another to settle the claim of the other or satisfy the judgment of another. Saiia Constr., LLC v. Terracon Consultants, Inc., 714 S.E.2d 3 (Ga. Ct. App. 2011). An indemnity claim based on a defective improvement to real property is is subject to Georgia's 8-year statute of repose. Gwinnett Place Assocs. v. Pharr Eng'g, Inc., 449 S.E.2d 889 (Ga. Ct. App. 1994).

Damages - Measure of Damages to Property
Real Property: The method of calculating damages should be flexible, so as to reasonably compensate the injured party, and at the same time be fair to all litigants. The cost of repair and diminution in value are alternative, oftentimes interchangeable, measures of damage. If the plaintiff seeks to recover based on the cost of repair method, evidence of the fair market value of the improved property is not a necessary element of the plaintiff's claim for damages. John Thurmond & Associates, Inc. v. Kennedy, 668 S.E.2d 666 (Ga. 2008) (discussing a negligent construction and breach of contract cases). The cost to repair or restore land may be an

appropriate measure of damages, even if the repair costs exceed the diminution in value, so long as restoration would not be an "absurd undertaking." Georgia Northeastern R. Co., Inc. v. Lusk, 587 S.E.2d 643 (Ga. 2003); cf. BellSouth Telecommunications, Inc. v. Helton, 451 S.E.2d 76 (Ga. Ct. App. 1994) ("While the correct measure of damages for injury to realty itself is the difference in value of the property before and after the injury, the appropriate measure of damages if the injury is solely to the structure or building is the cost of repairs.").

Personal Property: Total Loss: Diminution in market value from immediately before to immediately after the damage occurred. Hodges v. Vara, 603 S.E.2d 327 (Ga. Ct. App. 2004). Partial Loss: Reasonable cost of necessary repairs plus loss of use damages plus any residual diminution of the original value after repairs have been made not to exceed original market value of the property; OR diminution in value from immediately before to immediately after the damage occurred. Sykes v. Sin, 493 S.E.2d 571 (Ga. Ct. App. 1997); Canal Ins. Co. v. Tullis, 515 S.E.2d 649 (Ga. Ct. App. 1999) (requiring proof of the fair market value of the vehicle before the accident even in cases where the plaintiff chooses the cost of repairs as the measure of damage).

Experts - States Following the Daubert/Kumho Doctrine
Follows Daubert and Kumho Tire. Ga. Code § 24–7–702; Cash v. LG Electronics, Inc., 804 S.E.2d 713 (Ga. Ct. App. 2017).

Interest - Pre & Post Judgment
Prejudgment

Contract Actions/Liquidated Damages
Rate: The contract rate or, if not, 7%. Ga. Code §§ 7-4-2; 7-4-15; see Gwinnet County v. Old Peachtree Partners, LLC, 764 S.E.2d 193 (Ga. Ct. App. 2014) (award of prejudgment interest is mandatory).
Accrual Date:
Contract Actions: Date of breach. Goody Prods. v. Dev. Auth. of Manchester, 740 S.E.2d 261 (Ga. Ct. App. 2013).
Liquidated Damages: Date of demand or "from the time the party shall become liable and bound to pay them." Ga. Code § 7-4-15.

Tort Actions (Unliquidated Damages)
Rate: If a demand is made pursuant to Ga. Code § 51-12-14, the Federal Reserve prime rate plus 3%. Ga. Code § 51-12-14.
Accrual Date: If the judgment at trial is for an amount not less than the amount demanded, 30 days after a written demand is made. Ga. Code § 51-12-14.

Post Judgment

Rate: If judgment is rendered on a written contract with a specified interest rate, the contract rate. Ga. Code § 7-4-12. Otherwise, the Federal Reserve prime rate plus 3%. Id.
Accrual Date: Date of judgment. Id.

Joint and Several Liability
Several liability. Damages apportioned by the trier of fact shall be the liability of each person against whom they are awarded, shall not be a joint liability among the persons liable, and shall not be subject to any right of contribution. This applies to all persons who contributed to the injury regardless of whether they are named a party. Ga. Code § 51-12-33.

Judgment Liens
A judgment becomes dormant and unenforceable when seven years lapse after the granting of the judgment but may be revived by an additional entry within seven years from the initial judgment. Ga. Code Ann. § 9-12-60.

Landlord-Tenant Subrogation ("Sutton Doctrine")
Case law suggests a case-by-case approach. Where a lease provides that insurance will be provided as part of the bargain, such an agreement must be construed as providing mutual exculpation of the parties, who have agreed to look solely to insurance in the event of a loss. Pettus v. APC, Inc., 293 S.E.2d 65 (Ga. Ct. App. 1982) (commercial lease).

Made Whole Doctrine
Insurer may not pursue subrogation until its insured has been made whole, and an insurance policy provision requiring reimbursement without regard for whether insured is completely compensated violates public policy. Davis v. Kaiser Found. Health Plan of Ga., Inc., 521 S.E.2d 815 (Ga. 1999) (discussing medical benefits paid after an auto accident); but see Ga. Code § 33-24-56.1 (no subrogation for medical expenses in personal injury cases, but an insurer can seek reimbursement if the insured is made whole). The rule does not apply to a commercial property insurance contract that expressly authorizes an insurer to pursue its subrogation rights after compensating the insured for damage to its property. Woodcraft by MacDonald, Inc. v. Ga. Casualty & Surety Co., 743 S.E.2d 373 (Ga. 2013).

Professional Malpractice Filing Requirements (Affidavit of Merit)
An affidavit of merit by an expert is required for actions against health care professionals, architects, attorneys, CPAs, land surveyors and professional engineers. The affidavit shall be filed with the complaint setting forth at least one negligent act or omission and the factual basis for the claim. When the period of limitation will expire within ten days of the filing of the complaint, the affidavit may be filed 45 days after the filing of the complaint if the attorney swears or affirms that he was retained within 90 days of the limitation date. Ga. Code § 9-11-9.1.

Restitution - Crime Victims Restitution Statutes
Mandatory. Ga. Code § 17-14-3. Factors to be considered in an order of restitution include the defendant's financial resources. Ga. Code § 17-14-10. A restitution order shall be enforceable as if a civil judgment. Ga. Code § 17-14-13. Restitution payments may be set off against civil judgments. Ga. Code § 17-14-11. With regard to insurers, when the victim has been fully compensated by a third party, the defendant may be ordered to pay restitution to that third party. Wright v. State, 690 S.E.2d 259 (Ga. Ct. App. 2010). Restitution is not proper if the victim has already recovered damages in a civil suit. Turner v. State, 720 S.E.2d 264 (Ga. Ct. App. 2011).

Right to Repair/Notice Statutes – Construction Cases
Ga. Code §§ 8-2-35 to 8-2-43 *Buildings Generally – Resolution of Construction Defects.*

Spoliation – Remedies for Spoliation
No cause of action exists against a non-party for tortious spoliation. Owens v. American Refuse Systems, Inc., 536 S.E.2d 782 (Ga. Ct. App. 2000). When a party spoliates evidence, it "creates the presumption that the evidence would have been harmful to the spoliator." Thomas v. Metropolitan Atlanta Rapid Transit Authority, 684 S.E.2d 83 (Ga. Ct. App. 2009). Spoliation may be found if the loss of the evidence occurs at a time when there is "contemplated or pending litigation." Kitchens v. Brusman, 694 S.E.2d 667 (Ga. Ct. App.2010).

Statutes of Limitation and Repose*
Statutes of Limitation

Tort: To real property: 4 years. Ga. Code § 9-3-30; see Statute of Repose – Improvements, below, re: accrual. To personal property: 4 years. Ga. Code § 9-3-31. Personal injury: 2 years (damage to reputation, 1 year; loss of consortium, 4 years). Ga. Code § 9-3-33**.**
Contract: Written: 6 years. Ga. Code § 9-3-24. Oral: 4 years. Ga. Code § 9-3-25. All other contracts, express or implied: 4 years. Ga. Code § 9-3-26.
State Government: 2 years, Ga. Code § 50-21-27, with written notice of claim to be filed within 1 year. Ga. Code § 50-21-26.
County Government: Written notice must be provided to the county within 1 year. Ga. Code § 36-11-1. Filing of suit against the county satisfies the written notice requirement. Taylor v. Richmond County, 196 S.E. 303 (Ga. Ct. App. 1938).
Municipal Corporations: Written notice of claim to be filed within 6 months of the date of the incident; the municipality then has 30 days in which to consider the claim, during which time suit may not be filed. The statute of limitation is tolled during the 30-day period. Ga. Code § 36-33-5. Filing of suit against a municipal corporation does NOT satisfy the notice requirement. Atlanta Taxicab Co. Owners Ass'n, Inc. v. City of Atlanta, 638 S.E.2d 307 (Ga. 2006).

Statutes of Repose

Products: 10 years from the date of the first sale, except for failure to warn of known dangers. Ga. Code § 51-1-11; see Campbell v. Altec Indus., 707 S.E.2d 48 (Ga. 2011) (component parts – the statute of repose begins to run when a finished product is sold as new to the intended consumer who is to receive the product).
Improvements to Real Property: 8 years after substantial completion; within 2 years if claim arises in 7th or 8th year. Ga. Code § 9-3-51; but see Ga. Code § 9-3-51(c) (not applicable to breach of contract actions, including actions for breach of express contractual warranties). However, when there is 1) damage to real property with 2) privity between building owner and defendant, the 4-year statute of limitation is effectively the statute of repose as well, because the statute of limitation begins to run at the time of substantial completion, irrespective of date of damage. Colormatch Exteriors, Inc. v. Hickey, 569 S.E.2d

* For UCC Claims and claims based on improvements to real property and/or claims brought by condominium associations related to construction defects, see the notes at the end of the Table of Contents.

495 (Ga. 2002); Stamschror v. Allstate Ins. Co., 600 S.E.2d 751 (Ga. App. 2004); but cf. Ga. Code § 9-3-36 (claims brought against a decedent's estate – 6 years).

Subrogating in the Insured's Name – Real Party in Interest

"An action for a tort shall, in general, be brought in the name of the person whose legal right has been affected. In the case of an injury to property, a tort action shall be brought in the name of the person who was legally interested in the property at the time the injury thereto was committed or in the name of his assignee." Ga. Code § 9-2-21(a). Georgia's corresponding statute on parties to actions on contracts, Ga. Code § 9-2-20, contains no similar provision for assignees. Under an assignment or subrogation agreement, the insurer must sue in its name, but under a loan agreement, the insurer may sue in the insured's name. If an assignment is followed by a loan agreement, the assignment controls. Alta Refrigeration, Inc. v. AmeriCold Logistics, LLC, 688 S.E.2d 658 (Ga. Ct. App. 2009). The loan agreement is also ineffective if preceded by policy terms that work an assignment. U.S.F. & G. v. J. I. Case Co., 432 S.E.2d 654 (Ga. Ct. App. 1993). Policy conditions that do not expressly speak of transfers or assignments of causes of action do not work assignments. Allstate Ins. Co. v. Welch, 576 S.E.2d 57 (Ga. Ct. App. 2003.) An insured may accept payment for a loss from his own insurer and may assign to his insurer any claims which he may have against third parties. The language of the assignment must demonstrate an intent to transfer the right of action to the insurer. Bowen v. Waters, 316 S.E.2d 497 (Ga. Ct. App. 1984). If the insured assigns any and all causes of action against the tortfeasor, the insurer is the proper party. Parker Plumbing & Heating Co. v. Kurtz, 165 S.E.2d 729 (Ga. 1969). If the scope of the assignment is limited to the amount paid in benefits, the insured can still file suit in its own name to the extent of the deductible. Webb v. State Auto. Mut. Ins. Co., 370 S.E.2d 492 (Ga. Ct. App. 1988). If the insured has been completely compensated by the insurer, and by the tortfeasor for the deductible, the insurer must sue in its own name. King v. Prince, 80 S.E.2d 222 (Ga. Ct. App. 1954). Property torts are assignable; personal torts are not. Ga. Code § 44-12-24.

HAWAII

Anti-Subrogation Rule: Subrogation by Insurer Against Insured
No case on point.

Comparative/Contributory Negligence
Modified Comparative – 50%. Haw. Rev. Stat. § 663-31.

Contribution and Implied Indemnity
Contribution: The Uniform Contribution Among Tortfeasors Act, Haw. Rev. Stat. § 663-11, *et seq.*, grants joint tortfeasors a right of contribution. A joint tortfeasor is not entitled to contribution until it has discharged the common liability or has paid more than its pro rata share of liability. Haw. Rev. Stat. § 663-12(b). A joint tortfeasor who enters into a settlement with the injured person cannot recover contribution from another joint tortfeasor whose liability to the injured person is not extinguished by the settlement. Haw. Rev. Stat. § 663-12(c). A party seeking contribution may file a third-party claim against a person not a party to the action or maintain a separate action for contribution. Haw. Rev. Stat. § 663-17. However, if the party seeking contribution can assert a crossclaim against a co-party, the party seeking contribution cannot maintain a separate action. Haw. Rev. Stat. § 663-17(b). A party seeking contribution may recover contribution from responsible parties using fictitious names if the actual names can't be identified. Haw. Rev. Stat. § 663-17(d); Gump v. Wal-Martstores, Inc., 5 P.3d 407 (Haw. 2000). When there is a large disproportion of fault among joint tortfeasors that renders an equal distribution of the liability among them unfair, the tortfeasors' relative degrees of fault must be considered to determine their pro rata shares. Haw. Rev. Stat. §§ 663-12(d), 663-17(c). The 2-year statute of limitations begins to run at payment. Albert v. Dietz, 283 F.Supp. 854 (D.C. Haw. 1968). The limitations period is unclear but appears to be the 6-year "catch all" of Haw. Rev. Stat. § 657-1.

Implied Indemnity: A third-party claim for indemnity is based either upon contract or upon some other independent duty existing between indemnitor and indemnitee. Kamali v. Hawaiian Elec. Co., 504 P.2d 861 (Haw. 1972).

Damages - Measure of Damages to Property
Real Property: Diminution in value. Bernard v. Loo Ngawk, 6 Haw. 214 (1877). A plaintiff may also recover stigma damages if remediation will not return the value of the property to its prior level because of a lingering negative public perception. Uy v. Spencer Homes, Inc., 354 P.3d 186 (Haw. Ct. App. 2015); see Haw. Rev. Stat. § 269-32 (damage to public utility property).

Personal Property: Loss or destruction: Market value (for retailers, wholesale value) of property lost or destroyed which actually or as precisely as possible compensates injured party. United Truck Rental Equip. Leasing, Inc. v. Kleenco Corp., 929 P.2d 99 (Haw. Ct. App. 1996); see Haw. Rev. Stat. § 269-32 (damage to public utility property). If repairable: Generally, the difference in value before and after the damage. Richards v. Kailua Auto Machine Service, 880 P.2d 1233 (Haw. Ct. App. 1994). Loss-of-use damages may be recovered (even in excess of actual value of property) but, generally, are limited to period of time reasonably necessary to 1)

obtain replacement, 2) effect repairs, or 3) date upon which property is returned. Fukida v. Hon/Hawaii Serv. & Repair, 33 P.3d 204 (Haw. 2001). The different measures of damage to personal property are merely guides and should be adjusted as required to meet the goal of full compensation. Richards v. Kailua Auto Machine Service.

Experts - States Following the Daubert/Kumho Doctrine
Daubert not expressly adopted, but instructive in interpreting Haw. Rev. Stat. § Rule 702, which is patterned on Federal Rule 702. State v. Vliet, 19 P.3d 42 (Haw. 2001).

Interest - Pre & Post Judgment
Prejudgment

Contract Actions
Rate: The contract rate or, if none, 10%. However, for obligations of the State, the rate shall be the prime rate for each calendar quarter, not to exceed 10% a year. Haw. Rev. Stat. § 478-2.
Accrual Date: At the court's discretion, but no earlier than the date of breach. Haw. Rev. Stat. § 636-16.

Tort Actions
Rate: The contract rate or, if none, 10%. Haw. Rev. Stat. § 478-2. However, the State is not liable for prejudgment interest. Haw. Rev. Stat. § 662-2.
Accrual Date: At the court's discretion, but no earlier than the date when the injury first occurred. Haw. Rev. Stat. § 636-16.

Post Judgment
Rate: 10% per year. Haw. Rev. Stat. § 478-3. However, for judgments against the state, 4% a year up to, but not exceeding, 30 days after the date of approval of any appropriation act providing for payment of the judgment. Haw. Rev. Stat. § 662-8.
Accrual: Date of judgment. Haw. Rev. Stat. §§ 478-3; 662-8.

Joint and Several Liability
Modified joint and several liability. Joint and several liability is generally abolished. Exceptions include (1) economic damages in personal injury cases; (2) both economic and non-economic damages in actions involving: (a) intentional torts; (b) environmental torts; (c) toxic and asbestos-related torts; (d) aircraft-related torts; (e) products liability; and (f) most motor vehicle cases. In other cases, joint and several liability is preserved for non-economic damages arising from personal injury or death if one tortfeasor is 25% or more negligent. Haw. Rev. Stat. § 663-10.9.

Judgment Liens
Any judgment is presumed to be paid and discharged ten years after the judgment was rendered, however, a motion to extend judgment will renew the judgment for a period of ten years if sought within ten years from the initial judgment. Haw. Rev. Stat. §657-5. No judgment will be extended beyond twenty years from the date of the original judgment. Id.

Landlord-Tenant Subrogation ("Sutton Doctrine")
No case on point. Under the Residential Landlord-Tenant Code, a tenant may be held liable to the landlord for negligent failure to keep the dwelling in fit condition. Haw. Rev. Stat. § 521-69.

Made Whole Doctrine
Injured insured must be fully compensated before an insurer may seek reimbursement of its loss. AIG Hawaii Ins. Co., Inc. v. Rutledge, 955 P.2d 1069 (Haw. Ct. App. 1998) (discussing uninsured motorist benefits).

Professional Malpractice Filing Requirements (Affidavit of Merit)
In claims against engineers, architects, surveyors, landscape architects or health care professionals, a certificate of consultation must be filed with the conciliation panel as a prerequisite to the filing of a complaint. Any inquiry filed with the medical inquiry and conciliation panel under this chapter shall be accompanied by a certificate that declares that the party's attorney has consulted with at least one physician who is licensed to practice in this State or any other state, and who is knowledgeable or experienced in the same medical specialty as the health care professional against whom the inquiry is made, and that the party or the party's attorney has concluded on the basis of the consultation that there is a reasonable and meritorious cause for filing the inquiry. Haw. Rev. Stat. §§ 671-12, 671-12.5, 671-16, 672-B5, 672-B6, 672-B11.

Restitution - Crime Victims Restitution Statutes
Mandatory, when requested. The court shall order restitution when requested to do so by the "direct victim" of a crime. The defendant's ability to pay shall not be considered other than for purposes of establishing the time and manner of payment. Restitution shall be a dollar amount sufficient to fully reimburse the victim for losses, including the full value of damaged property as determined by replacement costs or, if repair is possible, the repair costs, and medical expenses. Haw. Rev. Stat. § 706-646. A restitution order shall be enforceable in the same manner as a civil judgment. Haw. Rev. Stat. § 706-647. Unless for lost wages as set forth in Haw. Rev. Stat. § 706-646(3)(d), the amount of restitution is not to be reduced by the amount the victim received from its insurer as the collateral source rule does not apply. State v. Borge, 526 P.3d 435 (Haw. 2023).

Right to Repair/Notice Statutes – Construction Cases
Haw. Rev. Stat. §§ 672E-1 to 672D-13 *Civil Remedies and Defenses and Special Proceedings – Contractor Repair Act.*

Spoliation – Remedies for Spoliation
No case on point as to whether spoliation of evidence is a tort. See Matsuura v. E.I. du Pont de Nemours and Co., 73 P.3d 687 (Haw. 2003) (declining to address the issue). A trial court may impose discovery sanctions for spoliation, taking into account: (1) the offending party's culpability, if any, in destroying or withholding discoverable evidence that the opposing party had formally requested through discovery; (2) whether the opposing party suffered any resulting prejudice as a result of the offending party's destroying or withholding the discoverable evidence; and (3) the inequity that would occur in allowing the offending party to accrue a benefit from its conduct. Sanctions do not generally lie until a discovery order has been violated.

Stender v. Vincent, 992 P.2d 50 (Haw. 2000). Adverse inference instruction is available whether spoliation was intentional or negligent. Id.

Statutes of Limitation and Repose*

Statutes of Limitation

Tort: To persons and property, 2 years. Haw. Rev. Stat. §§ 657-7; 657-8 (improvements to real estate).

Contract: 6 years. Haw. Rev. Stat. § 657-1. 4 years, if the cause of action arose in another jurisdiction. Haw. Rev. Stat. § 657-6.

Improvements to Real Property: 2 years after the cause of action has accrued. Haw. Rev. Stat. § 657-8.

Medical Malpractice: 2 years from discovery. Haw. Rev. Stat. § 657-7.3.

Other State: If the cause of action arises in another state and is barred by the other state's statute of limitation, the cause of action is barred in Hawaii also, except in favor of a Hawaii resident who has held the cause of action from the time it accrued. Haw. Rev. Stat. § 657-9.

State Government: 2 years generally. Haw. Rev. Stat. §§ 661-5, 662-4. 6 years for medical torts. Haw. Rev. Stat. § 662-4.

Local Government: Counties must be given written notice of claims within 2 years after injuries accrued. Haw. Rev. Stat. § 46-72. Political subdivisions other than counties are not subject to governmental immunity. Kahale v. City and County of Honolulu, 90 P.3d 233 (Haw. 2004).

Statutes of Repose

Improvements to Real Property: 10 years after substantial completion. The statute does not apply to actions for damages against owners or other persons having an interest in the real property or improvement based on their negligent conduct in the repair or maintenance of the improvement or to actions for damages against surveyors for their own errors in boundary surveys. Haw. Rev. Stat. § 657-8.

Medical Malpractice: 6 years from act or omission. Haw. Rev. Stat. § 657-7.3.

Subrogating in the Insured's Name – Real Party in Interest

Under Hawaii's rule on real parties in interest, a subrogee may bring its claim under the subrogor's name. Mauian Hotel, Inc. v. Maui Pineapple Co., 481 P.2d 310 (Haw. 1971).

* For UCC Claims and claims based on improvements to real property and/or claims brought by condominium associations related to construction defects, see the notes at the end of the Table of Contents.

IDAHO

Anti-Subrogation Rule: Subrogation by Insurer Against Insured
An insurer may not bring a subrogation action against an alleged wrongdoer who is protected by the policy. Pendlebury v. Western Cas. and Sur. Co., 406 P.2d 129 (Idaho 1965).

Comparative/Contributory Negligence
Modified Comparative – 49%. Idaho Code § 6-801.

Contribution and Implied Indemnity
Contribution: Idaho Code § 6-803 establishes a right of contribution for joint tortfeasors. Contribution is allowed when a defendant has paid more than its share of a judgment. Burgess v. Salmon River Canal Co., Ltd., 805 P.2d 1223 (Idaho 1991). A joint tortfeasor who settles with the plaintiff may not recover contribution from another joint tortfeasor whose liability to the injured person was not extinguished by the settlement. Brockman Mobile Home Sales v. Lee, 567 P.2d 1281 (Idaho 1977); Idaho Code § 6-803(2). A release given to one joint tortfeasor does not relieve that tortfeasor from liability for contribution unless (a) the release is given before the right of the other tortfeasor to secure a money judgment for contribution has accrued and (b) it provides for a reduction, to the extent of the pro rata share of the released tortfeasor, of the injured person's damages recoverable against all other tortfeasors. Idaho Code. § 6-806; Saint Alphonsus Diversified Care, Inc. v. MRI Assocs. LLP, 334 P.3d 780 (Idaho 2014). Absent express language, a release cannot operate to discharge joint tortfeasors from liability. Brockman. When a plaintiff releases a defendant from liability, a remaining joint tortfeasor in the case may seek contribution from the released defendant. Id. However, the remaining party in the action may not recover from the released party without establishing common liability. Id.; Idaho Code § 6-805(2). Statute of limitations begins to run when the underlying claim, judgment or settlement is paid or discharged. Schiess v. Bates, 693 P.2d 440 (Idaho 1984). The statute of limitations is 3 years. Porter v. Farmers Ins. Co. of Idaho, 627 P.2d 311 (Idaho 1981); Idaho Code § 5-218(a).

Implied Indemnity: A person who without fault on his part is compelled to pay damages occasioned by the negligence of another is entitled to indemnity. Industrial Indemnity Co. v. Columbia Basin Steel & Iron Co., 471 P.2d 574 (Idaho 1970). Where the party seeking indemnity settles a claim, it must establish: (1) actual liability of the indemnitee to the third-party, (2) an indemnity relationship, and (3) a reasonable settlement amount. Chenery v. Agri-Lines Corp., 766 P.2d 751 (Idaho 1988).

Damages - Measure of Damages to Property
Real Property: If land is permanently injured, but not totally destroyed, owner is entitled to difference between fair market value before and after injury. If land is only temporarily injured, owner is entitled to recover amount necessary to put land in condition it was immediately preceding injury. In regard to temporary injury to property, if cost of restoration exceeds value of premises in their original condition, or in diminution in market value, the latter are limits of recovery. Ransom v. Topaz Mktg., L.P., 152 P.3d 2 (Idaho 2006); see Idaho Code ¶ 38-107(2) (forest or range fires). When plaintiff seeks restoration cost, defendant, who would reap benefit of capping damages at diminution in value, bears the burden of establishing the diminution in

value. Farr W. Investments v. Topaz Mktg. L.P., 220 P.3d 1091 (Idaho 2009). Damages for trespass can include the cost of restoration that has been or may be reasonably incurred. In cases of trespass to land, the plaintiff need not prove actual harm in order to recover nominal damages. Radford v. Orden, 483 P.3d 344 (Idaho 2021).

Personal Property: Total: The value of the property at the time and place of its destruction. Skaggs Drug Centers, Inc. v. City of Idaho Falls, 407 P.2d 695 (Idaho 1965). Partial: The difference between its reasonable market value at the place of injury immediately before and immediately after such injury, or if such sum be less, the reasonable cost of repairs to restore the property to its previous condition. Skaggs Drug Centers, Inc. Where personal property has no market value, its value to owner may be used as basis for determining damages. Bratton v. Slininger, 460 P.2d 383 (Idaho 1969).

Experts - States Following the Daubert/Kumho Doctrine
Idaho has not adopted the Daubert standard for admissibility of expert testimony but has used some of Daubert's standards in assessing whether the basis of an expert's opinion is scientifically valid. Weeks v. E. Idaho Health Services, 153 P.3d 1180 (Idaho 2007); Idaho R. Evid. 702.

Interest - Pre & Post Judgment
Prejudgment

Contract Actions
Rate: The rate expressed in a written contract or, if none, 12%. Idaho Code § 28-22-104.
Accrual Date: The date of the breach of contract if the amount upon which interest is due is liquidated or mathematically and definitely ascertainable. Barber v. Honorof, 780 P.2d 89 (Idaho 1989); see Idaho Code § 28-22-104(1)2 (allowing interest on money owed after it becomes due).

Tort Actions
Rate: Interest at the "legal rate" established by § 28-22-104(2). Schenk v. Smith, 793 P.2d 231 (Idaho Ct. App. 1990).
Accrual Date: The date money becomes "due" and the amount is liquidated or can be ascertained by mathematical computation. Schenk; Idaho Code § 28-22-104(1)2. In addition, if the plaintiff makes an offer of settlement and, at trial, receives a judgment that equals or exceeds the offer of settlement, the plaintiff can recover interest at the "legal rate" established in Idaho Code § 28-22-104(2) from the date of the offer of settlement. Idaho Code § 12-301.

Post Judgment
Rate: The rate established by Idaho Code § 28-22-104(2) (5% plus the base rate in effect on the date of entry).
Accrual Date: The date of judgment. Id.

Joint and Several Liability
Modified joint and several liability. Joint and several liability is limited to circumstances where two or more parties act together in the commission of an intentional or reckless tortious act or where a person acts as an agent of another party. Idaho Code § 6-803.

Judgment Liens
A lien resulting from a judgment continues for ten years. Idaho Code § 10-1110. The judgment may be renewed, and the lien continued for an additional ten years. Idaho Code § 10-1111.

Landlord-Tenant Subrogation ("Sutton Doctrine")
A tenant's liability to the landlord's subrogee depends on the parties' intent, as shown by the lease and the surrounding facts and circumstances. Bannock Bldg. Co. v. Sahlberg, 887 P.2d 1052 (Idaho 1994).

Made Whole Doctrine
No case on point. However, Idaho Code § 41-1840 provides that an advance payment by the defendant or the defendant's insurer is to be credited against a later, overall settlement of all claims. The statute applies to advance settlements of subrogation claims. Schaffer v. Curtis-Perrin, 109 P.3d 1098 (Idaho 2005). It therefore effectively undercuts the insured-made-whole-first rule.

Professional Malpractice Filing Requirements (Affidavit of Merit)
Before a medical malpractice action can be filed, a claim must be submitted to a hearing panel, which is to issue an advisory opinion. Idaho Code § 6-1001, *et seq.*

Restitution - Crime Victims Restitution Statutes
Discretionary. A court shall order restitution unless it "determines that an order of restitution would be inappropriate or undesirable." Idaho Code § 19-5304. The court has discretion to order partial or nominal restitution. Factors considered by the court include the amount of economic loss, the defendant's earning capacity, assets and financial needs, and any other factors deemed relevant. An insurance company that has made payments to an insured victim is included in the definition of "victim" for purposes of the restitution statute. Id. A restitution order is enforceable as a civil judgment. Idaho Code § 19-5305. For juveniles, see Idaho Code § 20-520(3).

Right to Repair/Notice Statutes – Construction Cases
Idaho Code §§ 6-2501 to 6-2504 *Actions in Particular Cases – Notice and Opportunity to Repair Act.*

Spoliation – Remedies for Spoliation
When a party with a duty to preserve evidence intentionally destroys it, an inference arises that the destroyed evidence was unfavorable to that party. Ada County Highway Dist. v. Total Success Investments, LLC, 179 P.3d 323 (Idaho 2008). The merely negligent loss or destruction of evidence is not sufficient to invoke the spoliation doctrine. Courtney v. Big O Tires, Inc., 87 P.3d 930 (Idaho 2003). Idaho recognizes spoliation as an independent tort against third parties

who willfully interfere with a potential lawsuit by spoliating evidence. Raymond v. Idaho State Police, 451 P.3d 17 (Idaho 2019).

Statutes of Limitation and Repose*

Statutes of Limitation

Tort: Personal injury, including breach of implied warranty or implied covenant, 2 years. Idaho Code § 5-219. Professional malpractice, 2 years. Idaho Code § 5-219(4) (see 5-219(4), re: accrual and an SOR). Property damage: personal property and trespass to real property, 3 years. Idaho Code § 5-218; see Idaho Code § 5-241 (improvements to real property). Consequential damage to real property, 4 years. Idaho Code § 5-224; Woodland v. Lyon, 298 P.2d 380 (Idaho 1956).

Contract: Written, 5 years. Idaho Code § 5-216; see Idaho Code § 5-241 (improvements to real property); but see Idaho Code § 28-2-725 (4 years for UCC sale of goods claims). Oral, 4 years. Idaho Code § 5-217.

Professional Malpractice: 2 years from occurrence. Idaho Code § 5-219; City of McCall v. Buxton, 201 P.3d 629 (Idaho 2009).

Other State: If cause of action arises in another state and is barred by the other state's statute of limitation, the cause of action is barred in Idaho also, except in favor of an Idaho resident who has held the cause of action from the time it accrued. Idaho Code § 5-239.

State and Local Government: All claims shall be filed within 180 days from the date the claim arose or reasonably should have been discovered, whichever is later. Idaho Code §§ 6-905, 6-906. Within 90 days after the filing of the claim, the governmental entity shall notify the claimant in writing of its approval or denial. If the entity fails to respond, the claim is deemed denied. Idaho Code § 6-909. If the claim is denied, an action may be filed. Idaho Code § 6-910. An action must be commenced within 2 years after the date the claim arose or reasonably should have been discovered, whichever is later. Idaho Code § 6-911. 2-year limitation against a sheriff, coroner or constable. Idaho Code § 5-219.

Statutes of Repose

Products: For products that cause harm up to 10 years after the time of delivery. A product seller shall not be subject to liability if it proves by a preponderance of evidence that the harm was caused after the product's useful safe life had expired. For products which cause harm more than 10 years after time of delivery, a presumption arises that the harm was caused after the useful safe life had expired, rebuttable with clear and convincing evidence. The statute of repose does not apply if the seller expressly warranted that the product could be used safely for more than 10 years or if the seller misrepresented facts about the product, which was a substantial cause of the harm. Idaho Code § 6-1403.

Improvements to Real Property: Tort actions: If not previously accrued, the statute of limitations accrues 6 years after the final completion of construction; see Idaho Code § 5-241. Contract actions: accrues and the applicable limitation statute begins to run at the time of final completion of construction. But see Twin Falls Clinic & Hosp. Bldg. Corp v. Hamill, 644 P.2d 341 (Idaho 1982) (contract actions must be brought within 5 years from

* For UCC Claims and claims based on improvements to real property and/or claims brought by condominium associations related to construction defects, see the notes at the end of the Table of Contents.

date of completion of construction, malpractice actions must be brought within two years of discovery, and in no event later than 8 years following the completion of construction). Statute does not apply to persons in actual possession or control of the improvement at the time of injury. Idaho Code § 5-241.

Subrogating in the Insured's Name – Real Party in Interest

Idaho Rule of Civil Procedure 17 states that actions must be prosecuted in the name of the real party in interest. I.R.C.P. Rule 17. In the absence evidence that the insured conveyed, assigned or transferred the cause of action to the insurance company, the owner is the real party in interest and can maintain the action. Wilde v. Hansen, 211 P.2d 153 (Idaho 1949). An assignor of a cause of action is not the real party in interest and has no standing to prosecute the cause of action. Union Warehouse and Supply Co., Inc. v. Illinois R.B. Jones, Inc., 917 P.2d 1300 (Idaho 1996). Tortious injuries to property are assignable. MacLeod v. Stelle, 249 P. 254 (Idaho 1926).

ILLINOIS

Anti-Subrogation Rule: Subrogation by Insurer Against Insured
Generally an insurer may not bring a subrogation action against its own insured or any person or entity who has the status of a co-insured under the insurance policy. Express contract terms may overcome the general rule. Dix Mut. Ins. Co. v. LaFramboise, 597 N.E.2d 622 (Ill. 1992). An insurer may subrogate against a target covered by a *different* policy issued by the insurer, as long as the target's policy limits are adequate. If the target's limits are inadequate, the subrogating carrier may have a conflict of interest. Benge v. State Farm Mut. Auto. Ins. Co., 697 N.E.2d 914 (Ill. App. Ct. 1998).

Comparative/Contributory Negligence
Modified Comparative – 50%. 735 Ill. Comp. Stat. 5/2-1116.

Contribution and Implied Indemnity
Contribution: Illinois' Contribution Among Joint Tortfeasors Act (740 Ill. Comp. Stat. 100/0.01, *et. seq*.) establishes that joint tortfeasors have a right of contribution even though judgment has not been entered against all or any of them. 740 Ill. Comp. Stat. 100/2. The object of the claim may be liable for not more than its pro rata share unless the obligation of one or more of the joint tortfeasors is uncollectible. 740 Ill. Comp. Stat. 100/3. Contribution is allowed when the contribution-seeking plaintiff settles, in good faith, and obtains a release that releases the liability of both tortfeasors and when a plaintiff collects damages inconsistent with jury's finding of percentage of responsibility. 740 Ill. Comp. Stat. 100/2. A defendant who enters a good-faith settlement is protected from any contribution liability to a non-settling defendant. BHI Corp. v. Litgen Concrete Cutting & Coring Co., 827 N.E.2d 435 (Ill. 2005); 740 Ill. Comp. Stat. 100/2(d). A joint tortfeasor must pursue contribution in a third-party complaint if the injured party has filed an action. Otherwise, it may pursue contribution by a separate action. Harshman v. DePhillips, 844 N.E.2d 941 (Ill. 2006); 740 Ill. Comp. Stat. 100/5. 2-year statute of limitations running from settlement if the claimant hasn't filed a suit. If the claimant has filed suit, 2-year statute of limitations running from the filing date, or from the time the party seeking contribution should have known of the act or omission giving rise to the action for contribution, whichever period expires later. 735 Ill. Comp. Stat. 5/13-204. Contribution claims related to improvements to real property are subject to Illinois' 4-year statute of limitations and 10-year statute of repose for actions related to such improvements. Guzman v. C.R. Epperson Construction, Inc., 752 N.E.2d 1069 (Ill. 2001); Carlson v. Moline Bd. of Educ., 596 N.E.2d 176 (Ill. 1992); 735 Ill. Comp. Stat. 5/13-214.

Implied Indemnity: To assert implied indemnity, the defendant must show: 1) a pre-tort relationship between the defendant and tortfeasor, 2) a distinction between the actions and omissions of the defendant and the tortfeasor, and 3) that the defendant was free from fault in the original action. Frazer v. A.F. Munsterman, Inc., 527 N.E.2d 1248 (Ill. 1988). Implied indemnity based upon the active/passive negligence doctrine has been abolished. Allison v. Shell Oil Co., 495 N.E.2d 496 (Ill. 1986). The statute of limitations periods are the same as stated above for contribution claims, 735 Ill. Comp. Stat. 5/13-204, but the statute does not govern breaches of express indemnity agreements. Travelers Cas. & Sur. Co. v. Bowman, 893 N.E.2d 583 (Ill. 2008). The party seeking indemnification can file a third-party complaint or a separate action.

Madigan v. Yballe, 920 N.E.2d 1112 (Ill. App. Ct. 2009). Indemnity claims related to improvements to real property are subject to Illinois' 4-year statute of limitations and 10 year statute of repose for actions related on such improvements. Guzman; Board of Library Directors v. Skidmore, Owings & Merrill, 574 N.E.2d 869 (Ill. App. Ct. 1991); 735 Ill. Comp. Stat. 5/13-214.

Damages - Measure of Damages to Property

Real Property: Permanent Damage: Diminution in fair market value from immediately before to immediately after damage occurred. Hudlin v. City of East St. Louis, 591 N.E.2d 541 (Ill. App. Ct. 1992). Temporary: Cost of restoration. Arras v. Columbia Quarry Co., 367 N.E.2d 580 (Ill. App. Ct. 1977).

Personal Property: Permanent Damage: Fair market value of the property immediately before destruction. Harris v. Peters, 653 N.E.2d 1274 (Ill. App. Ct. 1995). Damages in absence of established fair market value may be ascertained based on replacement cost, value to plaintiff, or by other rational means and from such elements as are obtainable. Rajkovich v. Alfred Mossner Co., 557 N.E.2d 496 (Ill. App. Ct. 1990); see also Leith v. Frost, 899 N.E.2d 635 (Ill. App. Ct. 3d Dist. 2008) (plaintiff entitled to demonstrate value to him by such proof as circumstances admit). Temporary Damage: Reasonable cost of repairs. Beasley v. Pelmore, 631 N.E.2d 749 (Ill. App. Ct. 1994). But where cost of repairs exceeds fair market value, market value of property becomes ceiling on amount of recoverable damages. Wall v. Amoco Oil Co., 416 N.E.2d 705 (Ill. App. Ct. 1981).

Experts - States Following the Daubert/Kumho Doctrine

Follows Frye. People v. New (In re Det. of New), 21 N.E.3d 406 (Ill. 2014) (citing In re Commitment of Simons, 831 N.E.2d 1184 (Ill. 2004)); but see Ill. R. Evid. 702 (applying the general acceptance test only to new or novel scientific methodologies); Young v. Wilkinson, 213 N.E.3d 486 (Ill. App. Ct. 2022) (stating that the Frye standard only applies to new or novel scientific methodologies and that the general acceptance standard was never triggered because there was no evidence of the newness or novel nature of the methodology); Young ("[a] person will be allowed to testify if his experience and qualifications afford him the knowledge that is not common to laypersons, and where his testimony will aid the trier of fact in reaching its conclusions").

Interest - Pre & Post Judgment

Prejudgment

Contract Actions/Liquidated Damages

Rate: In the absence of an agreed upon rate in the contract, 5%. 815 Ill. Comp. Stat. 205/2; see E. M. Melahan Constr. Co. v. Carpentersville, 427 N.E.2d 181 (Ill. App. Ct. 1981) (interest may be awarded when the sum due is liquidated or subject to exact computation).

Accrual Date: Due date or, if there are multiple dates on which interest could have become due, the "most equitable date." E. M. Melahan Constr.

Tort Actions:
Interest is not recoverable, Northern Trust Co. v. County of Cook, 481 N.E.2d 957 (Ill. App. Ct 1985), unless authorized by statute or warranted by equitable considerations. Progressive Land Developers v. Exchange Nat'l Bank, 641 N.E.2d 608 (Ill. App. Ct. 1994).
Not allowed if the amendments to 735 ILCS 52/1303(c), effective July 1, 2021, are unconstitutional. If constitutional, for personal injury or wrongful death actions, interest accrues at the rate of 6%, minus punitive damages, sanctions, statutory attorney's fees and statutory costs. 735 ILCS 5/2-1303(c); but see 735 ILCS 5/2-1303(c) (discussing settlement offers); Hyland v. Advocate Health & Hosps. Corp., 2022 Ill. Cir. LEXIS 2735 (finding the amendments in 735 ILCS 5/2-1303(c) unconstitutional).
Accrual Date: None if 735 ILCS 5/2-1303(c) is unconstitutional. If constitutional, for personal injury and wrongful death actions, the date the action is filed. For personal injury or wrongful death actions occurring prior to July 1, 2021, interest shall accrue the later of the date the action is filed or July 1, 2021. For personal injury and wrongful death actions occurring after July 1, 2021, the accrual date is the date of the action is filed. 735 ILCS 5/2-1303(c); but see Hyland v. Advoc. Health & Hosps. Corp., 2022 Ill. Cir. LEXIS 2735 (finding the amendments in 735 ILCS 5/2-1303(c) unconstitutional).

Post Judgment

Rate: 6% for judgments against a unit of a local government or other governmental entity. Otherwise, 9%. 735 Ill. Comp. Stat. 5/2-1303. Consumer debt of less than $25,000 earns 5%. 735 Ill. Comp. Stat. 5/2-1303(b)(2) (eff. Jan. 1, 2020).
Accrual Date: Date of judgment. Id. The judgment debtor may stop the further accrual of interest, notwithstanding the prosecution of an appeal, by tendering payment of the judgment, costs and accrued interest to the date of payment. Id.

Joint and Several Liability

Modified joint and several liability. For damages other than medical expenses, several liability if defendant is less than 25% at fault; joint and several liability if defendant is 25% or more at fault. For medical expenses, joint and several liability. 735 Ill. Comp. Stat. 5/2-1117. Joint and several liability for environmental claims. 735 Ill. Comp. Stat. 5/2-1118.

Judgment Liens

A judgment is a lien on real estate for 7 years from the time it is entered or revived. 735 Ill. Comp. Stat. 5/12-101. A judgment may be revived at any time prior to 20 years after the entry of such judgment. 735 Ill. Comp. Stat. 5/13-218.

Landlord-Tenant Subrogation ("Sutton Doctrine")

Unless the lease states that the tenant is to be liable for damage that he/she caused, a tenant, by payment of rent, has contributed to the payment of the insurance premium, thereby gaining the status of co-insured under the insurance policy and precluding subrogation. Dix Mut. Ins. Co. v. LaFramboise, 597 N.E.2d 622 (Ill. 1992); cf. Sheckler v. Auto-Owners Ins. Co., 215 N.E.3d 883 (IL 2022) (holding that Dix Mutual and equitable subrogation principles were not applicable to determining whether the landlord's insurer had to defend the tenant from a contribution action). This rule applies to commercial leases as well as to residential leases. Cerny-Pickas & Co. v.

C.R. Jahn Co., 131 N.E.2d 100 (Ill. 1955); Nationwide Mut. Fire Ins. Co. v. T and N Master Builder and Renovators, 959 N.E.2d 201 (Ill. App. Ct. 2011). The application of the Dix Mutual exception may practically prove difficult. A "yield up" clause stating that the tenant agrees to surrender the premises in good condition and to be responsible for any damage is insufficient to trigger the exception. Towne Realty, Inc. v. Shaffer, 773 N.E.2d 47 (Ill. App. Ct. 2002). Moreover, even with a lease provision requiring the tenant to reimburse the owner for any repair caused by the tenant's negligence, the First District declined to apply the exception, reasoning that the owner's agreement to procure insurance for the property trumped the reimbursement provision. American Nat'l Bank & Trust Co. v. Edgeworth, 618 N.E.2d 899 (Ill. App. Ct. 1993).

Made Whole Doctrine
The equitable made whole doctrine does not apply where there is a subrogation clause stating that the insured transfers its rights to the insurer to the extent of its payments. Capitol Indem. Corp. v. Strike Zone, 646 N.E.2d 310 (Ill. App. Ct. 1995). For healthcare service liens, see 770 Ill. Comp. Stat. 23/50.

Professional Malpractice Filing Requirements (Affidavit of Merit)
In an action against a health care provider, plaintiff's attorney must file an affidavit of merit with the complaint declaring that the attorney has consulted with a health care professional and that the consultant has determined the action to have merit. 735 Ill. Comp. Stat. 5/2-622. Parts of Section 2-622 were held unconstitutional in Best v. Taylor Mach. Works, 689 N.E.2d 1057 (Ill. 1997) and Lebron v. Gottlieb Memorial Hosp., 930 N.E.2d 895 (Ill. 2010), but the statute remains in effect in an earlier form. Christmas v. Hugar, 949 N.E.2d 675 (Ill. App. Ct. 2010).

Restitution - Crime Victims Restitution Statutes
Mandatory for offenses under the Criminal Code or for driving while intoxicated when personal injury or property damage result. Discretionary otherwise. In calculating the amount, a court is to assess victim's actual damages. The defendant's ability to pay is to be consider only in setting a payment schedule. A restitution order may be satisfied as a civil judgment by the victim. 730 Ill. Comp. Stat. 5/5-5-6. Insurance companies may receive restitution payments, but not for pain and suffering. Id.; People v. Rednour, 665 N.E.2d 888 (Ill. App. Ct. 1996). Amounts paid in restitution may be credited against a civil judgment. See, e.g., Spircoff v. Stranski, 703 N.E.2d 431 (Ill. App. Ct. 1998).

Right to Repair/Notice Statutes – Construction Cases
None found.

Spoliation – Remedies for Spoliation
There is no general duty to preserve evidence; however, a duty to preserve evidence may arise through an agreement, a contract, a statute or another special circumstance. Moreover, a defendant may voluntarily assume a duty by affirmative conduct. Dardeen v. Kuhling, 821 N.E.2d 227 (Ill. 2004). While there is no tort of spoliation, under general negligence theories, a plaintiff may recover from a third-party spoliator if he alleges sufficient facts to support a claim that the loss or destruction of the evidence caused the plaintiff to be unable to prove an underlying lawsuit. Boyd v. Travelers Ins. Co., 652 N.E.2d 267 (Ill. 1995). A party who destroys

material evidence may be liable for discovery sanctions, even if the destruction occurs before the complaint is filed. Shimanovsky v. General Motors Corp., 692 N.E.2d 286 (Ill. 1998).

Statutes of Limitation and Repose*

Statutes of Limitation

Tort: Property: 5 years. 735 Ill. Comp. Stat. 5/13-205. Improvements to Real Property: 4 years. 735 Ill. Comp. Stat. 5/13-214(a). Personal Injury: 2 years. 735 Ill. Comp. Stat. 5/13-202. Claims against Public Accountants: 2 years, unless the plaintiff is under 18. 735 Ill. Comp. Stat. 5/13-214.2

Contract: Written: 10 years from when the cause of action accrued. 735 Ill. Comp. Stat. 5/13-206. Oral: 5 years. 735 Ill. Comp. Stat. 5/13-205. Improvements to Real Property: 4 years. 735 Ill. Comp. Stat. 5/13-214(a).

Medical malpractice: 2 years, but time may vary. See 735 Ill. Comp. Stat. 5/13-212.

State Government: Contract, 5 years; tort, 2 years. 705 Ill. Comp. Stat. 505/22. Notice of personal injury claims must be filed within 1 year. 705 Ill. Comp. Stat. 505/22-1. $2,000,000 limit on damages for non-vehicular torts. 705 Ill. Comp. Stat. 505/8.

Local Government: Against municipalities, townships and counties: Generally: 1 year from the date of injury or from when the cause of action accrued. Arising out of patient care: 2 years from discovery of harm, not to exceed 4 years from act or omission which caused harm. 745 Ill. Comp. Stat. 10/8-101.

Statutes of Repose

Products: For product actions based on strict liability in tort: 12 years from sale/lease/delivery by the initial seller or 10 years from sale/lease/delivery to the initial user, whichever is first. 735 Ill. Comp. Stat. 5/13-213. The statute of repose does not apply to product actions based on other theories of liability. Best v. Taylor Mach. Works, 689 N.E.2d 1057 (Ill. 1997).

Improvements to Real Property: 10 years, but any person discovering an actionable act or omission within the 10-year period shall in no event have less than 4 years to bring an action. 735 Ill. Comp. Stat. 5/13-214. If the plaintiff is under 18 or has a developmental disability or mental illness, the limitations period accrues when the person attains 18 years of age or the disability is removed. Id. Claims based on express warranties for a longer period can be brought within that period. Id. The repose period does not apply to personal injury, asbestos claims or actions arising out of fraudulent misrepresentation or concealment. Id.

Claims Against Public Accountants: 5 years. 735 Ill. Comp. Stat. 5/13-214.2.

Medical Malpractice: Generally, 8 years. See 735 Ill. Comp. Stat. 5/13-212.

Subrogating in the Insured's Name – Real Party in Interest

"Any action hereafter brought by virtue of the subrogation provision of any contract or by virtue of subrogation by operation of law shall be brought either in the name or for the use of the subrogee; and the subrogee shall in his or her pleading on oath, or by his or her affidavit if pleading is not required, allege that he or she is the actual bona fide subrogee and set forth how and when he or she became subrogee." 735 Ill. Comp. Stat. 5/2-403(c). The interest of the

* For UCC Claims and claims based on improvements to real property and/or claims brought by condominium associations related to construction defects, see the notes at the end of the Table of Contents.

subrogee cannot be concealed in any proceeding brought for its benefit; the subrogee either must be named as the plaintiff or disclosed as the real party in interest. However, if an insured plaintiff has even a *de minimis* pecuniary interest in the lawsuit, that interest is sufficient to allow a subrogation action to be maintained in the insured's name. Orejel v. York Intern. Corp., Inc., 678 N.E.2d 683 (Ill. App. Ct. 1997). A judgment in favor of a subrogee does not bar the subrogor from recovering upon any other cause of action arising out of the same transaction or series of transactions. 735 ILCS 5/2-403(d). Section 2-403(d) is designed to protect an insured from having a claim for personal injury barred by *res judicata* because his subrogated insurance carrier has previously litigated the issue of property damage arising out of the same accident. Zurich Ins. Co. v. Amcast Indus. Corp., 742 N.E.2d 337 (Ill. App. Ct. 2000). Where the right of subrogation is created by the terms of the policy, the subrogee must adhere to the policy's subrogation clause to perfect its subrogation right rather than rely upon equitable principles. For example, if the policy's subrogation clause calls for an assignment, the insurer must procure the assignment from the insured to proceed. American Family Mut. Ins. Co. v. Northern Heritage Builders, L.L.C., 937 N.E.2d 323 (Ill. App. Ct. 2010). Causes of action for damage to property are generally assignable. Dubina v. Mesirow Realty Development, Inc., 756 N.E.2d 836 (Ill. 2001).

INDIANA

Anti-Subrogation Rule: Subrogation by Insurer Against Insured
Subrogation by an insurer against an insured is prohibited on grounds of both basic equity principles and sound public policy; subrogation of this nature would produce costly litigation against the public's interest. S. Tippecanoe School Bldg. Corp. v. Shambaugh & Son, Inc., 395 N.E.2d 320 (Ind. Ct. App. 1979) (barring subrogation when subrogor and target covered by single policy). Subrogation against a subcontractor for property damage may be permitted where the subcontractor was not an intended insured under the subject policy. Ind. Erectors, Inc. v. Trustees of Ind. Univ., 686 N.E.2d 878 (Ind. Ct. App. 1997).

Comparative/Contributory Negligence
Modified Comparative – 50%. Ind. Code § 34-51-2-6; see 34-51-2-5.

Contribution and Implied Indemnity
Contribution: Indiana bars the right of contribution. Ind. Code §§ 34-51-2-12. A tortfeasor cannot be liable for more than its proportional percentage of fault. Ind. Code §§ 34-20-7-1 (products liability); Ind. Dep't of Ins. v. Everhart, 960 N.E.2d 129 (Ind. 2012). Liability is assessed between all parties and a defendant may attribute fault to a non-party. Ind. Code § 34-51-2-14.

Implied Indemnity: The right to indemnity may be implied at common law only in favor of one whose liability to a third person is derivative or constructive, and only as against one who has by his wrongful act caused such derivative or constructive liability to be imposed upon the indemnitee. Indianapolis Power & Light Co. v. Brad Snodgrass, Inc., 578 N.E.2d 669 (Ind. 1991). Examples include claims based on *respondeat superior* and implied warranty/product claims between sellers and manufacturers of products. E.Z. Gas, Inc. v. Hydrocarbon Transportation, Inc., 471 N.E.2d 316 (Ind. Ct. App. 1984). A seller may pursue indemnity against a manufacturer after the seller settles a suit, but it must prove the manufacturer was liable, the seller did not breach its duty to inspect and that the seller did not alter the product. Four Winns, Inc. v. Cincinnati Ins. Co., 471 N.E.2d 1187 (Ind. Ct. App. 1984). An indemnity claim may be brought in the primary suit even though the cause of action does not accrue until payment of the underlying claim. Coca-Cola Bottling Co. v. Vendo Co., 455 N.E.2d 370 (Ind. Ct. App. 1983); Ind. R. Trial P. 14. Indemnification claims are subject to Indiana's general, 10-year statute of limitations. Balvich v. Spicer, 894 N.E.2d 235 (Ind. Ct. App. 2008); Ind. Code § 34-11-1-2. The statute of limitations for an indemnity claim does not begin to run until the indemnitee's liability is determined. Coca-Cola.

Damages - Measure of Damages to Property
Real Property: In the case of permanent injury to property, the measure of damages is the value of the property before the injury. City of Marion v. Taylor, 785 N.E.2d 663 (Ind. Ct. App. 2003). A permanent injury is one in which the cost of restoration of the property to its pre-injury condition exceeds the market value of the real estate prior to injury. A temporary injury is one which is not defined as permanent. Neal v. Bullock, 538 N.E.2d 308 (Ind. Ct. App. 1989). Damages for temporary or repairable injury are measured by the cost of the repair. After the plaintiff establishes the cost of repair, if the defendant wishes to characterize the damage as

permanent rather than temporary, the defendant bears the burden of establishing the market value. City of Marion; General Outdoor Advertising Co. v. La Salle Realty Corp., 218 N.E.2d 141 (Ind. Ct. App. 1966).

Personal Property: Total Loss: Fair market value at the time property is destroyed. Ridenour v. Furness, 546 N.E.2d 322 (Ind. Ct. App. 1989). Indiana has long held that animals are personal property, and the fair market value of the animal at the time of loss is the appropriate basis for calculating damages. Liddle v. Clark, 107 N.E.3d 478 (Ind. App. Ct. 2018). Partial Loss: Diminution in fair market value from immediately before to immediately after damage occurred. Wiese-GMC, Inc. v. Wells, 626 N.E.2d 595 (Ind. Ct. App. 1993). The reduction in fair market value can be proved in one of three ways, depending on the circumstances: 1) by evidence of the fair market value before and the fair market value after the incident; or 2) by evidence of the cost of repair where repair will restore the personal property to its fair market value before the incident; or 3) by a combination of evidence of the cost of repair and evidence of the fair market value before the causative event and the fair market value after repair, where repair will not restore the item of personal property to its fair market value before the causative event. Wiese-GMC, Inc.

Experts - States Following the Daubert/Kumho Doctrine
Daubert is helpful, but not binding. There is no specific test or set of prongs which must be considered in order to satisfy Indiana Evidence Rule 702(b). Turner v. State, 953 N.E.2d 1039 (Ind. 2011).

Interest - Pre & Post Judgment
Prejudgment

Contract Actions
Rate: The contract rate or, if none, 8%. Ind. Code § 24-4.6-1-101.
Accrual Date: The date demanded, Ind. Code § 24-4.6-1-103, and ascertainable. Lystarczyk v. Smits, 435 N.E.2d 1011 (Ind. Ct. App. 1982).

Tort Actions
Rate: At the court's discretion a simple interest rate of not less than 6% nor more than 10%. Ind. Code § 34-51-4-9.
Accrual Date: On ascertainable damages, Eden United v. Short, 653 N.E.2d 126 (Ind. Ct. App. 1995), at the court's discretion, on the latest of the following dates: (1) fifteen months after the cause of action accrue, (2) six months after the claim is filed in court (if Ind. Code § 34-18-8 and § 34-18-9 [medical malpractice claims] do not apply), or (3) 180 days after a medical review panel is formed to review the claim under Ind. Code 34-18-10. The period cannot exceed 48 months. Ind. Code § 34-51-4-8.
Offers of Settlement:
No prejudgment interest is allowed if the plaintiff or defendant, as applicable, fail to make an offer of settlement as set forth in Ind. Code § 34-51-4-5 or Ind. Code. § 34-51-4-6.
No Prejudgment Interest
Prejudgment interest is not available: a) against the state or any political subdivision, Ind.

Code § 34-51-4-4; b) for claims against the patient's compensation fund, Ind. Code § 34-51-4-2; or 3) on punitive damage awards. Ind. Code § 34-51-4-3.

Post Judgment

Rate: If there is a contract, the contract rate but not to exceed 8%. If there is no contract, 8%. Ind. Code § 24-4.6-1-101.

Accrual Date: Date of the return of the verdict or finding. Id.

Joint and Several Liability

Several liability. To determine the liability of each defendant, the jury determines the percentage of fault attributable to each party and any non-party, then multiplies that percentage times the amount of damages. Ind. Code § 34-51-2-8; Ind. Code § 34-20-7-1 (products liability claims). Several liability created by the Comparative Fault Act does not apply in medical malpractice actions. Ind. Code § 34-51-2-1; Cavens v. Zaberdac, 849 N.E.2d 526 (Ind. 2006).

Judgment Liens

Judgments are presumed to be satisfied after 20 years; however, the presumption is rebuttable upon showing nonpayment. Ind. Code § 34-11-2-12, Lewis v. Rex Metal Craft, Inc., 831 N.E.2d 812 (Ind. Ct. App. 2005). All final judgments constitute a lien upon real estate, subject to execution for 10 years. Ind. Code § 34-55-9-2.

Landlord-Tenant Subrogation ("Sutton Doctrine")

A tenant's liability is determined by the terms of the lease and the reasonable expectations of the parties. If the lease obligates the tenant to maintain fire insurance, the tenant should anticipate being held responsible for damage to the leased premises and is open to a subrogation claim. If the lease states that the landlord will procure insurance, the parties would reasonably expect that the loss would remain with the landlord, and subrogation is precluded. For multi-unit structures, absent clear notice to the contrary, a negligent tenant will not be held responsible for damage beyond the lease's premises. LBM Realty, LLC v. Mannia, 19 N.E.3d 379 (Ind. Ct. App. 2014).

Made Whole Doctrine

The insured must be made whole first. However, the parties may contractually agree to the contrary as long as the contractual provision is clear and unequivocal. Willard v. Automobile Underwriters, Inc., 407 N.E.2d 1192 (Ind. 1980).

Professional Malpractice Filing Requirements (Affidavit of Merit)

A complaint against a health care provider may not be filed before the claim has first been presented to a medical review panel, and the panel has issued an opinion. Ind. Code § 34-18-8-4.

Restitution - Crime Victims Restitution Statutes

Discretionary. Ind. Code § 35-50-5-3. To determine the amount, the court shall consider medical costs incurred, including necessary testing costs; the victim's lost earnings; funeral costs in the case of homicide; and whether the victim sustained property damage, based upon cost to repair (or replacement cost if repair is inapplicable). Id. A restitution order is enforced in the same manner as a civil judgment lien. Id. Civil judgments must be reduced by amounts of restitution

paid. Myers v. State, 848 N.E.2d 1108 (Ind. Ct. App. 2006). Similarly, if a defendant has already paid all or part of a civil judgment, the amount of restitution must be offset by the amount already recovered. Kimbrough v. State, 911 N.E.2d 621 (Ind. Ct. App. 2009). An insurer may recover restitution. Little v. State, 839 N.E.2d 807 (Ind. Ct. App. 2005).

Right to Repair/Notice Statutes – Construction Cases
Ind. Code §§ 32-27-3-1 to 32-27-3-14 *Construction Warranties on Real Property – Notice and Opportunity to Repair.*

Spoliation – Remedies for Spoliation
In the absence of an independent tort, contract or agreement, or special relationship imposing a duty to the particular claimant, the claim of negligent or intentional interference with a person's prospective or actual civil litigation by the spoliation of evidence is not recognized. Glotzbach v. Froman, 854 N.E.2d 337 (Ind. 2006). When a party to litigation spoliates evidence, sanctions are available, including an inference that the spoliated evidence was unfavorable to the party responsible. Gribben v. Wal-Mart Stores, Inc., 824 N.E.2d 349 (Ind. 2005). However, if a defendant's liability insurer spoliates evidence after litigation has commenced, the plaintiff has an independent cause of action for spoliation against the insurer. Thompson v. Owensby, 704 N.E.2d 134 (Ind. Ct. App. 1998). The liability insurer cannot be held liable if at the time the evidence was destroyed the insurer did not have possession of it or if litigation was not then foreseeable. American Nat. Property and Cas. Co. v. Wilmoth, 893 N.E.2d 1068 (Ind. Ct. App. 2008).

Statutes of Limitation and Repose[*]

Statutes of Limitation

Tort: Personal injury/personal property: 2 years. Ind. Code § 34-11-2-4. Real property: 6 years. Ind. Code § 34-11-2-7.

Contract: Written: 10 years. Ind. Code § 34-11-2-11. Oral: 6 years. Ind. Code § 34-11-2-7.

State Government: Written notice to the attorney general or to the agency involved must be filed within 270 days. Ind. Code § 34-13-3-6. Within 90 days after filing of written notice, agency will consider whether to approve or deny the claim. If the claim is not approved within 90 days, it is deemed denied. Ind. Code § 34-13-3-11. Suit may be filed only after the claim has been denied. Ind. Code § 34-13-3-13.

Local Government: Political subdivisions: Written notice to the subdivision and to the Ind. Political Subdivision Risk Management Commission within 180 days after loss occurs. Ind. Code § 34-13-3-8. Other procedures are identical to those for state government.

Statutes of Repose

Products: 10 years of delivery to initial user. If cause of action accrues between 8 and 10 years of delivery, action may be commenced within 2 years of accrual. Ind. Code § 34-20-3-1.

Improvements to Real Property: 10 years from substantial completion or 12 years from submission of plans to owner, whichever is earlier. Ind. Code § 32-30-1-5. An action for

[*] For UCC Claims and claims based on improvements to real property and/or claims brought by condominium associations related to construction defects, see the notes at the end of the Table of Contents.

personal injury or death occurring during the 9th or 10th year after substantial completion of the work must be brought within 2 years of the date of injury, not to exceed 12 years after the substantial completion of the improvement or 14 years after submission of plans to the owner, whichever is earlier. Ind. Code § 32-30-1-6.

Subrogating in the Insured's Name – Real Party in Interest

When an insurer has paid an insured's entire loss under an insurance policy and has attained the right to pursue all causes of action associated with the loss, the insured can no longer sue in its own name. Puente v. Beneficial Mortg. Co. of Indiana, 9 N.E.3d 208 (Ind. Ct. App. 2014). As long as the insured maintains any interest in a claim, litigation may be maintained in the name of the insured. Risner v. Gibbons, 197 N.E.2d 184 (Ind. Ct. App. 1964). An insured's personal injury action does not prohibit the insurer from pursuing a property damage subrogation action in the insurer's name. Ind. Code 34-53-1-3.

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Anti-Subrogation Rule: Subrogation by Insurer Against Insured
An insurer cannot subrogate against its own insured if subrogor and target are both covered by the same policy. Conner v. Thompson Constr. & Development Co., 166 N.W.2d 109 (Iowa 1969).

Comparative/Contributory Negligence
Modified Comparative – 50%. Iowa Code § 668.3.

Contribution and Implied Indemnity
Contribution: A right of contribution exists between joint tortfeasors, whether or not judgment has been entered against all or any of them. Iowa Code § 668.5. The basis of contribution is each person's equitable share. Id. If a court has established the parties' percentage of fault, a party paying more than its percentage may recover judgment for contribution upon motion in the original action or in a separate action. Iowa Code § 668.6. A separate action must be commenced within 1 year after payment or after the judgment becomes final. Id. A settling defendant may seek contribution either in the underlying suit or a separate suit from a joint tortfeasor whose liability was released by the settlement. Iowa Code § 668.5. A settling tortfeasor seeking contribution must discharge the liability of the person from whom contribution is sought. Iowa Code § 668.6. Contribution claims related to improvements to real property are subject to a 10-year statute of repose, running from the act or omission, for residential construction, and 8 years for most other kinds of improvements to real property. Iowa Code § 614.1(11).

Implied Indemnity: Iowa recognizes the doctrine of implied contractual indemnity that rises from a contractual relationship between the parties even if the contract does not include an express indemnity clause. Wells Dairy, Inc. v. American Indus. Refrigeration, Inc., 762 N.W.2d 463 (Iowa 2009). However, indemnity will not be implied in ordinary, routine contracts. Id. A party seeking implied contractual indemnification need not be blameless in connection with the incident. Id. Iowa also recognizes equitable indemnity claims, which arise from non-contractual obligations and the relationship of the parties. Id. Equitable indemnification arises in vicarious liability situations and in situations where there is a "independent duty" between the indemnitor and the indemnitee. Id. Iowa does not recognize implied indemnity arising from a great disparity in fault. Id. To bring an indemnity claim in a third-party action, a party must establish that it was liable to the injured party, because indemnity involves shifting responsibility for the underlying claim from one to another. McNally & Nimergood v. Neumann-Kiewit Constructors, Inc., 648 N.W.2d 564 (Iowa 2002). For a defendant who settled the original claim to recover indemnification, it must establish the existence of its liability in the underlying suit, that a reasonable settlement was made, and that the indemnitor had a duty to indemnify the indemnitee. Id. The statute of limitations for implied contracts is 5 years. Diggan v. Cycle Sat, Inc., 576 N.W.2d 99 (Iowa 1998); Iowa Code § 614.1(4). Indemnity claims related to improvements to real property are subject to a 10-year statute of repose, running from the act or omission, for residential construction, and 8 years for most other kinds of improvements to real property. Iowa Code § 614.1(11).

Damages - Measure of Damages to Property

Real Property: Permanent Damage: Fair and reasonable market value. State v. Urbanek, 177 N.W.2d 14 (Iowa 1970). Temporary Damage: The fair and reasonable cost of replacement or repair, but not to exceed the value of the property immediately prior to the loss or damage. Hendricks v. Great Plains Supply Co., 609 N.W.2d 486 (Iowa 2000).

Personal Property: Total Loss: Fair market value of property immediately before damage. Harlan v. Passot, 150 N.W.2d 87 (Iowa 1967). Partial Loss: Reasonable cost of repairs not to exceed the value of the property immediately before the damage occurred. Ag Partners, L.L.C. v. Chicago Cent. & Pacific R. Co., 726 N.W.2d 711 (Iowa 2007).

Experts - States Following the Daubert/Kumho Doctrine

Rejects Frye but Daubert not adopted, either. When scientific evidence is particularly novel or complex, courts should consider the relevant Daubert factors to assess whether the testimony is reliable. In cases involving technical or other specialized knowledge, the application of Daubert considerations is not appropriate. Ranes v. Adams Laboratories, Inc., 778 N.W.2d 677 (Iowa 2010); State v. Hall, 297 N.W.2d 80 (Iowa 1980); Iowa R. Evid. 5.702.

Interest - Pre & Post Judgment

Prejudgment

Contract Actions

Rate: 5% unless the parties agree, in writing, to a rate not exceeding the rate allowed by Iowa Code § 535.2(3). Iowa Code § 535.2(1).

Accrual Date: Date due and payable. Iowa Code § 535.2(1); Lemrick v. Grinnell Mut. Reinsurance Co., 236 N.W.2d 714 (Iowa 1978).

Tort Actions Subject to Comparative Fault Statute

Rate: The rate established in Iowa Code § 668.13(3).

Accrual Date: Date action commenced. Iowa Code § 668.13(1). For future damages, the date of the entry of judgment. Iowa Code § 668.13(4).

Post Judgment

Rate: If applicable, the contract rate, not to exceed the rate allowed by Iowa Code § 535.2(3). Iowa Code § 668.13(2). Otherwise, the rate established in Iowa Code § 668.13(3).

Accrual Date: Date of judgment. See § 668.13.

Joint and Several Liability

Modified joint and several liability. No joint and several liability for a defendant found to be less than 50% at fault. A defendant found to be 50% or more at fault shall only be jointly and severally liable for economic damages but not for noneconomic damages. Iowa Code § 668.4.

Judgment Liens

Judgments are valid for a period of twenty years. Iowa Code § 614.1. Judgments are liens upon the real estate owned by the defendant for a period of ten years from the date of the judgment. Iowa Code § 624.23.

Landlord-Tenant Subrogation ("Sutton Doctrine")
A tenant is not an implied coinsured with its landlord, and a landlord's fire insurer is not precluded from exercising subrogation rights against a tenant. Neubauer v. Hostetter, 485 N.W.2d 87 (Iowa 1992).

Made Whole Doctrine
Case law suggests that Iowa courts will apply the made whole doctrine in first-party property cases. See Chickasaw County Farmers' Mut. Fire Ins. Co. v. Weller, 68 N.W. 443 (Iowa 1896) (allowing a property insurer to subrogate against an insured who had been fully compensated for the insured loss, but noting that an insured is "entitled to be fully compensated"); Ludwig v. Farm Bureau Mut. Ins. Co., 393 N.W.2d 143 (Iowa 1986) (discussing a subrogation claim for medical expense reimbursement and stating, as a general subrogation rule, that the made whole doctrine applies). The question of whether a property insurance policy's subrogation clause modifies the equitable made whole doctrine is undecided. Deductibles are recoverable in subrogation cases arising from first-party automobile damage claims on a pro rata basis. Iowa Admin. Code 191.15.43(507B).

Professional Malpractice Filing Requirements (Affidavit of Merit)
A certificate of merit is required from an expert in a negligence action against a health care provider prior to the commencement of discovery in the case and within sixty days of the defendant's answer. Iowa Code § 147.140.

Restitution - Crime Victims Restitution Statutes
Mandatory. The sentencing court shall order that restitution be made by each offender to the victims of the offenders' criminal activities for the victim's pecuniary damages. Iowa Code §§ 910.2, 910.1; State v. Tutor, 538 N.W.2d 894 (Iowa Ct. App.1995). The court is to consider the defendant's ability to pay. Iowa Code § 910.2. Pecuniary damages do not include amounts received from an insurer. Iowa Code § 910.1. A victim may enforce the restitution order as a civil judgment. Iowa Code § 910.7A. Restitution payments are to be set off against civil judgments. Iowa Code § 910.8. Unless fraud has been perpetrated against the insurer, a subrogating insurer is not a victim for purposes of criminal restitution. Iowa Code § 910.1.

Right to Repair/Notice Statutes – Construction Cases
Iowa Code §§ 686.1 to 686.7 *Special Actions - Repair Construction Defects in New Construction.*

Spoliation – Remedies for Spoliation
Spoliation may allow an inference "that a party who destroys a document with knowledge that it is relevant is likely to have been threatened by the document." Lynch v. Saddler, 656 N.W.2d 104 (Iowa 2003). The inference may only be drawn when relevant evidence was intentionally destroyed, as opposed to being negligently destroyed or destroyed as the result of a routine procedure. Lynch; cf. Meyn v. State, 594 N.W.2d 31 (Iowa 1999) (stating that remedies include discovery sanctions – barring duplicate evidence where fraud or intentional destruction is indicated and instructing the jury that can draw an unfavorable inference). Iowa declined to adopt the tort of negligent spoliation by a third party. Meyn.

Statutes of Limitation and Repose*

Statutes of Limitation

Tort: Personal injury, 2 years. Iowa Code § 614.1. Property damage, 5 years. Iowa Code § 614.1.

Contract: Oral, 5 years; written, 10 years. Iowa Code § 614.1. No separate statute for the sale of goods. Iowa Code § 554.2725.

Medical Malpractice: 2 years from discovery or from when the claimant should have known of the injury. Iowa Code § 614.1.

State Government: Written notice must be filed with the Director of the Department of Management within 2 years after the claim has accrued. Iowa Code § 669.13. Suit may not be filed until after the Attorney General has made final disposition of the claim. If, however, after 6 months the Attorney General has not made final disposition, the claimant may withdraw the claim in writing and file an action. Iowa Code § 669.5. Time to file suit is extended by 6 months after notice of final disposition or withdrawal. Iowa Code § 669.13.

Local Government: 2 years. Iowa Code § 670.5.

Statutes of Repose

Products: 15 years from date on which the product was purchased, leased or installed, for causes of action in strict liability, negligence or breach of implied warranty, unless expressly warranted for a longer period of time. The statute does not affect causes of action for contribution or indemnity, claims for intentional misrepresentation or fraudulent concealment, or claims arising from certain toxic substances including asbestos. Iowa Code § 614.1.

Improvements to Real Property: 10 years after the injury-causing act or omission for residential properties and 8 years for all other properties, for causes of action in tort, implied warranty and for contribution and indemnity. If discovered within one year of the expiration of the statute of repose, there is a one year extension. The statute does not bar an action against a person solely in the person's capacity as an owner, occupant, or operator of an improvement to real property. Iowa Code § 614.1.

Medical Malpractice: 6 years from the act or omission. Iowa Code § 614.1.

Subrogating in the Insured's Name – Real Party in Interest

Every action must be prosecuted in the name of the real party in interest. Iowa R. Civ. P. 1.201. An insurance company is not the real party in interest "absent some inability or unwillingness" of the insured to pursue his own claim. Estate of Boyd v. Norman, 634 N.W.2d 630 (Iowa 2001) (citing Farm Bureau Mut. Ins. Co. v. Allied Mut. Ins. Co., 580 N.W.2d 788, 790 (Iowa 1998)). If there is no realistic possibility of the insured's filing an action against the tortfeasor, the insurer may sue in its own name. Wayne County Mut. Ins. Co. v. Grove, 318 N.W.2d 192 (Iowa 1982). An insurer is not the real party in interest if the insured has not been completely compensated for its losses. Caligiuri v. Des Moines Ry. Co., 288 N.W. 702 (Iowa 1939). If both insured and insurer have claims against a defendant, they must file suit in the insured's name and arrange between them for an allocation of any recovery from the defendant. Rursch v. Gee, 25 N.W.2d

* For UCC Claims and claims based on improvements to real property and/or claims brought by condominium associations related to construction defects, see the notes at the end of the Table of Contents.

312 (Iowa 1946). The prohibition on subrogation in an insurer's name extends to claims in which the insured is only out-of-pocket for a deductible. Glancy v. Ragsdale, 102 N.W.2d 890 (Iowa 1960).

KANSAS

Anti-Subrogation Rule: Subrogation by Insurer Against Insured
An insurer cannot subrogate against its own insured if subrogor and target are both covered by the same policy. Western Motor Co., Inc. v. Koehn, 748 P.2d 851 (Kan. 1988).

Comparative/Contributory Negligence
Modified Comparative – 49%. Kan. Stat. Ann. § 60-258a.

Contribution and Implied Indemnity
Contribution: Except in product liability, contribution, known as "comparative implied indemnity," is generally not recognized. Parties are liable only for their fault, determined in a single trial, even if one or more parties cannot be joined formally as litigants or be held responsible for their proportionate share. Teepak, Inc. v. Learned, 699 P.2d 35 (Kan. 1985). Because of its one-action rule, Kansas does not generally recognize post-settlement contribution claims. Dodge City Implement, Inc. v. Board of County Comm'rs, 205 P.3d 1265 (Kan. 2009). However, under the doctrines of strict liability and implied warranty, a party in the chain of a product's distribution may seek contribution from other such parties. Id. The court will bar any lawsuit by a joint tortfeasor against another tortfeasor if (1) an injured party has previously sued one tortfeasor, but not others; (2) that tortfeasor has settled with the injured party; (3) the injured party has given a full release of all claims held by it, and (4) the settling tortfeasor claims the other tortfeasors caused all or part of the injured party's damages. Id. Claims are subject to a 2-year statute of limitations, running from the date when the party seeking contribution knew of facts giving rise to a potential contribution claim. Med James, Inc. v. Barnes, 61 P.3d 86 (Kan. App. 2003) (applying Kan. Stat. Ann. § 60-513).

Implied Indemnity: An implied contract of indemnity may arise when one personally without fault is made to pay for the tortious acts of another. Med James. To prevail on a claim, a party must prove (1) that it was compelled to pay an obligation that the purported indemnitor ought to have paid but did not; (2) that it was without fault; and (3) the obligation arose from the tortious actions of the purported indemnitor. Westport Ins. Corp. v. GuideOne Mut. Ins. Co., 2017 U.S. Dist. LEXIS 140310 (Kan. 2017). The statute of limitations period is 3 years running from the date the indemnitee suffers an actual loss. Med James (applying Kan. Stat. Ann. § 60-512).

Damages - Measure of Damages to Property
Real Property: Permanent Damage: Diminution in fair market value from immediately before to immediately after the damage occurred. Williams v. Amoco Prod. Co., 734 P.2d 1113 (Kan. 1987). Temporary Damage: Reasonable repair costs with interest, potentially including loss of use or rental value. Kiser v. Phillips Pipe Line Co., 41 P.2d 1010 (Kan. 1935). Damages for loss of use are limited to pecuniary value and do not include considerations of inconvenience and discomfort. McBride v. Dice, 930 P.2d 631 (Kan. Ct. App. 1997).

Personal Property: Total Loss: Diminution in fair market value from immediately before to immediately after damages occurred. Ultimate Chem. Co. v. Surface Transportation Int'l, Inc., 658 P.2d 1008 (Kan. 1983). Where damaged property has no real market value, replacement cost without a deduction for depreciation is the appropriate measure. Kansas Power and Light Co. v.

Thatcher, 797 P.2d 162 (Kan. Ct. App. 1990). Partial Loss: Cost of repairing object to substantially its previous condition, plus reasonable amount to compensate for the loss of use, limited to period reasonably necessary to complete repairs. The recoverable amount may not exceed the object's pre-loss value. Nolan v. Auto Transporters, 597 P.2d 614 (Kan. 1979).

Experts - States Following the Daubert/Kumho Doctrine
Follows Daubert and Kumho Tire. K.S. § 60-456(b); City of Topeka v. Lauck, 401 P.3d 1064 (Kan. Ct. App. 2017); Lundeen v. Lentell, 397 P.3d 453 (Kan. Ct. App. 2017).

Interest - Pre & Post Judgment
Prejudgment

Contract Actions/Liquidated Damages

Rate: Contract rate or 10% if not specified. Kan. Stat. Ann. § 16-201. Rate not to exceed maximum allowable by law. Kan. Stat. Ann. § 16-205.
Accrual Date: When amount owed and date due is fixed or amount owed and date due are ascertainable. Owen Lumber Co. v. Chartrand, 157 P.3d 1109 (Kan. 2007); Kan. Stat. Ann. § 16-201.

Unliquidated Damages

Although prejudgment interest is, generally, allowable only for liquidated claims, Miller v. Botwin, 899 P.2d 1004 (Kan. 1995), the court has discretion to award prejudgment interest on unliquidated claims where necessary to allow full compensation. Lightcap v. Mobil Oil Corp., 562 P.2d 1 (Kan. 1977).

Post Judgment

Rate: When specified in a contract, the contract rate, not exceeding maximum allowable by law. Kan. Stat. Ann. §§ 16-201, 16-205. Otherwise, the rate established by Kan. Stat. Ann. § 16-204.
Accrual Date: Date of judgment. Kan. Stat. Ann. § 16-205; see Kan. Stat. Ann. § 16-204.

Joint and Several Liability
Several liability. When recovery is allowed against more than one party, each such party shall be liable for that portion of the total dollar amount awarded as damages to any claimant in the proportion that the amount of such party's causal negligence bears to the amount of the causal negligence attributed to all parties against whom such recovery is allowed. Kan. Stat. Ann. § 60-258a.

Judgment Liens
A judgment becomes dormant if the judgment holder does not begin execution proceedings or file a renewal affidavit within five years after the date of judgment. Kan. Stat. Ann. § 60-2403.

Landlord-Tenant Subrogation ("Sutton Doctrine")
Absent a valid rental agreement to the contrary, a tenant is liable for fire damage caused by the tenant's negligence. See Kan. Stat. Ann. § 58-2555(f); New Hampshire Ins. Co. v. Hewins, 627 P.2d 1159 (Kan. Ct. App. 1981); New Hampshire Ins. Co. v. Fox Midwest Theatres, Inc., 457 P.2d 133 (Kan. 1969).

Made Whole Doctrine
Though not making an explicit declaration, in Shawnee Fire Ins. Co. v. Cosgrove, 116 P. 819 (Kan. 1911), the court suggested that an insurer is only entitled to subrogate for sums in excess of the insured's loss.

Professional Malpractice Filing Requirements (Affidavit of Merit)
In an action against a professional licensee other than a health care provider, at the request of a party the case must be referred to a screening panel. After the panel issues its recommendations, the plaintiff may reject them and proceed with the action. Kan. Stat. Ann. § 60-3501, *et seq.* The procedure for claims against health care providers is similar, although referral to the screening panel is compulsory. Kan. Stat. Ann. § 65-4901, *et seq.*

Restitution - Crime Victims Restitution Statutes
Mandatory, unless the court finds compelling circumstances to render restitution unworkable. Kan. Stat. Ann. § 21-6607. An item's fair market value is the usual standard for calculating restitution. State v. Hall, 247 P.3d 1050 (Kan. App. 2011). Damaged retail inventory is to be valued at wholesale cost. Id. A judgment of restitution is to be enforced through the same procedures as a civil judgment. Kan. Stat. Ann. § 60-4301. The amount of any restitution paid shall be set off against any subsequent civil recovery. Kan. Stat. Ann. § 60-4304. Insurance companies should be considered an aggrieved party entitled to restitution. State v. Blaylock, 2017 Kan. App. Unpub. LEXIS 134; see State v. Hand, 257 P.3d 780 (Kan. App. 2011), rev'd on other grds., 304 P.3d 1234 (Kan. 2013).

Right to Repair/Notice Statutes – Construction Cases
Kan. Stat. Ann. §§ 60-4701 to 60-4710 *Procedure Civil – Construction Defects.*

Spoliation – Remedies for Spoliation
The tort of spoliation of evidence is not recognized absent an independent tort, contract, agreement, voluntary assumption of duty, or special relationship of the parties. Superior Boiler Works, Inc. v. Kimball, 259 P.3d 676 (Kan. 2011). Court may give the jury an adverse inference instruction if a party had evidence in its possession that the party destroyed, concealed or failed to produce. Tichenor v. City of Topeka, 2012 WL 3136219 (Kan. Ct. App. 2012).

Statutes of Limitation and Repose*
Statutes of Limitation

Tort: Personal injury, medical malpractice and property damage, 2 years. Kan. Stat. Ann. § 60-513; see also Statute of Repose, below.

Contract: Oral, 3 years. Kan. Stat. Ann. § 60-512. Written, 5 years. Kan. Stat. Ann. § 60-511.

Other State: If the cause of action arises in another state and is barred by the other state's statute of limitation, the cause of action is barred in Kansas also, except in favor of a Kansas resident who has held the cause of action from the time it accrued. Kan. Stat. Ann. § 60-516.

* For UCC Claims and claims based on improvements to real property and/or claims brought by condominium associations related to construction defects, see the notes at the end of the Table of Contents.

State Government: The applicable statute of limitation is the statute that would apply if a private person would be liable under the same circumstances. Kan. Stat. Ann. § 75-6103; Gehring v. State, 886 P.2d 370 (Kan. 1995).

Local Government: Written notice of claim must be filed with the municipality. Action may not be commenced until after the claimant has received notice from the municipality that it has denied the claim or until after 120 days has passed following the filing of the notice of claim, whichever occurs first. A claim is deemed denied if the municipality fails to approve the claim in its entirety within 120 days unless the interested parties have reached a settlement before the expiration of that period. The applicable statute of limitation is extended 90 days from the date the claim is denied or deemed denied. Kan. Stat. Ann. § 12-105b. The applicable statute of limitation is the statute that would apply if a private person would be liable under the same circumstances. Kan. Stat. Ann. § 75-6103; Gehring v. State, 886 P.2d 370 (Kan. 1995).

Statutes of Repose

Products: After 10 years from time of delivery, rebuttable presumption arises that product exceeded its useful safe life, barring cause of action, unless expressly warranted for longer period. Presumption may only be rebutted by clear and convincing evidence. Statute does not affect causes of action for contribution or indemnity, claims for intentional misrepresentation or fraudulent concealment, or claims arising from certain toxic substances including asbestos. Kan. Stat. Ann. § 60-3303.

Generally: Most tort causes of action for damage to persons or property are barred more than 10 years beyond the time of the act giving rise to the cause of action. Kan. Stat. Ann. § 60-513.

Subrogating in the Insured's Name – Real Party in Interest

Under Kan. Stat. Ann. § 60-217(a), when a loss is partially covered by insurance, the insured is the proper party to bring suit for the entire loss. The insured will then hold in trust for the insurer such part of the recovery as the insurer has paid. When a loss is fully paid by an insurer and the insurer becomes subrogated to all rights of the insured, the right of action against the wrongdoer vests wholly in the insurer. In such case the insurer becomes the real party in interest and must undertake the maintenance of the action for reimbursement. In the partial payment situation where the insured refuses to bring the action or permit his name to be used, the insurer is free to bring the action in its own name and to join the insured as a defendant. Fidelity & Deposit Co. of Maryland v. Shawnee State Bank, 766 P.2d 191 (Kan. Ct. App. 1988).

KENTUCKY

Anti-Subrogation Rule: Subrogation by Insurer Against Insured
Although there is no case directly on point, in Liberty Mut. Fire Ins. Co. v. Jefferson Family Fair, Inc., 521 S.W.2d 244 (Ky. 1975), the court held that a landlord's insurer could not subrogate against a tenant when the lease implied that the tenant would be an insured under the landlord's insurance policy.

Comparative/Contributory Negligence
Pure Comparative. Ky. Rev. Stat. Ann. § 411.182.

Contribution and Implied Indemnity
Contribution: Although Kentucky has a contribution statute, Ky. Rev. Stat. Ann. § 412.030, it has been partially abrogated. Contribution is unavailable when the party claiming recovery and the party from which recovery is sought are both parties to the same action. Dix & Assocs. Pipeline Contractors, Inc. v. Key, 799 S.W.2d 24 (Ky. 1990). The law is unsettled as to whether contribution is actionable when the object of the claim was not a party to the underlying action by the injured person. CSX Transp. v. GE, 2009 U.S. Dist. LEXIS 94304 (W.D. Ky. 2009); Degener v. Hall Contracting Corp., 27 S.W.3d 775 (Ky. 2000). The statute of limitations is 5 years from judgment and/or payment. Baker v. Richeson, 440 S.W.2d 272 (Ky. 1969) (applying Ky. Rev. Stat. Ann. § 413.120).

Implied Indemnity: Common law indemnity is permitted in two classes of cases: (1) Where the party claiming indemnity has not been guilty of any fault, except technically, or constructively, as where an innocent master was held to respond for the tort of his servant acting within the scope of his employment; or (2) where both parties have been in fault, but not in the same fault, towards the party injured, and the fault of the party from whom indemnity is claimed was the primary and efficient cause of the injury. Degener. A claim for indemnity need not await payment of the liability on which indemnity is sought but may be asserted in the original tort action. Id. The statute of limitations is 5 years from judgment and/or payment. Degener (citing the "catch all" provision of Ky. Rev. Stat. Ann. § 413.120).

Damages - Measure of Damages to Property
Real Property: Permanent Damage: Difference in the fair market value of the property immediately before and immediately after the injury. Cent. Ky. Drying Co. v. Commonwealth, 858 S.W.2d 165 (Ky. 1993). Temporary Damage: Reasonable costs of repair not to exceed the diminution in value caused by the injury. Ellison v. R & B Contracting, Inc., 32 S.W.3d 66 (Ky. 2000). A party who suffers temporary damage need not show a diminution in value, as it may be inferred from the value of repair costs. Ellison.

Personal Property: Total Loss: Reasonable value of the property at the time and place of destruction. Continental Ins. Co. v. Plummer, 904 S.W.2d 231 (Ky.1995). For loss of certain household goods and clothing, measure of damages is the monetary value to the owner, for any reasonable purpose, not including sentimental value. Columbia Gas of Kentucky, Inc. v. Maynard, 532 S.W.2d 3 (Ky.1976). Partial Loss: Diminution in fair market value, from immediately before to immediately after the injury. Ecklar-Moore Express, Inc. v. Hood, 256

S.W.2d 33 (Ky. 1953). A repair bill can be offered as evidence to show the difference in fair market value and, if unchallenged, is sufficient to sustain a verdict. McCarthy v. Hall, 697 S.W.2d 955 (Ky. Ct. App. 1985).

Experts - States Following the Daubert/Kumho Doctrine
Follows Daubert and Kumho Tire pursuant to Ky. R. Evid. 702 and Toyota Motor Corp. v. Gregory, 136 S.W.3d 35 (Ky. 2004).

Interest - Pre & Post Judgment
Prejudgment

Contract Actions/Liquidated Damages
Rate: 8% or the contract rate, but not to exceed the amount set forth in Ky. Rev. Stat. Ann. § 360.010.
Accrual Date: Date payment due. Pursley v. Pursley, 144 S.W.3d 820 (Ky. 2004).
Tort Actions (Unliquidated Damages)
Rate: Discretionary, up to the amount maximum allowed by Ky. Rev. Stat. Ann. § 360.010. Nucor Corp. v. General Elec. Co., 812 S.W.2d 136 (Ky. 1991); Fields v. Fields, 58 S.W.3d 464 (Ky. 2001).
Accrual Date: Discretionary, as decided by the court. Nucor Corp.

Post Judgment

Contract Actions
Rate: Contract rate or 6%, compounded annually. Ky. Rev. Stat. Ann. § 360.040.
Accrual Date: Date of judgment. Id.

Tort Actions (Unliquidated Damages)
Rate: 6% or less, at the court's discretion, after a hearing. Ky. Rev. Stat. Ann. § 360.040.
Accrual Date: Date of judgment. Id.

Joint and Several Liability
Several liability. Liability for each tortfeasor is limited to equitable share of the obligation to each claimant in accordance with the respective percentages of fault. Ky. Rev. Stat. Ann. § 411.182.

Judgment Liens
An action upon a judgment must be commenced within fifteen years from the date of the last execution. Ky. Rev. Stat. § 413.090.

Landlord-Tenant Subrogation ("Sutton Doctrine")
Leases will be literally interpreted if possible. A lease requiring the landlord to insure the premises "as lessor's and lessee's interest may appear" intends both parties to benefit from the insurance and precludes subrogation against the tenant. Liberty Mut. Fire Ins. Co. v. Jefferson Family Fair, Inc., 521 S.W.2d 244 (Ky. 1975).

Made Whole Doctrine
An insurer's right of subrogation is rooted in equity, and generally only arises when the insured has been fully compensated. The priority of payments can be modified by contract provided the agreement does violate principles of equity. Wine v. Globe American Casualty Co., 917 S.W.2d 558 (Ky. 1996).

Professional Malpractice Filing Requirements (Affidavit of Merit)
A malpractice claim against a health care provider must be accompanied by a certificate of merit declaring that the claimant has consulted with a medical expert who is qualified to give expert testimony as to the standard of care. Ky. Rev. Stat. Ann. 411.167.

Restitution - Crime Victims Restitution Statutes
Mandatory. Ky. Rev. Stat. Ann. § 532.032. The amount of restitution must be based on reliable facts, Wiley v. Com., 348 S.W.3d 570 (Ky. 2010), and should consider defendant's ability to pay. Wallace v. Com., 2015 WL 603395 (Ky. Ct. App. 2015). If restitution is a condition of probation or conditional discharge, the amount of restitution may be capped at the greater of $100,000 or twice the amount of the gain from the crime. Ky. Rev. Stat. Ann.
§ 533.030. An insurer may not seek restitution because they do not fall within the category of victims or aggrieved persons. Clayborn v. Com., 701 S.W.2d 413 (Ky. Ct. App. 1985). If restitution is a condition of probation or conditional discharge, a civil award must be reduced by the amount of restitution paid. Ky. Rev. Stat. Ann.
§ 533.030.

Right to Repair/Notice Statutes – Construction Cases
Ky. Rev. Stat. Ann. §§ 411.250 to 411.266 *Rights of Action and Survival of Actions – Construction Professionals Opportunity to Repair.*

Spoliation – Remedies for Spoliation
Kentucky does not recognize a tort cause of action for spoliation of evidence. Spoliation may be remedied through evidentiary rules and "missing evidence" instructions. Monsanto Co. v. Reed, 950 S.W.2d 811 (Ky. 1997). The missing evidence instruction allows, but does not require, the jury to infer that the destroyed evidence would be adverse to the party who destroyed it and favorable to the other party, if the jury finds that the evidence was lost intentionally and in bad faith. University Medical Center, Inc. v. Beglin, 375 S.W.3d 783 (Ky. 2011). Before a missing evidence instruction can be given, there must be some intentional conduct to hinder discovery on the part of the party who is unable to produce the requested evidence. Adams v. Lexington-Fayette Urban County Government, 2009 WL 350600 (Ky. App. 2009).

Statutes of Limitation and Repose[*]
Statutes of Limitation

Tort: Personal injury: 1 year. Ky. Rev. Stat. Ann. § 413.140; but cf. Ky. Rev. Stat. Ann. § 304.39-230 (motor vehicle accidents). Real property: 5 years. Ky. Rev. Stat. Ann.

[*] For UCC Claims and claims based on improvements to real property and/or claims brought by condominium associations related to construction defects, see the notes at the end of the Table of Contents.

§ 413.120. Personal property: 2 years. § 413.125. Building code violations: 1 year from when the damage is discovered or could have been discovered. Ky. Rev. Stat. Ann. § 198B.130.
Contract: Written: 15 years § 413.090, unless executed after 7/15/2014, then 10 years. Ky. Rev. Stat. Ann. § 413.160. Oral: 5 years. Ky. Rev. Stat. Ann. § 413.120.
State Government: Any claims against the Commonwealth must be filed with the Kentucky Claims Commission within 1 year from the time the claim for relief accrued, subject to the following deadlines: Property damage: 1 year from the time of the negligent act. Personal injury, including medical malpractice: 1 year from the time the injury is first discovered or should have been discovered. Ky. Rev. Stat. Ann. § 49.120.

Statutes of Repose

Products: No statute of repose *per se*. However, in products liability actions filed more than 5 years after the date of sale to the first consumer, or more than 8 years after the date of manufacture, there is a rebuttable presumption that the product was not defective. Ky. Rev. Stat. Ann. § 411.310.
Improvements to Real Property: Statute of repose, Ky. Rev. Stat. Ann. § 413.135, held unconstitutional. Perkins v. Northeastern Log Homes, 808 S.W.2d 809 (Ky. 1991); Bray v. KMR Construction Co., 2004 WL 758392 (Ky. App. 2004). For building code violations: 10 years from the earlier of the: 1) first occupation; or 2) settlement date. Ky. Rev. Stat. Ann. § 198B.130.
Medical Malpractice: 5 years from the negligent act or omission. Ky. Rev. Stat. Ann. § 413.140.
State Government: Personal injury: 2 years from the negligent act or omission. Medical malpractice against the state: 3 years from the negligent act or omission. Ky. Rev. Stat. Ann. § 49.120.

Subrogating in the Insured's Name – Real Party in Interest

Actions must be prosecuted in the name of the real party in interest. Ky. CR Rule 17.01. An insurer has no right to independently maintain a cause of action as long as the insured is pursuing a claim, although the insurer may intervene in the insured's action. Government Employees Ins. Co. v. Winsett, 153 S.W.3d 862 (Ky. Ct. App. 2004).

LOUISIANA

Anti-Subrogation Rule: Subrogation by Insurer Against Insured
An insurer cannot subrogate against its own insured if subrogor and target are both covered by the same policy. Olinkraft, Inc. v. Anco Insulation, Inc., 376 So.2d 1301 (La. Ct. App. 1979). When underwriters issue a policy covering an additional assured and waiving 'all subrogation' rights against it, they cannot recoup from the additional assured any portion of the sums they have paid to settle a risk covered by the policy, even on the theory that the recoupment is based on the additional assured's exposure for risks not covered by the policy. Lloyd's Syndicate 457 v. FloaTEC, L.L.C., 921 F.3d 508 (5th Cir. 2019). When insurer covers both subrogor and target under separate policies, legal doctrine of extinguishment by confusion, in which the qualities of creditor and debtor become merged in the same person, prevents action against target. Johnson v. Deselle, 596 So.2d 261 (La. Ct. App. 1992); Norris v. Allstate Ins. Co., 293 So.2d 918 (La. Ct. App. 1974); La. Civ. Code Ann. art. 1903.

Comparative/Contributory Negligence
Pure Comparative, except for intentional torts. La. Civ. Code Ann. art. 2323.

Contribution and Implied Indemnity
Contribution: After the statutory abrogation of joint-and-several liability, contribution is not recognized, except in cases of intentional torts. Hamway v. Braud, 838 So.2d 803 (La. Ct. App. 2002). A tortfeasor who has paid more than his share of a solidary obligation may seek reimbursement from the other tortfeasors for their respective shares of the judgment which are proportionate to the fault of each. Id.

Implied Indemnity: Implied indemnity arises when the fault of the person seeking indemnification is solely constructive or derivative, from failure or omission to perform some legal duty, and may only be had against one who, because of his act, has caused such constructive liability to be imposed. A party who is actually negligent or at fault cannot recover tort indemnity. Hamway. There is a 1-year statute of limitations, which runs from the date of judgment and/or payment. Orlando v. E.T.I., 15 So.3d 951 (La. 2008) (applying La. Civ. Code Ann. art. 3492).

Damages - Measure of Damages to Property
Real Property: The reasonable cost of repairing property to its original condition, or, at the election of the plaintiff, diminution of value from immediately before to immediately after the harm. But if repair costs are disproportionate to property value or economically wasteful, plaintiff is limited to diminution of value, unless plaintiff has a personal reason for seeking restoration. Roman Catholic Church of Archdiocese of New Orleans v. La. Gas Service Co., 618 So.2d 874 (La. 1993). In contract cases, if the contract sets the measure of damages, the contract will control. Corbello v. Iowa Production, 850 So.2d 686 (La. 2003).

Personal Property: Fair market value prior to the incident, less any applicable salvage value. Southern Message Service, Inc. v. Commercial Union Ins. Co., 647 So.2d 398 (La. Ct. App. 1994). Generally, recovery for damage to an automobile is limited to the cost of repair plus, if appropriate, stigma damages. Romco, Inc. v. Broussard, 528 So.2d 231 (La. Ct. App. 1988).

However, if the vehicle is totally destroyed or the cost of repair exceeds its value, the measure of damages is the value of the vehicle less its salvage value. Romco, Inc. Loss of use damages may be recoverable for the period of time necessary to repair a vehicle. Romco, Inc. When property can be adequately repaired, the measure of damages is the cost of restoration, plus the loss of use during the time reasonably necessary for the repairs. The period of compensatory loss of use is the time required to secure the repair of the property in the exercise of proper diligence. Jensen v. Matute, 289 So. 3d 1136 (La. Ct. App. 2020).

Experts - States Following the Daubert/Kumho Doctrine
Follows Daubert. La. Code Evid. § art. 702; State v. Foret, 628 So. 2d 1116 (La. 1993); Independent Fire Ins. Co. v. Sunbeam Corp., 755 So. 2d 226 (La. 2000).

Interest - Pre & Post Judgment
Prejudgment

Contract Actions
Rate: Contract rate or, if not, the rate established by La. R.S. § 13:4202(B). La. Civ. Code art. 2000; La. R.S. § 9:3500.
Accrual Date: Date due. La. Civ. Code art. 2000; see La. Civ. Code art. 1989 (from the time the obligor is put in default); L & A Contracting Co. v. Ram Indus Coatings, Inc., 762 So.2d 1223 (La. Ct. App. 2000) (date of breach). However, for unliquidated or quasi-contractual claims, interest runs from the date of judgment. Crestent City Cabinets & Flooring, L.L.C. v. Grace Tama Dev. Co., 203 So.3d 408 (La. Ct. App. 2016).

Tort (ex delicto) Actions
Rate: The legal rate established in La. R.S. § 13:4202(B). See La. R.S. § 13:4203; La. R.S. § 9:3500.
Accrual Date: The date of judicial demand. La. R.S. § 13:4203; Corbello v. Iowa Prod., 850 So.2d 686 (La. Feb. 25, 2003).
Offer of Judgment
The form of an offer of judgment can impact the recovery of interest. See La. Code Civ. Proc. Ann. art. 970.

Post Judgment

Contract Actions
Rate: The legal rate established in La. R.S. § 13:4202(B). See La. Civ Code art. 2000; La. R.S. § 9:3500; La. Code Civ. Proc. Ann. art. 1921.
Accrual Date: Same as prejudgment.

Tort Actions
Rate: The legal rate established in La. R.S. § 13:4202(B). See La. R.S. § 13:4203; La. Civ. Code art. 2000; La. R.S. § 9:3500; La. Code Civ. Proc. Ann. art. 1921.
Accrual Date: Date of judicial demand. La. R.S. § 13:4203.

Joint and Several Liability
Modified joint and several liability. A joint tortfeasor shall not be liable for more than his degree of fault unless joint tortfeasors conspire to commit an intentional or willful act. La. Civ. Code Ann. art. 2324.

Judgment Liens
Generally, judgments expire after ten years. La Code Civ. Proc. Ann. art. 3501. A judgment may be revived by filing a motion with the court prior to the expiration of the original judgment. La. Code Civ. Proc. Ann. art. 2031.

Landlord-Tenant Subrogation ("Sutton Doctrine")
In commercial settings, where there is no suggestion of unfair bargaining, an express requirement in the lease that the lessor insure the leased premises shifts the risk of loss to the lessor's insurer. Home Ins. Co. v. National Tea Co., 588 So.2d 361 (La. 1991). The analysis in Home Ins. suggests that the terms of the lease will govern whether the parties intended to shift the risk of loss to insurance. In Aetna Cas. & Sur. Co. v. Allen, 132 So.2d 240 (La. Ct. App. 1961), the court held that the subrogee of the owner of a building has the right to recover against the employee of a commercial tenant for damage done to the building.

Made Whole Doctrine
An insured must be made whole before the insurer can claim any portion of a recovery. La. Civ. Code Ann. art. 1826; New Orleans Assets, L.L.C. v. Woodward, 363 F.3d 372 (5th Cir. 2004).

Professional Malpractice Filing Requirements (Affidavit of Merit)
All malpractice claims against health care providers, other than claims validly agreed for submission to a lawfully binding arbitration procedure, shall be reviewed by a medical review panel. La. R.S. 40:1231.8.

Restitution - Crime Victims Restitution Statutes
Mandatory. La. Code Crim. Proc. Ann. art. 883.2. Defendant's ability to pay should be considered in setting a payment schedule. Id.; La. Code Crim. Proc. Ann. art. 895.1. Restitution pursuant to a probation sentence shall be in a reasonable sum not exceeding the victim's actual pecuniary loss. La. Code Crim. Proc. Ann. art. 895.1; State v. Reynolds, 772 So.2d 128 (La. Ct. App. 2000). Judgment may be entered for amount of restitution, enforceable in civil or criminal court. La. Code Crim. Proc. Ann. art. 886. Restitution ordered by the court as a condition of probation shall be deemed a civil money judgment. La. Code Crim. Proc. Ann. art. 895.1. The amount of such restitution paid shall be credited against the amount of any subsequent civil judgment against the defendant and in favor of the victim. Id.; Lagrone v. Neely, 2011 WL 766689 (La. Ct. App. 2011). Insurance companies may not seek restitution for reimbursement of victims' losses because they are not "victims" within the meaning of Louisiana statute. State v. Perez, 966 So.2d 813 (La. Ct. App. 2007).

Right to Repair/Notice Statutes – Construction Cases
La. R.S. §§ 9:3141 to 9:3150 *Sale – New home warranty act.*

La. R.S. §§ 51:912.1 to 51:912.10 *Particular Goods – New Manufactured and Modular Home Warranty Act.*

Spoliation – Remedies for Spoliation

Louisiana recognizes the tort of intentional spoliation of evidence. Ritter v. Loraso, 234 So.3d 1096 (La. Ct. App. 2017). Negligent spoliation is not recognized as a tort. Reynolds v. Bordelon, 172 So.3d 589 (La. 2015). When a litigant fails to produce evidence within his reach, the courts have applied a presumption that the evidence would have been detrimental to his case. Id.

Statutes of Limitation and Repose*

Statutes of Limitation (Prescription)

Tort: 2 years for actions arising after July 1, 2024. La. Civ. Code Ann. art. 3493.11. The prescription begins to run from the day injury or damage is sustained. Id. The prescription period does not run against minors or interdicts in actions involving permanent disability and brought pursuant to the Louisiana Products Liability Act or state law governing product liability actions in effect at the time of the injury or damage. Id.

Immovable property - for actions arising before July 1, 2024 - when damage is caused to immovable property, the 1-year prescription commences to run from the day the owner acquired, or should have acquired, knowledge of the damage La. Civ. Code Ann. art. 3493; see La. Civ. Code Ann. art. 462-470, et. seq. (defining immovables).

Immovable property - for actions arising after July 1, 2024 - when damage is caused to immovable property, the 2-year period begins to run on the day the owner of the immovable acquired, or should have acquired, knowledge of the damage. La. Civ. Code Ann. art. 3493.12.

Contract: 10 years. La. Civ. Code Ann. art. 3499; Babkow v. Morris Bart, P.L.C., 726 So.2d 423 (La. Ct. App. 1998); but see La. Civ. Code Ann. art. 2762 (if a building, which an architect or workman has undertaken to make by the job, falls to ruin because of bad workmanship, he shall bear the loss if the building falls to ruin within 10 years for stone or brick buildings and 5 years if wood or frames filled with bricks); Orleans Parish Sch. Bd. v. Pittman Constr. Co., 260 So.2d 661 (La. 1972) (stating that Art. 2762 states an implied warranty claim); August v. Grand Lake Constr., 837 So.2d 78 (La. Ct. App. 2002) (the time when a cause of action may be asserted is governed by the prescriptive articles). For breach of warranty against contractor or architect for defective construction: 10 years from discovery. La. Civ. Code Ann. art. 3500; Orleans Parish Sch. Bd.

Action to revoke: must be brought within 1-year from time oblige learned or should have learned of the act, or the result of the failure to act, of the obligor, but never after 3-years from the date of the act or result. La. Civ. Code Ann. art. 2041.

Sales/Warranty (moveable or immovable): 2-years from the date of delivery or 1-year from the day the defect was discovered by the buyer, whichever occurs first. La. Civ. Code Ann. art. 2534(A). If the sellers knew of the defect or is presumed to have known, 1 year from the day the buyer discovers the defect or 10 years from the perfection of the contract of sale, whichever occurs first. La. Civ. Code art. 2534(B). See La. Civ. Code art. 2534(C) (tolling prescription); see also La. Civ. Code Ann. art. 2502 (warranty against redhibitory

* For UCC Claims and claims based on improvements to real property and/or claims brought by condominium associations related to construction defects, see the notes at the end of the Table of Contents.

defects); La. Civ. Code Ann. art. 2545 (seller who knows of defect; presumption of knowledge); see also La. Civ. Code Ann. art. 462-470 et. seq. (defining immovables); La. Civ. Code. Ann. art. 471-475 et. seq. (defining movables).
State Government: 10 years. La. R.S. § 49:112.
Local Government: Limitation which generally governs the type of action applies. See, e.g., Morris v. Westside Transit Line, 841 So.2d 920 (La. Ct. App. 2003) (applying 1-year limitation to tort action against parish).

Statutes of Repose (Peremption)

Improvements to Real Property: For the planning, construction, design, or building of immovable or movable property or the construction of immovables, or improvement to immovable property: 5 years from registry of mortgage, acceptance of work or occupation by owner. La. R.S. § 9:2772; but see La. R.S. § 9:2772(a)(1)(c) (90 days from service of main demand for contribution, indemnity or third-party claims). If the injury occurs during the fifth year, an action may be brought within 1 year after the date of injury, but in no event more than 6 years. Id.

Actions against Engineers, Architects and Other Professionals: No action, whether based upon tort, breach of contract or otherwise out of an engagement to provide movable or immovable planning, construction, design or building, shall be brought unless filed within 5 years from the registry in the mortgage office of acceptance of work by owner, the date owner occupied or took possession of the improvement, the date the person furnishing the services completed its services, if the person did not render services preparatory to construction or the person furnished preparatory services but did not perform any inspection of the work. La. R.S. § 9:5607. The provisions of § 9:5607 supersede La. R.S. § 9:227, La. Civ. Code Ann. art. 2762 and 3545. La. R.S. § 9:5607.

Subrogating in the Insured's Name – Real Party in Interest

A subrogated cause of action, arising either by agreement or by effect of law, shall be enforced judicially by: (1) the subrogor and the subrogee, when the subrogation is partial; or (2) the subrogee, when the entire cause of action is subrogated. La. Code Civ. Proc. Ann. art. 697; La. Civ. Code Ann. art. 1826. To overcome Art. 697, an insurer can assign its subrogation interest to the insured, with the parties agreeing that the insured will hold the amount paid by the insurer in trust in the event of recovery. The insured may then proceed to recover in its name. Carl Heck Engineers, Inc. v. Daigle, 219 So.2d 294 (La. Ct. App. 1969). If the insured assigns its entire cause of action to the insurer, only the insurer may recover from the responsible party, even if the insurance policy did not fully compensate the insured. Caro Properties (A), LLC v. City of Gretna, 3 So.3d 29 (La. Ct. App. 2008). When the assignment is in full, the action must be in the name of the assignee. La. Code Civ. Proc. Ann. art. 698. All rights may be assigned, with the exception of those pertaining to obligations that are strictly personal. The assignee is subrogated to the rights of the assignor against the debtor. La. Civ. Code Ann. art. 2642.

MAINE

Anti-Subrogation Rule: Subrogation by Insurer Against Insured
"[A]n insurer may not sue its own insured for damages covered under the policy." Willis Realty Assocs. v. Cimino Constr. Co., 623 A.2d 1287 (Me. 1993). However, if the policy issuing first-party benefits contains separate property and liability coverages, and if the defendant is insured only under the liability portion, subrogation may proceed. Philadelphia Indem. Ins. Co. v. Farrington, 37 A.3d 305 (Me. 2012).

Comparative/Contributory Negligence
Modified Comparative – 49%. Me. Rev. Stat. tit. 14, § 156.

Contribution and Implied Indemnity
Contribution: Contribution arises at common law rather than statute. Otis Elevator Co. F.W. Cunningham & Sons, 454 A.2d 335 (Me. 1983). While contribution is allowed for joint, negligent tortfeasors, it is not allowed for joint, intentional tortfeasors. Id.; Bedard v. Greene, 409 A.2d 676 (Me. 1979). A settling party seeking contribution should extinguish the claims of the party it seeks contribution from in the release it secures. S.R. Weiner & Assocs. v. Kohl's Dep't Stores, 2011 Me. Super. LEXIS 218 (Aug. 11, 2011). A party may pursue contribution in the plaintiff's lawsuit or in a subsequent lawsuit. St. Paul Ins. Co. v. Hayes, 676 A.2d 510 (Me. 1996). The statute of limitations is 6 years from the date of payment or judgment. Cyr v. Michaud, 454 A.2d 1376 (Me. 1983) (applying Me. Rev. Stat. tit. 14, § 752); Johanson v. Dunnington, 785 A.2d 1244 (Me. 2001). Contribution claims against architects and engineers are subject to a 4-year statute of limitations and a 10-year statute of repose. McKeeman v. Cianbro Corp., 1999 Me. Super. LEXIS 308 (Nov. 9, 1999), overruled on other grounds, 804 A.2d 406 (Me. 2002).

Implied Indemnity: In non-contractual situations, Maine does not recognize a cause of action for indemnity arising from a disparity of negligence between two parties responsible for another's injury. Roberts v. American Chain & Cable Co., Inc., 259 A.2d 43 (Me. 1969). Indemnity may be agreed to expressly, or a contractual right of indemnification may be implied from the nature of the relationship between the parties. Emery v. Hussey Seating Co., 697 A.2d 1284 (Me. 1997). In a products case, a manufacturer of a defective product must indemnify a seller when (1) the seller reasonably relied upon the manufacturer's knowledge and skill in making the product free from defects; and (2) that any negligence on the seller's part consists of, at most, a failure to discover the defect. Id. A party may pursue indemnification in the plaintiff's lawsuit or in a subsequent lawsuit. St. Paul Ins. Co.. The statute of limitations is 6 years from the date of payment. Me. Rev. Stat. tit. 14, § 752; Cyr; Johanson. Indemnification claims against architects and engineers are subject to a 4-year statute of limitations and a 10-year statute of repose. McKeeman.

Damages - Measure of Damages to Property
Real Property: The diminution in fair market value immediately before to immediately after the damage occurred. Borneman v. Milliken, 124 A. 200 (Me. 1924)

Personal Property: The diminution in fair market value from immediately before to immediately after the damage occurred. Collins v. Kelley, 179 A. 65 (Me. 1935). For damage to automobiles, the owner can recover reasonable rental costs actually expended, up to 45 days, including for destroyed vehicles. Me. Rev. Stat. tit. 14, § 1454.

Experts - States Following the Daubert/Kumho Doctrine
Daubert not adopted. Searles v. Fleetwood Homes of Pennsylvania, Inc., 878 A.2d 509 (Me. 2005). Evidence is admissible if shown to be sufficiently reliable, even if it is not generally accepted in the scientific community. State v. Williams, 388 A.2d 500 (Me. 1978); Me. R. Evid. 702.

Interest - Pre & Post Judgment
Prejudgment

Contract Actions
Rate: Contract rate or, if none, the one-year U.S. Treasury bill rate plus 3%. Me. Rev. Stat. tit. 14, § 1602-B(2), (3).
Accrual Date: The date notice of claim is given or, if none given, the date on which the complaint is filed. Me. Rev. Stat. tit. 14, § 1602-B(5).

Tort Actions
Rate: The one-year U.S. Treasury bill rate plus 3%. Me. Rev. Stat. tit. 14, § 1602-B(3).
Accrual Date: The date notice of claim is served on the defendant personally or by registered or certified mail or, if no notice given, the date on which the complaint is filed. Me. Rev. Stat. tit. 14, § 1602-B(5).

Post Judgment
Rate: The contract rate or, if none, the one-year U.S. Treasury bill rate plus 6%, whichever is greater. Me. Rev. Stat. tit. 14, § 1602-C(1)(A), (1)(B).
Accrual Date: Date of judgment, including any appeal period. Me Rev. Stat. tit. 14, § 1602-C(2).

Joint and Several Liability
Joint and several liability. In cases involving multiple defendants, each defendant is jointly and severally liable to the plaintiff for the full amount of the plaintiff's damages. Me. Rev. Stat. tit. 14, § 156.

Judgment Liens
A judgment lien continues for a period of 20 years from the date of the filing of the writ of execution, and the lien may be renewed once for a period of 20 years. Me. Rev. Stat. tit. 14, § 4651-A.

Landlord-Tenant Subrogation ("Sutton Doctrine")
When a lease does not contain an express agreement addressing the issue of subrogation when the tenant negligently causes a fire, the landlord's insurer may not proceed against the tenant as subrogee. North River Ins. Co. v. Snyder, 804 A.2d 399 (Me. 2002).

Made Whole Doctrine
No case on point.

Professional Malpractice Filing Requirements (Affidavit of Merit)
No certificate requirement. However, medical malpractice cases are screened by a panel of professionals. Me. Rev. Stat. tit. 24, § 2903; see Me. Rev. Stat. tit. 24, § 2853.

Restitution - Crime Victims Restitution Statutes
Discretionary. Me. Rev. Stat. 17-A § 2003 (a court "shall order restitution . . . when appropriate"). Restitution is for economic loss. Me. Rev. Stat. 17-A § 2005. When determining the amount, the court is to consider the victim's contributory misconduct, whether the victim reported the crime within 72 hours and the defendant's ability to pay. Id. Any restitution paid shall be deducted from the amount of any judgment awarded in a civil action. Me. Rev. Stat. 17-A § 2012. Unpaid amounts may be collected as an unpaid civil judgment. Me. Rev. Stat. 17-A § 2019. An insurance company may receive restitution as a "person providing recovery." Me. Rev. Stat. 17-A
§ 2004. The victim may not recover restitution for losses compensated by a collateral source unless he/she suffers economic loss in excess of the collateral compensation. Me. Rev. Stat. 17-A § 1325.

Right to Repair/Notice Statutes – Construction Cases
None found.

Spoliation – Remedies for Spoliation
There is no cause of action for tortious spoliation of evidence. Breen v. Lucas, 2005 WL 2736540 (Me. Super. 2005). Maine has not addressed the question of sanctions for spoliation of evidence in civil cases. However, see Rule 37 of the Maine Rules of Civil Procedure on discovery sanctions. In criminal cases, the State's failure to preserve evidence does not violate a criminal defendant's right to a fair trial unless: (1) the evidence possesses an exculpatory value that was apparent before the evidence was destroyed; (2) the defendant would be unable to obtain evidence of comparable value by other reasonably available means; and (3) the State acted in bad faith in failing to preserve potentially useful evidence. State v. Kremen, 754 A.2d 964 (Me. 2000). In civil cases in federal court in Maine, sanctions for spoliation may include dismissal of the case, the exclusion of evidence, or a jury instruction on the spoliation inference. Driggin v. American Sec. Alarm Co., 141 F.Supp.2d 113 (D. Me. 2000).

Statutes of Limitation and Repose*
Statutes of Limitation

Tort: For personal injury or property damage: 6 years. Me. Rev. Stat. tit. 14, § 752. (Some intentional torts: 2 years. Me. Rev. Stat. tit. 14, § 753.)
Contract: 6 years after cause of action accrues, except if arising from the sale of goods. Me. Rev. Stat. tit. 14, § 752; Me. Rev. Stat. tit. 11, § 725.
Medical Malpractice: 3 years. Me. Rev. Stat. tit. 24, § 2502.

* For UCC Claims and claims based on improvements to real property and/or claims brought by condominium associations related to construction defects, see the notes at the end of the Table of Contents.

Improvements to Real Property: With respect to architects and engineers, 4 years after the malpractice or negligence is discovered. Me. Rev. Stat. tit. 14, § 752-A.
State and Local Government: 2 years. Me. Rev. Stat. tit. 14, § 8110. Written notice must be filed within 365 days of accrual of cause of action, with the state agency and the attorney general, or with the political subdivision, whichever applies. Me. Rev. Stat. tit. 14, § 8107; but see 2019 ch. 14, §§ 1. 2 (the 365 period applies to causes of action that accrue on or after Jan. 20, 2020; 185 day period applies to causes of action accruing prior to that date). Government has 120 days in which to approve or deny the claim. At the expiration of the 120-day period, if the government has not approved the claim, it is deemed denied. Me. Rev. Stat. tit. 14, § 8108. Suit may not be filed before the 120-day period expires. Springer v. Seaman, 658 F.Supp. 1502 (D. Me. 1987).

Statutes of Repose

Improvements to Real Property: With respect to architects and engineers, 10 years after substantial completion of the contract or the services provided. May be modified by mutual agreement of the parties. Me. Rev. Stat. tit. 14, § 752-A.

Subrogating in the Insured's Name – Real Party in Interest

An insurer who has paid all or part of a loss may sue in the name of the assured to whose rights it is subrogated. Me. R. Civ. P. 17(a). An insurer wishing to proceed in the insured's name must serve the insured with formal notice of its intentions at least ten days before filing such a pleading. If the insured also wishes to pursue its own claim, it must advise the insurer in writing within ten days after receipt of the insurer's notice. Me. R. Civ. P. 17(c).

MARYLAND

Anti-Subrogation Rule: Subrogation by Insurer Against Insured
"[I]t has long been recognized that an insurer may not recover from its insured, or a co-insured, as subrogee." Rausch v. Allstate Ins. Co., 882 A.2d 801 (Md. 2005). However, whether a tenant is an insured on the landlord's policy is to be determined on a case-by-case basis. Id.

Comparative/Contributory Negligence
Strict Contributory. Coleman v. Soccer Ass'n of Columbia, 69 A.3d 1149 (Md. 2013). However, the doctrine of last clear chance permits a contributorily negligent plaintiff to recover damages from a negligent defendant if each of the following elements is satisfied: (i) the defendant is negligent; (ii) the plaintiff is contributorily negligent; and (iii) the plaintiff makes a showing of something new or sequential, which affords the defendant a fresh opportunity, of which he fails to avail himself, to avert the consequences of his original negligence. Wooldridge v. Price, 966 A.2d 955 (Md. App. 2009).

Contribution and Implied Indemnity
Contribution: Maryland's Uniform Contribution Among Joint Tortfeasors Act creates a right of contribution among joint tortfeasors. Md. Code Ann. Cts. & Jud. Proc. § 3-1401, *et. seq*. There is no contribution where the injured person has no right of action against the third-party defendant. Montgomery County v. Valk Mfg. Co., 562 A.2d 1246 (Md. 1989). Recovery is by equal shares, not by allocated percentages. Mercy Med. Ctr. v. Julian, 56 A.3d 147 (Md. 2012). A joint tortfeasor is not entitled to a money judgment for contribution until he has, by payment, discharged the common liability or paid more than his pro rata share. Md. Code Ann. Cts. & Jud. Proc. § 3-1402; Hashmi v. Bennett, 7 A.3d 1059 (Md. 2010). A joint tortfeasor who enters into a settlement with the plaintiff is not entitled to recover contribution from a tortfeasor whose liability the plaintiff did not extinguish in the settlement. Md. Code Ann. Cts. & Jud. Proc. § 3-1402. The plaintiff's release of one joint tortfeasor does not relieve the released party from liability to make contribution to another joint tortfeasor unless the release: a) is given before the right of the other tortfeasor to secure a money judgment for contribution has accrued; and b) provides for a reduction, to the extent of the pro rata share of the released tortfeasor, of the injured person's damages against all tortfeasors. Md. Code Ann. Cts. & Jud. Proc. § 3-1405. The plaintiff's release of one joint tortfeasor, whether before or after judgment, does not discharge the other tortfeasors unless the release so provides. Md. Code Ann. Cts. & Jud. Proc. § 3-1404. Although a party pursuing contribution may pursue the claim in the original action, it is not required to do so. Mercy Med. Ctr. Rather, after discharging the judgment or paying more than its pro rata share of the judgment, a party pursuing contribution can file a post-trial motion for contribution against another defendant. Id. (applying Md. Rule 2-614). Alternatively, it can file a second action. Mercy Med. Ctr. The liability of the party seeking contribution must have been adjudicated in the injured party's action, or the party must admit its joint tortfeasor status; such status cannot be adjudicated in a second contribution action. Mercy Med. Ctr.; Jones v. Hurst, 459 A.2d 219 (Md. App. 1983). The statute of limitations is 3 years from the date of payment. Baker, Watts & Co. v. Miles & Stockbridge, 620 A.2d 356 (Md. App. 1993) (applying Md. Code Ann., Ct. & Jud. Proc. § 5-101). Contribution actions related to an improvement to real property are subject to a 20-year statute of repose. Md. Code Ann. Cts. & Jud. Proc. § 5-108(a).

Implied Indemnity: Arises in two situations, involving (a) a special relationship between the indemnitee and indemnitor or (b) when one party is unjustly enriched at the expense of another when the other discharges liability that it is his responsibility to pay. Pulte Home Corp. v. Parex, Inc., 942 A.2d 722 (Md. 2008). To recover the latter type of indemnity, the party asserting the claim cannot be guilty of active negligence. Id. The statute of limitations is 3 years from the date of payment. Md. Code Ann. Cts. & Jud. Proc. § 5-101; Tadjer v. Montgomery County, 487 A.2d 658 (Md. App. 1985). Indemnity actions related to an improvement to real property are subject to a 20-year statute of repose. Md. Code Ann. Cts. & Jud. Proc. § 5-108(a).

Damages - Measure of Damages to Property

Real Property: At plaintiff's election, either the diminution in value from immediately before to immediately after the loss, or the cost of repairs not to exceed the diminution in value, unless the plaintiff has some personal reason to seek restoration. Regal Const. Co. v. West Lanham Hills Citizen's Ass'n, 260 A.2d 82 (Md. 1970). Additionally, a plaintiff is entitled to damages to compensate for the loss of use and enjoyment of the property, which can be calculated as a reasonable rental value. Superior Const. Co. v. Elmo, 102 A.2d 739 (Md. 1954). In breach of contract actions involving defective performance of a construction contract, damages are measured by the reasonable cost of repair as long as it does not involve unreasonable economic waste. If economic waste results, the proper measure of damages is the diminution of market value. Yaffe v. Scarlett Place Residential Condo., Inc., 45 A.3d 844 (Md. App. 2012).

Personal Property: Total Loss: Property's value at the time of destruction. Western Md. R.R. Co. v. Martin, 73 A. 267 (Md. 1909); Bastian v. Laffin, 460 A.2d 623 (Md. App. 1983). Partial Loss: The lesser of the difference between the value of the property immediately before the harm has been done and its value immediately thereafter or the reasonable cost of repairs. Bastian v. Laffin. With respect to motor vehicles, the measure of damages includes a reasonable allowance for loss of use. Berry v. Queen, 233 A.3d 42 (Md. 2020) (citing Washington, B. & A. E. R. Co. v. William A. Fingles, Inc., 109 A. 431 (1920)).

Experts - States Following the Daubert/Kumho Doctrine

Follows Daubert by relying on the Daubert factors to interpret Md. Rule 5-702 and determine the admissibility of expert testimony. Rochkind v. Stevenson, 236 A.3d 630 (Md. 2020). All of the Daubert factors are relevant to the analysis and no single factor is dispositive. Id; see also Katz, Abosch, Windesheim, Gershman & Freedman, P.A. v. Parkway Neuroscience & Spine Inst., LLC, 301 A.3d 42 (Md. 2023) (summarizing the evolution and clarifying the application of Md. Rule 5-702).

Interest - Pre & Post Judgment

Prejudgment

Contract Actions

Rate: Contract rate, or if none, up to 6%. Md. Code Ann. Com. Law. § 12-102; Maryland Nat'l Bank v. Cummins, 588 A.2d 1205 (Md. 1991).

Accrual Date: If liquidated, the date due. I.W. Berman Properties v. Porter Bros., Inc., 344 A.2d 65 (Md. 1975). If unliquidated, at the discretion of the jury. Id.

Tort Actions

Rate: Generally, because damages are unliquidated, interest is not allowed. Taylor v. Wahby, 314 A.2d 100 (Md. 1974). Automobile Bodily Injury: Not more than 10%. Md. Code Ann. Cts. & Jud. Proc. § 11-301(a). Not permitted against the state. Md. Code Ann. Cts. & Jud. Proc. § 5-522(a).

Accrual Date:

Automobile Bodily Injury: Available at the court's discretion from the time the date was filed if the defendant caused unnecessary delay. Md. Code Ann. Cts. & Jud. Proc. § 11-301(a).

Post Judgment

Rate: 10% per annum. Md. Code Ann. Cts. & Jud. Proc. § 11-107; but see Md. Code Ann. Cts. & Jud. Proc. § 11-106 (contracts involving repayment of a loan).

Accrual date: Date of judgment. Md. Rule 2-604.

Joint and Several Liability

Joint and several liability. Concurrent tortfeasors are held jointly and severally liable to prevent the absurd result that would follow from burdening plaintiffs with apportioning damages in cases of indivisible injury. Consumer Prot. Div. v. Morgan, 874 A.2d 919 (Md. 2005).

Judgment Liens

A judgment is valid for a period of twelve years but can be renewed with the filing of a notice with the court clerk. Md. Rule 3-625.

Landlord-Tenant Subrogation ("Sutton Doctrine")

A tenant's liability is determined by the terms of the lease and the reasonable expectations of the parties. If the landlord communicated to the tenant an express or implied agreement to maintain fire insurance, the parties' reasonable expectations may preclude a subrogation claim – in the absence of a lease provision stating that the tenant will surrender the premises in good condition. Rausch v. Allstate Ins. Co., 882 A.2d 801 (Md. 2005); cf. Fowlkes v. Choudhry, 248 A.3d 298 (Md. 2021) (stating that a tenant's reasonable expectations are determined by examining "the lease as a whole, along with any other relevant and admissible evidence"). For multi-unit structures, absent a clear, enforceable provision to the contrary, a court may properly conclude that the parties expected that the landlord would secure fire insurance covering the entire building and, with respect to damage to parts of the building beyond the leased premises, look only to the policy for compensation. Rausch.

Made Whole Doctrine

Insurer is entitled to subrogation from the tortfeasor before the insured is made whole. Stancil v. Erie Ins. Co., 740 A.2d 46 (Md. App. 1999).

Professional Malpractice Filing Requirements (Affidavit of Merit)

Within 90 days of filing a claim against a doctor, architect, engineer or interior designer, a claimant must file a certificate from a qualified expert stating that the licensed professional failed to meet a standard of professional care. Md. Code, Cts. & Jud. Proc. §§ 3-2C-02, 3-2A-04. Claims against doctors must first be submitted for mandatory arbitration, and the certificate must

also state that the departure from standard of care was the proximate cause of the alleged injury. Md. Code, Cts. & Jud. Proc. § 3-2A-04.

Restitution - Crime Victims Restitution Statutes
Discretionary. The court may enter a restitution order unless it finds that the defendant is unable to pay or that extenuating circumstances make restitution inappropriate. Md. Code. Ann. Crim. Proc. §§ 11-603, 11-605. Insurance companies may seek restitution. Payment of restitution to the victim has priority over payment of restitution to any other person. If the victim has been fully compensated by a third-party payor, then the court may order payment to be made to third-party payor directly. Md. Code. Ann. Crim. Proc. § 11-606. A civil verdict shall be reduced by the amount paid under the criminal judgment of restitution. Id.; Md. Code Ann. Crim. Proc. § 11-603.

Right to Repair/Notice Statutes – Construction Cases
None found, generally, but if a claim is made for compensation to the Home Builder Guaranty Fund, see Md. Code Ann. Bus. Reg. § 4.5-705(b) (requiring notice before submitting a claim).

Spoliation – Remedies for Spoliation
There is no tort for the spoliation of evidence. Goin v. Shoppers Food Warehouse Corp., 890 A.2d 894 (Md. App. 2006). The destruction or alteration of evidence by a party gives rise to inferences or presumptions unfavorable to the spoliator, the nature of the inference being dependent upon the intent or motivation of the party. Unintentional destruction by a party gives rise to an inference that the evidence would have been unfavorable to the party. Intentional destruction by a party gives rise to an inference that the evidence would have been unfavorable and that the party was aware that the evidence would have been unfavorable. Miller v. Montgomery County, 494 A.2d 761(Md. App. 1985).

Statutes of Limitation and Repose*
Statutes of Limitation

Improvements to Real Property: 3 years. Md. Code Ann. Cts. & Jud. Proc. § 5-108(c); Statute does not apply if the defendant was in actual possession of the property when the injury occurred. Id.; § 5-108(d)(2)(i).
Tort: Personal injury or property damage: 3 years. Md. Code Ann. Cts. & Jud. Proc. § 5-101; but see Md. Code Ann. Cts. & Jud. Proc. § 5-108(a) (improvements to real property); Md. Code Cts. & Jud. Proc. § 5-115 (causes of action against a manufacturer or seller of a product for personal injury caused by a defective product that arise in a foreign jurisdiction).
Contract: 3 years. Md. Code Ann. Cts. & Jud. Proc. § 5-101.
State Government: Torts: Notice is to be filed with state treasurer within 1 year of injury. Suit may be filed within 3 years of injury if the claim is denied. Md. Code, State Gov't § 12-106. Contracts: Suit for breach of written contract must be filed within 1 year after the later of: (1) the date on which the claim arose; or (2) the completion of the contract that gives rise to the claim. Id.; § 12-202.

* For UCC Claims and claims based on improvements to real property and/or claims brought by condominium associations related to construction defects, see the notes at the end of the Table of Contents.

Local Government: Written notice of claims for unliquidated damages to be given within 1 year. A court may entertain a suit even though the required notice was not given, unless the defendant can affirmatively show that its defense was prejudiced by the lack of notice. Md. Code Ann. Cts. & Jud. Proc. § 5-304.

Statutes of Repose

Improvements to Real Property: Against architect, professional engineer or contractor: no claim more than 10 years after the entire improvement first becomes available for its intended use. Against all others: 20 years after the entire improvement first becomes available for its intended use. Statute does not apply if the defendant was in actual possession of the property when the injury occurred. Md. Code Ann. Cts. & Jud. Proc. § 5-108; cf. Rose v. Fox Pool Corp., 643 A.2d 906 (Md. 1994) (finding that the 20 year period in § 5-108(a) barred claims against product manufacturers whose products do not contain asbestos).

Subrogating in the Insured's Name – Real Party in Interest

If the insured has not been completely compensated by the insurer, the action may be maintained in the insured's name. Poteet v. Sauter, 766 A.2d 150 (Md. App. 2001).

MASSACHUSETTS

Anti-Subrogation Rule: Subrogation by Insurer Against Insured
An insurer "cannot recover by means of subrogation against its own insured." Peterson v. Silva, 704 N.E.2d 1163 (Mass. 1999). However, if the policy issuing first-party benefits contains separate property and liability coverages, and if the defendant is insured only under the liability portion, subrogation may proceed. Commerce Ins. Co. v. Empire Fire & Marine Ins. Co., 879 N.E.2d 1272 (Mass. App. Ct. 2008). In residential tenancies, subrogation is barred unless the lease specifically imposes liability on tenant for negligently caused fires. Peterson. In commercial tenancies, the parties' agreement must be examined to determine if the parties intended the tenant to be insured by the landlord's policy. Seaco Ins. Co. v. Barbosa, 761 N.E.2d 946 (Mass. 2002).

Comparative/Contributory Negligence
Modified Comparative – 50%. Mass. Gen. Laws ch. 231, § 85.

Contribution and Implied Indemnity
Contribution: Authorized by Right of Contribution Among Joint Tortfeasors Statute, Mass. Gen. Laws ch. 231B § 1. The right to contribution exists irrespective of a judgment. Id. A right of contribution exists in favor of a joint tortfeasor who has paid more than his pro rata share of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share. Id. A tortfeasor's contribution share is apportioned on a pro rata basis, by equal shares, not on relative degree of fault. Mass. Gen. Laws ch. 231B § 2; Zeller v. Cantu, 478 N.E.2d 930 (Mass. 1985). Contribution claim may be asserted in the injured party's action or in a separate action. Mass. Gen. Laws ch. 231B § 3. Where a judgment has been entered in an action against two or more tortfeasors, contribution should be enforced in that action by judgment in favor of one against other judgment defendants. Id. If there is a judgment, any separate contribution action against non-parties must be brought within one year after the judgment has become final. Id. If there is no judgment against the tortfeasor seeking contribution, to seek contribution he has to: 1) discharge, by payment, the common liability within the statute of limitations period applicable to the claimant's right of action against him *and* commence any separate action for contribution within one year after payment; or 2) agree while the action is pending against him to discharge the common liability and, within one year after the agreement, pay the common liability and commence his action for contribution. Id. Payment by a joint tortfeasor is a prerequisite to an action for contribution. Robertson v. McCarte, 433 N.E.2d 1262 (Mass. App. Ct. 1982). The 6-year statute of repose for tort actions related to improvements to real property applies to contribution actions. Dighton v. Federal Pacific Electric Co., 506 N.E.2d 509 (Mass. 1987); Mass. Gen. Laws ch. 260 §2B.

Implied Indemnity: A contractual right to indemnification will be implied only in two circumstances. First, when there are unique special factors demonstrating that the parties intended that the putative indemnitor bear the ultimate liability, or second, when there is a generally recognized special relationship between the parties. Indemnity is available where the party seeking indemnification did not join in the negligent act but is nonetheless exposed to derivative or vicarious liability by reason of the negligence of another. Fireside Motors, Inc. v. Nissan Motor Corp., 479 N.E.2d 1386 (Mass. 1985). A person seeking implied indemnity may pursue the indemnification claim even if the claim is settled. Id. An action for implied

contractual indemnification is subject to a 6-year statute of limitations, accruing at the time the implied contract is breached. Fall River Housing Authority v. H. V. Collins Co., 604 N.E.2d 1310 (Mass. 1992); Mass. Gen. Laws ch. 260 § 2.

Damages - Measure of Damages to Property
Real Property: Permanent Damage: Diminution in fair market value from immediately before to immediately after damage occurred and/or restoration costs. Clean Harbors Environmental Services, Inc. v. Boston Basement Technologies, Inc., 916 N.E.2d 406 (Mass. App. Ct. 2009). Temporary Damage: Reasonable cost of repairs plus loss of use damages. Rattigan v. Wile, 841 N.E.2d 680 (Mass. 2006). Repair costs cannot exceed diminution in value. Guaranty-First Trust Co. v. Textron, Inc., 622 N.E.2d 597 (Mass. 1993).

Personal Property: Diminution in fair market value immediately before and immediately after damage occurred; or reasonable cost of restoration or replacement if diminution is unavailable or unsatisfactory as a measure of damages. Irwin v. Deresh, 2012 Mass. App. Div. LEXIS 43 (discussing pets). A vehicle owner should, if proven, also be able to recover stigma (aka Inherent Diminished Value) damages. See McGilloway v. Safety Ins. Co., 174 N.E.3d 1191 (Mass. 2021) (requiring an insurer to pay such damages).

Experts - States Following the Daubert/Kumho Doctrine
Follows Daubert. Expert testimony must be reliable, as shown by Frye's general acceptance standard or, alternatively, under Daubert and Kumho Tire. Com. v. Lanigan, 641 N.E.2d 1342 (Mass. 1994); Commonwealth v. Powell, 877 N.E.2d 589 (Mass. 2007); Commonwealth v. Caruso, 67 N.E.3d 1203 (Mass. 2017).

Interest - Pre & Post Judgment
Prejudgment

Contract Actions
Rate: Contract rate or 12% if the contract is silent. Mass. Gen. Laws ch. 231, § 6C. For cases against the Commonwealth, the contract rate or the rate established in Mass. Gen. Laws ch. 231, § 6I.
Accrual Date: Date of breach or demand. If no date of breach or demand is established, then from the date of commencement of the action. Mass. Gen. Laws ch. 231, § 6C.

Tort Actions
Rate: 12%. Mass. Gen. Laws ch. 231, § 6B; see Greene v. Philip Morris USA, Inc., 491 Mass. 866 (2023) (affirming the use of a 12% interest rate despite the arguable windfall). However, no interest permitted against the Commonwealth. Mass. Gen. Laws ch. 258, § 2.
Accrual Date: Commencement of the action. Mass. Gen. Laws ch. 231, § 6B.

Post Judgment

Contract and Tort Actions
Rate: Same rate as provided for prejudgment interest. Mass. Gen. Laws ch. 235, § 8; see Greene.
Accrual Date: Time judgment entered. Id.

Joint and Several Liability
Joint and several liability. A plaintiff injured by more than one tortfeasor may sue any or all of them for her full damages. Shantigar Foundation v. Bear Mountain Builders, 804 N.E.2d 324 (Mass. 2004).

Judgment Liens
A judgment is presumed to be paid and satisfied at the expiration of twenty years after it was rendered. Mass. Gen. Laws 260 § 20. The presumption is rebuttable, not an absolute bar to an action on the judgment. Brown v. Greenlow, 111 N.E.2d 744 (1953).

Landlord-Tenant Subrogation ("Sutton Doctrine")
Absent an express lease provision establishing a residential tenant's liability, the landlord's insurance is held for the mutual benefit of both the landlord and the tenant. Peterson v. Silva, 704 N.E.2d 1163 (Mass. 1999). Whether a commercial tenant can be held liable for a negligently caused fire depends on the intent of the parties, as evidenced in the lease. Seaco Ins. Co. v. Barbosa, 761 N.E.2d 946 (Mass. 2002).

Made Whole Doctrine
Unsettled. In *dictum*, the court in Apthorp v. OneBeacon Ins. Group, LLC, 935 N.E.2d 365 (Mass. App. Ct. 2010), suggests that the insurer has priority.

Professional Malpractice Filing Requirements (Affidavit of Merit)
In a medical malpractice action, there is no prerequisite to filing a complaint, but within 15 days of the defendant's answer, the claim is to be heard by a tribunal. If the tribunal finds for the defendant, the case can proceed only if the plaintiff files a $6000 bond. Mass. Gen. Laws ch. 231, § 60B; see Mass. Super. Ct. Rule 73.

Restitution - Crime Victims Restitution Statutes
Discretionary, Com. v. Cromwell, 778 N.E.2d 936 (Mass. App. Ct. 2002), at the victim's request. Mass. Gen. Laws ch. 258B, § 3. The payment of restitution is limited to the economic losses caused by the conduct of the defendant and documented by the victim and might include, *inter alia*, medical expenses, court-related travel expenses, property loss and damage, lost pay, or even paid vacation days lost to attend court proceedings. Commonwealth v. Rotonda, 747 N.E. 2d 1199 (Mass. 2001). Insurers may recover restitution in the case of stolen autos. Mass. Gen. Laws ch. 266, § 29. However, the definition of "victim" in Mass. Gen. Laws ch. 258B, § 1, which governs the restitution statute, is limited to natural persons and their family members.

Right to Repair/Notice Statutes – Construction Cases
None found.

Spoliation – Remedies for Spoliation
No cause of action exists for tortious spoliation against a nonparty, absent the violation of a subpoena or an agreement to preserve the evidence. Against parties, remedies for spoliation include an adverse inference against the spoliator, the preclusion of evidence and the dismissal of the case. Fletcher v. Dorchester Mut. Ins. Co., 773 N.E.2d 420 (Mass. 2002).

Statutes of Limitation and Repose*

Statutes of Limitation

Improvements to Real Property: 3 years from the date the cause of action accrues. Mass. Gen. Laws ch. 260, § 2B.

Tort: 3 years. Mass. Gen. Laws ch. 260, §§ 2A, 4; Mass. Gen. Laws ch. 106, § 2-318 (tort-based warranty claims) (see UCC, below).

Contract: For personal injuries: 3 years. Mass. Gen. Laws ch. 260, § 2A. Not involving personal injuries: 6 years. Mass. Gen. Laws ch. 260, § 2.

UCC: Although 4 years from when the breach occurs generally applies, see Mass. Gen. Laws ch. 106, § 2-725, it is 3 years after the date the injury and damages occurs for breach of warranty and negligence claims by someone not in privity with the defendant. Mass. Gen. Laws ch. 106, § 2-318.

State and Local Government: All public entities: Suit cannot be filed unless written notice is given within 2 years after the cause of action accrues, and the agency denies the claim. Failure to deny the claim after 6 months is deemed a denial. Suit must be filed within 3 years of the date the cause of action accrues. Mass. Gen. Laws ch. 258, § 4; Mass. Gen. Laws ch. 260, § 3A. Against the Commonwealth for harm from a state highway or against political subdivisions for harm from a public way: 30 days' notice and 3-year limitation. Mass. Gen. Laws ch. 81, § 18; Mass. Gen. Laws ch. 84, § 18.

Statutes of Repose

Improvements to Real Property: If claim is not against a public agency: 6 years from opening of the improvement to use, or from substantial completion, whichever is earlier. If the improvement is to the real property of a public agency: 6 years from the opening of the improvement to public use, the substantial completion of the improvement, the public agency's acceptance of the project, or the contractor's acceptance of the public agency's substantial completion estimate, whichever is earliest. Mass. Gen. Laws ch. 260, § 2B.

Medical Malpractice: 7 years after the occurrence of the act or commission at issue, except where the action is based upon the leaving of a foreign object in the body. Mass. Gen. Laws ch. 260, § 4.

Subrogating in the Insured's Name – Real Party in Interest

An insurer who has paid all or part of a loss may sue in the name of the assured to whose rights it is subrogated. Mass. R. Civ. P. 17(a); Liberty Mut. Ins. Co. v. National Consolidated Warehouses, 609 N.E.2d 1243 (Mass. App. Ct. 1993).

* For UCC Claims and claims based on improvements to real property and/or claims brought by condominium associations related to construction defects, see the notes at the end of the Table of Contents.

MICHIGAN

Anti-Subrogation Rule: Subrogation by Insurer Against Insured
Generally, an insurer may not bring a subrogation action against its own insured Prestige Cas. Co. v. Mich. Mut. Ins. Co., 99 F.3d 1340 (6th Cir. 1996).

Comparative/Contributory Negligence
Pure Comparative for economic damages. Modified Comparative – 50% for noneconomic damages. Mich. Comp. Laws § 600.2959.

Contribution and Implied Indemnity
Contribution: Authorized by statute, Mich. Comp. Laws § 600.2925a, *et seq.* A right of contribution exists in favor of a tortfeasor who has paid more than his pro rata share and his total recovery is limited to the amount paid by him in excess of his pro rata share. Id. Pro rata share is determined by relative degrees of fault. Mich. Comp. Laws § 600.2925b. Contribution is barred if the object of the contribution claim is not notified of the action or settlement negotiations and given the opportunity to contribute to the settlement of the injured party's claim. Mich. Comp. Laws § 600.2925a. A settlement must extinguish the liability of the contributee. Id. Contribution may be enforced in a separate action. Mich. Comp. Laws § 600.2925c. Statute of limitations is 1 year from judgment or payment, id., subject to the 6-year statute of repose for claims arising from improvements to real property (10 years in case of gross negligence). Mich. Comp. Laws § 600.5839.

Implied Indemnity: Michigan recognizes both common-law indemnity and implied contractual indemnity. Skinner v. D-M-E Corp., 335 N.W.2d 90 (Mich. App. 1983). Common law indemnity is based on the equitable principle that where the wrongful act of one results in another being held liable, the latter party is entitled to restitution from the wrongdoer; the right can only be enforced where liability arises vicariously or by operation of law from the acts of the party from whom indemnity is sought. Id. An implied contract to indemnify arises only if there is a special relationship between the parties or a course of conduct whereby one party undertakes to perform a certain service and impliedly assures indemnification. Id. Both types of indemnity require that the person seeking indemnification be free from active negligence, to be determined from the allegations of the injured party's complaint. Id. Statute of limitations for breach of an implied contract causing damage to financial expectations and economic benefit is 6 years, Fries v. Holland Hitch Co., 162 N.W.2d 672 (Mich. Ct. App. 1968) (applying Mich. Comp. Laws § 600.5837), subject to the 6-year statute of repose for claims arising from improvements to real property (10 years in case of gross negligence). Mich. Comp. Laws § 600.5839.

Damages - Measure of Damages to Property
Real Property: Permanent Damage: Diminution in fair market value from immediately before to immediately after damage occurred. Strzelecki v. Blaser's Lakeside Industries of Rice Lake, Inc., 348 N.W.2d 311 (Mich. Ct. App. 1984). Temporary Damage: Reasonable cost of repairs not to exceed diminution in fair market value from immediately before to immediately after damage occurred. Bayley Products, Inc. v. American Plastic Products Co., 186 N.W.2d 813 (Mich. Ct. App. 1971).

Personal Property: Total Loss: Fair market value at time of loss. Strzelecki v. Blaser's Lakeside Industries of Rice Lake, Inc., 348 N.W.2d 311 (Mich. Ct. App. 1984). Partial Loss: Reasonable cost of repairs not to exceed the pre-loss value of the property. Bluemlein v. Szepanski, 300 N.W.2d 493 (Mich. Ct. App. 1980).

Experts - States Following the Daubert/Kumho Doctrine
Follows Daubert and Kumho Tire. Mich. R. Evid. 702; Gilbert v. Daimler Chrysler Corp., 685 N.W.2d 391 (Mich. 2004).

Interest - Pre & Post Judgment
Prejudgment

Contract Actions
Written Contracts (Complaint filed on or after July 1, 2002)
Rate: Contract rate if the rate is specified in a written contract. If the rate is variable, the rate in effect under the instrument when the complaint is filed. The rate shall not exceed 13% per year compounded annually. Mich. Comp. Laws § 600.6013(7).
For other contract actions (Complaint filed on or after Jan. 1, 1987)
Rate: 1% above the average interest rate paid at auctions of 5-year U.S. treasury notes during the 6 months immediately preceding July 1 and January 1, compounded annually. Rate calculated at 6 month intervals. Interest is calculated on the entire money judgment, including attorney fees and other costs. Mich. Comp. Laws § 600.6013(8).
Accrual Date: The date of filing the complaint. Mich. Comp. Laws § 600.6013(7), (8).

Tort Actions
Rate: 1% above the average interest rate paid at auctions of 5-year U.S. treasury notes during the 6 months immediately preceding July 1 and January 1, compounded annually. Rate calculated at 6 month intervals. Interest is calculated on the entire money judgment, including attorney fees and other costs. Mich. Comp. Laws § 600.6013(8) (Complaints filed on or after Jan. 1, 1987).
Accrual Date: The date of filing the complaint. Mich. Comp. Laws § 600.6013(8).
Settlement Offers: Settlement offers, by plaintiff or defendant, may impact the amount of interest recoverable. See Mich. Comp. Laws § 600.6013(9), (10), (13).
Future damages: See Mich. Comp. Laws § 600.6013(1).
Medical Malpractice: See Mich. Comp. Laws § 600.6013(8), (11), (12).

Post Judgment
Rate/Accrual: Rates referenced above continue until date judgment is satisfied. Mich. Comp. Laws § 600.6013(7), (8).

Court of Claims – Pre and Post Judgment
For cases within the jurisdiction of the Court of Claims, see Mich. Comp. Laws § 600.6455.

Joint and Several Liability
Modified joint and several liability. In an action seeking damages for personal injury, property damage, or wrongful death involving the fault of more than one person, liability is several only and not joint. A person shall not be required to pay damages greater than his percentage of fault. In medical malpractice actions, if the plaintiff is without fault, or if the plaintiff has fault but a judgment against one defendant is uncollectible, the defendants may be jointly and severally liable. Mich. Comp. Laws §§ 600.6304, 600.6312 (criminal conduct).

Judgment Liens
A judgment lien expires after 5 years from the date it is recorded but may be rerecorded once for another period of 5 years not less than 120 days before the expiration of the initial judgment. Mich. Comp. Laws § 600.2809.

Landlord-Tenant Subrogation ("Sutton Doctrine")
In tort: For damage to the *leased* real property, absent an express lease provision establishing tort liability, a tenant is not liable in tort to the landlord or the landlord's insurer. A "yield up" clause, providing that the premises will be surrendered in the same condition as received, is insufficient to establish liability. New Hampshire Ins. Group v. Labombard, 399 N.W.2d 527 (Mich. Ct. App. 1986). For other types of damage, such as damage to personal property and lost income, the tenant may be held liable in tort if it can be shown that the damages were the legal and natural consequence of the tenant's negligence. Antoon v. Community Emergency Medical Service, Inc., 476 N.W.2d 479 (Mich. Ct. App. 1991); Westfield Ins. Co. v. Ritcher, 2021 U.S. Dist. LEXIS 94926 (E.D. Mich.) (discussing damage to other portions of the house, the landlord's personal property, lost rental income and the landlord's additional living expenses). However, Antoon involved uninsured losses and no subrogation.
In contract: In Laurel Woods Apartments v. Roumayah, 734 N.W.2d 217 (Mich. Ct. App. 2007), which did not involve subrogation, the court held that with respect to a tenant's violation of a lease clause holding her liable for damage caused by her acts or omissions, Labombard did not apply to the landlord's claim of contractual liability, and that the tenant was subject to contractual liability. In an unpublished opinion, the Court of Appeals later applied Laurel Woods to subrogation. American States Ins. Co. v. Hampton, 2008 WL 4724279 (Mich. Ct. App. 2008).

Made Whole Doctrine
Michigan is a made whole state. Washtenaw Mut. Fire Ins. Co. v. Budd, 175 N.W. 231 (Mich. 1919). The question of whether a property insurance policy's subrogation clause modifies the equitable made whole doctrine is undecided.

Professional Malpractice Filing Requirements (Affidavit of Merit)
In a medical malpractice action, the plaintiff's attorney shall file with the complaint an affidavit of merit signed by a health professional which states: (a) the applicable standard of practice or care; (b) the opinion that the applicable standard of practice or care was breached; (c) the actions that should have been taken or omitted to have complied with the applicable standard of practice or care; and (d) the manner in which the breach of the standard of practice or care was the proximate cause of the injury. Mich. Comp. Laws § 600.2912d.

Restitution - Crime Victims Restitution Statutes
Mandatory. Defendant is to pay the fair market value of property, or replacement cost if fair market value cannot be determined. Civil judgment is to be reduced by amount of restitution paid. Mich. Comp. Laws 780.766. An insurer has a subrogation right against a party who causes a crime-related loss of its policyholder. People v. Norman, 454 N.W.2d 393 (Mich. Ct. App. 1989). An insurer may recover its investigation costs. People v. Fawaz, 829 N.W.2d 259 (Mich. Ct. App. 2012).

Right to Repair/Notice Statutes – Construction Cases
None found.

Spoliation – Remedies for Spoliation
Michigan does not recognize the tort of spoliation of evidence. When a party destroys or loses material evidence, whether intentionally or unintentionally, and the other party is unfairly prejudiced because it is unable to challenge or respond to the evidence, the spoliating party may be sanctioned. If a party intentionally destroys relevant evidence, a presumption arises that the evidence would have been adverse to that party's case. Teel v. Meredith, 774 N.W.2d 527 (Mich. Ct. App. 2009).

Statutes of Limitation and Repose*
Statutes of Limitation

Tort: Personal injury/property damage: 3 years. Mich. Comp. Laws § 600.5805; but cf. Mich. Comp. Laws § 600.5839(1)(b) (gross negligence claims related to improvements to real estate). Condouminum Projects – common elements: 2 or 3 years depending on when cause of action accrues and control is transfered. Mich. Comp. Laws § 559.276. Malpractice: If not involving improvements to real property, 2 years, or 6 months from the date the claim was discovered or should have been discovered, whichever is later. Mich. Comp. Laws § 600.5805; Mich. Comp. Laws § 600.5838; Mich. Comp. Laws § 600.5838a.

Contract: 6 years. Mich. Comp. Laws § 600.5807. Claims for recovery of personal or property protection benefits. See Mich. Comp. Laws § 500.3145 (generally, 1 year for personal injury and property protection claims but exceptions apply).

Medical Malpractice: 2 years or 6 months after discovery. Mich. Comp. Laws § 600.5838a.

State Government: If involving a public highway or a public building, written notice to be filed with clerk of the court of claims within 120 days. Mich. Comp. Laws §§ 691.1404, 691.1406. If involving a sewer discharge, written notice within 45 days of when the damage was discovered or should have been discovered. Mich. Comp. Laws § 691.1419. In other cases of personal injury or property damage: written notice within 6 months. In all other types of cases, notice to be filed within 1 year. Mich. Comp. Laws § 600.6431. 3-year limitation period, Mich. Comp. Laws §§ 600.6452, 691.1411, but 2 years if involving a public highway. Mich. Comp. Laws §§ 691.1411, 691.1402.

* For UCC Claims and claims based on improvements to real property and/or claims brought by condominium associations related to construction defects, see the notes at the end of the Table of Contents.

Local Government: If involving a public highway or a public building, written notice within 120 days. Mich. Comp. Laws §§ 691.1404, 691.1406. If involving a sewer discharge, written notice within 45 days that the damage was discovered or should have been discovered. Mich. Comp. Laws § 691.1419. 2-year limitation period if involving a public highway. Otherwise, general statutes of limitation apply. Mich. Comp. Laws § 691.1411.

Statutes of Repose

Products: No statute of repose *per se*, but 10 years after the product has been in use, the plaintiff loses any presumptions, such as that of negligence, otherwise afforded by Michigan law. Mich. Comp. Laws § 600.5805.

Improvements to Real Property: 6 years from occupancy, use or acceptance. In cases of gross negligence, claims can be brought within 1 year after the defect is discovered or should have been discovered, but no action can be maintained 10 years from occupancy, use or acceptance. Mich. Comp. Laws § 600.5839; Hinder v. Snyder, 2019 Mich. App. LEXIS 162 (Mich. Ct. App. 2019).

Medical, Attorney Malpractice: 6 years from the act or omission. Mich Comp. Laws §§ 600.5838a, 600.5838b.

Subrogating in the Insured's Name – Real Party in Interest

An action must be prosecuted in the name of the real party in interest, although a party with whom or in whose name a contract has been made for the benefit of another may sue in his or her own name without joining the party for whose benefit the action is brought. Mich. Ct. R. 2.201(B)(1). Under this rule, a subrogation agreement which gives the insured a pro-rated interest in the insurer's recovery of benefits paid allows the action to be brought in the insured's name. Hayes-Albion Corp. v. Whiting Corp., 459 N.W.2d 47 (Mich. Ct. App. 1990). Usually, however, when the insured has not been made whole, both insured and insurer are real parties in interest and either may bring an action in its own right. Gordon Food Service, Inc. v. Grand Rapids Material Handling Co., 454 N.W.2d 137 (Mich. Ct. App. 1989). An insured who has been completely compensated cannot sue. Sinai Hospital of Detroit v. Sivak, 276 N.W.2d 518 (Mich. Ct. App. 1979).

MINNESOTA

Anti-Subrogation Rule: Subrogation by Insurer Against Insured
An insurer is statutorily prohibited from subrogating against another person insured for the same loss, by the same insurer, whether under the same policy or a different policy. M.S.A. § 60A.41; Ill. Farmers Ins. Co. v. Schmuckler, 603 N.W.2d 138 (Minn. Ct. App. 1999) (applying statute to two-policy situation); see RAM Mut. Ins. Co. v. Rohde, 820 N.W.2d 1 (Minn. 2012) ("no right of subrogation can arise in favor of an insurer against its own insured"). Courts have held that Minn. Stat. § 60A.41 wholly protects any party covered by the insurance policy at issue, even if that party is only partially covered under the policy. Depositors Ins. Co. v. Dollansky, 919 N.W.2d 684 (Minn. 2018)

Comparative/Contributory Negligence
Modified Comparative – 50%. Minn. Stat. § 604.01.

Contribution and Implied Indemnity
Contribution: At common law, when two parties share common liability for another's damages, one may be liable to the other for contribution even though the injured party sued only one. Spitzack v. Schumacher, 241 N.W.2d 641 (Minn. 1976). A joint tortfeasor may seek contribution so long as he is not guilty of intentional wrongdoing. Employers Mut. Cas. Co. v. Chicago, S.P., M. & O. R. Co., 50 N.W.2d 689 (Minn. 1951). Minnesota also allows for contribution among persons against whom judgments have been entered. Minn. Stat. § 548.19. When a judgment against multiple tortfeasors is enforced against or paid by one of them, or one of them pays more than a proper share, the paying debtor may continue the judgment in force for purposes of compelling contribution. Id. If, within 10 days after enforcement or payment, the paying debtor files a notice of the amount paid or collected from the debtor in excess of the debtor's proper share, and of the debtor's claim for contribution, the judgment shall remain in effect in favor of the party filing the notice. Id. A joint tortfeasor need not wait until it has made the actual payment to bring a contribution or indemnity claim but may institute a third-party action in conjunction with the original claim. Blomgren v. Marshall Management Services, Inc., 483 N.W.2d 504 (Minn. Ct. App. 1992). A party to the injured person's lawsuit may also pursue contribution in a second action. Anderson v. Gabrielson, 126 N.W.2d 239 (Minn. 1964). Contribution between joint tortfeasors is apportioned in accordance with the degree of negligence attributable to each rather than by equal shares. Spitzack. A cause of action does not arise until the party seeking contribution pays more than its share of the damage. Blomgren. Generally, contribution claims arising under the statute and at common law are subject to a six-year limitation. Minn. Stat. § 541.05. Contribution claims related to improvements to real property are subject to a 2-year statute of limitations, with claims accruing upon payment of a final judgment, arbitration award or settlement, subject to a 14-year statute of repose. Minn. Stat. § 541.051. A party whose share of an obligation to an injured person is uncollectible and which is distributed among the other parties is subject to contribution. Minn. Stat. § 604.02(2).

Implied Indemnity: Indemnity arises out of a contractual relationship, either express or implied by law, which requires one party to reimburse the other entirely. Blomgren. A joint tortfeasor may generally recover indemnity only in the following situations: (1) where the one seeking indemnity has only a derivative or vicarious liability for damage caused by the one sought to be

charged; (2) where the one seeking indemnity has incurred liability by action at the direction, in the interest of, and in reliance upon the one sought to be charged; (3) where the one seeking indemnity has incurred liability because of a breach of duty owed to him by the one sought to be charged. (4) where the one seeking indemnity has incurred liability merely because of failure, even though negligent, to discover or prevent the misconduct of the one sought to be charged; (5) where there is an express contract between the parties containing an explicit undertaking to reimburse for liability of the character involved. Hendrickson v. Minnesota Power & Light Co., 104 N.W.2d 843 (Minn. 1960). In situation (4), indemnity between joint tortfeasors is limited to contribution based upon relative fault. Tolbert v. Gerber Indus., Inc., 255 N.W.2d 362 (Minn. 1977). 6-year statute of limitations generally. Minn. Stat. § 541.05. Indemnity claims related to improvements to real property are subject to a 2-year statute of limitations, with claims accruing upon payment of a final judgment, arbitration award or settlement, subject to a 14-year statute of repose. Minn. Stat. § 541.051.

Damages - Measure of Damages to Property

Real Property: Permanent Damage: Diminution in fair market value from immediately before to immediately after damage occurred. In re Commodore Hotel Fire & Explosion Cases, 324 N.W.2d 245 (Minn. 1982). Temporary Damage: The lesser of two values: 1) diminution in fair market value from immediately before to immediately after damage occurred, or 2) reasonable cost of repairs. In re Commodore Hotel Fire & Explosion Cases. For contaminated properties, the owner may also be able to recover stigma damages. Dealers Mfg., Co. v. County of Anoka, 615 N.W.2d 76 (Minn. 2000).

Personal Property: Total Loss: Fair market value from immediately before damage occurred minus salvage value. Bartl v. City of New Ulm, 72 N.W.2d 303 (Minn. 1955). Partial Loss: Diminution in fair market value from immediately before to immediately after damage occurred or, at plaintiff's election, reasonable cost of repairs plus any residual diminution in original value after repairs have been made. Bartl.

Experts - States Following the Daubert/Kumho Doctrine

Expert testimony is admissible if: 1) the witness is qualified; 2) the expert's opinion has foundational reliability; and 3) the expert's testimony is helpful. Minn. R. Evid. 702; Doe v. Archdiocese of St. Paul & Minneapolis, 817 N.S.2d 150 (Minn. 2012). In addition, if the testimony involves a novel scientific theory, the Frye-Mack standard applies. The Frye-Mack standard requires that the proponent of novel scientific evidence prove that the science is generally accepted in the relevant scientific community and that the particular scientific evidence at issue has foundational reliability. Minn. R. Evid. 702; Doe; Goeb v. Tharaldson, 615 N.W.2d 800 (Minn. 2000).

Interest - Pre & Post Judgment

Prejudgment

Contract Actions

Judgments under $50,000 or judgment against the state or a political subdivision regardless of amount, or a judgment in family court regardless of amount:

Rate: Rate based on secondary market yield of one year U.S. Treasury bills, calculated annually by state court administrator. Amount rounded to nearest one percent or four percent,

whichever is greater. Minn. Stat. § 549.09(c)(1). Interest computed as simple interest per annum. Id.

Judgments over $50,000, other than judgments against the state or a political subdivision or a judgment in family court:

Rate: 10%. Minn. Stat. § 549.09(c)(2).

Accrual Date: Except as provided by contract, the time of commencement of action or a demand for arbitration, or the time of a written notice of claim, whichever occurs first. Minn. Stat. § 549.09(b). The action must be commenced within two years of the notice of claim. Minn. Stat. § 549.09(b).

Settlement Offers: Settlement offers may impact the amount of interest recoverable. See Minn. Stat. § 549.09(b).

Future Damages: Minn. Stat. § 549.09(b)(1) limits the recovery of interest on future damages and other specified categories of damages.

Tort Actions

Rate: Same as for contract actions.

Accrual Date: Same as for contract actions.

Post Judgment

Rate/Accrual Date: Rates referenced above continue until date judgment is satisfied. See Minn. Stat. § 549.09(a).

Joint and Several Liability

Modified joint and several liability. Several liability unless (1) defendant's fault is greater than 50%; (2) two or more persons act in a common scheme or plan; (3) defendant commits an intentional tort; or (4) liability arises under one of several environmental statutes. Also, uncollectible amounts can be reallocated among the parties. Minn. Stat. § 604.02.

Judgment Liens

A judgment may be enforced for ten years from date of entry. Minn. Stat. § 550.01.

Landlord-Tenant Subrogation ("Sutton Doctrine")

Minnesota has adopted a case-by-case approach, based on the expectations of the parties. The parties intent is determined from the language of the lease and by examining other admissible evidence shedding light on the expectations of the parties, including the types of insurance purchased by each party. RAM Mut. Ins. Co. v. Rohde, 820 N.W.2d 1 (Minn. 2012). In determining the parties' expectations, the court may consider principles of equity and good conscience, such as whether the lease is a contract of adhesion, whether the lease provisions allocating responsibility are unfair and in violation of public policy, and whether the leased premises are part of a large multi-unit structure. Melrose Gates, LLC v. Moua, 875 N.W.2d 814 (Minn. 2016).

Made Whole Doctrine

Under the "full recovery rule," subrogation may not be pursued until the insured has fully recovered, unless the contract explicitly allows for the contrary. Commercial Union Ins. Co. v.

Minn. Sch. Bd. Ass'n, 600 N.W.2d 475 (Minn. Ct. App. 1999); see also MedCenters Health Care v. Ochs, 26 F.3d 865 (8th Cir. 1994) (contractual language that is sufficiently clear can overcome Minnesota's full recovery rule).

Professional Malpractice Filing Requirements (Affidavit of Merit)
In medical malpractice actions, the plaintiff must serve the defendant with: a) an affidavit of expert review by the plaintiff's attorney, with the summons and complaint; and (b) within 180 days of commencing an action, an affidavit identifying the plaintiff's expert, the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for the opinion. Minn. Stat. § 145.682. In actions against non-medical professionals, including attorneys, architects, landscape architects, CPAs, engineers and land surveyors, the plaintiff must satisfy the requirements of Section 145.682. In the alternative, the parties may agree to waive the expert review, or the filing party may apply for a waiver from the court upon commencement of the action. In reviewing a waiver application, the court must determine whether good cause exists to grant the waiver. Minn. Stat. § 544.42.

Restitution - Crime Victims Restitution Statutes
Discretionary. The victim of a crime has the right to receive restitution. Minn. Stat. § 611A.04(a); see Minn. Stat. § 609.10(5) (discussing felony convictions). Criteria to be considered in determining whether to order restitution include the amount of economic loss and the income, resources, and obligations of the defendant. An order of restitution shall be docketed as a civil judgment. Minn. Stat. §§ 611A.04 – 611A.046. Statute does not address whether subrogated insurers may recover restitution. However, "victim" is defined to include a corporation that incurs loss or harm as a result of a crime. Minn. Stat. § 611A.01. Also, a court may order restitution to an insurance company outside the mechanism of Chapter 611A. State v. Jola, 409 N.W.2d 17 (Minn. Ct. App. 1987).

Right to Repair/Notice Statutes – Construction Cases
Minn. Stat. §§ 327A.01 to 327A.08 *Housing; Statutory Warranties.*

Minn. Stat. § 515B.3-102 *Common Interest Ownership ... Powers of Unit Owners' Association.*

Spoliation – Remedies for Spoliation
Minnesota does not recognize an independent tort for spoliation of evidence. Spoliation sanctions are typically imposed where one party gains an evidentiary advantage over the opposing party by failing to preserve evidence. This is true where the spoliator knew or should have known that the evidence should be preserved for pending or future litigation; the intent of the spoliator is irrelevant. When the evidence is under the exclusive control of the party who fails to produce it, Minnesota also permits the jury to infer that the evidence, if produced, would have been unfavorable to that party. The propriety of a sanction for the spoliation of evidence is determined by the prejudice resulting to the opposing party. Prejudice is determined by considering the nature of the item lost in the context of the claims asserted and the potential for correcting the prejudice. Foust v. McFarland, 698 N.W.2d 24 (Minn. Ct. App. 2005).

Statutes of Limitation and Repose*

Statutes of Limitation

Tort: Personal injury, generally, 6 years. Minn. Stat. § 541.05; D.M.S. v. Barber, 645 N.W.2d 383 (Minn. 2002); but see Minn. Stat. § 541.07(1) (other tort resulting in personal injury – 2 years); Sipe v. STS Mfg., 834 N.W.2d 683 (Minn. 2013) (stating that § 541.07(1) applies to common law tort actions not created by statute); Property damage, 6 years. Minn. Stat. § 541.05; but see Minn. Stat. § 541.07(3) (damages caused by a dam – 2 years); Minn. Stat. § 541.07(7) (pesticide application - 2 years); Improvements to Real Property, below. Strict liability arising from products, 4 years. Minn. Stat. § 541.05.

Wrongful death: Actions based on medical malpractice and any other action, 3 years from the date of death. Minn. Stat. § 573.02. Intentional acts causing death may be commenced at any time. Minn. Stat. § 573.02. But see Statute of Repose, below.

Medical Malpractice: 4 years from the date when some injury or damage occurs. Minn. Stat. § 541.076; MacRae v. Group Health Plan, Inc., 753 N.W.2d 711 (Minn. 2008). Wrongful Death, 3 years, but in no event later than 4 years. Minn. Stat. §§ 573.02; 541.076.

Contract: 6 years. Minn. Stat. § 541.05.

Improvements to Real Property: For actions accruing before May 8, 2018, 2 years after discovery. Minn. Stat. § 541.051. For actions accruing after May 8, 2018, 2 years after discovery for personal injury or wrongful death actions; 2 years after discovery for injury to property, but in no event does action accrue earlier than substantial completion or abandonment. Id. Actions for contribution or indemnification, 2 years after accrual. Id.

State Government: Notice must be given within 180 days after the loss or injury is discovered (1 year for wrongful death). The general tort statutes of limitation apply. Minn. Stat. § 3.736.

Local Government: Notice must be given within 180 days after the loss or injury is discovered (1 year for wrongful death). Minn. Stat. § 466.05.

Statutes of Repose

Improvements to Real Property: 10 years after substantial completion of the construction. The statute does not apply in cases of fraud or to actions resulting from negligence in the maintenance, operation or inspection of the real property improvement against the owner or other person in possession, or to the manufacturer or supplier of any equipment or machinery installed upon real property. If the cause of action accrues during the 9th or 10th year after substantial completion, an action may be brought within 2 years, but not later than 12 years after substantial completion. Contribution or indemnity action barred more than 14 years after substantial completion. Minn. Stat. § 541.051.

Wrongful Death: Actions for medical malpractice, 4 years. Minn. Stat. § 573.02; Minn. Stat. § 541.076. Other actions must be commenced within 6 years after the act or omission. Minn. Stat. § 573.02.

Subrogating in the Insured's Name – Real Party in Interest

The insurer is the real party in interest when it fully reimburses the insured for the loss and must bring the action in the insurer's name. If the insured is not completely compensated for his

* For UCC Claims and claims based on improvements to real property and/or claims brought by condominium associations related to construction defects, see the notes at the end of the Table of Contents.

damages, he retains an interest in the action, and the lawsuit may be brought in his name. A loan receipt agreement may be used to bring the action in the insured's name. Blair v. Espeland, 43 N.W.2d 274 (Minn. 1950).

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Anti-Subrogation Rule: Subrogation by Insurer Against Insured
Where single policy was issued to subrogor and target, subrogation against target may proceed if coverage of target is excluded. Hutson v. State Farm Fire & Cas. Co., 954 So.2d 514 (Miss. Ct. App. 2007) (in subrogating for damage paid to insured-wife, insurer may act against insured-husband who intentionally damaged house in divorce situation). In *dicta*, the Hutson court spoke approvingly of other, out-of-state cases applying the anti-subrogation rule in one- and two-policy situations, but distinguished the facts of those cases from the facts before it.

Comparative/Contributory Negligence
Pure Comparative. Miss. Code Ann. § 11-7-15.

Contribution and Implied Indemnity
Contribution: Available only in the case of intentional torts. Miss. Code Ann. § 85-5-7. Contribution available only where a joint judgment is obtained among the parties. Estate of Hunter v. GMC, 729 So.2d 1264 (Miss. 1999).

Implied Indemnity: The obligation to indemnify may arise in three different instances: a contractual relation, from an implied contractual relation, or out of liability imposed by law. Tupelo Redevelopment Agency v. Gray Corp., 972 So. 2d 495 (Miss. 2007). The general rule governing implied indemnity for tort liability is that a joint tortfeasor, whose liability is secondary as opposed to primary, or is based upon imputed or passive negligence, as opposed to active negligence, or is negative negligence as opposed to positive negligence, may be entitled, upon an equitable consideration, to shift his responsibility to another joint tortfeasor. Home Ins. Co. v. Atlas Tank Mfg. Co., 230 So. 2d 549 (Miss. 1970). However, where the fault of each is equal in grade and similar in character, the doctrine of implied indemnity is not available since no one should be permitted to base a cause of action on his own wrong. Id. Two critical prerequisites are generally necessary for the invocation of noncontractual implied indemnity in Mississippi: (1) The damages which the claimant seeks to shift are imposed upon him as a result of some legal obligation to the injured person; and (2) it must appear that the claimant did not actively or affirmatively participate in the wrong. Id. To secure indemnity, the payment made by the party seeking indemnification cannot be voluntary. Minn. Life Ins. Co. v. Columbia Cas. Co., 164 So. 3d 954 (Miss. 2015); Southwest Mississippi Electric Power Asso. v. Harragill, 182 So.2d 220 (Miss. 1966). The statute of limitations for an implied contract is 3 years after the cause of action accrues. Miss. Code Ann. § 15-1-29. With respect to improvements to real property, except where there is a prior written agreement providing for indemnification, indemnification claims are subject to the 6-year statute of repose. Miss. Code Ann. § 15-1-41.

Damages - Measure of Damages to Property
Real Property: Permanent Damage: Diminution in market value immediately before and immediately after damage occurred. Check Cashers Exp., Inc. v. Crowell, 950 So.2d 1035 (Miss. Ct. App. 2007); Harper v. Hudson, 418 So. 2d 54 (Miss. 1982). Temporary Damage: Reasonable cost of repairs. Teledyne Exploration Co. v. Dickerson, 253 So.2d 817 (Miss. 1971); Harper v. Hudson; but cf. Miller v. Vicksburg Masonic Temple, 288 So.3d 372 (Miss. Ct. App. 2019) (discussing lateral support and damage to land and stating that a plaintiff can

choose to prove either reasonable cost of replacement or repairs or diminution in value, and if he proves either of those measures with reasonable certainty, damages are allowable); Maslon v. Brown, 148 So.3d 27 (Miss. Ct. App. 2014) (stating that when the injury to land is temporary and can be restored, the appropriate measure of damages is the cost of restoration).

Personal Property: Total Loss: Fair market value of property before damage occurred. Mississippi Power Co. v. Harrison, 152 So.2d 892 (Miss. 1963). Partial Loss: Reasonable cost of repairs plus any residual diminution in original value after repairs have been made. Thomas v. Global Boat Builders & Repairmen Inc., 482 So.2d 1112 (Miss. 1986).

Experts - States Following the Daubert/Kumho Doctrine
Follows Daubert. Miss. R. Evid. 702; Janssen Pharm., Inc. v. Bailey, 878 So.2d 31 (Miss. 2004).

Interest - Pre & Post Judgment
Prejudgment

Contract Actions
Rate: If the damages are liquidated or in bad faith cases, Preferred Risk Mut. Ins. Co. v. Johnson, 730 S.2d 574 (Miss. 1998), the contract rate. Miss. Code Ann. § 75-17-7. If none, 8%. Miss. Code Ann. § 75-17-1.
Accrual Date: Date of the breach. Sentinel Indus. Contr. Corp. v. Kimmins Indus. Serv. Corp., 743 So.2d 954 (Miss. 1999).

Tort Actions
Rate: Set by the judge. Miss. Code Ann. § 75-17-7. However, no prejudgment interest is allowed in actions against the state and its political subdivisions. Miss. Code Ann. § 11-46-15(2).
Accrual Date: Determined by the judge, but never prior to the date of the filing of the complaint. Miss. Code Ann. § 75-17-7.

Post Judgment

Contract Actions
Rate: Same as above.
Accrual Date: The contract rate, if applicable, continues. In all other cases, to be determined by the judge. Miss. Code Ann. §§ 75-17-1, 75-17-7.

Tort Actions
Rate/Accrual: To be determined by the judge. Miss. Code Ann. § 75-17-7; see Ground Control, LLC v. Capsco Indus., 214 So.3d 232 (Miss. 2017).

Joint and Several Liability
Modified joint and several liability. The liability for damages caused by two or more persons shall be several only, and not joint and several. A joint tortfeasor shall be liable only for the amount of damages allocated to him in direct proportion to his percentage of fault. Joint and several liability with a right of contribution shall be imposed when two or more persons conspire to commit a tortious act. Miss. Code Ann. § 85-5-7.

Judgment Liens
An action must be brought within seven years after the entry of the judgment or the last renewal of judgment. Miss. Code Ann. § 15-1-43. A judgment can be renewed only if the existing judgment has not expired. Id.

Landlord-Tenant Subrogation ("Sutton Doctrine")
In the absence of any contract between the lessor and the lessee as to insurance by one for the benefit of the other, neither has any interest in the insurance taken out by the other in his own interest. But where the lease agreement stipulates that one of the parties shall keep the property insured for the benefit of the other, each is entitled to a proportionate interest in the proceeds of such insurance, and subrogation is precluded. Fry v. Jordan Auto Co., 80 So.2d 53 (Miss. 1955).

Made Whole Doctrine
Insured made whole first. Hare v. State, 733 So.2d 277 (Miss. 1999). The doctrine applies to contractual subrogation claims too. Id.

Professional Malpractice Filing Requirements (Affidavit of Merit)
In a medical malpractice action, the complaint shall be accompanied by a certificate from the attorney declaring: (a) that the attorney has consulted with a qualified expert who has given the attorney the belief that there is a reasonable basis for the action; (b) that the attorney was unable to obtain the certificate because of an approaching statute of limitation; or (c) that the attorney was unable to obtain the certificate because, after approaching three experts, none would agree to a consultation. When the certificate is not filed with the complaint because of an approaching statute of limitation, the attorney must supplement the filing with the certificate within sixty days after service of the complaint or the suit shall be dismissed. Miss. Code Ann. § 11-1-58.

Restitution - Crime Victims Restitution Statutes
Discretionary, with some exceptions. The court may order restitution for pecuniary damages – i.e., special damages, such as the money equivalent of property destroyed or harmed, and losses such as medical expenses. Miss. Code Ann. §§ 99-37-1, 99-37-3. When determining whether to order restitution, the court considers: 1) the defendant's financial resources; 2) the ability of the defendant to pay in installments; and 3) the rehabilitative effect on the defendant. Miss. Code Ann. § 99-37-3. A court will credit any restitution paid by the defendant to a victim against any civil judgment in favor of the victim. Miss. Code Ann. § 99-37-17. Insurers paying a primary victim's claim should be considered a "victim" and be made part of the restitution proceeding. See In Interest of B.D., 720 So.2d 476 (Miss. 1998).

The restitution limit for the justice court is the sum of $5,000. Miss. Code Ann. § 99-37-3(1). Where juvenile delinquents are involved, consult Miss. Code Ann. § 99-37-23 (limiting restitution) and Miss. Code Ann. § 43-21-619 (parents may be ordered to pay restitution).

Mississippi has separate statutes addressing restitution for victims of home repair fraud, Miss. Code Ann. § 97-23-103(6), stolen metal property, Miss. Code Ann. § 97-17-71 (restitution "shall" be ordered), vehicle chop shops, Miss. Code Ann. § 63-25-5(5), and malicious mischief. Miss. Code Ann. § 97-17-67 (restitution "shall" be ordered").

Right to Repair/Notice Statutes – Construction Cases
Miss Code Ann. §§ 83-58-1 to 83-58-17 *Insurance – New Home Warranty Act*.

Spoliation – Remedies for Spoliation
No tort of spoliation exists either in cases of negligent or intentional destruction of evidence. Richardson v. Sara Lee Corp., 847 So.2d 821 (Miss. 2003). Proof of spoliation entitles the non-offending party to an instruction that the jury may infer that spoliated evidence is unfavorable to the offending party. Other remedies include discovery sanctions, criminal penalties, contempt sanctions and disciplinary sanctions imposed against attorneys who participate in spoliation. Dowdle Butane Gas Co., Inc. v. Moore, 831 So.2d 1124 (Miss. 2002).

Statutes of Limitation and Repose*
Statutes of Limitation

Tort: 3 years for most personal injury and property damage. Miss. Code Ann. § 15-1-49. 1 year for certain intentional torts. Miss. Code Ann. § 15-1-35. The period of limitations shall not be changed by contract. Miss. Code Ann. § 15-1-5. The period of limitations is also a statute of repose. Miss. Code Ann. § 15-1-3(1). If a plaintiff or defendant dies before the limitations period runs, the action may be commenced by or against the executor or administrator after the expiration of said time and within one year after the death. Miss. Code Ann. § 15-1-55.

Contract: Unwritten, 3 years (unwritten employment contract, 1 year). Miss. Code Ann. § 15-1-29. Written, 3 years. Miss. Code Ann. § 15-1-49. For sale of goods, 6 years. Miss. Code Ann. § 75-2-725. Parties' contractual agreements to alter statutes of limitation are void. Miss. Code Ann. § 15-1-5. The period of limitations is also a statute of repose. Miss. Code Ann. § 15-1-3(1). If a plaintiff or defendant dies before the limitations period runs, the action may be commenced by or against the executor or administrator after the expiration of said time and within one year after the death. Miss. Code Ann. § 15-1-55.

Medical Malpractice: Generally, 2 years. Miss. Code Ann. § 15-1-36(2).

Other State: If that cause of action arises in another state and is barred by other state's statute of limitation, the cause of action is barred in Mississippi also, except that for Mississippi plaintiffs, the Mississippi period of limitation shall apply. Miss. Code Ann. § 15-1-65.

State and Local Government: Written notice served in person or by registered or certified mail must be given 90 days prior to filing an action. The action must be filed within 1 year of the harm-producing conduct. The written notice will toll the limitation period for 95 days, during which time no action may be filed. After expiration of the tolling period, the claimant has an additional 90 days in which to file an action. If the government unit denies the claim, the additional 90 days runs from receipt of the denial. Miss. Code Ann. § 11-46-11.

Statutes of Repose

Improvements to Real Property: 6 years after written acceptance or actual occupancy or use, whichever occurs first. Statute does not apply to any person, firm or corporation in

* For UCC Claims and claims based on improvements to real property and/or claims brought by condominium associations related to construction defects, see the notes at the end of the Table of Contents.

actual possession and control as owner, tenant or otherwise of the improvement at the time the defective and unsafe condition of such improvement causes injury, nor to actions for wrongful death. Miss. Code Ann. § 15-1-41.

Medical Malpractice: 7 years. Miss. Code Ann. § 15-1-36(2).

Subrogating in the Insured's Name – Real Party in Interest

In subrogation cases, regardless of whether subrogation has occurred by operation of law, assignment, loan receipt, or otherwise, if the subrogor no longer has a pecuniary interest in the claim the action shall be brought in the name of the subrogee. If the subrogor still has a pecuniary interest in the claim, the action shall be brought in the names of the subrogor and the subrogee. M.R.C.P. 17(b).

MISSOURI

Anti-Subrogation Rule: Subrogation by Insurer Against Insured
An insurer cannot subrogate against its own insured when subrogor and target are covered by same policy. Factory Ins. Ass'n v. Donco Corp., 496 S.W.2d 331 (Mo. Ct. App. 1973). If a party is covered by the third-party liability portion of a policy, but not the property damage portion of the policy, an insurer can still subrogate for the property damages portion of the policy. Behlmann Pontiac GMC Truck, Inc. v. Harbin, 6 S.W.3d 891 (Mo. 1999).

Comparative/Contributory Negligence
Pure Comparative. Children's Wish Found. Int'l v. Mayer Hoffman McCann, P.C., 331 S.W.3d 648 (Mo. 2011); Gustafson v. Benda, 661 S.W.2d 11 (Mo. 1983).

Contribution and Implied Indemnity
Contribution: The right of contribution exists pursuant to statute. Mo. Rev. Stat. § 537.060. Contribution is available after judgment or settlement. Id. When the plaintiff gives a release or a covenant not to sue or not to enforce a judgment in good faith, the agreement shall not discharge the other tortfeasors unless the terms of the agreement so provide. Id. The agreement discharges the tortfeasor to whom it is given from all liability for contribution or noncontractual indemnity to any other tortfeasor. Id. To enforce contribution, the liability of the non-settling party must be extinguished by the terms of the agreement with the injured person or by the passing of the statute of limitations governing the injured person's claim against the non-settling party. Clark's Resources, Inc. v. Ireland, 142 S.W.3d 769 (Mo. Ct. App. 2004). If contribution claims are not resolved in the plaintiff's original lawsuit, a defendant seeking contribution against nonparties may pursue a second action. Safeway Stores, Inc. v. Raytown, 633 S.W.2d 727 (Mo. 1982); Mo. Rev. Stat. § 537.060. The statute of limitation is 5 years from the time of settlement or payment of judgment, Greenstreet v. Rupert, 795 S.W.2d 539 (Mo. Ct. App. 1990) (applying Mo. Rev. Stat. § 516.120), subject to the 10-year statute of repose for claims arising from improvements to real property. Mo. Rev. Stat. § 516.097. An architect, engineer or builder faced with a claim of a defective or unsafe condition to an improvement to real property filed within the statute of repose may file a contribution claim arising from an improvement to real property within 1 year of the filing of the underlying case. Id.

Implied Indemnity: In addition to express contractual indemnity, there are two other general classes of indemnity: (1) implied contractual indemnity, also known as implied-in-fact indemnity; and (2) equitable indemnity, also known as implied-in-law indemnity. American Nat'l Prop & Cas. Co. v. Ensz & Jester, P.C., 358 S.W.3d 75 (Mo. Ct. App. 2011). Implied-in-fact contractual indemnity stems from the existence of a binding contract between two parties that necessarily implied the right of indemnification. Id. The party asserting such indemnity must show that the parties to the contract intended the indemnitor to be responsible for the loss. Id. Thus, a claim of implied-in-fact indemnity asserts a contractual right to indemnity, even though no express contract for indemnity exists. Id. In contrast, when equitable (implied-in-law) indemnity is involved, the intention of the parties is irrelevant. Id. The law imposes indemnity due to the relationship of the parties regardless of intention. Id. The question is whether there is some duty between the indemnitor and the indemnitee sufficient to impose indemnity on the indemnitor as a matter of law, regardless of their intentions. Id. Generally, to give rise to

equitable indemnity, a relationship between the parties must be found. Id. To establish a claim for equitable indemnity, the plaintiff must show: (1) the discharge of an obligation by the plaintiff" (2) the obligation discharged by the plaintiff is identical to an obligation owed by the defendant; and (3) the discharge of the obligation by the plaintiff is under such circumstances that the obligation should have been discharged by the defendant, and defendant will be unjustly enriched if the defendant does not reimburse the plaintiff to the extent that the defendant's liability has been discharged. Beeler v. Martin, 306 S.W.3d 108 (Mo. Ct. App. 2010). 5-year statute of limitations for implied contracts, Mo. Rev. Stat. § 516.120, runs from the time that the party seeking indemnity paid or was compelled to pay a judgment recovered by the injured person, Simon v. Kansas City Rug Co., 460 S.W.2d 596 (Mo. 1970), subject to the 10-year statute of repose for claims arising from improvements to real property. Mo. Rev. Stat. § 516.097. An architect, engineer or builder faced with a claim of a defective or unsafe condition to an improvement to real property filed within the statute of repose may file an indemnity claim arising from an improvement to real property within 1 year of the filing of the underlying case. Id.

Damages - Measure of Damages to Property

Real Property: Permanent Damage: Diminution in market value from immediately before to immediately after damage occurred. Curtis v. Fruin-Colnon Contracting Co., 253 S.W.2d 158 (Mo. 1952). Temporary Damage: Reasonable cost of repair not to exceed fair market value diminution. Nelson v. State ex rel. Missouri Highway and Transp. Commission, 734 S.W.2d 521 (Mo. Ct. App. 1987).

Personal Property: Generally, diminution in market value from immediately before to immediately after damage occurred. Loss of use damages may also be available. Randall v. Steelman, 294 S.W.2d 588 (Mo. Ct. App. 1956). When personal property is entirely destroyed, the owner may recover the full value of the destroyed chattel. State v. Eyler, 663 S.W.3d 834 (Mo. Ct. App. 2023). In automobile cases, the cost of repairs and stigma damages may also be allowed. Rook v. John F. Oliver Trucking Co., 556 S.W.2d 200 (Mo. Ct. App. 1977).

Experts - States Following the Daubert/Kumho Doctrine

With the exception of certain domestic-relations actions such as divorce, adoption and support, to which the older, Frye-related standard continues to apply, Missouri generally follows Daubert factors. See Mo. Rev. Stat. § 490.065; State v. Marshall, 596 S.W.3d 156 (Mo. Ct. App. 2020)

Interest - Pre & Post Judgment

Prejudgment

Contract Actions

Rate: Contract rate or, if the contract is silent, 9%. Mo. Rev. Stat. § 408.020.

Accrual Date: For written contracts, from the date of breach or the time when payment was due. Mo. Rev. Stat. § 408.020; R.J.S. Sec. v. Command Sec. Servs., 101 S.W.3d 1 (Mo. Ct. App. 2003). On accounts, after they become due and demand is made. Mo. Rev. Stat. § 408.020.

Tort Actions

Rate: If the claimant has made a demand for payment or an offer of settlement and the amount of the judgment exceeds the demand for payment or offer of settlement, the Federal Funds Rate (established by the Federal Reserve) plus 3%. Mo. Rev. Stat. § 408.040(3), (4). For pre-suit demands, the complaint must be filed within 120 days of the demand unless the parties agree to a longer period. Mo. Rev. Stat. § 408.040(3).

Accrual Date: 90 days after the demand or offer was received or from the date the demand or offer was rejected without counteroffer, whichever is earlier. Mo. Rev. Stat. § 408.040(3).

Post Judgment

Contract Actions

Rate: 9% or, if it is higher, the contract rate. Mo. Rev. Stat. § 408.040(2).

Accrual Date: Judgment date. Mo. Rev. Stat. § 408.040(2).

Tort Actions

Rate: Federal Funds Rate (established by the Federal Reserve) plus 5%. Mo. Rev. Stat. § 408.040(3).

Accrual Date: Judgment date. Id.

Joint and Several Liability

Modified joint and several liability. Several liability if the defendant is found less than 51% liable. Joint and several liability if the defendant is found 51% or more liable. Mo. Rev. Stat. § 537.067.

Judgment Liens

A judgment lien continues for a period of ten years. Mo. Sup. Ct. R. § 74.08. A judgment may be revived by order of the court within ten years of the entry or last revival. Mo. Sup. Ct. R. § 74.09.

Landlord-Tenant Subrogation ("Sutton Doctrine")

Whether a tenant is exonerated for its negligence depends on the intent of the parties, as expressed in the lease, including the terms of the "yield up" clause. A lease which calls for the landlord to obtain insurance may insulate the tenant from liability as a coinsured under the policy. Rock Springs Realty, Inc. v. Waid, 392 S.W.2d 270 (1965).

Made Whole Doctrine

Unsettled. In *dictum*, the federal court in Travelers Property Casualty Co. of America v. National Union Ins. Co. of Pittsburgh, PA, 621 F.3d 697(8th Cir. 2010), suggested that Missouri would follow the made-whole rule unless the policy stated otherwise.

Professional Malpractice Filing Requirements (Affidavit of Merit)

Within 90 days of the filing of a petition alleging medical malpractice, the plaintiff's attorney must file an affidavit stating that he or she has obtained the written opinion of a legally qualified health care provider which states that the defendant health care provider failed to use such care as a reasonably prudent and careful health care provider would have under similar circumstances

and that the failure to use such reasonable care directly caused or directly contributed to cause the damages claimed in the petition. Mo. Rev. Stat. § 538.225.

Restitution - Crime Victims Restitution Statutes
Discretionary. A court may order a defendant to pay restitution to a crime victim as a condition of probation. Mo. Rev. Stat. § 559.021(2)(1). Though not set forth in the statute, a judge may order restitution be paid to an insurance company that has issued payments to an insured victim, if her or she deems it just and appropriate to do so. State v. Gladden, 294 S.W.3d 73 (Mo. Ct. App. 2009).

Right to Repair/Notice Statutes – Construction Cases
Mo. Rev. Stat. §§ 436.350 to 436.365 *Special Purpose Contracts – Residential Construction Defects.*

Spoliation – Remedies for Spoliation
Missouri has not recognized intentional or negligent spoliation as a tort. Fisher v. Bauer Corp., 239 S.W.3d 693 (Mo. Ct. App. 2007). If a party has intentionally spoliated evidence, indicating fraud and a desire to suppress the truth, that party is subject to an adverse evidentiary inference. If a party intentionally spoliates evidence, the party is subject to an adverse evidentiary inference. The standard for application of the spoliation doctrine requires that there is evidence of an intentional destruction of the evidence indicating fraud and a desire to suppress the truth. Although in some circumstances the destruction of evidence without a satisfactory explanation may give rise to an unfavorable inference against the spoliator, the party seeking the benefit of the doctrine must still show that the spoliator destroyed the evidence under circumstances manifesting fraud, deceit or bad faith. Simple negligence is insufficient to warrant the application of the spoliation doctrine. Prins v. Director of Revenue, 333 S.W.3d 17 (Mo. Ct. App. 2010).

Statutes of Limitation and Repose*
Statutes of Limitation

Tort: Personal injuries, 5 years. Mo. Rev. Stat. § 516.120. Intentional torts, 2 years. Mo. Rev. Stat. § 516.140. Property damage, 5 years. Mo. Rev. Stat. § 516.120. Wrongful death, 3 years. Mo. Rev. Stat. § 537.100.

Contract: Generally, 5 years. Mo. Rev. Stat. § 516.120. Written, for payment of money. 10 years. Mo. Rev. Stat. § 516.110.

Medical Malpractice: 2 years after the plaintiff knows or should have known of the malpractice. Mo. Rev. Stat. § 516.105; Smith v. Tang, 926 S.W.2d 716 (Mo. Ct. App. 1996).

Other State: Whenever a cause of action has been time-barred by the laws of the state, territory or country in which it originated, the action will also be time-barred in Missouri. Mo. Rev. Stat. § 516.190.

State and Local Government: Against a sheriff, coroner or other public official, 3 years. Mo. Rev. Stat. § 516.130. Otherwise, the statute applicable to the type of action controls. Actions against constitutional charter cities, special charter cities and towns, third class cities and fourth class cities for injuries growing out of any defect in bridge, street or sidewalk

* For UCC Claims and claims based on improvements to real property and/or claims brought by condominium associations related to construction defects, see the notes at the end of the Table of Contents.

require written notice within 90 days of the occurrence. Mo. Rev. Stat. §§ 82.210, 81.060, 77.600, 79.480.

Statutes of Repose

Improvements to Real Property: 10 years from completion, for tort actions. If an occupancy permit is issued, the 10-year period commences on the date the permit is issued. When such an action is filed, a defendant's action for contribution or indemnity must be commenced within 1 year of the filing of plaintiff's action. Mo. Rev. Stat. § 516.097.

Medical Malpractice: 10 years from the act of neglect. Mo. Rev. Stat. § 516.105.

Subrogating in the Insured's Name – Real Party in Interest

When the insurer pays the insured, the insured retains legal title to the claim. The insurer has a right to subrogation, however. The exclusive right to pursue the tortfeasor remains with the insured, and the insured holds the proceeds for the insurer. Knob Noster R-VIII School Dist. v. Dankenbring, 220 S.W.3d 809 (Mo. Ct. App. 2007). If the interest of the insurer is derived by subrogation, the action must be brought by, or at least in the name of, the insured, even though the insurer is subrogated to the entire cause of action. If the entire cause of action is assigned to the insurer, the action must be brought by the insurer, even though the insurer has paid only part of the loss and is subrogated to the extent of the payment. Warren v. Kirwan, 598 S.W.2d 598 (Mo. Ct. App. 1980). Causes of in action for property torts may be assigned. Causes of action for personal torts - including contracts of a purely personal nature, such as promises of marriage - are not assignable. Scottsdale Insurance Company v. Addison Insurance Company, 448 S.W.3d 818 (Mo. 2014).

MONTANA

Anti-Subrogation Rule: Subrogation by Insurer Against Insured
No right of subrogation can arise in favor of an insurer against its own insured since, by definition, subrogation exists only with respect to rights of the insurer against third persons to whom the insurer owes no duty. Home Ins. Co. v. Pinski Bros., Inc., 500 P.2d 945 (Mont. 1972) (subrogation prohibited against target-insured to which insurer coincidentally issued a liability policy). This is true both as to the named insured and as to any party to whom coverage is extended under the policy terms; an additional insured is entitled to the same protection as the named insured. Truck Ins. Exchange v. Transport Indem. Co., 591 P.2d 188 (Mont. 1979). This rule also applies to subrogation when the subrogor and target are covered by the same policy. Continental Ins. Co. v. Bottomly, 817 P.2d 1162 (Mont. 1991).

Comparative/Contributory Negligence
Modified Comparative – 50%. Mont. Code Ann. § 27-1-702.

Contribution and Implied Indemnity
Contribution: Mont. Code Ann. § 27-1-703 creates a right of contribution among joint tortfeasors. The joint tortfeasor from which contribution is sought must have been a party in the underlying action. Id. Contribution may be sought in the underlying action or as a separate action. Consolidated Freightways v. Osier, 605 P.2d 1076 (Mont. 1979). Statute of limitations is 3 years from the date of settlement or payment of judgment. Mont. Code Ann. § 30-3-122(7).

Implied Indemnity: Where the parties are not both at fault and an injury results from the act of one party whose negligence is the primary, active and proximate cause of the injury, and another party, who is not negligent, is nevertheless exposed to liability by the acts of the first party, the first party may be liable to the second party for the full amount of damages incurred by such acts. Consolidated Freightways. Indemnity of a passively negligent party is no longer permitted; the party seeking indemnity must have clean hands. Metro Aviation, Inc. v. United States 305 P.3d 832 (Mont. 2013). A joint tortfeasor who settles with the claimant before judgment on the claim is entered is not subject to claims for contribution or indemnity from the non-settling joint tortfeasors. State ex re. Deere & Co. v. District Court 730 P.2d 396 (Mont. 1986). Statute of limitations is 3 years from the date of settlement or payment of judgment. Mont. Code Ann. § 30-3-122(7).

Damages - Measure of Damages to Property
Real Property: Permanent Damage: Generally, the difference between the value of property before and after an injury. Lampi v. Speed, 261 P.3d 1000 (Mont. 2011). Temporary Damage: Generally, the cost of restoring property to its pre-injury condition. Lampi. The plaintiff must establish (1) temporary injury and (2) personal reasons for restoring the property. Lampi.

Personal Property: Total Loss: Market value of property and loss of use during period reasonably required to replace it. Cuddy v. U.S., 490 F. Supp. 390 (D. Mont. 1980). Partial Loss: Generally, the cost of repair plus loss of use. Spackman v. Ralph M. Parsons Co., 414 P.2d 918 (Mont. 1966). However, the plaintiff is entitled to recover the damages that restore the injured party to its pre-tort position. Walden v. Yellowstone Elec. Co., 487 P.3d 1 (Mont. 2021)

(allowing the cost of removing dead cows from the roadway in the absence of a more accurate method for calculating damages).

See also Mont. Code Ann. § 27-1-301, *et seq.*, on the measure of damages for certain types of claims. Mont. Code. Ann. § 25-1146 (stating that the plaintiff may recover any damages he may be entitled to).

Experts - States Following the Daubert/Kumho Doctrine
Follows Daubert only partially. An expert may offer opinion testimony if the testimony will assist the trier of fact and is reliable. M.R.E. 702; Cleveland v. Ward, 364 P.3d 1250 (Mont. 2016). When the introduction of novel scientific evidence is sought, Daubert applies. State v. Price, 171 P.3d 293 (Mont. 2007).

Interest - Pre & Post Judgment
Prejudgment
A person entitled to recover liquidated damages or damages capable of being made certain by calculation is entitled to recover interest on the damages. Mont. Code Ann. § 27-1-211.

Contract Actions
Rate: The contract rate, Mont. Code Ann. § 27-1-213, or, if none, the rate for bank prime loans published on the date of judgment plus 3%. Mont. Code § 25-9-205; see Kraft v. High Country Motors, Inc., 276 P.3d 908 (Mont. 2012) (citing § 25-9-205); Mont. Code Ann. § 27-1-311.
Accrual Date: The date of the breach, Mont. Code Ann. § 27-1-213, if the date damages are capable of being made certain. Mont. Code Ann.
§ 27-1-211. The state is liable from the date on which the payment on the contract became due. Mont. Code Ann. § 18-1-404(1)(b).

Tort Actions
Rate: The rate for bank prime loans published by the federal reserve system on the date of judgment plus 3%. Mont. Code Ann. § 27-1-210(1). The rate does not apply to certain damages – including pain and suffering – until the damages are incurred. See Mont. Code Ann. § 27-1-210(2). Except for actions against a governmental entity brought pursuant to Title 2, Chapter 9, parts 1 through 3, interest is awarded at the jury's discretion. Mont. Code Ann. § 27-1-212.
Accrual Date: 30 days after the claimant presents a written statement of damages. Mont. Code Ann. § 27-1-210(1)(a).

Post Judgment
Contract Actions
Rate: The contract rate or, if none, the rate for bank prime loans on the date of judgment plus 3%. Mont. Code Ann. § 25-9-205.
Accrual Date: Date of judgment. Id.; see Mont. Code Ann. § 27-1-213.

Tort Actions

Rate: The rate for bank prime loans published on the date of judgment plus 3%. Mont. Code Ann. § 25-9-205.

Accrual Date: Date of judgment. Id. However, if the government pays a judgment within 2 years after it is entered, the government is not liable for interest. Mont. Code Ann. § 2-9-317.

Joint and Several Liability

Modified joint and several liability. If a party is found to be 50% or less negligent, that party is liable for contribution only up to the percentage of negligence attributed to him. If a party is greater than 50% liable, then there is joint and several liability. Parties acting in concert or as principal/agent may be jointly liable. Mont. Code Ann. § 27-1-703; see Mont. Code Ann. § 27-1-705 (discussing several liability in certain situations and allocation of fault to non-parties).

Judgment Liens

An action upon a judgment must be commenced within ten years. Mont. Code Ann. § 27-2-201. If before the ten years runs, the judgment holder files a separate action on the judgment, he may obtain a new judgment. Jones v. Arnold, 900 P.2d 917 (Mont. 1995).

Landlord-Tenant Subrogation ("Sutton Doctrine")

Courts have not specifically addressed a tenant's status as a coinsured, but case law suggests that whether suit can be brought against a tenant depends on the terms of the lease. See Holiday Village Shopping Center v. Osco Drug, Inc., 315 F.Supp. 171 (D. Mont. 1970) (involving a waiver of subrogation); but cf. Twiss v. Miura, 1996 Mont. Dist. LEXIS 161 (4th Jud. Dist. Ct., Missoula Cnty) (tenant is an implied co-insured absent a clearly expressed contrary intent)

Made Whole Doctrine

An insured must be totally reimbursed for all losses as well as costs, including attorney fees, involved in recovering those losses before the insurer can exercise any right of subrogation, regardless of contract language to the contrary. Swanson v. Hartford Ins. Co. of Midwest, 46 P.3d 584 (Mont. 2002). The insurer has a duty to first determine whether the insured has been made whole before the insurer may collect subrogation. Ferguson v. Safeco Ins. Co. of America, 180 P.3d 1164 (Mont. 2008) (citing Swanson). Montana has not specifically addressed reimbursement of deductibles, but it is likely that an insurer would have to reimburse the full amount of the insured's deductible if the issue came before a court. See State v. Sharp, 148 P.3d 625 (Mont. 2006).

Professional Malpractice Filing Requirements (Affidavit of Merit)

Claims of medical malpractice must first be submitted to the Montana Medical Legal Panel for a hearing and a decision of the panel before a claimant can file a civil action in any court. No certificate of merit is required. Mont. Code Ann. § 27-6-101, *et. seq.*; see Mont. Code Ann. § 27-6-701.

Restitution - Crime Victims Restitution Statutes

Mandatory, unless the offender is unable to pay. Mont. Code Ann.
§ 46-18-241. The definition of victim includes an insurer or surety with a right of subrogation to the extent it has reimbursed the victim of the offense for pecuniary loss. Mont. Code Ann. § 46-

18-243. The victim and government have priority over an insurer. Mont. Code Ann. § 46-18-251. Restitution may be collected as a civil judgment by the victim. Amounts paid must be set off against a judgment in a civil action. Mont. Code Ann. § 46-18-249.

Right to Repair/Notice Statutes – Construction Cases
Mont. Code Ann. §§ 70-19-426 to § 70-19-428 *Residential construction disputes.*

Spoliation – Remedies for Spoliation
The torts of intentional and negligent spoliation of evidence are not recognized as independent causes of action against a direct party. They apply only to nonparties to the litigation. Harris v. State, Dept. of Corrections, 294 P.3d 382 (Mont. 2013). A duty to preserve evidence may arise in relation to a third-party spoliator where: (1) the spoliator voluntarily undertakes to preserve the evidence and a person reasonably relies on it to his detriment; (2) the spoliator entered into an agreement to preserve the evidence; (3) there has been a specific request to the spoliator to preserve the evidence; or (4) there is a duty to do so based upon a contract, statute, regulation, or some other special circumstance/relationship. Some threshold showing of causation and damages is required. To prove causation, a plaintiff must show that: (1) the underlying claim was significantly impaired due to the spoliation of evidence; (2) a causal relationship exists between the projected failure of success in the underlying action and the unavailability of the destroyed evidence; and (3) the underlying action would enjoy a significant possibility of success if the spoliated evidence still existed. The speculative nature of damages should not bar recovery. Oliver v. Stimson Lumber Co., 993 P.2d 11 (Mont. 1999). A party's concealment of evidence may result in a default judgment or other sanctions. Estate of Wilson v. Addison, 258 P.3d 410 (Mont. 2011); Oliver.

Statutes of Limitation and Repose[*]
Statutes of Limitation

Tort: Personal injury, 3 years. Intentional torts, 2 years. Mont. Code Ann. § 27-2-204. Property damage, 2 years. Mont. Code Ann. § 27-2-207; but see Ritland v. Rowe, 861 P.2d 175 (Mont. 1993) (stating that where there is a conflict between two statutes of limitations, such as between § 27-2-207 and the general negligence statute of limitations in § 27-2-204, the longer period of time (3 years) should apply). Breach of implied warranty claims – asserting covenants imposed by law regardless of contract – sound in tort and are subject to the 3-year limitations period in § 27-2-204. Bennett v. Dow Chem. Co., 713 P.2d 992 (Mont. 1986).

Contract: Not in writing, 5 years. In writing, 8 years. Mont. Code Ann. § 27-2-202. Other obligation or liability not founded on an instrument in writing, 3 years. Mont. Code Ann. § 27-2-202.

Medical Malpractice: 2 years after injury or 2 years after discovery, whichever occurs last, but never more than 5 years after injury. Mont. Code Ann. § 27-2-205.

State Government: Before filing a complaint, a claimant must first file a written notice with the Department of Administration and receive a denial. No action by the Department of Administration after 120 days will be deemed a denial. Upon the Department's receipt of the

[*] For UCC Claims and claims based on improvements to real property and/or claims brought by condominium associations related to construction defects, see the notes at the end of the Table of Contents.

notice, the statute of limitation is tolled for 120 days. Mont. Code Ann. § 2-9-301. The statute of limitation relevant to the type of action applies. Mont. Code Ann. § 2-9-302.
Local Government: Notice procedures applicable to the state under Mont. Code Ann. § 2-9-301 do not apply to claims against political subdivisions. Stratemeyer v. Lincoln County, 915 P.2d 175 (Mont. 1996). Against a sheriff, coroner or constable, 3 years. Relating to prisoner escape, 1 year. For claims against a county that have been rejected by county commissioners, 6 months. For an action against a municipality for damage from mob or riot, 1 year. For action against a municipality relating to a land use, construction, or development project, 6 months from the written decision. Mont. Code Ann. § 27-2-209. Otherwise, the statute of limitation relevant to the type of action applies. Mont. Code Ann. § 2-9-302.

Statutes of Repose

Improvements to Real Property: 10 years from completion or land surveying. If the injury occurred during the 10th year after completion, the action may be commenced within 1 year after the occurrence. The statute does not apply to an action upon any contract, obligation, or liability founded upon an instrument in writing, nor to any owner, tenant, or person in actual possession and control of the improvement or real property that is surveyed at the time a right of action arises. Mont. Code Ann. § 27-2-208.

Subrogating in the Insured's Name – Real Party in Interest

A fully subrogated insurer is the real party in interest and must bring suit in its own name against the wrongdoer responsible for the loss. When an insurance carrier pays only part of its insured's loss because the loss exceeds the coverage of the insurance policy or the policy contains a deductible amount, both the insured and the carrier have a claim for relief against the wrongdoer and either may bring suit in his own name to the extent of his respective claim. State ex rel. Nawd's TV and Appliance Inc. v. District Court, 543 P.2d 1336 (Mont. 1975).

NEBRASKA

Anti-Subrogation Rule: Subrogation by Insurer Against Insured
No right of subrogation can arise in favor of an insurer against its own insured or coinsured for a risk covered by the policy, even if the insured is a negligent wrongdoer. Jacobs Eng'g Grp. Inc. v. ConAgra Foods, Inc., 917 N.W.2d 435 (Neb. 2018); see also Jindra v. Clayton, 529 N.W.2d 523 (Neb. 1995) (no subrogation against party which owned insured property as joint tenant). But see Allstate Ins. Co. v. LaRandeau, 622 N.W.2d 646 (Neb. 1991) (where single policy was issued to subrogor and target, subrogation against target may proceed if coverage of target is excluded because of arson). The anti-subrogation rule is limited to claims arising from the very risk for which the insured was covered by the insurer. Bacon v. DBI/SALA, 822 N.W.2d 14 (Neb. 2012). Rule may not apply to statutory workers' compensation subrogation. Id.

Comparative/Contributory Negligence
Modified Comparative – 49%. Neb. Rev. Stat. § 25-21,185.09.

Contribution and Implied Indemnity
Contribution: The right to equitable contribution exists among joint tortfeasors. Royal Indem. Co. v. Aetna Casualty & Surety Co. 229 N.W. 2d 183 (Neb. 1975). A party seeking contribution must establish four elements, to wit: (1) there must be a common liability among the party seeking contribution and the parties from whom contribution is sought; (2) the party seeking contribution must have paid more than its pro rata share of the common liability; (3) the party seeking contribution must have extinguished the liability of the parties from whom contribution is sought; and (4) if such liability was extinguished by settlement, the amount paid in the settlement must be reasonable. Estate of Powell v. Montange, 765 N.W. 2d 496 (Neb. 2009). Statute of limitations is 4 years from the date the party seeking contribution "pays or has paid one-half of the debt as a whole." Neb. Rev. Stat. § 25-206; Cepel v. Smallcomb, 628 N.W. 2d 654 (Neb. 2001).

Implied Indemnity: For indemnity to be implied a "special relationship" must exist. Harsh Int'l v. Monfort Indus. 662 N.W.2d 574 (Neb. 2003). Examples of a special relationship include principle and agent, bailor and bailee, lessor, and lessee, or a situation giving rise to vicarious liability. Id. The party seeking indemnity must have been free of any wrongdoing, and its liability is vicariously imposed. Wood River v. Geer-Melkus Constr. Co., 444 N.W. 2d 305 (Neb. 1989). Statute of limitations is 4 years and accrues at the time the indemnity claimant suffers loss or damage. Id.; Neb. Rev. Stat. § 25-206.

Damages - Measure of Damages to Property
Real Property: The cost of repair or restoration and any other consequential damages, not to exceed the market value of the property immediately preceding damage to the property. "L" Investments, Ltd. v. Lynch, 322 N.W.2d 651 (Neb. 1982); see de Vries v. L&L Custom Builders, Inc., 968 N.W.2d 64 (Neb. 2021) (allowing amounts expended to investigate a construction defect and determine the proper course of remediation). Goal is to award the amount that will restore the injured party to the status he occupied immediately before the injury. de Vries. In a proper case, a court may award stigma damages so long as the cost of repairs and diminution of value do not exceed the value of the real estate before the injury. de Vries

Personal Property: Total Loss: If the reasonable cost of repair exceeds the difference in market value, the lost market value plus the reasonable value of the loss of use of the property for the reasonable amount of time required to obtain a suitable replacement. Chlopek v. Schmall, 396 N.W.2d 103 (Neb. 1986). Partial Loss: The reasonable cost of repair plus the reasonable value of the loss of the use of the property for the reasonable amount of time required to complete the repair. Chlopek.

Experts - States Following the Daubert/Kumho Doctrine
Follows Daubert and Kumho Tire. Schafersman v. Agland Coöp, 631 N.W.2d 862 (Neb. 2001); Neb. Rev. Stat. Ann. § 27-702.

Interest - Pre & Post Judgment
Prejudgment

Contract Actions
Rate: If based on a liquidated claim, the contract rate or 12%. Neb. Rev. Stat. § 45-104.
Accrual Date: The due date or the date of the breach. Id.; see Neb. Rev. Stat. § 45-103.02 (interest accrues on the date the cause of action arose); Horse Shoe Lake Drainage Dist. v. F.M. Crane Co., 199 N.W. 526 (Neb. 1924).

Tort Actions/Unliquidated Claims
Rate: 2% above the bond investment rate as stated in Neb. Rev. Stat. § 45-103.
Accrual Date: From the date of the plaintiff's first offer of settlement which is exceeded by the judgment until the entry of judgment if the conditions stated in § 45-103.02 are met. Neb. Rev. Stat. § 45-103.02. However, no prejudgment interest is allowed against the state, a political subdivision or any employee of either for any negligent act or omission. Neb. Rev. Stat. § 45-103.04.

Post Judgment
Rate: Contract rate, if applicable. If none, 2% above the bond investment rate as stated in Neb. Rev. Stat. § 45-103.
Accrual Date: Date of entry of judgment. Neb. Rev. Stat. § 45-103.01.

Joint and Several Liability
Modified joint and several liability. When two or more defendants act as part of a common enterprise or in concert to cause harm, the liability of each such defendant for economic and noneconomic damages shall be joint and several. In any other action involving more than one defendant, the liability of each defendant for economic damages shall be joint and several and the liability of each defendant for noneconomic damages shall be several only. Neb. Rev. Stat. § 25-21,185.10. But cf. Neb. Rev. Stat. § 25-21,239 (leased trucks).

Judgment Liens
A judgment becomes dormant if not executed on within five years. Neb. Rev. Stat. § 25-1515. A dormant judgment may be revived by bringing an action but must be within ten years of the judgment becoming dormant. Neb. Rev. Stat. § 25-1420.

Landlord-Tenant Subrogation ("Sutton Doctrine")
Absent an express agreement to the contrary in a lease, a tenant is an implied coinsured on his landlord's fire insurance policy. Buckeye State Mut. Ins. Co. v. Humlicek, 822 N.W.2d 351 (Neb. 2012); Tri-Par Investments, L.L.C. v. Sousa, 680 N.W.2d 190 (Neb. 2004). A lease requiring the tenant to obtain liability or renter's insurance does not change the general rule. Beveridge v. Savage, 830 N.W.2d 482 (Neb. 2013). Landlord's recovery of uninsured losses is not prohibited. SFI Ltd. Partnership 8 v. Carroll, 851 N.W.2d 82 (Neb. 2014).

Made Whole Doctrine
The insured must be fully compensated for a loss before the insurer may pursue subrogation. Blue Cross and Blue Shield of Nebraska, Inc. v. Dailey, 687 N.W.2d 689 (Neb. 2004). Contractual provisions which would deny the insured complete recovery for a loss are unenforceable. Id.

Professional Malpractice Filing Requirements (Affidavit of Merit)
No action against a health care provider may be commenced before the claimant's proposed complaint has been presented to a medical review panel and an opinion has been rendered by the panel. Neb. Rev. Stat. § 44-2840.

Restitution - Crime Victims Restitution Statutes
Discretionary. Neb. Rev. Stat. § 29-2280. The amount of restitution is based on actual damages sustained and is to account for the defendant's ability to pay. Neb. Rev. Stat. § 29-2281. In cases of property damage, the court may require the return of property, payment of reasonable repair costs, or the payment of replacement costs, if repair is impractical or impossible. Neb. Rev. Stat. § 29-2282. Restitution order may be enforced in the same manner as a judgment in a civil action. Neb. Rev. Stat. § 29-2286. Any restitution paid by the defendant to the victim shall be set off against any judgment in favor of the victim in a civil action. Neb. Rev. Stat. § 29-2287. The court shall not impose restitution for a loss for which the victim has received compensation, except that the court may order payment by the defendant to any person who has compensated the victim. Neb. Rev. Stat. § 29-2283. "Person" includes an insurance company. State v. Holecek**,** 621 N.W.2d 100 (Neb. 2000).

Right to Repair/Notice Statutes – Construction Cases
Neb. Rev. Stat. §§76-887 to 76-890 *Protection of Condominium Purchasers Act.*

Spoliation – Remedies for Spoliation
No cases have addressed whether Nebraska recognizes the tort of spoliation of evidence. The intentional spoliation or destruction of evidence relevant to a case raises an inference that this evidence would have been unfavorable to the case of the spoliator, on which the jury should be instructed. The inference does not arise where destruction was a matter of routine with no fraudulent intent because the adverse inference drawn from the destruction of evidence is predicated on bad conduct. McNeel v. Union Pacific R. Co., 753 N.W.2d 321 (Neb. 2008). Where an expert employed by a party conducts an examination of evidence without notice to the other party and negligently or intentionally destroys the evidence to the prejudice of the other party, evidence by the party employing the expert may be precluded. In determining the appropriate sanction, the court should consider five factors: (1) whether the defendant was prejudiced as a

result of the expert's conduct; (2) whether the prejudice can be cured; (3) the practical importance of the evidence; (4) whether the party employing the expert was in good or bad faith; and (5) the potential for abuse if the evidence is not excluded. In re Estate of Schindler, 582 N.W.2d 369 (Neb. App. 1998).

Statutes of Limitation and Repose*

Statutes of Limitation

Tort: Personal injury and property damage, 4 years. Neb. Rev. Stat. § 25-207; but see Neb. Rev. Stat. §§ 30-809, 30-810 (wrongful death – 2 years).

Contract: Written, 5 years. Neb. Rev. Stat. § 25-205. Oral, 4 years. Neb. Rev. Stat. § 25-206.

Medical Malpractice: 2 years. Neb. Rev. Stat. § 25-222.

Improvements to Real Property: Claims for breach of warranty or act or omission for deficiency in the design, planning, supervision or observation of construction, or construction generally subject to a 4-year repose period with no other limitation applicable. If the cause of action is not discovered and could not reasonably be discovered in 4 years, an action may be commenced within 2 years from the date of discovery or from the date of discovery of facts which would reasonably lead to discovery, whichever is earlier, subject to 10-year repose period. Neb. Rev. Stat. § 25-223. Warranty actions for condominium purchasers, see Neb. Rev. Stat. 76-890(a).

Professional Liability: For damages based on professional negligence or breach of warranty, 2-year repose period with no other limitation applicable. If the cause of action not discovered and could not reasonably be discovered in 2 years, an action may be commenced within 1 year from the date of discovery or from the date of discovery of facts which would reasonably lead to discovery, whichever is earlier, subject to 10-year repose period. Neb. Rev. Stat. § 25-222.

State Government: 2 years. Neb. Rev. Stat. §§ 25-218, 81-8,227. Suit may not be filed until the Risk Manager or State Claims Board has disposed of the claim. If the Risk Manager or State Claims Board has not acted within 6 months from filing, the notice may be withdrawn and suit may be filed. Neb. Rev. Stat. § 81-8,213. Suit must be filed within 2 years after the claim accrues. The limitation period is extended 6 months from the government's mailing of the disposition notice or from claimant's withdrawal of notice. Neb. Rev. Stat. § 81-8,227.

Local Government: Written notice required within 1 year. Neb. Rev. Stat. §§ 13-905, 13-919. Suit may not be filed until the government has disposed of the claim. If the government has not acted within 6 months from filing, the notice may be withdrawn and suit may be filed. Neb. Rev. Stat. § 13-906. Suit must be filed within 2 years after the claim accrues. The limitation period is extended 6 months from the local government's mailing of the disposition notice or from the claimant's withdrawal of notice. Neb. Rev. Stat. § 13-919.

Statutes of Repose

Products: If the product is made in Nebraska, 10 years from the first sale. If the product is not made in Nebraska, time from the statute of repose date for the state or country where

* For UCC Claims and claims based on improvements to real property and/or claims brought by condominium associations related to construction defects, see the notes at the end of the Table of Contents.

made, but not less than 10 years. If the other state/country has no statute of repose, none shall apply. Asbestos and certain other toxic substances also excepted. Neb. Rev. Stat. § 25-224.

Improvements to Real Property: 4 years from the act or omission, for breach of warranty or defective design, planning, construction. If the discovery rule applies (see below), 10 years from the act. Neb. Rev. Stat. § 25-223.

Professional Liability: 2 years from the act or omission, for professional negligence or breach of warranty. If the discovery rule applies (see below), 10 years from act or omission. Neb. Rev. Stat. § 25-222. Sec. 25-222 applies to architects; sec. 25-223 to contractors. Witherspoon v. Sides Const. Co., Inc., 362 N.W.2d 35 (Neb.1985).

Subrogating in the Insured's Name – Real Party in Interest

If the loss exceeds the amount of insurance paid, the action may be brought in the name of the insured for the entire loss. Schweitz v. Robatham, 234 N.W.2d 834 (Neb. 1975). If the insured is making no demands on the tortfeasor for uninsured losses, the insurer is the real party in interest and must sue in its name. Jelinek v. Nebraska Natural Gas Co., 243 N.W.2d 778 (Neb. 1976). A loan receipt agreement may allow the insurer to recover in the insured's name. Hammond v. Nebraska Natural Gas Co., 309 N.W.2d 75 (Neb. 1981). Under a loan receipt agreement, the insured's release with the tortfeasor for uninsured damages only does not preserve the insurer's cause of action even if the release specifically exempts the insurer's claim. Schmidt v. Henke, 222 N.W.2d 114 (Neb. 1974). An assignment may allow the insurer to sue in its name. American Sur. of New York v. Smith, Landeryou & Co., 4 N.W.2d 889 (Neb. 1942). Tort claims are not assignable where the tort causes a strictly personal injury and does not survive the death of the person injured. Mutual of Omaha Bank v. Kassebaum, 814 N.W.2d 731 (Neb. 2012).

NEVADA

Anti-Subrogation Rule: Subrogation by Insurer Against Insured
An insurer may not subrogate against its own insured. Safeco Ins. Co. v. Capri, 705 P.2d 659 (Nev. 1985) (landlord's insurer may not subrogate against tenant). "[A]n insurer may not subrogate against a co-insured of its insured." Lumbermen's Underwriting Alliance v. RCR Plumbing, Inc., 969 P.2d 301 (Nev. 1998) (where single policy was issued to subrogor and target, subrogation against target prohibited only if target's status as insured is explicitly stated in policy).

Comparative/Contributory Negligence
Modified Comparative – 50%. Nev. Rev. Stat. § 41.141.

Contribution and Implied Indemnity
Contribution: Nev. Rev. Stat. § 17.225 creates a right of contribution among joint tortfeasors. Contribution is only available if a judgment or settlement agreement expressly extinguishes liability on the party from whom contribution is sought. Discount Tire Co. of Nev. v. Fisher Sand & Gravel Co., 400 P.3d 244 (Nev. 2017). Judgment against one tortfeasor does not discharge the other tortfeasors from liability, nor does satisfaction of the judgment impair the right of contribution. Nev. Rev. Stat. § 17.225; Van Cleave v. Gamboni Constr. Co., 706 P.2d 845 (Nev. 1985). No tortfeasor is compelled to make contribution beyond his or her own equitable share of the entire liability and a settling party will not be entitled to recover any amount paid in settlement which is in excess of what was reasonable. Nev. Rev. Stat. § 17.225. A settlement made in good faith releases the settling parties from further contribution to the non-settling parties. Nev. Rev. Stat. § 17.245(1)(b). Factors a court considers in assessing whether a settlement is in good faith are "the amount paid in settlement, the allocation of the settlement proceeds among plaintiffs, the insurance policy limits of settling defendants, the financial condition of settling defendants, and the existence of collusion, fraud, or tortious conduct aimed to injure the interests of the non-settling defendants." In re MGM Grand Hotel Fire Litig., 570 F.Supp. 913 (D. Nev. 1983). A contribution claim must be filed within 1 year after the judgment has become final by lapse of time for appeal or after appellate review. Nev. Rev. Stat. § 17.285(3). Saylor v. Arcotta, 225 P.3d 1276 (Nev. 2010).

Implied Indemnity: The right of indemnity rests upon a difference between the primary (active) and the secondary (passive) liability of two parties, each of whom is made responsible by the law to an injured third-party. Black & Decker v. Essex Group, 775 P.2d 698 (Nev. 1989). For one tortfeasor to be in a position of secondary responsibility and thus be entitled to indemnification, there must be a preexisting legal relation between them, or some duty on the part of the primary tortfeasor to protect the secondary tortfeasor. Id. A settling party may seek protection against claims of implied indemnity by obtaining a formal ruling that its settlement is made in good faith under Nev. Rev. Stat. § 17.245. Doctors Co. v. Vincent, 98 P.3d 681, 690 (Nev. 2004). 4-year statute of limitations. Nev. Rev. Stat. 11.190(2)(c); Saylor v. Arcotta, 225 P.3d 1276 (Nev. 2010).

Damages - Measure of Damages to Property

Real Property: Permanent injury: Either 1) the value of the property less the salvage value or 2) the cost of replacement, at the discretion of the court. Montgomery Ward & Co. v. Stevens, 109 P.2d 895 (Nev. 1941). Temporary injury: The cost of restoring the property to its previous condition. A.B. Harvey v. The Sides Silver Mining Co., 1 Nev. 539 (1865). For residential construction defect cases, see Nev. Rev. Stat. § 40.655 (listing damages recoverable). For negligent misrepresentations in the sale or marketing of real property, see 1 Nev. Pat. J. Inst. Civ. 17.10

Personal Property: Damages based on the cost to repair personal property may be reduced by an amount equal to the diminution in the property's value from the damage, if the cost to repair the property exceeds the property's value's diminution. TM & KKH, Inc. v. First Judicial Dist. Court of State ex rel. Carson City, 2009 WL 1441657, 281 P.3d 1225 (Nev. 2009) (Table). With respect to irreplaceable property for which there is no market, factors to be considered include the property's original cost, the quality and condition of the property at the time of the loss, and the cost of reproduction, but exclude subjective considerations of sentimental value. Countrywide Home Loans, Inc. v. Thitchener, 192 P.3d 243 (Nev. 2008).

Experts - States Following the Daubert/Kumho Doctrine

Follows neither Daubert nor Frye. See Nev. Rev. Stat. § 50.275; Higgs v. State of Nevada, 222 P.3d 648 (Nev. 2010). Daubert factors may be examined but not mechanically applied. Id.

Interest - Pre & Post Judgment

Prejudgment

Contract Actions

Rate: Contract rate. If silent, at a rate equal to the prime rate at the largest bank in Nevada, plus 2%. Nev. Rev. Stat. § 17.130; see Nev. Rev. Stat. § 99.050. But see Nev. Rev. Stat. § 624.630 (money owed by prime contractors to subcontractors). Absent an agreement to the contrary, interest accumulates as simple interest. See Nev. Rev. Stat. § 99.050.

Accrual Date: As specified in the contract or, if no express written agreement, when the payment becomes due. See Nev. Rev. Stat. § 99.050; Nev. Rev. Stat. § 99.040(1). In other cases, interest runs from the time of service of the summons and complaint. Nev. Rev. Stat. § 17.130. However, for future damages, interest runs only from the time of the entry of judgment. Id. Offers of judgment may affect the recovery of interest. See Nev. R.C.P. 68(f)(1); Nev. Rev. Stat. § 40.652(4)(b) (construction defect cases).

Tort Actions

Rate: If the rate is not established by contract, a rate equal to the prime rate at the largest bank in Nevada, plus 2%. Nev. Rev. Stat. § 17.130.

Accrual Date: From the time of service of the summons and complaint. Id. However, for future damages, interest runs only from the time of the entry of judgment. Id.

Offer of Judgment

An offer of judgment can impact the interest award. See Nev. R.C.P. 68; see also Nev. Rev. Stat. § 40.652 (construction defect actions).

Post Judgment

Rate: If no rate specified in a contract, at a rate equal to the prime rate at the largest bank in Nevada, plus 2%. Nev. Rev. Stat. § 99.050; Nev. Rev. Stat. § 17.130(2).

Accrual Date: Interest continues to run from the times stated under Prejudgment Interest.

Joint and Several Liability

Modified joint and several liability. Where the plaintiff is not at fault, joint and several liability applies. Buck v. Greyhound Lines, Inc., 783 P.2d 437 (Nev. 1989). In cases where the plaintiff is comparatively negligent, each defendant is severally liable only for that portion of the judgment which represents the percentage of negligence attributable to that defendant unless the action is based upon (1) strict liability; (2) an intentional tort; (3) the emission of a hazardous substance; (4) the concerted acts of two or more defendants; or (5) an injury to any person or property resulting from a product. Nev. Rev. Stat. § 41.141. The owner of a motor vehicle is jointly and severally liable for the negligent operation by a family member. Nev. Rev. Stat. § 41.440.

Judgment Liens

A judgment is valid for six years but can be renewed by filing a petition within the six year period. Nev. Rev. Stat. § 17-150.

Landlord-Tenant Subrogation ("Sutton Doctrine")

Absent an express provision in the lease establishing a tenant's liability, the tenant is an implied coinsured on the landlord's policy. Safeco Ins. Co. v. Capri, 705 P.2d 659 (Nev. 1985).

Made Whole Doctrine

Unless it is explicitly excluded, the made-whole doctrine operates as a default rule that is read into insurance contracts. Canfora v. Coast Hotels & Casinos, Inc., 121 P.3d 599 (Nev. 2005).

Professional Malpractice Filing Requirements (Affidavit of Merit)

An action for medical or dental malpractice must be filed with affidavit of merit. Nev. Rev. Stat. § 41A.071. Failure to file the affidavit cannot be cured by amending the complaint. Fierle v. Perez, 219 P.3d 906 (Nev. 2009). An action against an engineer, land surveyor, architect or landscape architect must be filed with an affidavit of merit. Nev. Rev. Stat. § 40.6884.

Restitution - Crime Victims Restitution Statutes

Discretionary. If restitution is appropriate, the court shall set an amount of restitution for each victim of the offense. Nev. Rev. Stat. § 176.033. There is no requirement that the court consider a defendant's ability to pay when determining the amount. Martinez v. State, 974 P.2d 133 (Nev.1999). An insurance company is not a victim entitled to restitution. Id.; Nev. Rev. Stat. § 176.015.

Right to Repair/Notice Statutes – Construction Cases

Nev. Rev. Stat. §§ 40.640 to 40.695 *Actions Resulting from Construction Defect.*

Spoliation – Remedies for Spoliation

Nevada declines to recognize an independent tort for spoliation of evidence regardless of whether the alleged spoliation is committed by a first or third party. Timber Tech Engineered Bldg. Products v. The Home Ins. Co., 55 P.3d 952 (Nev. 2002). However, in Timber Tech the court left open the possibility that under the appropriate circumstances it might enforce a contract to preserve evidence. When a potential for litigation exists, the litigant is under a duty to preserve evidence which it knows or reasonably should know is relevant to the action. The court may instruct the jury that it can draw an adverse inference that destroyed evidence was unfavorable to the party that destroyed it. Banks ex rel. Banks v. Sunrise Hosp., 102 P.3d 52 (Nev. 2004). As a sanction for destruction or loss of evidence, dismissal should be used only in extreme situations; if less drastic sanctions are available, they should be utilized. GNLV Corp. v. Service Control Corp., 900 P.2d 323 (Nev. 1995).

Statutes of Limitation and Repose*

Statutes of Limitation

Tort: Personal injury, 2 years. Property damage, 3 years. Nev. Rev. Stat. § 11.190.

Contract: Written, 6 years. Oral, 4 years. Nev. Rev. Stat. § 11.190.

Medical Malpractice: Generally, for injuries occurring on or after October 1, 2002, 3 years, or 1 yar after discovery. Nev. Rev. Stat. § 41A.097(2). Generally, for injuries occurring on or after October 1, 2023, 3 years or 2 years after discovery. Nev. Rev. Stat. § 41A.097(3).

Other State: If the cause of action arises in another state and is barred by the other state's statute of limitation, the cause of action is barred in Nevada also, except in favor of a Nevada resident who has held the cause of action from the time it accrued. Nev. Rev. Stat. § 11.020.

State and Local Government: A notice of claim must be filed within 2 years. Nev. Rev. Stat. § 41.036. Statutes requiring notice against a local government to be filed within 6 months (Nev. Rev. Stat. §§ 244.245, 244.250) where held unconstitutional in Turner v. Staggs, 510 P.2d 879 (Nev. 1973). Against a sheriff, coroner or constable, 2 years. Nev. Rev. Stat. § 11.190. Otherwise, the statutes of limitation which would control against a private party generally applicable. Jimenez v. State, 644 P.2d 1023 (Nev. 1982).

Statutes of Repose

Improvements to Real Property: No action may be commenced against the owner, occupier or any person performing or furnishing the design, planning, supervision of observation or construction, or the construction of an improvement to real property more than 10 years after the substantial completion of such an improvement, for the recovery of damages for any deficiency in the construction, injury to real or personal property, or death. Nev. Rev. Stat. § 11.202; see Owners Ass'n v. Somerset Dev. Co., 492 P.3d 534 (Nev. 2021) ("substantial completion" means when the owner can occupy or utilize the work for its intend use). The statute does not apply to fraud claims. Nev. Rev. Stat. § 11.202. However, lower-tiered subcontractors who unknowingly cover up a defect are not subject to

* For UCC Claims and claims based on improvements to real property and/or claims brought by condominium associations related to construction defects, see the notes at the end of the Table of Contents.

the fraud exception. Id. The statute is not applicable to contribution or indemnity claims, innkeeper liability or product defect claims. Id.

Subrogating in the Insured's Name – Real Party in Interest

An insurer that pays its insured in full for claimed losses must sue in the insurer's name. If the insurer has paid only part of the loss, both the insured and insurer can sue in their respective names. If the action is brought in the insured's name and the insured recovers, the insurer has a right to reimbursement of its payments from the insured. Arguello v. Sunset Station, Inc., 252 P.3d 206 (Nev. 2011). A loan receipt agreement destroys the insurer's subrogation right and prevents it from suing in its own name. Central Nat. Ins. Co. of Omaha v. Dixon, 559 P.2d 1187 (Nev. 1977).

NEW HAMPSHIRE

Anti-Subrogation Rule: Subrogation by Insurer Against Insured
No case directly on point. However, in the landlord-tenant arena, a landlord's insurer may not subrogate against a tenant, unless the lease expressly provides otherwise. Cambridge Mut. Fire Ins. Co. v. Crete, 846 A.2d 521 (N.H. 2004).

Comparative/Contributory Negligence
Modified Comparative – 50%. N.H. Rev. Stat. Ann. § 507:7-d.

Contribution and Implied Indemnity
Contribution: Joint tortfeasors may assert contribution claims against each other. N.H. Rev. Stat. Ann. § 507:7-f. Contribution action may be pursued by a party even if no judgment was rendered against said party. Id. Contribution is not available to a person who enters into a settlement with a claimant unless the settlement extinguishes the liability of the person from whom contribution is sought, and then only to the extent that the amount paid in settlement was reasonable. Id.; Pike Indus. v. Hiltz Constr., 718 A.2d 236 (N.H. 1998). Contribution actions must be commenced within 1 year after the underlying judgment becomes final or the underlying settlement is made. N.H. Rev. Stat. Ann. § 507:7-g(III); Connors v. Suburban Propane Co., 916 F. Supp. 73 (D.N.H. 1996). Contribution actions involving improvements to real property are subject to New Hampshire's 8-year statute of repose. Rankin v. South St. Downtown Holdings, Inc., 215 A.3d 882 (N.H. 2019).

Implied Indemnity: A duty to indemnify may be implied if the indemnitor had agreed to perform a service for the indemnitee and the service was performed negligently, causing harm to a third person in breach of a non-delegable duty of the indemnitee. Hamilton v. Volkswagen of Am., 484 A.2d 1116 (N.H. 1984). Indemnity is limited to when the indemnitee's liability is derivative or imputed by law or where an express or implied duty to indemnify exists. Collectramatic v. Kentucky Fried Chicken Corp., 499 A.2d 999 (N.H. 1985). The courts will rarely imply indemnity. Dunn v. CLD Paving, 663 A.2d 104 (N.H. 1995). Indemnity actions involving improvements to real property are subject to New Hampshire's 8-year statute of repose. Rankin.

Damages - Measure of Damages to Property
Real Property: Cost of restoration if practicable; the difference between the value of the properties before and after the injury if not. Moulton v. Groveton Papers Co., 323 A.2d 906 (N.H. 1974).

Personal Property: Either (1) compensation for the difference between the value of the property before and after the harm or (2) the reasonable cost of repair with allowance for any difference between the value before and after the repairs, at the discretion of the property owner, as well as loss of use. Copadis v. Hamond, 47 A.2d 120 (N.H. 1946).

Experts - States Following the Daubert/Kumho Doctrine
Follows Daubert and Kumho Tire. N.H. R. Evid. 702; Baker Valley Lumber, Inc. v. Ingersoll-Rand Co., 813 A.2d 409 (N.H. 2002).

Interest - Pre & Post Judgment

Prejudgment

Contract Actions/Liquidated Damages

Rate: Contract rate, see In the Matter of Liquidation of the Home Ins. Co., 89 A.3d 165 (N.H. 2014), or, if none, simple interest the prevailing discount rate on 26-week U.S. Treasury bills at the last auction thereof preceding the last day of September each year, plus 2%, rounded to the nearest tenth of a percentage point. N.H. Rev. Stat. Ann. § 336:1(II).

Accrual Date: From the date of demand or, if none, from the time of the institution of suit. N.H. Rev. Stat. Ann. § 524:1-a; J.M. Lumber & Constr. Co. v. Smyjunas, 20 A.3d 947 (N.H. 2011).

Tort Actions

Rate: Simple interest at the prevailing discount rate on 26-week U.S. Treasury bills at the last auction thereof preceding the last day of September each year, plus 2%, rounded to the nearest tenth of a percentage point. N.H. Rev. Stat. Ann. § 336:1(II).

Accrual Date: The date of the writ or the filing of the petition to the date of judgment. N.H. Rev. Stat. Ann. § 524:1-b.

Post Judgment

Rate: The contract rate, see Mast Road Grain & Bldg. Materials Co. v. Ray Piet, Inc., 489 A.2d 143 (N.H. 1981) or, if none, simple interest at the prevailing discount rate on 26-week U.S. Treasury bills at the last auction thereof preceding the last day of September each year, plus 2%, rounded to the nearest tenth of a percentage point. N.H. Rev. Stat. Ann. § 336:1(II). If an appeal is frivolous, the court may award interest at the rate of 12%. N.H. Rev. Stat. Ann. § 490:14-a.

Accrual Date: The date of judgment. N.H. Rev. Stat. Ann. § 527:10.

Joint and Several Liability

Modified joint and several liability. Joint and several liability in all cases where the parties are found to have knowingly pursued or taken an active part in a common plan resulting in harm. In other cases, joint and several liability only for defendants 50% or more at fault. N.H. Rev. Stat. Ann. § 507:7-e.

Judgment Liens

Actions of debt upon judgments must be brought within 20 years. N.H. Rev. Stat. Ann. § 508:5.

Landlord-Tenant Subrogation ("Sutton Doctrine")

Absent an express agreement in a lease holding the tenant liable for the tenant's own negligence in causing a fire, the tenant is considered a coinsured on the landlord's insurance policy. Recovery is also barred for the recovery of uninsured losses if the landlord failed to obtain adequate insurance coverage. Cambridge Mut. Fire Ins. Co. v. Crete, 846 A.2d 521 (N.H. 2004) (residential lease). A New Hampshire court will probably apply the doctrine broadly. See Ro v. Factory Mut. Ins. Co. as Trustees of Dartmouth College, 260 A.3d 811 (N.H. 2021) (applying the doctrine to students in a dorm room who were subject to provisions in a college handbook and

stating that, to determine whether the Crete anti-subrogation rule applies, courts "look at the contractual relationship between the parties more broadly than whether it was 'technically a lease in the traditional sense'").

Made Whole Doctrine
In *dictum*, the Supreme Court noted that the equitable principal of subrogation, "is generally not allowed where the insured's total recovery is less than the insured's actual loss." Dimick v. Lewis, 497 A.2d 1221 (N.H. 1985). The court went on to state that the made whole rule is applied, "in cases where there is a recovery in full upon a judgment and *in absence of express contract terms*," id. (emphasis added), thereby suggesting that the made whole rule can be modified by contract or policy provisions.

Professional Malpractice Filing Requirements (Affidavit of Merit)
No affidavit/certificate of merit requirement.

Restitution - Crime Victims Restitution Statutes
Discretionary, but if the court does not order restitution, the court must state the reasons why on the record. N.H. Rev. Stat. Ann. § 651:63. A court may order restitution if restitution: 1) will rehabilitate the offender; 2) will compensate the victim; and 3) no other compensation is available. State v. Fleming, 480 A.2d 107 (N.H. 1984). The amount of restitution must equal the amount of liquidated damages which are causally connected and bear a significant relationship to the offense. State v. Gibson, 999 A.2d 240 (N.H. 2010); Fleming. The amount is not contingent upon offender's ability to pay. N.H. Rev. Stat. Ann. §§ 651:61-a; 651:63. An insurer may seek restitution. N.H. Rev. Stat. Ann. § 651:62. A civil award must be reduced by the amount of restitution paid. N.H. Rev. Stat. Ann. § 651:65.

Right to Repair/Notice Statutes – Construction Cases
N.H. Rev. Stat. Ann. §§ 359-G:1 to 359-G:8 *Residential Construction Defects; Dispute Resolution.*

Spoliation – Remedies for Spoliation
There are no civil cases on point, although a federal court has held that a tort action cannot be maintained by a party against a non-party for injury stemming from either the withholding or concealment of documentary evidence. Baker v. Cestari, 569 F.Supp. 842 (D.N.H. 1983). An adverse inference – that the missing evidence would have been unfavorable – can be made only when the evidence is destroyed deliberately, with fraudulent intent. Rodriguez v. Webb, 680 A.2d 604 (N.H. 1996). The timing of the destruction is not dispositive of the issue of intent. Murray v. Developmental Servs., 818 A.2d 302 (N.H. 2003).

Statutes of Limitation and Repose*
Statutes of Limitation

Tort: 3 years from act or omission, or 3 years from the date the act or omission was discovered or should have been discovered. N.H. Rev. Stat. Ann. § 508:4.

* For UCC Claims and claims based on improvements to real property and/or claims brought by condominium associations related to construction defects, see the notes at the end of the Table of Contents.

Contract: 3 years from act or omission, or 3 years from date the act or omission was discovered or should have been discovered. N.H. Rev. Stat. Ann. § 508:4.
State Government: Notice to the agency within 180 days of loss; suit within 3 years. N.H. Rev. Stat. Ann. § 541-B:14.
Local Government: Notice by registered mail to the agency within 60 days of loss, or within 60 days of the date the loss was discovered if it could not have been discovered at time of occurrence. 3 year limitation. N.H. Rev. Stat. Ann. § 507-B:7.

Statutes of Repose

Products: None. N.H. Rev. Stat. Ann. § 507-D:2, which attempted to impose a repose period, was held unconstitutional in Heath v. Sears, Roebuck & Co., 464 A.2d 288 (N.H. 1983).
Improvements to Real Property: 8 years from the date of substantial completion. N.H. Rev. Stat. Ann. § 508:4-b; Winnisquam Regional School Dist. v. Levine, 880 A.2d 369 (N.H. 2005).

Subrogating in the Insured's Name – Real Party in Interest

Both in cases of full subrogation and of partial subrogation, the action must be maintained in the insured's name. Sibson v. Robert's Express, Inc., 182 A.2d 449 (N.H. 1962); Montello Shoe Co. v. Suncook Industries, 26 A.2d 676 (N.H. 1942).

NEW JERSEY

Anti-Subrogation Rule: Subrogation by Insurer Against Insured
Generally, an insurer may not bring a subrogation action against its own insurer unless the case involves the insureds' criminal wrongdoing. Ambassador Ins. Co. v. Montes, 388 A.2d 603 (N.J. 1978). Although no case is directly on point, in Universal Underwriters Group v. Heibel, 901 A.2d 398 (N.J. Super. App. Div. 2006), the court implied that an insurer may not subrogate when the subrogor and target are both covered by the same policy. In *dicta* in Cozzi v. Government Employees Ins. Co., 381 A.2d 1235 (N.J. Super. App. Div. 1977), the court found an insurer's subrogation against another insured, covered by a different policy, to be a "valueless right" intended to balance the carrier's books.

Comparative/Contributory Negligence
Modified Comparative – 50%. N.J. Stat. Ann. § 2A:15-5.1.

Contribution and Implied Indemnity
Contribution: Contribution is available when an injured party recovers a judgment against one or more tortfeasors and any one of the joint tortfeasors pays such judgment in whole or in part in excess of its proportionate share. N.J. Stat. Ann. § 2A:53A-3. Settling parties are entitled to contribution, regardless of whether the non-settling joint tortfeasor was a party to the original action, if the settlement extinguishes the non-settling party's liability. Sattelberger v. Telep, 102 A.2d 577 (N.J. 1954). To satisfy the judgment requirement, a settling party should move for a consent judgment from the court rather than file a stipulation of dismissal. Lawler v. Isaac, 592 A.2d 1 (N.J. Super. App. Div. 1991). Contribution for ordinary settlements may be permitted if the non-settling tortfeasor was a non-party to the lawsuit, there was a dismissal, and the statute of limitations time-bars the original plaintiff from making a claim against the contribution defendant. Gangemi v. Nat'l Health Labs., Inc., 701 A.2d 965 (N.J. Super. App. Div. 1997). Claims for contribution are governed by contract law and are subject to a 6-year statute of limitations. Ideal Mut. Ins. Co. v. Royal Globe Ins. Co., 511 A.2d 1205 (N.J. Super. App. Div. 1986); N.J Stat. Ann. § 2A:14-1.

Implied Indemnity: The right of indemnity rests upon a difference between the primary and secondary liability of two persons each of whom is made responsible by the law to an injured party. Adler's Quality Bakery, Inc. v. Gaseteria, Inc., 159 A.2d 97 (N.J. 1960). It is a right which enures to a person who, without active fault on his own part, has been compelled, by reason of some legal obligation, to pay damages occasioned by the initial negligence of another, and for which he himself is only secondarily liable. Id. Implied indemnity is available only when a special legal relationship exists between the indemnitee and indemnitor and the liability of the indemnitee is vicarious. Ramos v. Browning Ferris Industries, Inc., 510 A.2d 1152 (N.J. 1986). Examples of the special relationship include that of principal and agent, bailor and bailee, lessor and lessee, and manufacturer and retailer. Id. A party may be indemnified for settlement payments it makes provided that: (a) the indemnitee's claims are based on a valid, pre-existing indemnitor/ indemnitee relationship; (b) the indemnitee faced potential liability for the claims underlying the settlement; and (c) the settlement amount was reasonable. Serpa v. N.J. Transit, 951 A.2d 208 (N.J. Super. App. Div. 2008). The statute of limitations does not begin to run until a judgment for damages has been entered. Adler's.

Damages - Measure of Damages to Property

Real Property: Generally, either the difference in value before and after injury or the reasonable cost to repair or restore the property; courts have discretion in applying the best measure for the circumstance. Mosteller v. Naiman, 7 A.3d 803 (N.J. Super. App. Div. 2010); St. Louis, LLC v. Final Touch Glass & Mirror, Inc., 899 A.2d 1018 (N.J. Super. App. Div. 2006). For cases involving trespass to land, such as where trees are removed, restoration costs may be awarded if there is a personal reason to the owner for restoring the property, but the upper limit of damages is "reasonableness." Kornbleuth v. Westover, 227 A.3d 1209 (N.J. 2020).

Personal Property: Partial Loss: The difference between the market value of the personal property before and after the damage occurred. Hyland v. Borras, 719 A.2d 662 (N.J. Super. App. Div. 1998); Associated Metals & Minerals Corp. v. Dixon Chem. & Research, Inc., 197 A.2d 569 (N.J. Super. App. Div. 1963); Jones v. Lahn, 63 A.2d 804 (N.J. 1949). Total Loss: The market value at the time of the loss; if the market value cannot be ascertained, then the reasonable value of the property to the owner may be used. Jones v. Lahn.

Experts - States Following the Daubert/Kumho Doctrine

Has not adopted expressly Daubert. Kemp ex rel. Wright v. State, 809 A.2d 77 (N.J. 2002). To be admissible as expert testimony: (1) the intended testimony must concern a subject matter that is beyond the ken of the average juror; (2) the field testified to must be at a state of the art such that an expert's testimony could be sufficiently reliable; and (3) the witness must have sufficient expertise to offer the intended testimony. Hisenaj v. Kuehner, 942 A.2d 769 (N.J. 2008) (applying N.J.R.E. 702). The Daubert factors are helpful, but not necessary or definitive, in guiding courts. In re Accutane Litigation, 191 A.3d 560 (N.J. 2018). In criminal cases, courts apply Frye. State v. Cassidy, 197 A.3d 86 (N.J. 2018).

Interest - Pre & Post Judgment

Prejudgment

Contract Actions

Prejudgment interest is awarded at the court's discretion based on equitable principles. DialAmerica Marketing, Inc. v. KeySpan Energy Corp., 865 A.2d 728 (N.J. Super. App. Div. 2005). While the method used for tort cases is a factor to consider, it is not determinative. Id. Prejudgment interest is not available in contract actions against the state except that, in its discretion, the court may award prejudgment interest on a judgment arising out of claims for the construction or installation of improvements to real property. N.J. Stat. Ann. § 59:13-8.

Tort Actions

Rate: For judgments exceeding the monetary limit of the Special Civil Part, simple interest at a rate equal to 2% above the average rate of return, to the nearest whole or one-half percent of the State of New Jersey Cash Management Fund. N.J. Court Rules, R. 4:42-11(b). However, no interest shall accrue prior to the entry of judgment against a public entity or public employee. N.J. Stat. Ann. § 59:9-2.

Accrual Date: The later of the date of the institution of the action or 6 months after the date the cause of action arises. N.J. Court Rules, R. 4:42-11(b).

Offer of Judgment

An offer of judgment can impact the award of prejudgment interest. See N.J. Court Rules, R. 4:58-2 and N.J. Court Rules, R. 4:58-3.

Post Judgment

Rate: For judgments exceeding the monetary limit of the Special Civil Part, judgments for the payment of money, taxed costs and attorney's fees shall bear simple interest at a rate equal to 2% above the average rate of return, to the nearest whole or one-half percent of the State of New Jersey Cash Management Fund. N.J. Court Rules, R. 4:42-11(a)(iii).

Accrual Date: Date of judgment. See N.J. Court Rules, R. 4:42-11(a)

Joint and Several Liability

Modified joint and several liability. Defendants found 60% or more liable are jointly and severally liable. If liability is less than 60%, then defendant is only severally liable. Joint and several liability is imposed for environmental tort cases, except where the extent of negligence or fault can be apportioned. In such a case and where the recovering party is unable to recover the percentage of compensatory damages attributable to a non-settling insolvent party's negligence or fault, that amount of compensatory damages may be recovered from any non-settling party in proportion to the percentage of liability attributed to that party. N.J. Stat. Ann. § 2A:15-5.3.

Judgment Liens

A judgment is valid for a period of twenty years, but can be renewed within the twenty year period by the filing of a notice with the court clerk. N.J. Stat. Ann. § 2A:14-5.

Landlord-Tenant Subrogation ("Sutton Doctrine")

When the parties agree that the landlord is to provide insurance for the structure, and that the tenant is to obtain insurance for its personal property, the parties are deemed to have agreed to look solely to insurance for recompense of their damages, protecting the tenant from subrogation by the landlord's insurer. Mayfair Fabrics v. Henley, 234 A.2d 503 (N.J. Super. Law Div. 1967). The Mayfair rule also applies if pursuant to the lease the tenant obtains an insurance policy naming the landlord as the insured. Foster Estates, Inc. v. Wolek, 252 A.2d 219 (N.J. Super. App. Div. 1969). In Zoppi v. Traurig, 598 A.2d 19 (N.J. Super. Law Div. 1990), the trial court opined that it could find no binding case law holding that a tenant could be immune to a subrogation claim by the landlord's insurer, absent an express agreement by the parties. In light of Foster Estates, which cited Mayfair with approval, Zoppi may have been wrongly decided.

Made Whole Doctrine

An insured must be made whole only in the absence of express terms in the insurance contract to the contrary. Culver v. Ins. Co. of North America, 559 A.2d 400 (N.J. 1989) (citing Providence Washington Ins. Co. v. Hogges, 171 A.2d 120 (N.J. Super. App. Div. 1961)).

Professional Malpractice Filing Requirements (Affidavit of Merit)

An affidavit of merit shall be served upon each defendant within 60 days of the filing of the answer in any action alleging malpractice or negligence by a licensed professional, including health care providers, attorneys, insurance producers, land surveyors and engineers. N.J. Stat. Ann. §§ 2A:53A-26, 2A:53A-27.

Restitution - Crime Victims Restitution Statutes
Mandatory, if the defendant is able to pay. N.J. Rev. Stat. Ann. § 2C:44-2. The amount shall not exceed the victim's loss. N.J. Rev. Stat. Ann. § 2C:43-3. Restitution is mandatory, without consideration of the ability to pay in cases of vehicle theft. N.J. Rev. Stat. Ann. § 2C:43-2.1; State v. Jones, 789 A.2d 131 (N.J. Super. App. Div. 2002). Insurers may receive restitution. State v. Hill, 714 A.2d 311 (N.J. 1998); State v. Jones. Any civil recovery is reduced by the amount of restitution ordered. N.J. Rev. Stat. Ann. § 2C:44-2. If restitution is not paid, the court shall recall the defendant or issue an arrest warrant to have him appear and explain the default. Penalties for unpaid restitution include suspension of the defendant's driver's license and/or imprisonment. A restitution order may be enforced as a civil judgment. N.J. Rev. Stat. Ann. § 2C:46-2. Parties to a civil action cannot reduce the amount of restitutionary obligation as a condition of settlement. State v. DeAngelis, 747 A.2d 289 (N.J. Super. App. Div. 2000).

Right to Repair/Notice Statutes – Construction Cases
None found.

Spoliation – Remedies for Spoliation
Although there is no tort for negligent spoliation, damages are recoverable for the intentional destruction of evidence, either by a party or by a non-party, under the theory of fraudulent concealment. The amount of damages is limited to additional costs or expenses suffered by the victim of the spoliation. The tort is available only if the party had notice of an actual or potential proceeding and had agreed to safeguard the evidence. Otherwise, a party may ask the trial court to instruct the jury that the spoliated evidence would have been adverse to the spoliator. Tartaglia v. UBS PaineWebber Inc., 961 A.2d 1167 (N.J. 2008); Viviano v. CBS, Inc., 597 A.2d 543 (N.J. Super. App. Div. 1991).

Statutes of Limitation and Repose*
Statutes of Limitation

Tort: Personal injury: 2 years. N.J. Rev. Stat. Ann. § 2A:14-2. Property damage: 6 years. N.J. Rev. Stat. Ann. § 2A:14-1; but see N.J. Rev. Stat. Ann. § 2A:14-1(c) (tolling for condominiums/condos); N.J. Rev. Stat. Ann. § 2A:58C-9(e) (tolling of certain products liability actions).

Contract: 6 years. N.J. Rev. Stat. Ann. § 2A:14-1; but see N.J. Rev. Stat. Ann. § 2A:14-1(c) (tolling for condominiums/condos).

State and Local Government: Torts: Written notice of claim to be filed with the Attorney General or responsible agency within 90 days. Suit may be filed after 6 months from the date the claim is received. 2-year limitation. N.J. Rev. Stat. Ann. § 59:8-8. 90-day notice period may be extended to 1 year with court approval upon showing of extraordinary circumstances. N.J. Rev. Stat. Ann. § 59:8-9. Contracts: Written notice of claim with the contracting agency within 90 days of accrual of claim. Suit may be filed after 90 days from the date the claim is received. Limitation of 2 years, or 1 year after the completion of the contract, whichever is later. N.J. Rev. Stat. Ann. § 59:13-5. The 90-day notice period may be extended to 1 year

* For UCC Claims and claims based on improvements to real property and/or claims brought by condominium associations related to construction defects, see the notes at the end of the Table of Contents.

with court approval, if the state has not been prejudiced by the delay. N.J. Rev. Stat. Ann. § 59:13-6.

Statutes of Repose

Improvements to Real Property: 10 years after services rendered. N.J. Rev. Stat. Ann. § 2A:14-1.1.

Subrogating in the Insured's Name – Real Party in Interest

Every action may be prosecuted in the name of the real party in interest. Rule 4:26-1. The rule is permissive. A subrogated insurer may proceed in its own name or in the insured's name, even without the insured's consent. Sullivan v. Naiman, 32 A.2d 589 (N.J. 1943). A loan receipt agreement merely gives the insurer the same rights it has at common law. Id.

NEW MEXICO

Anti-Subrogation Rule: Subrogation by Insurer Against Insured
Insurers may not bring subrogation actions against their own insureds. State ex rel. Regents of New Mexico State Univ. v. Siplast, Inc., 877 P.2d 38 (N.M. 1994) (subrogation prohibited against insured contractor whose negligence may have resulted in a loss to another co-insured covered by same builder's risk policy).

Comparative/Contributory Negligence
Pure Comparative. Scott v. Rizzo, 634 P.2d 1234 (N.M. 1981).

Contribution and Implied Indemnity
Contribution: Authorized by Uniform Contribution Among Tortfeasors Act, N.M. Stat. § 41-3-1, *et seq.* Available for payments made by a joint tortfeasor, irrespective of a judgment. N.M. Stat. §§ 41-3-1, 41-3-2. However, except in cases of intentional tort, vicarious liability, strict product liability and for other public policy reasons, defendants are severally liable and said defendants are not entitled to contribution. N.M. Stat. § 41A-3A-1. A joint tortfeasor is not entitled to contribution from another unless the other tortfeasor's liability is extinguished by the settlement. N.M. Stat. 41-3-2. Recovery is equal to the ratio of each joint tortfeasor's percentage of fault to the total percentage of fault attributed to all tortfeasors. N.M. Stat. § 41-3-2. 4-year statute of limitations under N.M. Stat. § 37-1-4, accruing at time of payment of settlement, though claim may be barred by statute of limitations or repose applicable to particular type of underlying case (i.e. medical malpractice) irrespective of the date of settlement. Mora-San Michel Elec. Coop., Inc. v. Hicks & Ragland Consulting & Eng'g Co. 598 P.2d 218 (N.M. Ct. App. 1979); Christus St. Vincent Reg'l Med. Ctr. v. Duarte-Afara, 267 P.3d 70 (N.M. Ct. App. 2011).

Implied Indemnity: Traditional indemnification is a common-law right to seek all-or-nothing recovery against the primary wrongdoer where there is an independent, pre-existing relationship between the parties. Amrep Southwest v. Shollenbarger Wood Treating, 893 P.2d 438 (N.M. 1995). Traditional indemnification allows a party who has been held liable without active fault to seek recovery from one who was actively at fault. Id. The right to indemnification may be established through an express or implied contract, or may arise without agreement, and by operation of law to prevent an unjust result. Id. Traditional indemnification applies in negligence, breach of warranty, and strict liability cases where the indemnitee is in the chain of supply of a product. Id. Proportional indemnification is allowed only where a defendant is otherwise denied an apportionment of fault and can then seek partial recovery from another at fault. Id. The statute of limitations for indemnification claims begins running at the time of payment of settlement of the underlying claim. Budget Rent-A-Car Sys. v. Bridgestone Firestone N. Am. Tire, LLC, 203 P.3d 154 (N. M. Ct. App. 2008). Applicable statute of limitations is likely the 4-year "catch all" of N.M. Stat. § 37-1-4.

Damages - Measure of Damages to Property
Real Property: Permanent Damage: The diminution in the fair market value of the property from the period before the injury to the period after the injury. McNeill v. Burlington Res. Oil & Gas Co., 153 P.3d 46 (N.M. Ct. App. 2006). Permanent damage to real property takes into

consideration the damage to the property in its entirety and is not limited to an evaluation of the damaged portion only. McNeill. Temporary Damage: The reasonable cost of repair or remediation. If the repair or remediation cost exceeds the diminution in the fair market value, then the diminution in fair market value should be applied. McNeill v. Burlington Res. Oil & Gas Co.

Personal Property: The lesser of: (1) the cost of repair plus depreciation after repairs, or (2) the reduction in fair market value from before the injury took place to after the injury occurred. Hubbard v. Albuquerque Truck Ctr. Ltd., 958 P.2d 111 (N.M. Ct. App. 1998).

Experts - States Following the Daubert/Kumho Doctrine
Daubert followed with respect to scientific evidence. State v. Alberico, 861 P.2d 192 (N.M. 1993); 11-702 NMRA. Kumho Tire not followed; Daubert factors do not apply to non-scientific testimony. Acosta v. Shell W. Exploration & Prod., 370 P.3d 761 (N.M. 2016).

Interest - Pre & Post Judgment
The state and its political subdivisions are exempt from § 56-8-4 interest except as otherwise provided by statute or common law. N.M. Stat. § 56-8-4(D).

Prejudgment

Rate: Prejudgment interest is a matter of right when damages are liquidated, but a matter of discretion where the amount owed is not fixed or readily ascertainable. Sunwest Bank, N.A. v. Colucci, 872 P.2d 346 (N.M. 1994). Interest is awarded at the discretion of the court, up to 10%. N.M. Stat. § 56-8-4(B); Gonzalez v. Surgidev Corp., 899 P.2d 576 (N.M. 1995); but cf. N.M. Stat. § 56-8-3 (allowing up to 15% for certain actions).

Accrual Date: In contract cases, interest should accrue from the date the plaintiff's claim accrues. P.S.C. v. Diamond D. Constr. Co., 33 P.3d 651 (N.M. Ct. App. 2001); see Hillelson v. Republic Ins. Co., 627 P.2d 878 (N.M. 1981) (stating that interest accrued from the time of breach). For other cases where interest is awarded pursuant to § 56-8-4(B), interest accrues from the date the complaint is served. Id.

Post Judgment

Rate: 8.75% unless (1) the parties contracted for a different rate; or (2) the judgment is based on tortious conduct, bad faith or intentional or willful acts, in which case interest shall be computed at the rate of 15%. N.M. Stat. § 56-8-4(A).

Accrual Date: Date of judgment. Id.

Joint and Several Liability
Modified joint and several liability. Each defendant is generally liable for only his share of the negligence. Joint and several liability shall apply (1) to defendants acting with the intention of inflicting injury or damage; (2) to defendants whose relationship to each other would make one person vicariously liable for the acts of the other; (3) to defendants who are strictly liable for the manufacture and sale of a defective product; or (4) to any other situation with a strong public policy for imposing joint and several liability. N.M. Stat. § 41-3A-1.

Judgment Liens
A judgment is a lien on the real estate of the judgment debtor and expires after fourteen years. N.M. Stat. § 39-1-6.

Landlord-Tenant Subrogation ("Sutton Doctrine")
"In the absence of an agreement between the parties specifying which of them will carry fire insurance for the benefit of both parties, or an express clause in the lease relieving a party from his own negligence, each party must bear the risk of loss for his own negligence." Acquisto v. Joe R. Hahn Enterprises, Inc., 619 P.2d 1237 (N.M. 1980), overruled on other grounds by, C.R. Anthony Co. v. Loretto Mall Partners, 817 P.2d 238 (N.M. 1991).

Made Whole Doctrine
Made-whole rule is not followed. The insured's and insurer's share of a recovery should instead be equitably apportioned. White v. Sutherland, 585 P.2d 331 (N.M. 1978); Quality Chiropractic, PC v. Farmers Ins. Co. of Arizona, 51 P.3d 1172 (N.M. Ct. App. 2002).

Professional Malpractice Filing Requirements (Affidavit of Merit)
No certificate requirement. However, medical malpractice cases involving an independent provider are screened by a medical review commission, but the independent provider and patient may stipulate to forego the panel process. See N.M. Stat. §§ 41-5-14 and 41-5-15. Beginning July 1, 2022, malpractice cases involving hospitals or outpatient healthcare facilities shall not be considered and shall not be filed with the review commission. N.M. Stat. § 41-5-14.

Restitution - Crime Victims Restitution Statutes
Mandatory, to the extent that the defendant is reasonably able to make restitution. The amount ordered is to consider, *inter alia*, the physical and mental health of the defendant, the defendant's age, education and employment circumstances, the victim's actual damages and such other factors as shall be appropriate. A restitution order may be enforced in the same manner as a civil judgment. N.M. Stat. § 31-17-1. An insurance company may recover restitution. State v. Brooks, 862 P.2d 57 (N.M. Ct. App. 1993).

Right to Repair/Notice Statutes – Construction Cases
N.M. Stat. §42-14-3 *NM Right to Repair Act.*

Spoliation – Remedies for Spoliation
Recovery for the tort of intentional spoliation of evidence requires establishing: (1) the existence of a potential lawsuit; (2) the defendant's knowledge of the potential lawsuit; (3) the destruction, mutilation, or significant alteration of potential evidence; (4) intent on the part of the defendant to disrupt or defeat the lawsuit; (5) a causal relationship between the act of spoliation and the inability to prove the lawsuit; and (6) damages. The intent must rise to the level of a malicious intent to harm. When there is no malice, the jury can be instructed that they may infer that the evidence would have been unfavorable to that party that destroyed it. There is no cause of action for negligent spoliation of evidence. Torres v. El Paso Elec. Co., 987 P.2d 386 (N.M. 1999); cf. N.M. Stat. § 29-1-18(B) (discussing spoliation related to body cam footage).

Statutes of Limitation and Repose[*]

Statutes of Limitation

Tort: Personal injury, 3 years. N.M. Stat. § 37-1-8. Property damage, 4 years. N.M. Stat. § 37-1-4.

Contract: Written, 6 years. N.M. Stat. § 37-1-3. Oral, 4 years. N.M. Stat. § 37-1-4.

State and Local Government: 90 days written notice. N.M. Stat. § 41-4-16. 2-year limitation. N.M. Stat. § 41-4-15.

Statutes of Repose

Improvements to Real Property: 10 years from substantial completion. N.M. Stat. § 37-1-27; but see N.M. Stat. § 42-14-3(M) (tolling the statute of repose or other applicable limitations period during the repair and replacement process specified in the Right to Repair Act notice).

Medical Malpractice: 3 years from date of malpractice. N.M. Stat. § 41-5-13. Minors and incapacitated persons shall have 1 year from and after the date of majority or termination of incapacity. N.M. Stat. § 41-5-13.

Subrogating in the Insured's Name – Real Party in Interest

There is but one cause of action for the entire recovery, including the subrogated amount, and that cause of action lies in the name of the insured. The insurer is entitled to join with the insured and participate in settlement negotiations for the entire settlement amount, and it is entitled to intervene in any legal action. However, if the insurer chooses not to participate in settlement negotiations for the entire recovery, then it is properly deemed to be relying on the efforts of the insured to protect its subrogated interest. When the insured recovers from the wrongdoer, either by settlement or by judgment, he or she then holds the insurer's subrogated interest in trust. Amica Mut. Ins. Co. v. Maloney, 903 P.2d 834 (N.M. 1995). The insurer is an indispensable party in the insured's cause of action and must be joined, but its existence is not to be disclosed to the jury. Safeco Ins. Co. of America v. U.S. Fidelity & Guar. Co., 679 P.2d 816 (N.M. 1984).

[*] For UCC Claims and claims based on improvements to real property and/or claims brought by condominium associations related to construction defects, see the notes at the end of the Table of Contents.

NEW YORK

Anti-Subrogation Rule: Subrogation by Insurer Against Insured
Insurer has no right of subrogation against an insured covered by policy from which benefits were issued. Pa. Gen. Ins. Co. v. Austin Powder Co., 502 N.E.2d 982 (N.Y. 1986). However, the agreement between insured and potential co-insured must be examined to determine whether coverage was actually afforded the putative co-insured. Commerce & Indus. Ins. Co. v. Admon Realty, Inc., 562 N.Y.S.2d 655 (App. Div. 1990). Rule does not bar subrogation against a subcontractor insured under a builder's risk policy if the loss did not arise from the subcontractor's covered property. St. Paul Fire & Marine Ins. Co. v. FD Sprinkler Inc., 908 N.Y.S.2d 637 (App. Div. 2010). Rule also applies only to the extent of the limit of the common policy. Federated Dept. Stores, Inc. v. Twin City Fire Ins. Co., 807 N.Y.S.2d 62 (App. Div. 2006). Rule may bar recovery of subrogor's deductible. Stranz v. NYSERDA, 930 N.Y.S.2d 136 (App. Div. 2011). Where the same carrier issues property policy to subrogor and separate liability policy to target, subrogation is permitted. Fashion Tanning Co., Inc. v. Fulton County Elec. Contractors, Inc., 536 N.Y.S.2d 866 (App. Div. 1989).

Comparative/Contributory Negligence
Pure Comparative. N.Y. C.P.L.R. § 1411.

Contribution and Implied Indemnity
Contribution: Authorized by N.Y. C.P.L.R. § 1401, *et seq.* In absence of release, waiver of contribution, or bar by workers' compensation laws, two or more parties liable for the same damages may claim contribution from the others whether or not action has been brought or judgment rendered against party from whom contribution is sought. N.Y. C.P.L.R. § 1401. A party is entitled to an amount in contribution paid by him over and above his equitable share. N.Y. C.P.L.R. § 1402. A claim for contribution may be asserted in the underlying action or a separate action. N.Y. C.P.L.R.
§ 1403. 6-year statute of limitations, beginning with the payment of the underlying claim. Blum v. Good Humor Corp., 394 N.Y.S.2d 894 (App. Div. 1977) (applying N.Y. C.P.L.R. § 213). However, claims against the state are still subject to a limited 2-year statute of limitations. Berlin & Jones, Inc. v. State, 381 N.Y.S.2d 778 (Ct Cl. 1976).

Implied Indemnity: Common law indemnity is available where the proposed indemnitor's negligence contributed to injury when the party seeking indemnity was free from negligence. Martins v. Little, 899 N.Y.S.2d 30 (App. Div. 2010). New York recognizes both implied-in-fact (contract-based) and implied-in-law (tort-based) indemnification, depending on whether the relationship between the parties is contractual in nature or if the proposed indemnitor owes some other independent duty to the proposed indemnitee. Landtek Grp., Inc. v. Am. Specialty Flooring, Inc., 2016 U.S. Dist. LEXIS 107945 (E.D.N.Y. 2016). Six-year statute of limitations, accruing from the payment of settlement on the underlying claim. McDermott v. New York, 406 N.E.2d 460 (N.Y. 1980) (applying N.Y. C.P.L.R. § 213).

Damages - Measure of Damages to Property
Real Property: Permanent Damage: The lesser of two values: (1) Cost of restoration, or (2) the decline in market value. Fisher v. Qualico Constr. Corp., 779 N.E.2d 178 (NY 2002). The

plaintiff need only establish one measure. It is the defendant's burden to introduce evidence of another, lesser measure. Fisher (citing Jenkins v. Etlinger, 432 N.E.2d 589 (1982)); cf. Gibbs v Porath, 145 A.D.3d 1221 (App. Div. 2016) (stating that a plaintiff may claim damages for permanent injury to real property based on restoration costs for permanent injury). Temporary Damage: Reasonable cost of repair but not to exceed the fair market value diminution. Mennito v. Town of Weyland, 56 N.Y.S.2d 654 (Sup. Ct. 1943). Where the injury is temporary, damages can include loss of use, evidenced by the decrease in rental value. Jenkins.

Personal Property: Permanent Damage: Fair market value of the property, taking depreciation into consideration. Kodak v. Am. Airlines, 805 N.Y.S.2d 223 (App. Term 2005). For automobiles, the fair market value of the car before the destruction, less the salvage value. Aurnou v. Craig, 584 N.Y.S.2d 249 (App. Div. 1992). For household goods for which there is no market, plaintiff may recover purchase price less adjustment for wear and tear. Ashare v. Mirkin, Barre, Saltzstein & Gordon, P.C., 435 N.Y.S.2d 438 (Sup. Ct. 1980). Temporary Damage: The difference between the market value of the property immediately prior to the loss and immediately after the injury occurred. Schwartz v. Crozier, 565 N.Y.S.2d 567 (App. Div. 1991). For items with a repair cost of up to $2,000: cost of repair, with appropriate documentation. N.Y. C.P.L.R. R. 4533-a. For automobiles, reasonable cost of repairs may be used to establish damages, so long as repair costs do not exceed fair market value of vehicle prior to the injury. Schwartz v. Crozier.

Experts - States Following the Daubert/Kumho Doctrine
Follows Frye. Kelly v. Metro-North Commuter R.R., 902 N.Y.S.2d 78 (N.Y. App. Div. 2010); People v. Wesley, 633 N.E.2d 451 (N.Y. 1994).

Interest - Pre & Post Judgment
Interest on a judgment or accrued claim against the state, a municipal corporation or a public corporation shall not exceed 9% per annum. N.Y. State Fin. Law § 16; N.Y. Gen. Mun. Law § 3-a(1); N.Y. CLS Unconsol. Ch. 195, § 1. For condemnation proceedings and wrongful death actions against a municipal corporation, the rate shall not exceed 6% per annum. N.Y. Gen. Mun. Law § 3-a(2).

Prejudgment

Contract Actions

Rate: 9% unless otherwise provided by statute, N.Y. C.P.L.R. § 5004(a); see N.Y. C.P.L.R. § 5001(a), or otherwise agreed to in a contract. NCYTL 1998-2 Trust v. Wagner, 876 N.Y.S.2d 522 (App. Div. 2009).

Accrual Date: Date of the breach. See City of Binghamton v. Serafini, 778 N.Y.S.2d 547 (App. Div. 2004); N.Y. C.P.L.R. § 5001(b).

Tort Actions

Rate: For an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of property, 9%. N.Y. C.P.L.R. §§ 5004, 5001(a).

Accrual Date: The earliest ascertainable date the cause of action existed. N.Y. C.P.L.R. § 5001(b).

For equitable actions, interest and the accrual date are set at the court's discretion. N.Y. C.P.L.R. § 5001(a).
For wrongful death actions, 9% interest from the date of the decedent's death. N.Y. C.P.L.R. § 5004; N.Y. E.P.T.L. § 5-4.3.

Post Judgment

Rate: 9%, unless otherwise prescribed by statute. N.Y. C.P.L.R. § 5004(a).
Effective April 30, 2022: 2% for a consumer debt where a natural person is a defendant for judgments entered on or after April 30, 2022, and for any judgment for a consumer debt entered prior to April 30, 2022 that remains unpaid. N.Y. C.P.L.R. § 5004(a).
Accrual Date: Date of entry of judgment. N.Y. C.P.L.R. § 5003; see N.Y. C.P.L.R. § 5004(a) [effective April 30, 2022].

Joint and Several Liability

Modified joint and several liability. Generally, defendants are jointly and severally liable, but in personal injury cases, defendants are only responsible for their actual share of non-economic damages if that defendant's percentage of liability is 50 percent or less. The 50 percent exception does not apply in a number of circumstances – including motor vehicle cases, cases of recklessness, pollution, strict product liability when the manufacturer is outside the court's jurisdiction, and in cases of intentional torts in which the defendants acted in concert. N.Y. C.P.L.R. §§ 1601 and 1602; Rangolan v. County of Nassau, 749 N.E.2d 178 (N.Y. 2001).

Judgment Liens

A judgment lien is valid for ten years. N.Y. C.P.L.R. § 5203. An action to renew the judgment may be commenced within the year prior to the expiration of the 10 years. N.Y. C.P.L.R. § 5014. A judgment is conclusively presumed to be paid and satisfied after 20 years, except in limited circumstances set forth in N.Y. C.P.L.R. § 211.

Landlord-Tenant Subrogation ("Sutton Doctrine")

A tenant is not an implied coinsured on her landlord's insurance policy. Phoenix Ins. Co. v. Stamell, 796 N.Y.S.2d 772 (App. Div. 2005). The tenant is liable for its negligent acts unless the lease exempts the tenant from liability in clear and unequivocal terms. Galante v. Hathaway Bakeries, Inc., 176 N.Y.S.2d 87 (App. Div. 1958). However, where a lease requires the tenant to pay the cost of the landlord's insurance, the landlord's insurance company cannot subrogate. Meadvin v. Buckley-Southland Oil Co., 451 N.E.2d 491 (N.Y. 1983).

Made Whole Doctrine

An insurer does not have to wait for its insured to be made whole before it can assert a subrogation claim. Winkelmann v. Excelsior Ins. Co., 650 N.E.2d 841 (N.Y. 1995). This is true whether the tortfeasor's insurance coverage is adequate to cover both the subrogor's and subrogee's claims or even if it is inadequate. Id. However, if the tortfeasor's insurance coverage is inadequate, and the insured/subrogor recovers money from the tortfeasor, the insurer has no right to recover any of the settlement proceeds which its insured received. Winkelmann; Berry v. St. Peter's Hosp. of City of Albany, 678 N.Y.S.2d 674 (App. Div. 1998).

Professional Malpractice Filing Requirements (Affidavit of Merit)
A certificate of merit must be filed along with the complaint in any malpractice action for medical, dental or podiatric malpractice. N.Y. C.P.L.R. § 3012-a.

Restitution - Crime Victims Restitution Statutes
Discretionary, depending upon the recommendation of the district attorney and/or a request of victim. Civil damages may be recovered in excess of restitution paid. N.Y. Penal Law § 60.27. An insurer has right of restitution against a defendant who caused property loss. People v. Chery, 511 N.Y.S.2d 88 (App. Div. 1987). Juveniles are subject to payment of restitution up to $1500. Family Court Act § 353.6. When an insured signs a loan receipt with a subrogated insurer, court may order a juvenile to pay the insured, who will then remit proceeds to the insurer. A juvenile may not be liable directly to an insurance company. Matter of Sean P.K., 896 N.Y.S.2d 543 (App. Div. 2010).

Right to Repair/Notice Statutes – Construction Cases
N.Y. Gen Bus. Laws § 777-a *Housing merchant implied warranty.*

Spoliation – Remedies for Spoliation
The tort of spoliation is grounded in speculation and is not recognized. The victim of spoliation has a number of other remedies against a party-spoliator, including an adverse inference instruction, a preclusion order, discovery sanctions, the recovery of costs associated with replacing evidence and the striking of pleadings. Ortega v. City of New York, 876 N.E.2d 1189 (N.Y. 2007).

Statutes of Limitation and Repose*
Statutes of Limitation

Tort: Personal injury or property damage: 3 years. N.Y. C.P.L.R. § 214; but see N.Y. E.P.T.L. § 5-4.1 (generally, 2 years for wrongful death). Non-medical malpractice: 3 years from completion of performance, applicable even if claim is contract-based. Id.; In re R.M. Kliment, 821 N.E.2d 952 (N.Y. 2004). Medical malpractice: 2½ years, or, if applicable, 1 year from discovery of a foreign object in the patient, whichever is earlier. N.Y. C.P.L.R. § 214-a. Crime Victims see N.Y. C.P.L.R. § 213-b.

Contract: 6 years. N.Y. C.P.L.R. § 213. As to architects and contractors, runs from completion of performance. Town of Oyster Bay v. Lizza Industries, Inc., 4 N.E.3d 944 (N.Y. 2013). Implied Warranty Claims – New Homes: 1 year after expiration of applicable warranty period or within 4 years after the warranty date, whichever is later. N.Y. Gen. Bus. § 777-a(4)(b). If the builder makes repairs, 1 year after the last date of repairs. N.Y. Gen. Bus. § 777-a(4)(b). Action for contribution or indemnification 1 year after entry of judgment. N.Y. Gen. Bus. § 777-a(4)(c). Builder must receive written notice of warranty claim prior to the commencement of any action and no later than 30 days after the expiration of the applicable warranty period. N.Y. Gen. Bus. § 777-a(4)(1).

State Government: Claim (equivalent of complaint) must be filed with the Court of Claims and served on the Attorney General within the limitation periods specified by the Court of Claims Act. A Notice of Intention to File a Claim, served on the Attorney General, extends

* For UCC Claims and claims based on improvements to real property and/or claims brought by condominium associations related to construction defects, see the notes at the end of the Table of Contents.

the limitation period. Wrongful death: Claim or Notice of Intention to be filed within 90 days from the naming of the estate's personal representative, but not later than 2 years after death. Personal injury or property damage based on an unintentional tort: Filing of claim within 90 days OR Notice of Intention within 90 days and filing of claim within 2 years. Personal injury or property damage based on an intentional tort: Filing of claim within 90 days OR Notice of Intention within 90 days and filing of claim within 1 year. Breach of Contract: Filing of claim within 6 months OR Notice of Intention within 6 months and filing of claim within 2 years. Time limitations may be excused in lieu of general statutes of limitation applicable to non-public entities, with court approval. Court of Claims Act § 10.
Local Government: Within 90 days, written notice by registered or certified mail to public corporation's designee or attorney. Late notice up to the end of limitation period is permissible with court approval. 30-day waiting period after filing of notice before suit can be filed. Limitation period of 1 year 90 days (2 years for wrongful death). Gen. Mun. Law §§ 50-e, 50-i. Property destroyed or injured pursuant to a health order where no personal liability exists against the health board, health officer or representative a health officer, 6 months. N.Y. C.P.L.R. Pub. Health § 329(2).

Statutes of Repose

Improvements to Real Property: None *per se*. However, no action may be filed against an architect, engineer or surveyor for a claim arising more than 10 years after performance, conduct or omission, unless the plaintiff first gives written notice to the defendant. Suit may be filed after a 90-day waiting period. N.Y. C.P.L.R. § 214-d.

Subrogating in the Insured's Name – Real Party in Interest

An insurer seeking to enforce its right of subrogation generally has two options – the insurer can bring an independent action against the wrongdoer in the name of its insured, the subrogor, or seek to intervene in an existing action between the insured and the wrongdoer. Peterson v. New York State Elec. and Gas Corp., 981 N.Y.S.2d 834 (App. Div. 2014). When an insured has signed a loan or subrogation agreement, the insurer need not be joined as a party. N.Y. C.P.L.R. 1004. If the insured has been completely compensated by its insurer, the insured is not the real party in interest. Skinner v. Klein, 260 N.Y.S.2d 799 (App. Div. 1965).

NORTH CAROLINA

Anti-Subrogation Rule: Subrogation by Insurer Against Insured
No case on point. In Atlantic Joint Stock Land Bank of Raleigh v. Farmers' Mut. Fire Ins. Ass'n of N.C., 166 S.E. 789 (N.C. 1932), the court, without explanation, held that an insurer compelled to pay its insured's mortgagee for a fire loss was not entitled to be subrogated to the mortgagee's rights and therefore could not recover the payment to the mortgagee from its insured.

Comparative/Contributory Negligence
Strict Contributory. Sorrells v. M.Y.B. Hospitality Ventures of Asheville, 423 S.E. 2d 72 (N.C. 1992); Crawford v. Mintz, 673 S.E.2d 746 (N.C. Ct. App. 2009); N.C. Gen. Stat. § 99B-4 (products liability). Contributory negligence is not a bar in cases of gross negligence, or willful or wanton conduct. Yancey v. Lea, 550 S.E.2d 155 (N.C. 2001).

Contribution and Implied Indemnity
Contribution: Authorized by Uniform Contribution among Tort-Feasors Act, N.C. Gen. Stat. § 1B-1, *et seq*. Contribution exists in favor of a tortfeasor who has paid more than his *pro rata* share of common liability. N.C. Gen. Stat. §§ 1B-1, 1B-2. Contribution can be enforced in the underlying action or in separate action. N.C. Gen. Stat. § 1B-3. If judgment has been entered in an action, and it is satisfied by fewer than all of the liable joint tortfeasors, the payor(s) shall set a notation on the docket of the preservation of the right of contribution, and then may enforce contribution by motion. N.C. Gen. Stat. § 1B-7. Where there is no judgment, contribution is barred unless the tortfeasor: (1) discharged the common liability within statute of limitations for the underlying right of action and commenced contribution action within 1 year after payment; (2) agreed to discharge common liability while underlying action was pending and commenced contribution action within 1 year; or (3) joined other tortfeasors as third-party defendants for purposes of contribution and re-filed the contribution action within 3 years following a voluntary dismissal. N.C. Gen. Stat. § 1B-3; Safety Mut. Casualty Corp. v. Spears, Barnes, Baker, Wainio, Brown & Whaley, 409 S.E.2d 736 (N.C. Ct. App. 1991).

Implied Indemnity: Common law allows indemnity claim where there are tortfeasors that are not both at fault. Edwards v. Hamill, 138 S.E.2d 151 (N.C. 1964). Primary and secondary liability exists only when parties are jointly and severally liable; and either one has been passively negligent but exposed to liability for activity by the other, or one has done the injury-causing act but the other is derivatively liable. Id. Action can be pursued in underlying claim, or in a separate claim commenced after payment and satisfaction of the debt. Ingram v. Garner, 191 S.E.2d 390 (N.C. Ct. App. 1972). 3-year statute of limitations, beginning to run upon payment of the debt. Id.

Damages - Measure of Damages to Property
Real Property: Permanent Damage: The diminution in value from immediately before to immediately after the damage occurred. Feierstein v. N.C. Dept. of Env't & Natural Res., 712 S.E.2d 343 (N.C. Ct. App. 2011). Under North Carolina law, damages to land may be recovered using one of two measures: (1) the difference in market value before and after the injury, or (2) the cost of restoring the land to its pre-injury state. When the damage to land is "impermanent" in nature, diminution in value is not an appropriate measure of damages. BSK Enters. v. Beroth

Oil Co., 783 S.E.2d 236 (N.C. Ct. App. 2015). For trespass to timber, the owner can recover the value of the property immediately before and after the cutting. King v. Duke Energy Progress, LLC, 854 S.E.2d 593 (N.C. Ct. App. 2021). Where property is owned for personal use, diminution in value of ornamental trees can be established with evidence of the replacement cost for the trees. King. For commercial timber, damages are either the difference in property value or double the value of the timber. King; N.C. Gen. Stat. § 1-539.1. Temporary Damage: Reasonable cost of replacement or repairs but not diminution in value. Casado v. Melas Corp., 318 S.E.2d 247 (N.C. Ct. App. 1984).

Personal Property: The difference between the fair market value immediately before and immediately after the damage occurred. Repair cost may be admitted as evidence of diminution. Sprinkle v. N.C. Wildlife Resources Commission, 600 S.E.2d 473 (N.C. Ct. App. 2004).

Experts - States Following the Daubert/Kumho Doctrine
Follows Daubert and Kumho Tire. N.C. Gen. Stat. § 8C-1, Rule 702; State v. McGrady, 787 S.E.2d 1 (N.C. 2016).

Interest - Pre & Post Judgment
Unless otherwise authorized by statute or contract, plaintiffs are not entitled to pre or post judgment interest from the state. McGee v. North Carolina Dep't of Revenue, 520 S.E.2d 84 (N.C. Ct. App. 1999); Myers v. Dep't of Crime Control & Public Safety, 313 S.E.2d 276 (N.C. Ct. App. 1984).

Prejudgment

Contract Actions
Rate: 8% or the rate enumerated in the contract. N.C. Gen. Stat. § 24-5(a); see N.C. Gen. Stat. § 24-1.
Accrual Date: Date of breach. N.C. Gen. Stat. § 24-5(a).

Tort Actions
Rate: 8%, but only on compensatory damages. N.C. Gen. Stat. § 24-5(b); see N.C. Gen. Stat. § 24-1.
Accrual Date: Date the action is commenced. N.C. Gen. Stat. § 24-5(b).

Post Judgment

Contract Actions:
Rate: The contract rate if the parties agreed that the rate applies after judgment. Otherwise, 8%. N.C. Gen. Stat. § 24-5(a); see N.C. Gen. Stat. § 24-1.
Accrual Date: Date of judgment. Id.

Tort Actions:
Rate/Accrual Date: For compensatory damages, the 8% rate continues until the judgment is satisfied. For other portions of a money judgment, except costs, 8% from the date of judgment. N.C. Gen. Stat. § 24-5(b); see N.C. Gen. Stat. § 24-1.
For condemnation actions, see N.C. Gen. Stat. § 136-113.

Joint and Several Liability
Joint and several liability. Joint and several liability is allowed when (1) defendants have acted in concert to commit a wrong that caused an injury; or (2) defendants, even without acting in concert, have committed separate wrongs that still produced an indivisible injury. G.E. Betz, Inc. v. Conrad, 752 S.E.2d 634 (N.C. Ct. App. 2013).

Judgment Liens
A judgment is a lien on real property for ten years from the entry date. N.C. Gen. Stat. § 1-234. A motion to revive a dormant judgment may be brought as an independent action. Lilly v. West, 1 S.E. 834 (N.C. 1887).

Landlord-Tenant Subrogation ("Sutton Doctrine")
Even if the landlord agrees to insure the property, the tenant is liable for its negligent acts unless the terms of the lease clearly and explicitly establish a contrary intent. Dixie Fire & Casualty Co. v. Esso Standard Oil Co., 143 S.E.2d 279 (N.C. 1965); Winkler v. Appalachian Amusement Co., 79 S.E.2d 185 (N.C. 1953).

Made Whole Doctrine
Insured made whole first. St. Paul Fire and Marine Ins. Co. v. W.P. Rose Supply Co., 198 S.E.2d 482 (N.C. Ct. App. 1973). With regard to automobile collision insurance, the insured must be made whole, except for any deductible. N.C. Auto Insur. L. § 16:2.

Professional Malpractice Filing Requirements (Affidavit of Merit)
In a medical malpractice action, the complaint shall be dismissed unless it asserts that the medical records have been reviewed by a consultant who is willing to testify that the medical care did not comply with the applicable standard of care, or that negligence is established under the existing common-law doctrine of *res ipsa loquitur*. N.C. Gen. Stat. § 1A-1, R.9(j).

Restitution - Crime Victims Restitution Statutes
A victim has a right to receive restitution pursuant to Art. 81C of Chapter 15A. N.C. Gen. Stat. § 15A-834. Restitution is mandatory for certain felonies and misdemeanors, including arson. It is discretionary for other crimes. The amount of restitution depends upon the defendant's ability to pay. The value of property lost is to be determined by its value on the date of loss or value on the date of sentencing, less the value of any part of the property that is returned. A civil judgment must be reduced by the amount of restitution paid. N.C. Gen. Stat. §§ 15A-1340.34 – 1340.37. Insurance companies may not receive restitution. State v. Stanley, 339 S.E.2d 668 (N.C. App. 1986); see N.C. Gen. Stat. § 15A-1340.37(d).

Right to Repair/Notice Statutes – Construction Cases
None found.

Spoliation – Remedies for Spoliation
Although North Carolina does not recognize a cause of action in tort for spoliation of evidence, it does permit a common law cause of action for obstruction of justice. Such a cause of action arises for acts which obstruct, impede or hinder public or legal justice. Grant v. High Point Regional Health System, 645 S.E.2d 851 (N.C. Ct. App. 2007) (hospital's destruction of decedent's x-rays

gave rise to cause of action of obstruction of justice). Where a party fails to produce certain evidence relevant to the litigation, the finder of fact may infer that the party destroyed the evidence because the evidence was harmful to its case. Panos v. Timco Engine Center, Inc., 677 S.E.2d 868 (N.C. Ct. App. 2009). Conduct giving rise to a spoliation inference might also support the imposition of sanctions under the Rules of Civil Procedure. Holloway v. Tyson Foods, Inc., 668 S.E.2d 72 (N.C. Ct. App. 2008).

Statutes of Limitation and Repose*

Statutes of Limitation

Tort: Personal injury/property damage: 3 years. N.C. Gen. Stat. §1-52. Where bodily injury to the person or a defect in property is an essential element in the cause of action, the 3-year statute, rather than the 4-year UCC statute, N.C. Gen. Stat. § 25-2-725, should be used. Hanover Ins. Co. v. Amana Refrigeration, Inc., 415 S.E.2d 99 (N.C. Ct. App. 1992); N.C. Gen. Stat. § 1-52(1)-(5). See also the Statute of Repose, below. Wrongful Death: 2 years unless barred by N.C. Gen. Stat. § 1-15(6) or 1-52(16). N.C. Gen. Stat. § 1-53(4).

Contract: 3 years. N.C. Gen. Stat. § 1-52. See also, the Statute of Repose, below.

Professional Malpractice: 3 years from the last act of the defendant giving rise to the cause of action, but if injury or damage is discovered or should have been discovered 2 or more years after the last act: 1 year from discovery. N.C. Gen. Stat. § 1-15; Flippin v. Jarrell, supra.

State Government: Tort claims: 3 years, or, in the case of wrongful death, 2 years from death. N.C. Gen. Stat. §143-299.

Local Government: Contract claims: 2 years, or, if longer, 90 days from substantial completion or termination of the project. Wrongful death: 2 years from date of death. N.C. Gen. Stat. § 1-53.

Statutes of Repose

Products: For causes of action accruing on or after October 1, 2009: 12 years after initial purchase. N.C. Gen. Stat. § 1-46.1. For causes of action accruing before October 1, 2009: 6 years after initial purchase. N.C. Gen. Stat. § 1-50.

Improvements to Real Property: 6 years after the last act giving rise to the cause of action or substantial completion, whichever is later. N.C. Gen. Stat. § 1-50.

Professional Malpractice: If injury or damage is not discovered within 2 years of defendant's last act: 4 years from last act of the defendant giving rise to the cause of action, or, if a foreign object is discovered left within patient, 10 years from the last act. N.C. Gen. Stat. § 1-15; Flippin v. Jarrell, 270 S.E.2d 482 (N.C. 1980).

Other Personal Injury or Property Damage: 10 years from the last act or omission of the defendant giving rise to the cause of action, except in case of groundwater contamination. N.C. Gen. Stat. §1-52.

* For UCC Claims and claims based on improvements to real property and/or claims brought by condominium associations related to construction defects, see the notes at the end of the Table of Contents.

Subrogating in the Insured's Name – Real Party in Interest

A single and indivisible cause of action arises against the tortfeasor for the total amount of the loss. The insurance company can become subrogated to the rights of the insured against the tortfeasor only when it pays the insured, not some third party. The insurance company becomes a necessary party plaintiff and must sue in its own name to enforce its right of subrogation where it has paid the insured the loss in full. The insured is a necessary party plaintiff where the insurance company has paid only a portion of the loss. Security Fire & Indem. Co. v. Barnhardt, 148 S.E.2d 117 (N.C. 1966). If there is a dispute as to whether the insurer has completely compensated the insured for the insured's damages, the insurer or insured may be made a party defendant in the other's action, at the discretion of the trial court. New v. Public Service Co. of N.C., Inc., 153 S.E.2d 870 (N.C. 1967).

NORTH DAKOTA

Anti-Subrogation Rule: Subrogation by Insurer Against Insured
Insurer cannot subrogate against its own insured, nor anyone who holds the status of additional insured. American Nat. Fire Ins. Co. v. Hughes, 658 N.W.2d 330 (N.D. 2003). A subcontractor cannot obtain insured status under a builder's risk policy sufficient to invoke the anti-subrogation rule if the subcontractor was not expressly named as a co-insured under the policy. Tri-State Insurance Co. of Minnesota v. Commercial Group West, LLC, 698 N.W.2d 483 (N.D. 2005). To the extent that a policy expressly covers an unnamed subcontractor's property, the unnamed subcontractor is protected from subrogation only to the extent of the express coverage. Id.

Comparative/Contributory Negligence
Modified Comparative – 49%. N.D. Cent. Code § 32-03.2-02.

Contribution and Implied Indemnity
Contribution: Authorized by N.D. Cent. Code § 32-38-01, *et seq*. If two or more persons become jointly or severally liable for the same injury there is a right of contribution among them, even if judgment has not been recovered against all or either of them, where one has paid more than his own *pro rata* share of the entire liability. N.D. Cent. Code § 32-38-01. There is no contribution for intentional torts, and a tortfeasor is not subject to contribution if its liability was not extinguished by a settlement, or if an amount paid in settlement was not reasonable. Id. Contribution can be sought in underlying action or separate action. N.D. Cent. Code § 32-38-03. Action for contribution must be commenced 1 year after payment, final judgment or appellate review of judgment. Id.

Implied Indemnity: A right of indemnity may arise by agreement or implication. Mann v. Zabolotny, 615 N.W.2d 526 (N.D. 2000). Where there is no express agreement, indemnification can be found based on the contractual nature of a relationship between parties, or in a tort-based right to indemnity when there is a great disparity in the fault of two tortfeasors, and one of the tortfeasors has paid for a loss that was primarily the responsibility of the other. Id. 6-year statute of limitations. N.D. Cent. Code § 28-01-16(1); Johnson v. Haugland, 303 N.W.2d 533 (N.D. 1981).

Damages - Measure of Damages to Property
Real Property: The lesser of (1) the cost of repair plus loss of use during repairs or (2) the diminution in value plus loss of use pending replacement. Roll v. Keller, 356 N.W.2d 154 (N.D. 1984).

Personal Property: The lesser of (1) the cost of necessary repairs and loss of use pending restoration, or (2) the difference in market value from before the injury took place to after the injury occurred and value of loss of use pending replacement. Sullivan v. Pulkrabek, 611 N.W.2d 162 (N.D. 2000). The plaintiff may choose which remedy is more appropriate when either method could be applied, and defendant must then prove the alternative is more suitable. Sullivan.

See also N.D. Cent. Code § 32-03-01, *et seq.*, on the measure of damages for certain types of claims, such as: N.D. Cent. Code § 32-03-09.1 (the measure of damages for injury to property *not* arising from contract); N.D. Cent. Code § 32-03-09.2 (liability for willful damages to property; N.D. Cent. Code § 32-3-23 (damages for conversion of personalty); N.D. Cent. Code § 32-03-30 (damages for wrongful injuries to timber).

Experts - States Following the Daubert/Kumho Doctrine

Does not follow Daubert or Kumho Tire. N.D.R.E. 702 envisions generous allowance of the use of expert testimony if the witness is shown to have some degree of expertise in the field in which the witness is to testify. An expert need not be a specialist in a highly particularized field if the expert's knowledge, training, education, and experience will assist the trier of fact. A trial court has broad discretion to determine whether a witness is qualified as an expert and whether the witness' testimony will assist the trier of fact. State v. Hernandez, 707 N.W.2d 449 (N.D. 2005).

Interest - Pre & Post Judgment

Prejudgment

Contract Actions

Rate: The contract rate or, if none, 6%. N.D. Cent. Code § 47-14-05; Hirschkorn v. Severson, 319 N.W.2d 475 (N.D. 1982).

Accrual Date: The date due for the recovery of damages certain or capable of being determined by calculation. N.D. Cent. Code § 32-03-04; see North Am. Pump Corp. v. Clay Equip. Corp., 199 N.W.2d 888 (N.D. 1792) (date of breach for liquidated damages; no prejudgment interest for unliquidated damages).

Tort Actions

The award of interest is at the discretion of the court or jury, up to a maximum of 6%. N.D. Cent. Code § 32-03-05; N.D. Cent. Code § 47-14-05; Hirschkorn.

Post Judgment

Rate: The contract rate, not exceed the rate provided in § 47-14-109 or, if none, the prime rate plus 3% and rounded up to the nearest half, as determined in N.D. Cent. Code § 28-20-34.

Accrual Date: Date of judgment. Id.

Joint and Several Liability

Modified joint and several liability. When two or more parties are found to have contributed to the injury, the liability of each party is several only. Each party is liable only for the amount of damages attributable to the percentage of fault of that party. "Fault" includes negligence, malpractice, absolute liability, dram shop liability, failure to warn, reckless or willful conduct, assumption of risk, misuse of product, failure to avoid injury, and product liability, including product liability involving negligence or strict liability or breach of warranty for product defect. Persons who act in concert in committing a tortious act are jointly liable for all damages attributable to their combined percentage of fault. N.D. Cent. Code § 32-03.2-02.

Judgment Liens
A judgment is a lien on all real property for a period of ten years. N.D. Cent. Code § 28-20-13; see N.D. Cent. Code § 28-20-13(2) and (3) (discussing a change to what the judgment is a lien on effective August 1, 2021). A judgment may renewed by affidavit at any time within ninety days preceding the expiration of ten years from the first docketing of the original judgment. N.D. Cent. Code § 28-20-21. Note: N.D. Cent. Code § 28-21-21 was amended effective August 1, 2021, to reflect new procedural requirements). Pursuant to 2021 N.D. HB 1251 Sec. 6, however, § 28-20-21 is repealed effective August 1, 2031.

Landlord-Tenant Subrogation ("Sutton Doctrine")
Absent an express agreement to the contrary, a tenant is an implied coinsured under landlord's fire insurance policy and the landlord's insurer may not subrogate against the tenant. Community Credit Union of New Rockford, N.D. v. Homelvig, 487 N.W.2d 602 (N.D. 1992) (residential lease); but cf. Agra-By-Products v. Agway, 347 N.W.2d 142 (N.D. 1984) (reviewing the terms of a commercial lease to determine the parties' intent).

Made Whole Doctrine
North Dakota courts have not addressed the made whole doctrine in first-party property cases.

Professional Malpractice Filing Requirements (Affidavit of Merit)
In medical malpractice actions, the complaint will be dismissed unless the plaintiff submits an affidavit of merit from an expert within three months of the commencement of the action. N.D. Cent. Code § 28-01-46.

Restitution - Crime Victims Restitution Statutes
Mandatory, unless the court finds that the defendant cannot pay and the victim consents. N.D. Cent. Code § 12.1-32-08. When considering restitution, the court shall take into account the reasonable damages sustained by the victim or victims of the criminal offense, which damages are limited to those directly related to the criminal offense and expenses incurred as a direct result of the defendant's criminal action. Id. A court may award replacement cost and is not bound by the measure of damages applicable to civil cases. State v. Tupa, 691 N.W.2d 579 (N.D. 2005). A restitution order may be enforced in the same manner as a civil judgment. N.D. Cent. Code § 12.1-32-08. An insurer may seek restitution. State v. Vick, 587 N.W.2d 567 (N.D. 1998). A civil award must be reduced by the amount of restitution paid. N.D. Cent. Code § 12.1-32-08. A parent of a child adjudged delinquent may be ordered to make restitution on the child's behalf up to $5,000. N.D. Cent. Code § 27-20.4-20. Before ordering parental restitution, the court takes into account the factors set forth in N.D. Cent. Code § 27-20.4-20. The child is jointly and severally liable for the parent's amount and solely liable for any restitution ordered over that amount. Id.

Right to Repair/Notice Statutes – Construction Cases
N.D. Cent. Code § 43-07-26 *Warranty Repairs – Required Notice.*

Spoliation – Remedies for Spoliation
North Dakota courts have not addressed whether a tort for spoliation of evidence exists. See Simpson v. Chicago Pneumatic Tool Co., 693 N.W.2d 612 (N.D. 2005); Schueller v. Remington

Arms Co., LLC, 2012 WL 2370109 (D.N.D. 2012). Sanctions for spoliation of evidence should take into account: 1) the culpability, or state of mind, of the party against whom the sanctions are being imposed; 2) the prejudice against the affected party and the degree of the prejudice; and 3) the availability of less severe, alternative sanctions. Fines v. Ressler Enterprises, Inc., 820 N.W.2d 688 (N.D. 2012).

Statutes of Limitation and Repose*

Statutes of Limitation

Tort: Personal injury and property damage, 6 years. N.D. Cent. Code § 28-01-16; but see N.D. Cent. Code § 32-46.2-07 (asbestos actions); N.D. Cent. Code § 28-01-18(4) (wrongful death actions).

Contract: 6 years. N.D. Cent. Code § 28-01-16.

Medical Malpractice: 2 years from malpractice. N.D. Cent. Code § 28-01-18(3).

Other State: If another state supplies the substantive law, the other state's statute of limitation applies. N.D. Cent. Code § 28-01.2-02. Exception may be made in case of unfairness. N.D. Cent. Code § 28-01.2-04.

State Government: A notice of tort claim must be filed with Director of Office of Management and Budget within 180 days (1 year for wrongful death). N.D. Cent. Code § 32-12.2-04. No contract action may be filed until a notice of claim is filed with the state agency and refused. The failure of the agency to respond in 10 days is deemed a refusal. N.D. Cent. Code § 32-12-03. Tort and contract claims subject to 3-year limitation. N.D. Cent. Code § 28-01-22.1; but see N.D. Cent. Code § 28-01-22.1(3), (4) (sexual assault).

Local Government: 3-year limitation on tort claims. N.D. Cent. Code § 32-12.1-10; but see N.D. Cent. Code § 32-12.1-10(2), (3) (sexual assault).

Statutes of Repose

Products: None. N.D. Cent. Code § 28-01.3-08 held unconstitutional in Dickie v. Farmers Union Oil Co., 611 N.W.2d 168 (N.D. 2000).

Improvements to Real Property: 10 years from substantial completion. If the injury occurred during the 10th year after such substantial completion, an action may be brought within 2 years of the injury, but not later than 12 years from substantial completion. N.D. Cent. Code § 28-01-44.

Medical Malpractice: 6 years from act or omission. N.D. Cent. Code § 28-01-18.

Subrogating in the Insured's Name – Real Party in Interest

North Dakota's real-party-in-interest rule is complied with where an action is brought against a tortfeasor in the name of an insured who has been paid by an insurer for only a portion of the insured's loss. Agra-By-Products, Inc. v. Agway, Inc., 347 N.W.2d 142 (N.D. 1984). A cause of action for damage to property is assignable. N.D. Cent. Code § 47-07-03. After the insured assigns its rights to the insurer, the insured loses the right to recover. Tschider v. Burtts, 149 N.W.2d 710 (N.D. 1967). Where an insurer has made payment in full of the insured's loss, the insurer is generally the real party in interest and must bring the action against the person causing

* For UCC Claims and claims based on improvements to real property and/or claims brought by condominium associations related to construction defects, see the notes at the end of the Table of Contents.

the damage. Id. However, if a subrogation agreement authorizes the insured to sue on behalf of the insurer, the insured may do so. Hermes v. Markham, 60 N.W.2d 267 (N.D. 1953).

OHIO

Anti-Subrogation Rule: Subrogation by Insurer Against Insured
"No right of subrogation exists where the tortfeasor is also an insured under the policy which gives rise to the right of subrogation." Aetna Cas. & Sur. Co. v. Urban Imperial Bldg. & Rental Corp., 526 N.E.2d 819 (Ohio Ct. App. 1987).

Comparative/Contributory Negligence
Modified Comparative – 50%. Ohio Rev. Code Ann. § 2315.33.

Contribution and Implied Indemnity
Contribution: Authorized by Ohio Rev. Code Ann. § 2307.25, *et seq*. Right of contribution arises if one or more persons are jointly and severally liable and a tortfeasor pays more than its proportionate share of the liability. Ohio Rev. Code Ann. § 2307.25. There is no contribution for intentional torts, and a tortfeasor is not subject to contribution if its liability was not extinguished by a settlement, or if an amount paid in settlement was not reasonable. Id. Proportionate share of liability is based on comparative fault, but principles of equity may apply as well. Id. Contribution can be sought in underlying action or separate action. Ohio Rev. Code Ann. § 2307.26. Action for contribution must be commenced 1 year after settlement, final judgment or appellate review of judgment. Id. Contribution arising out of actions related to improvements to real property are subject to Ohio's 10-year statute of repose. New Riegel Local Sch. Dist. Bd. of Educ. v. Buehrer Grp. Architecture & Eng'g, Inc. 2019-Ohio-2851, 2019 Ohio LEXIS 1446 (2019).

Implied Indemnity: A person is entitled to indemnity when he is secondarily liable for the wrongs of another, who is primarily liable. Convention Center Inn, Ltd. v. Dow Chemical Co., 590 N.E.2d 898 (Ohio Ct. App. 1990). To collect indemnity for sums paid in settlement of a claim, the party seeking indemnity must prove that the party from whom indemnity is claimed received timely notice of the settlement, that legal liability required the settlement, and that the settlement was fair and reasonable. Id. Cause of action does not arise until person seeking indemnification suffers a loss (*i.e.*, pays the claim). Firemen's Ins. Co. v. Antol, 471 N.E.2d 831 (Ohio Ct. App. 1984). 6-year statute of limitations. Id. (citing Ohio Rev. Code Ann. § 2305.07). Indemnity arising out of actions related to improvements to real property are subject to Ohio's 10-year statute of repose. New Riegel.

Damages - Measure of Damages to Property
Real Property: Permanent Damage: The difference of the market value of the property as a whole, including the improvements thereon, immediately before and immediately after the injury. City of Youngstown v. Rochford, 1935 WL 1831, 1935 Ohio Misc. LEXIS 1300 (Ohio Ct. App. 1935). Loss of use is also recoverable. Henry v. City of Akron, 501 N.E.2d 659 (Ohio Ct. App. 1985). Temporary Damage: Generally, the cost of repair, limited by the difference between the market value of the property before the injury and the market value of the property after the injury. Reeser v. Weaver Bros., Inc., 560 N.E.2d 819 (Ohio Ct. App. 1989). To noncommercial real estate, the reasonable cost of restoration is not limited by diminution of value. However, either party may offer evidence of diminution of market value as a factor bearing on the reasonableness of the cost of restoration. Martin v. Design Constr. Servs., Inc.,

902 N.E.2d 10 (Ohio 2009). In commercial cases also, damages exceeding diminution may be recovered in appropriate circumstances. Reeser v. Weaver Bros. When permanent damage occurs to an item affixed to real property, it is considered to be only a temporary injury if the item can be replaced. Simmons v. Ohio DOT, No. 2013-00442, 2015 Ohio Misc. LEXIS 178 (Ohio Ct. Clms. 2015).

Personal Property: Not Repairable: The difference between the market value immediately before and after the damage. Rakich v. Anthem Blue Cross & Blue Shield, 875 N.E.2d 993 (Ohio Ct. App. 2007). Loss of use may not be recovered. Hayes Freight Lines v. Tarver, 73 N.E.2d 192 (Ohio 1947). Repairable: The reasonable cost or value of repairs. Albert v. Boatsmith Marine Service & Storage, Inc., 582 N.E.2d 1023 (Ohio Ct. App. 1989). Loss of use during repairs may also be recovered. Hayes Freight Lines v. Tarver.

Experts - States Following the Daubert/Kumho Doctrine
Follows Daubert. Miller v. Bike Athletic Co., 687 N.E.2d 735 (Ohio 1998); Ohio Evid. R. 702.

Interest - Pre & Post Judgment
Prejudgment
Prejudgment interest is allowed on judgments rendered against the state for the same time period and rate as allowed between private parties. The court may exercise its discretion to deny interest for periods of undue delay after commencement of the action. Ohio Rev. Code Ann. § 2743.18(A). However, no interest is allowed on settlements. Ohio Rev. Code Ann. § 2743.15.

Contract Actions

Rate: The contract rate or the federal short-term rate plus 3%, calculated as stated in Ohio Rev. Code Ann. § 5703.47. Ohio Rev. Code Ann. § 1343.03(A).

Accrual Date: When the money becomes due and payable. Ohio Rev. Code Ann. § 1343.03(A).

Tort Actions

Rate/Accrual date: If prejudgment interest is allowed because the parties failed to make a good faith effort to settle the case, the rate is the federal short term rate plus 3%, calculated as stated in Ohio Rev. Code Ann. § 5703.47. Ohio Rev. Code Ann. §§ 1343.03(A); 1343.03(C). Interest accrues as stated in Ohio Rev. Code Ann. § 1343.03(C).

Post Judgment

For judgments against the state, see Ohio Rev. Code Ann. § 2743.18(B) and § 2743.19(C).

Rate: Unless a contract requires otherwise, Ohio Rev. Code Ann. § 1343.02, the federal short-term rate plus 3%, calculated as stated in Ohio Rev. Code Ann. § 5703.47. Ohio Rev. Code Ann. § 1343.03(B). The interest required by § 1343.03(B) does not, however, apply to workers compensation actions governed by Chapter 4132 of the Revised Code. Ohio Rev. Code Ann. § 1343.03(D).

Accrual Date: Date of judgment. Ohio Rev. Code Ann. § 1343.03(B).

Joint and Several Liability
Modified joint and several liability. In tort cases: several liability for non-economic losses. For economic losses, several liability if fault is 50 percent or less; joint and several liability if fault is greater than 50 percent or if tort is intentional. Ohio Rev. Code Ann. § 2307.22. Principal and agent shall constitute a single party when determining percentages of tortious conduct in a tort action in which vicarious liability is asserted. Statutory modifications do not affect joint and several liability not grounded in tort. Ohio Rev. Code Ann.
§ 2307.24.

Judgment Liens
A judgment becomes dormant after five years from the date of the judgment or renewal of the judgment. Ohio Rev. Code Ann. § 2329.07. An action to revive a judgment can be brought within ten years from the time the judgment became dormant. Ohio Rev. Code Ann. § 2325.18.

Landlord-Tenant Subrogation ("Sutton Doctrine")
A tenant is not relieved of his common law liability for negligence unless the lease clearly shows an intent to relieve the tenant of such liability. United States Fire Ins. Co. v. Phil-Mar Corporation, 139 N.E.2d 330 (Ohio 1956). If the tenant is relieved of liability, the landlord's insurer cannot subrogate against the tenant. Id. Ohio rejects the implied coinsured rule and follows a case-by-case approach. Cincinnati Ins. Co. v. Getter, 958 N.E.2d 202 (Ohio Ct. App. 2011).

Made Whole Doctrine
The insured made whole doctrine is followed but can be modified where the terms of the subrogation agreement clearly and unambiguously provide otherwise. Northern Buckeye Education Council Group Health Benefits Plan v. Lawson, 814 N.E.2d 1210 (Ohio 2004).

Professional Malpractice Filing Requirements (Affidavit of Merit)
Affidavit of merit by an expert must be attached to a complaint that contains a medical claim, dental claim, optometric claim, or chiropractic claim, or, with leave of court, may follow such a complaint by up to ninety days. Rule 10(D), Ohio Civil Rules.

Restitution - Crime Victims Restitution Statutes
Discretionary. Ohio Rev. Code Ann. §§ 2929.18, 2929.28. The amount is to be no greater than the victim's actual economic loss and may be determined through, *inter alia*, estimates or receipts indicating the cost of repairing or replacing property and the victim's recommendation. Id. Restitution awards may be enforced as civil judgments. Id. Any civil award predicated upon economic loss shall be reduced by the amount of restitution paid. Id. Insurance companies may not seek restitution. State v. Colon, 925 N.E.2d 212 (Ohio Ct. App. 2010).

Right to Repair/Notice Statutes – Construction Cases
Ohio Rev. Code Ann. §§ 1312.01 to 1312.08 *Claims Against Residential Contractors.*

Spoliation – Remedies for Spoliation
(1) A cause of action exists in tort for interference with or destruction of evidence; (2) the elements of a claim for interference with or destruction of evidence are (a) pending or probable litigation

involving the plaintiff, (b) knowledge on the part of defendant that litigation exists or is probable, (c) willful destruction of evidence by the defendant designed to disrupt the plaintiff's case, (d) disruption of the plaintiff's case, and (e) damages proximately caused by the defendant's acts; (3) such a claim should be recognized between the parties to the primary action and against third parties; and (4) such a claim may be brought at the same time as the primary action. Smith v. Howard Johnson Co., Inc., 615 N.E.2d 1037 (Ohio 1993). In order to sanction a party with an adverse instruction, the trial court must determine that the spoliation of the evidence was prejudicial to the party seeking the instruction. Once the party seeking the instruction demonstrates the other's malfeasance, that party enjoys a presumption that it was prejudiced by the spoliation. The spoliating party then has the burden of rebutting this presumption by demonstrating that its actions did not deprive the other party of favorable evidence not otherwise obtainable. RFC Capital Corp. v. EarthLink, Inc., 2004-Ohio-7046 (Ohio Ct. App. Dec. 23, 2004).

Statutes of Limitation and Repose*

Statutes of Limitation

Products: 2 years after the cause of action accrues. Ohio Rev. Code Ann. § 2305.10.

Tort: Personal injury/personal property: 2 years. Ohio Rev. Code Ann. § 2305.10. Real property: 4 years. Ohio Rev. Code Ann. § 2305.09; Harris v. Liston, 714 N.E.2d 377 (Ohio 1999).

Contract: Written: 6 years. Ohio Rev. Code Ann. § 2305.06. Oral: 4 years. Ohio Rev. Code Ann. § 2305.07(A). U.C.C. Contracts for Sale: 4 years, except consumer transactions, which is 6 years. Ohio Rev. Code Ann. §§ 1302.98, 2305.07(C).

Malpractice: Non-medical: 1 year. Ohio Rev. Code Ann. § 2305.11. Medical: 1 year, or 180 days after written notice to defendant, if given within 1 year. For foreign object: 1 year after the object is discovered or should have been discovered. Ohio Rev. Code Ann. § 2305.113.

State Government: Other than actions involving vehicles operated by state employees: Civil action to be filed in Court of Claims within 2 years after the date of accrual of the cause of action or within any shorter period that is applicable to similar suits between private parties. Actions involving vehicles operated by state employees: Claim must first be presented to state before suit is filed. If, after request to settle, state does not compromise the claim within a reasonable time after the request and at least 60 days before limitation period expires, suit may be filed against the state agency within limitation period applicable to non-vehicular claims (generally, 2 years). Ohio Rev. Code Ann. § 2743.16.

Local Government: Against political subdivisions: 2 years from the accrual of the cause of action. Ohio Rev. Code Ann. § 2744.04.

Statutes of Repose

Products: 10 years from the date the product was delivered to its first purchaser or lessee, excepting warranty claims if the seller warranted the product for more than 10 years. Claims arising from certain hazardous or toxic products, including medical devices, DES and asbestos, also subject to exceptions. Ohio Rev. Code Ann. § 2305.10; Groch v. General Motors Corp., 883 N.E.2d 377 (Ohio 2008).

* For UCC Claims and claims based on improvements to real property and/or claims brought by condominium associations related to construction defects, see the notes at the end of the Table of Contents.

Improvements to Real Property: 10 years after substantial completion. Ohio Rev. Code Ann § 2305.131; Oaktree Condominium Assoc. v. Hallmark Bldg. Co., 11 N.E.3d 266 (Ohio 2014). If the defect is discovered two years prior to the 10-year expiration, a cause of action may be brought within 2 years from the date of discovery. Ohio Rev. Code Ann. § 2305.131. **Medical Malpractice:** 4 years from the act or omission forming the basis of the claim. If the basis of the claim is discovered in the 3rd year and could not have been discovered earlier: 1 year from discovery. Not applicable to claims for foreign objects left inside the body. Ohio Rev. Code Ann. § 2305.113. The medical malpractice repose period in § 2305.113(c) applies to wrongful death claims. Everhart v. Coshocton Cnty. Mem'l Hosp. 2023-Ohio-4670, 2023 Ohio LEXIS 2557.

Subrogating in the Insured's Name – Real Party in Interest

Neither the insured nor the insurer is necessarily always the real party in interest. An assignor and a partial assignee of a tort claim are united in interest; upon suit by the partial assignee alone for the amount of the assignment, the assignor must be joined upon the motion of the defendant

tortfeasor. Upon suit by the assignor alone for the full amount of the damages, the partial assignee must be joined if the defendant so moves. Holibaugh v. Cox, 148 N.E.2d 677 (Ohio 1958). Subrogation is the assignment of rights by operation of law. Reed v. Ramey, 80 N.E.2d 250 (Ohio Ct. App. 1947). A cause of action to recover for property damage is assignable. Aetna Cas. & Sur. Co. v. Hensgen, 258 N.E.2d 237 (Ohio 1970).

OKLAHOMA

Anti-Subrogation Rule: Subrogation by Insurer Against Insured
A co-insured is immune from liability on an insurer's subrogation claim. Travelers Ins. Companies v. Dickey, 799 P.2d 625 (Okla. 1990). With respect to landlord-tenant matters, an insurer may not subrogate against the tenant, who at law is deemed to be a co-insured of the landlord unless there is an express agreement between the landlord and the tenant to the contrary. Sutton v. Jondahl, 532 P.2d 478 (Okla. Civ. App. 1975).

Comparative/Contributory Negligence
Modified Comparative – 50%. 23 Okla. Stat. §§ 13 – 14.

Contribution and Implied Indemnity
Contribution: 12 Okla. Stat. § 832(A) provides that when two or more persons become jointly liable in tort for the same injury to a person, there is a right of contribution among them. Barringer v. Baptist Healthcare of Okla., 22 P.3d 695 (Okla. 2001). For a settling tortfeasor to bring a contribution claim against another non-settling tortfeasor, the release must extinguish the full amount of plaintiff's claims against the non-settling tortfeasor. Id. 12 Okla. Stat. § 95(2) prescribes a 3-year statute of limitations for an action upon liability created by statute. The statute of limitations does not run on a contribution claim until plaintiff has discharged the common debt or paid more than his share of it. Wilson v. Crutcher, 56 P.2d 416 (Okla. 1936).

Implied Indemnity: One who is only constructively or vicariously obligated to pay damages because of another's tortious conduct may recover the sum paid from the tortfeasor; however, concurrent or joint tortfeasors with no legal relationship have no right of indemnity against each other. GuideOne America Ins. Co., Inc., v. Shore Ins. Agency, Inc., 259 P.3d 864 (Okla Civ. App. 2011). A cause of action for indemnity does not arise until the former judgement is paid. Central National Bank v. McDaniel, 734 P.2d 1314 (Okla. Civ. App. 1986). 12 Okla. Stat. § 95(A) applies a 3-year statute of limitations for implied contracts and a 2-year statute of limitations for an action for injury to the rights of another not arising in contract. See McDaniel.

Damages - Measure of Damages to Property
Real Property: Permanent Damage: The difference between the actual value immediately before and immediately after the damage is sustained. Cleveland v. Dyn-A-Mite Pest Control, Inc., 57 P.3d 119 (Okla. Civ. App. 2002). Temporary Damage: The reasonable cost of repairing the damage and restoring it to its former condition, not to exceed the depreciated value of the land itself. Thompson v. Andover Oil Co., 691 P.2d 77 (Okla. Civ. App. 1984). See also Houck v. Hold Oil Corp., 867 P.2d 451 (Okla. 1993). For damages associated with wrongful injuries to timber, see 23 Okla. St. § 72.

Personal Property: Total Damage: Difference between the actual value immediately before and immediately after the damage has been sustained. A.B.C. Const. Co. of OK v. Thomas, 347 P.2d 649 (Okla. 1959). Partial Damage: Reasonable cost of repairs and damages for the loss of use. Brennen v. Aston, 84 P.3d 99, 101 (Okla. 2003). Where it is shown that repairs failed to bring the property up to the condition prior to the damage, the measure shall be the cost of repairs plus the diminution in value of the property. Brennan; but cf. Frank Bartel Transp., Inc.

v. State ex rel. Murray State Coll., 540 P.3d 480 (OK 2023) (stating that when a plaintiff shows that its property has diminished in value after repair, that subsequent loss of value may also be recoverable in a claim for property loss).

Experts - States Following the Daubert/Kumho Doctrine
Follows Daubert and Kumho Tire. Christian v. Gray, 65 P.3d 591 (Okla. 2003); 12 Okl. Stat. § 2702.

Interest - Pre & Post Judgment
Prejudgment

Contract Actions

Rate: Contract rate, see 23 Okla. Stat. §§ 6, 21, or, if none, initially, the rate in effect (i.e., the average U.S. Treasury Bill rate for the preceding calendar year) for the calendar year which is 24 months after the suit was commenced. 12 Okla. Stat. § § 727.1(E); 727.1(I). The rate is subject to adjustment. See 12 Okla. Stat. § 727.1(E).
Accrual Date: From the date of the breach of contract if damages are capable of being made certain. 23 Okla. St. § 6. Otherwise, the date which is 24 months after the suit was commenced to the earlier of the date the verdict is accepted by the trial court or the date the judgment is filed with the court clerk. 12 Okla. Stat. § 727.1(E).

Tort Actions

Rate: Initially, the rate in effect (i.e., the average U.S. Treasury Bill rate for the preceding calendar year) for the calendar year which is 24 months after the suit was commenced. 12 Okla. Stat. §§ 727.1(E); 727.1(I). The rate is subject to adjustment. See 12 Okla. Stat. § 727.1(E). For suits against the state or its political subdivisions, initially, the rate in effect for the calendar year in which the suit was commenced. 12 Okla. Stat. § 727.1(F). The rate is subject to adjustment. Id. Offers of judgment can affect the recovery of interest. See 12 Okla. Stat § 940.
Accrual Date: Date which is 24 months after the suit was commenced to the earlier of the date the verdict is accepted by the trial court or the date the judgment is filed with the court clerk. 12 Okla. Stat. § 727.1(E). For actions against the state or its political subdivisions, interest accrues from the date the suit was commenced to the earlier of the date the court accepts the verdict or the date the judgment is filed. 12 Okla. Stat. § 727.1(F).

Post Judgment

Rate: Contract rate or, if none, the prime rate plus 2%. 12 Okla. Stat.
§§ 727.1(D); 727.1(I). If the judgment remains unpaid after the first calendar year, the prime rate is subject to adjustment. 12 Okla. Stat. § 727.1(C).
Accrual Date: The earlier of the date the judgment is rendered or the date the judgment is filed with the court clerk. 12 Okla. Stat. § 727.1(C).

Joint and Several Liability
Several liability. For causes of action arising on or after November 1, 2011 in any civil action based on fault and not arising out of contract, a joint tortfeasor is liable only for the amount of

damages allocated to that tortfeasor. Actions brought by or on behalf of the state are excepted. 23 Okla. Stat. § 15.

Judgment Liens
A judgment becomes unenforceable if not executed upon or renewed within five years. 12 Okla. Stat. § 735.

Landlord-Tenant Subrogation ("Sutton Doctrine")
Absent an express agreement to the contrary, a tenant is a coinsured on the landlord's fire insurance policy. Sutton v. Jondahl, 532 P.2d 478 (Ok. Civ. App. 1975).

Made Whole Doctrine
As a default rule, an insurer cannot recover through subrogation unless the insured has been fully compensated for its loss. Reeds v. Walker, 157 P.3d 100 (Okla. 2006). However, the parties may contract around the doctrine, provided the policy "contains an unequivocal, express statement that the insured does not have to be made whole before the insurer is entitled to recoup its payments." Id.

Professional Malpractice Filing Requirements (Affidavit of Merit)
No certificate requirement. Zeier v. Zimmer, Inc., 152 P.3d 861 (Okla. 2006) (holding the affidavit of merit statute, 63 O.S. § 1-1708.1E, unconstitutional; statute was repealed in 2009).

Restitution - Crime Victims Restitution Statutes
Mandatory for property damage and loss of income, irrespective of the financial resources of the offender. A restitution order may be enforceable as a civil judgment. 22 Okla. Stat. § 991f. Although no Oklahoma court has addressed whether an insurer can seek restitution, the definition of "victim" includes a corporation or other legal entity "that suffers an economic loss as a direct result of the criminal act of another person." Id.

Right to Repair/Notice Statutes – Construction Cases
None found. However, residential contractors are allowed to include a notice provision in contracts. See 15 Okla. Stat. §§ 765.5 to 765.6 (*Notice of Opportunity to Repair Act*).

Spoliation – Remedies for Spoliation
Oklahoma has never recognized spoliation of evidence as a cause of action. Patel v. OMH Medical Center, Inc., 987 P.2d 1202 (Okla. 1999). Spoliation refers to the destruction or material alteration of evidence or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation. Spoliation occurs when evidence relevant to prospective civil litigation is destroyed, adversely affecting the ability of a litigant to prove his or her claim. Spoliation includes the intentional or negligent destruction or loss of tangible and relevant evidence which impairs a party's ability to prove or defend a claim. A litigant who is on notice that documents and information in its possession are relevant to litigation or potential litigation or are reasonably calculated to lead to the discovery of admissible evidence has a duty to preserve such evidence. Factors that should be considered in choosing a sanction include willfulness, prejudice, whether there was a warning that failure to cooperate could lead to dismissal, whether less drastic

sanctions are appropriate, and the amount of interference with judicial process. Barnett v. Simmons, 197 P.3d 12 (Okla. 2008).

Statutes of Limitation and Repose*

Statutes of Limitation

Tort: Personal injury and property damage, 2 years. Some intentional torts, 1 year. 12 Okla. Stat. § 95.

Contract: Written, 5 years. Oral, 3 years. 12 Okla. Stat. § 95. For sale of goods, 5 years. 12A Okla. Stat. § 2-725.

Other State: If the claim accrued outside Oklahoma, the statute shall be that of the place where the claim accrued, or Oklahoma's, whichever last bars the claim. 12 Okla. Stat. § 105.

State and Local Government: A notice must be filed within 1 year of the loss. 51 Okla. Stat. § 156. If the government denies claim within 90 days, suit must be filed within 180 days of the denial. The failure to deny claim within 90 days will be deemed a denial. 51 Okla. Stat. § 157.

Statutes of Repose

Improvements to Real Property: 10 years from substantial completion. 12 Okla. Stat. § 109.

Subrogating in the Insured's Name – Real Party in Interest

Where the insured stands fully compensated for the value of the loss by the insurer, the fully subrogated insurer as the real party in interest may bring an action in its own name to recover to the extent of its payment for the loss. On the other hand, where the insured does not stand fully compensated for the value of the loss by the insurer, the insured, as a real party in interest, may properly bring an action in his own name and/or as trustee for the partially subrogated insurer to recover for the full amount of the loss. A partially subrogated insurer may not maintain an action in its own name directly against the person causing the loss to recover on its subrogated interest. While the law proscribes assignment of claims not arising from contract, interests acquired by subrogation are an exception; insurers subrogated to rights of their insureds by payment of claims may occupy the status of a real party in interest. Muskogee Title Co. v. First Nat. Bank & Trust Co. of Muskogee, 894 P.2d 1148 (Okla. Civ. App. 1995); 12 Okla. Stat. § 2017(D). Also see the committee note to 12 Okla. Stat. § 2017, Oklahoma's real-party-in-interest statute.

* For UCC Claims and claims based on improvements to real property and/or claims brought by condominium associations related to construction defects, see the notes at the end of the Table of Contents.

OREGON

Anti-Subrogation Rule: Subrogation by Insurer Against Insured
An insurer has no right to subrogation against its own insured. Koch v. Spann, 92 P.3d 146 (Or. Ct. App. 2004). Whether a tenant is an insured under a landlord's policy is to be determined from the parties' agreement and the facts of the case. Id.

Comparative/Contributory Negligence
Modified Comparative – 50%. Or. Rev. Stat. § 31.600.

Contribution and Implied Indemnity
Contribution: Right of contribution is established by statute with five elements: (1) joint liability for the same injury; (2) payment by the contribution plaintiff of more than a proportional share of the common liability; (3) settlement extinguishing the contribution defendant's liability for the injury; (4) settlement that was not in excess of what was reasonable for the injury; (5) liability insurer is subrogated to the right of recovery to the extent of payment. Or. Rev. Stat. § 31.800; see Jensen v. Alley, 877 P.2d 108 (Or. Ct. App. 1994) (construing a predecessor statute). 2-year statute of limitations on the right of contribution, running from payment or judgment. Or. Rev. Stat. § 31.810.

Implied Indemnity: In an action for indemnity, the claimant must plead and prove that (1) he has discharged a legal obligation owed to a third party; (2) the defendant was also liable to the third party; and (3) as between the claimant and the defendant, the obligation ought to be discharged by the latter. Eclectic Inv., LLC v. Patterson, 346 P.3d 468 (Or. 2015). The duty to indemnify will be recognized in cases where community opinion would consider that in justice the responsibility should rest upon one rather than the other. General Ins. Co. v. P.S. Lord Mechanical Contractors, 482 P.2d 709 (Or. 1971). An indemnity action, under contract theory, may be brought within 6 years after the payment of a tort claim. Owings v. Rose', 497 P.2d 1183 (Or. 1972) (citing Or. Rev. Stat. § 12.080).

Damages - Measure of Damages to Property
Real Property: Permanent Damage: The difference between the value of the property immediately before the injury and its value immediately afterward. Hudson v. Peavey Oil Co., 566 P.2d 175 (Or. 1977). See also McCormick v. City of Portland, 82 P.3d 1043 (Or. Ct. App. 2004). The proper formulation may differ depending upon the circumstances. Hudson. Temporary Damage: The cost of restoration, where the injury is susceptible of remedy at a moderate expense and the cost of restoration is reasonable, or where the cost of restoration is less than the diminution in the value of property. Oregon Mut. Fire. Ins. Co. v. Mathis, 334 P.2d 186 (Or. 1959). See also McCormick. If the cost of repair is disproportionate to the diminution in value, the proper measure of damages will be diminution in value. Hanset v. General Const. Co., 589 P.2d 1117 (Or. 1979).

Personal Property: The difference between the value immediately before and immediately after the injury. Cutzforth v. Kinzua Corp., 517 P.2d 640 (Or. 1973).

Experts - States Following the Daubert/Kumho Doctrine
Applies a Daubert-like test, first articulated in State v. Brown, 687 P.2d 751 (Or. 1984), to analyze the admissibility of expert scientific evidence. State v. O'Key, 899 P.2d 663 (Or. 1995); Or. Rev. Stat. § 40.410 (Rule 702).

Interest - Pre & Post Judgment
Prejudgment

Facts supporting a claim of interest must be stated in the body of the complaint. Emmert v. No Problem Harry, Inc., 192 P.3d 844 (Or. Ct. App. 2008).

Contract Actions

Rate: Contract rate or, if none, 9%. Or. Rev. Stat. § 82.010.

Accrual Date: The due date or the date of breach. Id.; see Tasaki v. Moriarty, 225 P.3d 68 (Or. Ct. App. 2009).

Tort Actions – Ascertainable Damages

Prejudgment interest may be allowed if the time from which interest runs can be ascertained and damages are ascertainable by simple calculation. Smith v. Williams, 779 P.2d 1057 (Or. Ct. App. 1989). Interest may be awarded if necessary to make the plaintiff whole. Chase & Chase, 323 P.3d 266 (Or. 2014).

Post Judgment

Rate: Contract rate or, if none, 9%. Or. Rev. Stat. § 82.010(2)(e). For professional negligence claims against physicians and nurses, see Or. Rev. Stat. § 82.010(2)(f).

Accrual Date: Judgment date unless the judgment specifies another date. Or. Rev. Stat. § 82.010(2).

Joint and Several Liability
Modified joint and several liability**.** Liability is several and not joint, although if one party's share is uncollectible, that share may be reallocated to the other defendants on the basis of that defendants respective percentage of fault. Liability may be joint and several in cases involving hazardous materials and pollution. Or. Rev. Stat. § 31.610.

Judgment Liens
Generally, judgment remedies expire after 10 years of the entry of the judgment. Or. Rev. Stat. § 18.180. However, judgment remedies may be extended for 10 years by filing a certificate of extension. Or. Rev. Stat. § 18.182.

Landlord-Tenant Subrogation ("Sutton Doctrine")
An agreement in a lease obligating the landlord to carry fire insurance on the leased premises is a complete defense to a subrogation action by the landlord's insurer against the tenant for negligence in causing a fire. Koennecke v. Waxwing Cedar Products, Ltd., 543 P.2d 669 (Or. 1975). Whether the landlord's insurer can subrogate against the tenant depends on the facts of each case and the terms of the rental agreement. Koch v. Spann, 92 P.3d 146 (Or. Ct. App. 2004).

Made Whole Doctrine
No case on point. But cf. Or. Rev. Stat. § 742.544 (discussing personal injuries and motor vehicle accidents).

Professional Malpractice Filing Requirements (Affidavit of Merit)
An attorney's certificate of consultation with an expert is required in actions against architects, landscape architects, engineers, land surveyors and real estate licensees. Or. Rev. Stat. §§ 31.300, 31.350.

Restitution - Crime Victims Restitution Statutes
Mandatory when victim suffers economic damages. Amounts paid in restitution are to be credited against any civil judgment in favor of the victim. The term "victim" eligible for restitution is defined to include an insurance carrier. Or. Rev. Stat. §§ 137.103 – 137.109. Restitution is discretionary for infractions of the Vehicle Code which cause property damage. Or. Rev. Stat. § 811.706.

Right to Repair/Notice Statutes – Construction Cases
Or. Rev. Stat. §§ 701.560 to 701.600 *Notices of Defect in Residence*.

Spoliation – Remedies for Spoliation
The tort of spoliation is not recognized. Classen v. Arete NW, LLC, 294 P.3d 520 (Or. Ct. App. 2012). It is presumed that evidence willfully suppressed would be adverse to the party suppressing it. Or. Rev. Stat. § 40.135; see also Stephens v. Bohlman, 909 P.2d 208 (Or. Ct. App. 1996). Sanctions for discovery violations can include the striking of pleadings. Or. R. Civ. Proc. 46.

Statutes of Limitation and Repose*
Statutes of Limitation

Tort: Personal injury and medical malpractice, 2 years. Or. Rev. Stat. § 12.110; but see Or. Rev.Stat. § 30.020(1) (wrongful death – 3 years). Property damage, 6 years. Or. Rev. Stat. § 12.080. Product liability actions for injury to person or property, 2 years. Or. Rev. Stat. 30.905. Products liability wrongful death actions, 3 years. Id. Product liability, asbestos-related damage, 2 years after discovery. Or. Rev. Stat. § 30.907 (for actions against contractors, see Or. Rev. Stat. § 30.907(3), (4)). Property Damage caused by nuclear incident: 2 years. Or. Rev. Stat. § 12.137. See also, Statute of Repose, below.
Contract: 6 years. Or. Rev. Stat. § 12.080.
Professional Malpractice: If against an architect, landscape architect or engineer: 2 years, for claims arising out of the construction, alteration or repair of any improvement to real property, regardless of legal theory. Or. Rev. Stat. § 12.135.
State and Local Government: Notice of claim must be filed within 180 days of the injury (1 year for wrongful death.) Commencement of an action satisfies the notice requirement. 2-year limitation period. Or. Rev. Stat. § 30.275.

Statutes of Repose

* For UCC Claims and claims based on improvements to real property and/or claims brought by condominium associations related to construction defects, see the notes at the end of the Table of Contents.

Products: Action must be commenced before the later of: (a) 10 years after purchase; or (b) the expiration of any statute of repose for an equivalent civil action in the state in which the product was manufactured, or, if manufactured in a foreign country, the expiration of any statute of repose for an equivalent civil action in the state into which the product was imported. Or. Rev. Stat. § 30.905. Death cases must be brought within 3 years after death, 10 years after the product was first purchased, or the
expiration of statute of repose in the state where the product was manufactured or, if manufactured in a foreign country, its statute of repose; whichever comes first. Id. The statute does not apply to manufactured dwellings or a prefabricated structure. Id. Asbestos-related disease excepted. Or. Rev. Stat. § 30.907.

Improvements to Real Property:

By a plaintiff not a public body: If by a homeowners association or association of unit owners, 10 years after substantial completion or abandonment of construction for a small commercial structure, a residential structure, a large commercial structure. For actions related to other large commercial structures, 6 years. Or. Rev. Stat. § 12.135

By a public body: 10 years after substantial completion or abandonment of the improvement. Id.

Claims against architects, landscape architects, engineers: Notwithstanding either of the foregoing, for claim arising on or before 1/1/14: 10 years after substantial completion or abandonment of the construction, alteration or repair. For causes of action arising on or after 1/1/14: If by a homeowners' associations or association of unit owners of a residential, small commercial and large commercial structures, 10 years from completion; for actions by others for large commercial structures, 6 years. Or. Rev. Stat. § 12.135.

For causes of action arising after January 1, 2020, substantial completion is defined to mean the earliest of: a) the date the contractee accepts the improvement in writing, the date of the certificate of occupancy; or b) the date the owner uses or occupies the improvement. Id. Actions against any person in actual possession and control of the improvement are excepted. Or. Rev. Stat. § 12.135.

Manufacturers and sellers of manufactured or prefabricated homes are subject to the limitations in § 12.135. Or. Rev. Stat. § 30.905.

Negligent Injury to Person or Property: 10 years from act or omission. Or. Rev. Stat. § 12.115.

Medical Malpractice: 5 years from act or omission. Or. Rev. Stat. § 12.110.

Subrogating in the Insured's Name – Real Party in Interest

A subrogated insurer becomes the owner of the claim and the real party in interest in any action to enforce it. A valid loan receipt overcomes this rule and allows an action to be filed in the insured's name. However, an agreement which recites the insurer's payment of a claim rather than a loan is not a valid loan receipt. Metropolitan Property & Cas. v. Harper, 7 P.3d 541 (Or. Ct. App. 2000).

PENNSYLVANIA

Anti-Subrogation Rule: Subrogation by Insurer Against Insured
An insurer cannot recover by means of subrogation against its own insured. Remy v. Michael D's Carpet Outlets, 571 A.2d 446 (Pa. Super. 1990). Whether a tenant is the landlord's co-insured is determined by examining the parties' agreement and the policy. Id. Where the same carrier issued property policy to subrogor and separate liability policy to target, subrogation is prohibited. Fidelity and Guar. Ins. Underwriters, Inc. v. American Buildings Co., 14 F.Supp.2d 704 (M.D. Pa. 1998); Keystone Paper Converters, Inc. v. Neemar, Inc., 562 F.Supp. 1046 (E.D. Pa. 1983).

Comparative/Contributory Negligence
Modified Comparative – 50%. 42 Pa. Cons. Stat. § 7102.

Contribution and Implied Indemnity
Contribution: Authorized by Uniform Contribution Among Tort-feasors Act, 42 Pa. Cons. Stat. § 8321, *et seq.* Available for payments made by a joint tortfeasor, irrespective of a judgment. 42 Pa. Cons. Stat. § 8324. Target must first be discharged by release in underlying claim. Id.; Oviatt v. Automated Entrance System Co., 583 A.2d 1223 (Pa. Super. Ct. 1990). Contribution action must adjudicate both parties to be joint tortfeasors if initial case did not. MIIX Ins. Co. v. Epstein, 937 A.2d 469 (Pa. Super. Ct. 2007). Non-settling party's share is to be determined in accordance with the Comparative Negligence Act, 42 Pa. Cons. Stat. § 7102. Charles v. Giant Eagle Markets, 522 A.2d 1 (Pa. 1987). Target can be joined as a defendant in the initial case or sued in a second action. McMeekin v. Harry M. Stevens, Inc., 530 A.2d 462 (Pa. Super. Ct. 1987). 6-year statute of limitations. Penna. Nat'l v. Nicholson, 542 A.2d 123 (Pa. Super. Ct. 1988) (applying 42 Pa. Cons. Stat. § 5527). Statute of limitations runs from time of judgment or settlement. Oviatt.

Implied Indemnity: Available when a party who is secondarily liable pays the injured party and then seeks recovery from the party who is primarily liable, when liability arises from some legal relation between the parties or arises from some rule of common or statutory law, or because of a failure to discover or correct a defect or dangerous condition caused by the party primarily responsible. Builders Supply Co. v. McCabe, 77 A.2d 368 (Pa. 1951). 4-year statute of limitations, 42 Pa. Cons. Stat. § 5525, which runs from the time of payment of the underlying claim, payment of a judgment thereon, or payment of a settlement thereof by the party seeking indemnity. West View v. North Hills School District, 418 A.2d 527 (Pa. Super. Ct. 1980).

Damages - Measure of Damages to Property
Real Property: Permanent Damage: Diminution in market value attributable to the conduct, product, or instrumentality giving rise to the liability. Pennsylvania Dep't of Gen. Servs. v. U.S. Mineral Products. Co., 898 A.2d 590 (Pa. 2006). Temporary Damage: Lesser of either the cost of repair or the market value of the affected property before the loss. Pennsylvania Dep't of Gen. Servs.

Personal Property: If irreparable: The actual market value at the time of the destruction. Pennsylvania Dept. of Gen. Servs. If repairable: The lesser of the cost of repairing the property and its actual market value at the time of its destruction. Pennsylvania Dept. of Gen. Servs.

Experts - States Following the Daubert/Kumho Doctrine
Follows Frye. The Frye test, which is premised on the rule of "general acceptance," is more likely to yield uniform, objective, and predictable results among the courts, than is the application of the Daubert standard, which calls for a balancing of several factors. Grady v. Frito-Lay, Inc., 839 A.2d 1038 (Pa. 2003); Pa. R.E. 702.

Interest - Pre & Post Judgment
Prejudgment

Contract Actions
Rate: Where the damages are liquidated and certain, contract rate or, if none, 6%. Pittsburgh Constr. Co. v. Griffith, 834 A.2d 572 (Pa. Super. Ct. 2003); 41 Pa. Stat. § 202.
Accrual Date: Date wrongfully withheld. Pittsburgh Constr.

Tort Actions (Action seeking relief for bodily injury, death or property damage – Delay Damages)
Rate: Prime rate, as stated in Pa. R.C.P. 238(a)(3). The plaintiff must request delay damages within 10 days of the verdict or decision. Pa. R.C.P. 238(c); but cf. Pa. R.C.P. 238(d) (actions heard by a board of arbitrators); 42 Pa. Cons. Stat. § 8371 (insurance bad faith claims); Touloumes v. E.S.C. Inc., 899 A.2d 343 (Pa. 2006) (prejudgment interest, not delay damages, is recoverable in a breach of contract action where the damages sought are measurable by actual property damage).
Accrual Date: The date that is one year after the date original process was first served. Pa. R.C.P. 238(a)(2). The recoverable interest can be affected by a written settlement offer and times when plaintiff caused the delay. See Pa. R.C.P. 238(b)(1).

Post Judgment
Rate: Contract rate or, if none, 6%. Pittsburgh Constr.; 41 Pa. Stat. 202.
Accrual Date: Date of the verdict. 42 Pa. Cons. Stat. § 8101.

Joint and Several Liability
Joint and several liability for causes of action accruing before 6/28/2011. The plaintiff may recover the full amount of the allowed recovery from any defendant against whom the plaintiff is not barred from recovery. Any defendant who is so compelled to pay more than his percentage share may seek contribution. 1976, July 9, P.L. 855, No. 152; DeWeese v. Weaver, 880 A.2d 54 (Pa. Commw. Ct. 2005) (finding legislative amendment imposing modified joint and several liability unconstitutional) aff'd, 906 A.2d 1193 (Pa. 2006).

Modified joint and several liability for causes of action accruing on or after 6/28/2011. Defendants found 60% or more liable have joint and several liability. If liability is under 60%, then defendant is only severally liable. Joint and several liability is also imposed for an intentional misrepresentation, an intentional tort, release of a hazardous substance, and a liquor

licensee's violation of the Liquor Code, 47 Pa. Stat. § 4-497. Any defendant who is so compelled to pay more than his percentage share may seek contribution. 42 Pa. Cons. Stat. § 7102(a.1).

Judgment Liens
A judgment creates a lien upon real property for 5 years. Pa. R.C.P. § 3023. An action for revival of a judgment lien on real property must be commenced within 5 years from the date of the judgment. Pa. R.C.P. § 3031.1; 42 Pa. Cons. Stat. § 5526(a). An execution against personal property must be issued within 20 years. 42 Pa. Cons. Stat. § 5529(a).

Landlord-Tenant Subrogation ("Sutton Doctrine")
A tenant's liability depends on the parties' intent, as expressed in the lease. Remy v. Michael D's Carpet Outlets, 571 A.2d 446 (Pa. Super. 1990); Joella v. Cole, 2019 Pa. Super. 313 (analyzing a lease to determine the reasonable expectations of the parties).

Made Whole Doctrine
An insurance company cannot exercise its right of subrogation until the insured has been fully compensated. Nationwide Mutual Ins. co. v. DiTomo, 478 A.2d 1381 (Pa. Super. Ct. 1984). An automobile insurer shall reimburse the insured's deductible on a pro-rata basis. 31 Pa. Code § 146.8, Jones v. Nationwide Prop. & Cas. Ins. Co., 32 A.3d 1261 (Pa. 2011). Whether a policy's terms can supersede the "made whole" rule is unsettled. See Valora v. Pa. Employees Benefit Trust Fund, 939 A.2d 312 (Pa. 2007) (where the court recognized the issue but declined to address it).

Professional Malpractice Filing Requirements (Affidavit of Merit)
Certificates of merit are required in actions asserting professional liability claims against either a licensed professional or the entity responsible for the licensed professional. The term "licensed professional" refers to any person licensed in the Commonwealth of Pennsylvania or in another state as a health care provider, an accountant, an architect, a chiropractor, a dentist, an engineer or land surveyor, a nurse, an optometrist, a pharmacist, a physical therapist, a veterinarian or an attorney at law. The certificate shall be filed with the complaint or within sixty days after the filing of the complaint. The certificate of merit must substantially comply with the form set forth in Pa. R.C.P. 1042.9. Pa. R.C.P. 1042.1, 1042.3, 1042.9.

Restitution - Crime Victims Restitution Statutes
Mandatory. The court shall order full restitution regardless of the defendant's current financial resources. When setting the amount of restitution, the court shall consider the extent of the injury, the victim's request for restitution and such other matters deemed appropriate. The restitution award shall not be reduced by amounts paid by an insurance company. Amounts paid by an insurer shall be ordered to be paid to the insurer. The victim shall be made whole before payments are ordered to the insurer. Civil awards shall be reduced by the amount paid in restitution. 18 Pa. Cons. Stat. § 1106.

Pennsylvania has a separate statute addressing victims of certain computer offenses; see 18 Pa. Cons. Stat. § 7603, trademark counterfeiting, see 18 Pa. Cons. Stat. § 4119, and victims of someone convicted of trafficking in persons. See 18 Pa. Cons. Stat. § 3003.

Right to Repair/Notice Statutes – Construction Cases
None found.

Spoliation – Remedies for Spoliation
No tort for spoliation against a third party who had custody of the evidence, absent some special relationship, such as a contractual obligation to preserve the evidence. Elias v. Lancaster Gen'l Hosp., 710 A.2d 65 (Pa. Super. Ct. 1998). When a party spoliates evidence, the trial court may instruct the jury to infer that the evidence would have been adverse to the spoliator. Schroeder v. Commonwealth, 710 A .2d 23 (Pa. 1998). In a products case alleging a manufacturing (rather than a design) defect, summary judgment for the defendant may be warranted if the plaintiff spoliates evidence, or if the plaintiff fails to ensure that a third party protects the evidence. Creazzo v. Medtronic, Inc., 903 A.2d 24 (Pa. Super. Ct. 2006).

Statutes of Limitation and Repose*
Statutes of Limitation

Tort: 2 years. 42 Pa. Cons. Stat. § 5524.
Contract: 4 years. 42 Pa. Cons. Stat. § 5525.
Home Inspection Reports: Residential: damage arising from a home inspection report, 1 year after report is delivered. 68 Pa. Cons. Stat. § 7512.
State and Local Government: If against a government unit, notice must be filed with the unit, and, if a state agency, with the Attorney General also, within 6 months. A court may dispense with the notice requirement upon the showing of a reasonable excuse for the failure to file. The statute of limitation applicable to the type of cause of action applies. If against the officer of a government unit for anything done in the execution of his office, a civil action (not notice) must be filed within 6 months. 42 Pa. Cons. Stat. § 5522.

Statutes of Repose

Improvements to Real Property: 12 years after completion. If the injury occurs between the 10th and 12th year after completion, a civil action may be commenced not later than 14 years after completion. 42 Pa. Cons. Stat. §5536. Land surveying and landscape architecture: 12 years from the time the services are performed. 42 Pa. Cons. Stat. §§ 5537, 5538.

Subrogating in the Insured's Name – Real Party in Interest
All actions shall be prosecuted by and in the name of the real party in interest, subrogees excepted. Pa. R.C.P. 2002(d). "When suit is commenced in the name of the insured alone, the cause of action will be pleaded as though there were no subrogation. The pleading will contain only the statement of the cause of action against the defendant and the damages claimed. There will be no reference to insurance, to payments made thereunder, or to subrogation." Hillworth v. Smith, 624 A.2d 122 (Pa. Super. 1993). In a workers' compensation claim, the right of action against a third-party tortfeasor remains in the injured employee, and the employer's/insurer's right of subrogation must be achieved through a single action brought in the name of the injured

* For UCC Claims and claims based on improvements to real property and/or claims brought by condominium associations related to construction defects, see the notes at the end of the Table of Contents.

employee or joined by the injured employee. Hartford Ins. Grp. ex rel. Chen v. Kamara, 199 A.3d 841 (Pa. 2018).

RHODE ISLAND

Anti-Subrogation Rule: Subrogation by Insurer Against Insured
Although the Supreme Court of Rhode Island has not yet explicitly adopted the rule, Nationwide Prop. & Cas. Ins. Co. v. D.F. Pepper Cosntr., 593 A.3d 106 (R.I. 2013), federal courts in Rhode Island have adopted the rule. The federal courts state that where an insurer has paid a loss to one of the insureds under its policy, it cannot, as subrogee, recover from another of the parties for whose benefit the insurance was written even though the latter's negligence may have caused said loss, there being no design or fraud on his part. New Amsterdam Cas. Co. v. Homans-Kohler, Inc., 310 F.Supp. 374 (D.R.I. 1970).

Comparative/Contributory Negligence
Pure Comparative. R.I. Gen. Laws, § 9-20-4.

Contribution and Implied Indemnity
Contribution: A joint tortfeasor who enters into a settlement with the injured person is not entitled to recover contribution from another joint tortfeasor whose liability to the injured person is not extinguished by the settlement. R.I. Gen. Laws § 10-6-5. Damages are allocated, pro rata, proportionate to fault. R.I. Gen. Laws § 10-6-3; Hawkins v. Gadoury, 713 A.2d 799 (R.I. 1998). Contribution liability can be established by either judgment or settlement. Id. Actions for contribution have a 1-year statute of limitation following the first payment made by the joint tortfeasor. R.I. Gen. Laws § 10-6-4.

Implied Indemnity: R.I. Gen. Laws § 10-6-9 preserves the right of indemnity. Right to indemnity may arise from contract, express or implied, as well as on the basis of equity – if the paying party was only passively negligent. Helgerson v. Mammoth Mart, 335 A.2d 339 (R.I. 1975). The general 10-year statute of limitations codified in R.I. Gen. Laws § 9-1-13 is applied to common law indemnity claims, running from the time of discharge of the common liability. Hawkins.

Damages - Measure of Damages to Property
Real Property: Permanent Damage: Difference between market value immediately before the loss and the market value immediately after the loss. Greco v. Mancini, 476 A.2d 522 (R.I. 1984); Tortolano v. DiFilippo, 349 A.2d 48 (R.I. 1975). Temporary Damage: The reasonable cost of repair. Greco v. Mancini; Tortolano v. DiFilippo.

Personal Property: Generally, the difference between the before and after fair market values. DeSpirito v. Bristol County Water Co., 227 A.2d 782 (R.I. 1967). For apparel and household goods which do not have a fair market value, recovery will be measured by the actual value to the owner, excluding sentimental value. Factors to consider include, but are not limited to, the cost of the item when new, the length of time in use, its condition at the time of the loss or injury, the expense to the owner of replacing it with another item ok like kind and condition, and any other fact that may assist in determining the worth of the item to the owner at the time of loss or injury. DeSprito.

Experts - States Following the Daubert/Kumho Doctrine
Follows Daubert and Kumho Tire pursuant to R.I. R. Evid. Art. VII, Rule 702 and Raimbeault v. Takeuchi Mfg. (U.S.), Ltd., 772 A.2d 1056 (R.I. 2001).

Interest - Pre & Post Judgment
Prejudgment

Contract Actions
Rate: Contract rate or, if none, 12% per annum. R.I. Gen. Laws. § 9-21-10(a).
Accrual Date: Date the action accrues. Id.

Tort Actions
Rate: 12% per annum. R.I. Gen. Laws § 9-21-10(a).
Accrual Date: Date the action accrues. Id. However, for medical malpractice actions, from the date of notice of claim or filing of the action, whichever occurs first. R.I. Gen. Laws § 9-12-10(b).

Post Judgment
Rate: Contract rate or, if none, 12% per annum, accruing on both the principal amount of the judgment and the prejudgment interest entered therein. R.I. Gen. Laws § 9-21-10(a).
Accrual Date: Entry of judgment. Id.

Joint and Several Liability
Joint and several liability. A plaintiff may recover 100 percent of his or her damages from a joint tortfeasor who has contributed to the injury in any degree. Roberts-Robertson v. Lombardi, 598 A.2d 1380 (R.I. 1991); R.I. Gen. Laws
§ 10-6-2 (defining a joint tortfeasor).

Judgment Liens
A lien executed against real property is deemed discharged after twenty years from the date of the judgment. R.I. Gen. Laws § 9-26-33.

Landlord-Tenant Subrogation ("Sutton Doctrine")
The terms of the lease determine if the insurer, stepping into the landlord's shoes, may maintain a subrogation action against the tenant for the tenant's negligence. 56 Associates ex rel. Paolino v. Frieband, 89 F.Supp.2d 189 (D.R.I. 2000) (predicting how a state court would address the issue).

Made Whole Doctrine
An insurer does not acquire subrogation rights until the insured is fully compensated. Lombardi v. Merchants Mut. Ins. Co., 429 A.2d 1290 (R.I. 1981). Rhode Island has disallowed contractual limitations that curtail an insured's recovery in instances in which the insured has not recovered the amount of his or her actual loss. Di Tata v. Aetna Cas. & Sur. Co., 542 A.2d 245 (R.I. 1988) (discussing UM coverage).

Professional Malpractice Filing Requirements (Affidavit of Merit)
No certificate requirement.

Restitution - Crime Victims Restitution Statutes
Discretionary. A court may order restitution. R.I. Gen. Laws. § 12-19-32; see R.I. Gen. Laws § 12-19-33 (juveniles) Courts may utilize any rational method to calculate the restitution judgment, as long as it is, "reasonably calculated to make the victim whole" and is consistent with the goals of rehabilitation. *In re* James C., 871 A.2d 940 (R.I. 2005). However, the courts have been silent as to whether an insurance company may seek restitution.

Right to Repair/Notice Statutes – Construction Cases
None found.

Spoliation – Remedies for Spoliation
The destruction of evidence, whether deliberate or negligent, does not give rise to an independent cause of action. Malinou v. Miriam Hosp., 24 A.3d 497 (R.I. 2011). Such destruction may give rise to an inference that the destroyed evidence was unfavorable to the spoliating party. Although a showing of bad faith may strengthen the inference of spoliation, such a showing is not essential. An obligation to preserve evidence even arises prior to the filing of a complaint where a party is on notice that litigation is likely. Tancrelle v. Friendly Ice Cream Corp., 756 A.2d 744 (R.I. 2000). In federal court, heightened scrutiny is applied to insurance carriers that possess or examine evidence in anticipation of subrogation, and then subsequently lose or destroy evidence. Amica Mutual Ins. Co. v. Brasscraft, 2018 WL 2433560 (D. R.I. 2018) (finding that carriers familiar with subrogation may be found reckless for the mishandling of evidence material to a subrogation claim).

Statutes of Limitation and Repose[*]

Statutes of Limitation

Tort: Personal injury: 3 years. R.I. Gen. Laws § 9-1-14. Property damage: 10 years. R.I. Gen. Laws § 9-1-13(a). Malpractice: 3 years from the incident (or, in case of home inspector, from delivery of written report). If not discoverable during that time, 3 years from the date the injury was discovered or should have been discovered. R.I. Gen. Laws §§ 9-1-14.1, 9-1-14.3, 9-1-14.4.

Contract: 10 years. R.I. Gen. Laws § 9-1-13(a).

State and Local Government: 3 years, against the state or any political subdivision. R.I. Gen. Laws § 9-1-25. For actions against towns for liability arising from a bridge or highway: 60 days written notice to town council is required, plus there is a 40-day waiting period before suit can be filed. R.I. Gen. Laws §§ 45-15-9; 45-15-5. For all other actions against towns: presentment of a claim to town council is required plus there is a 40-day waiting period before suit can be filed. R.I. Gen. Laws § 45-15-5.

Statutes of Repose

Products: None. R.I. Gen. Laws § 9-1-13(b) was held unconstitutional in Kennedy v. Cumberland Engineering Co., 471 A.2d 195 (R.I. 1984).

[*] For UCC Claims and claims based on improvements to real property and/or claims brought by condominium associations related to construction defects, see the notes at the end of the Table of Contents.

Improvements to Real Property: 10 years from substantial completion. R.I. Gen. Laws § 9-1-29.

Subrogating in the Insured's Name – Real Party in Interest

An insurer who has paid all or part of a loss may sue in the name of the assured to whose right it is subrogated. R.I. R.C.P. 17(a).

SOUTH CAROLINA

Anti-Subrogation Rule: Subrogation by Insurer Against Insured
An insurer cannot subrogate against its own insured, nor anyone who holds the status of additional insured. Aetna Cas. & Sur. Co. v. Security Forces, Inc., 347 S.E.2d 903 (S.C. Ct. App. 1986).

Comparative/Contributory Negligence
Modified Comparative – 50%. Berberich v. Jack, 709 S.E.2d 607 (S.C. 2011); Nelson v. Concrete Supply Co., 399 S.E.2d 783 (S.C. 1991).

Contribution and Implied Indemnity
Contribution: Authorized by S.C. Code Ann. § 15-38-20. A right to contribution exists only in favor of a tortfeasor who has paid more than its pro rata share of common liability and recovery is limited to the amount paid in excess of pro rata share. Id. A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury not extinguished by the settlement. S.C. Code Ann. § 15-38-20(D), Progressive Max Ins. Co. v. Floating Caps, Inc., 747 S.E.2d 178 (S.C. 2013). An action for contribution must be commenced within one year after payment or judgment. S.C. Code Ann. § 15-38-40.

Implied Indemnity: Courts have traditionally allowed equitable indemnity in cases of imputed fault or where some special relationship exists between the first and second parties. Toomer v. Norfolk S. Ry. Co., 544 S.E.2d 634 (S.C. Ct. App. 2001). Attorney fees may also be recoverable. Winnsboro v. Wiedeman-Singleton, Inc., 414 S.E.2d 118 (S.C. 1992). A party seeking indemnity must show that the other party was liable for its damages, that it was not at fault, and that the settlement with the injured party was reasonable. Columbia/CSA-HS Greater Columbia Healthcare Sys. v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n, 713 S.E.2d 639 (S.C. Ct. App. 2011). 3-year statute of limitations, S.C. Code Ann. § 15-3-530(1), running from the time judgment is entered against the defendant. First Gen. Servs. of Charleston, Inc. v. Miller, 445 S.E.2d 446 (S.C. 1994). A claim may be barred by a relevant statute of repose. Columbia.

Damages - Measure of Damages to Property
Real Property: Difference between the value of the entire premises before and after the injury. Joyner v. St. Matthews Builders, 208 S.E.2d 48 (S.C. 1974). If pollution results in temporary injury: The depreciation in the rental or usable value of the property caused by the pollution. Gray v. Southern Facilities, Inc., 183 S.E.2d 438 (S.C. 1971).

Personal Property: Generally, the difference between the market value of the property immediately before the injury and its market value immediately after the injury. Coleman v. Levkoff, 122 S.E. 875 (S.C. 1924). If the property had no actual market value, such as wearing apparel and household goods, the owner is entitled to recover its actual or reasonable value, or its special value to the owner, excluding sentimental value. Nelson v. The Coleman Co., Inc., 155 S.E.2d 917 (S.C. 1967).

Experts - States Following the Daubert/Kumho Doctrine

Does not follow Daubert or Frye but the analysis that the court uses is very similar to the Daubert test. Factors for the admission of scientific expert testimony are: (1) the publication and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures. State v. Council, 515 S.E.2d 508 (S.C. 1999); Rule 702, SCRE. Non-scientific expert testimony is not subject to the Council factors. State v. White, 676 S.E.2d 684 (S.C. 2009). However, the expertise, reliability, and the ability of the testimony to assist the trier of fact are all threshold determinations to be made prior to the admission of expert testimony, and generally, a witness's expert status will be determined prior to determining the reliability of the testimony. State v. Tapp, 728 S.E.2d 468 (S.C. 2012); Graves v. CAS Med. Sys., 735 S.E.2d 650 (S.C. 2012).

Interest - Pre & Post Judgment

Prejudgment

Contract Actions

Rate: Contract rate or 8.75% per annum. S.C. Code Ann. § 34-31-20(A).

Accrual Date: Date due. Id.

Tort Actions

Rate: If ascertainable, i.e., is a sum certain or is capable of being reduced to certainty, 8.75%. S.C. Code Ann. § 34-31-20(A); Smith-Hunter Constr. Co. v. Hopson, 616 S.E.2d 419 (S.C. 2005).

Accrual Date: When, by agreement or operation of law, the payment was demandable. Dixie Bell, Inc. v. Redd, 656 S.E.2d 765 (S.C. Ct. App. 2007); S.C. Code Ann. § 34-31-20(A).

Offer of Judgment

An offer of judgment can impact the recovery of interest. See § S.C. Code Ann. 15-35-400; SCRCP Rule 68.

Post Judgment

Rate: Contract rate, or, if none, the prime rate, as calculated in § 34-31-20(B), plus 4%, compounded annually. Renaissance Enters., Inc. v. Ocean Resorts, Inc., 513 S.E.2d 617 (S.C. 1999); S.C. Code Ann. § 34-31-20(B).

Accrual Date: Date of judgment. Id.

Joint and Several Liability

Modified joint and several liability. Subject to certain exceptions, see S.C. Code Ann. § 15-38-15(F), joint and several liability does not apply to any defendant whose conduct is determined to be less than 50 percent of the total fault for the indivisible damages as compared with the total of: (i) the fault of all the defendants; and (ii) the fault (comparative negligence), if any, of the plaintiff. A defendant whose conduct is determined to be less than fifty percent of the total fault shall only be liable for that percentage of the indivisible damages determined by the jury or trier of fact. S.C. Code Ann. § 15-38-15.

Judgment Liens
Final judgments create a lien upon real estate for a period of ten years. S.C. Code Ann. § 15-35-810.

Landlord-Tenant Subrogation ("Sutton Doctrine")
Notwithstanding any other provision of law, no insurer has a cause of action against a tenant who causes damage to real or personal property leased by the landlord to the tenant when the insurer is liable to the landlord for the damages under an insurance contract between the landlord and the insurer, unless the damage is caused by the tenant intentionally or in reckless disregard of the rights of others. S.C. Code Ann. § 38-75-60.

Made Whole Doctrine
No published case law on the made-whole doctrine. However, the party claiming the right of subrogation must establish, *inter alia*, that "no injustice will be done to the other party by the allowance of the equity." Prudential Inv. Co. v. Connor, 112 S.E. 539 (S.C. 1921).

Professional Malpractice Filing Requirements (Affidavit of Merit)
A complaint alleging professional negligence against a licensed professional must include an affidavit of merit signed by a licensed and qualified expert in the same field as the alleged tortfeasor. The statute specifically includes various types of doctors, attorneys, engineers, architects, CPAs, land surveyors and other professionals. S.C. Code Ann. § 15-36-100.

Restitution - Crime Victims Restitution Statutes
Mandatory. For victims of a crime resulting in pecuniary damages or loss, the court must hold a hearing and order the defendant to make restitution for pecuniary damages. In determining the manner, method or amount of restitution, the court will consider: 1) the financial resources of the defendant and victim and the burden that the manner and method of restitution will impose on each; 2) the ability of the defendant to pay in installments; 3) the anticipated rehabilitative effect on the defendant; 4) any burden or hardship on the victim as a direct or indirect result of the crime; and 5) the mental, physical, and financial well-being of the victim. S.C. Code Ann. § 17-25-322. Insurers may receive restitution as determined by the court but only after the primary victim receives his or her portion of a restitution order. S.C. Code Ann. § 17-25-324.

South Carolina has a separate statute addressing victims whose aquaculture products or facilities have been damaged, see S.C. Code Ann. § 50-18-285, and victims whose personal property, money or goods have been stolen. See S.C. Code Ann. § 17-25-120. It also has a separate statute addressing restitution by juvenile delinquents. See S.C. Code Ann. § 63-19-1410(3).

Right to Repair/Notice Statutes – Construction Cases
S.C. Code Ann. §§ 40-59-810 to 40-59-860 *South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act.*

S.C. Code Ann. §§ 40-11-500 to 40-11-570 *South Carolina Notice and Opportunity to Cure Nonresidential Construction Defects Act.*

Spoliation – Remedies for Spoliation

South Carolina does not recognize a cause of action in tort for spoliation of evidence. Austin v. Beaufort County Sheriff's Office, 659 S.E.2d 122 (S.C. 2008). When evidence is lost or destroyed by a party, an inference may be drawn by the jury that the evidence which was lost or destroyed by that party would have been adverse to that party. Kershaw County Board of Education v. U.S. Gypsum Co., 396 S.E.2d 369 (S.C. 1990). However, the party seeking the inference must be prepared to make a showing that the document or evidence might reasonably have supported whatever presumption is being requested of the fact finder. Pringle v. SLR, Inc. of Summerton, 675 S.E.2d 783 (S.C. Ct. App. 2009).

Statutes of Limitation and Repose*

Statutes of Limitation

Tort: 3 years. S.C. Code Ann. § 15-3-530.

Contract: 3 years. S.C. Code Ann. § 15-3-530. Arising from the sale of goods: 6 years. S.C. Code Ann. § 36-2-725.

Medical Malpractice: Generally: 3 years from the date of treatment, or 3 years from the date of discovery or the date the injury should have been discovered. Foreign object: 2 years from the date of discovery or the date the object should have been discovered. S.C. Code Ann. § 15-3-545.

State and Local Government: Optional verified claim may be filed with the State Budget and Control Board or with the political subdivision. If filed, the state or subdivision has 180 days in which to approve the claim. If the claimant has not been notified of the status of the claim within 180 days, the claim is deemed disallowed. S.C. Code Ann. § 15-78-80. If a verified claim is filed, the claimant may not file suit until the earliest of: (1) 180 days from the filing of the claim; (2) the governmental entity's disallowance of the claim; or (3) the governmental entity's rejection of a settlement offer. S.C. Code Ann. § 15-78-90. If no claim was filed, the limitation period is 2 years from the date that injury was discovered or should have been discovered; if a claim was filed, the limitation period is 3 years from the date that the injury was discovered or should have been discovered. S.C. Code Ann. §§ 15-78-100, 155-78-110.

Statutes of Repose

Improvements to Real Property: 8 years after substantial completion. S.C. Code Ann. § 15-3-640.

Medical Malpractice: 6 years from occurrence generally; 3 years for leaving of foreign object in patient. S.C. Code Ann. § 15-3-545.

Subrogating in the Insured's Name – Real Party in Interest

An insurer who has paid the insured the entire loss may bring a subrogation action either in its own name or in the name of the insured. The insurer may not bring the action in its own name where it has paid only a portion of the loss sustained by the insured. In such a case, it may join the insured in bringing the action, but need not do so. Ordinarily, the insured is the only necessary party and the subrogated insurer cannot be compelled to join. Seaside Resorts, Inc. v.

* For UCC Claims and claims based on improvements to real property and/or claims brought by condominium associations related to construction defects, see the notes at the end of the Table of Contents.

Club Car, Inc., 416 S.E.2d 655 (S.C. Ct. App. 1992). A loan receipt is a lawful device by which subrogation is avoided and under which the insured is entitled to bring the action in her own name. Martin v. McLeod, 127 S.E.2d 129 (S.C. 1962).

SOUTH DAKOTA

Anti-Subrogation Rule: Subrogation by Insurer Against Insured
South Dakota should determine whether the anti-subrogation rule bars subrogation using a case-by-case approach. See Am. Family Mut. Ins. Co. v. Auto-Owners Ins. Co., 757 N.W.2d 584 (S.D. 2008).

Comparative/Contributory Negligence
Modified Comparative – Slight Negligence. S.D. Codified Laws
§ 20-9-2. What constitutes "slight" or "small" contributory negligence varies with the facts and circumstances in each case. Westover v. East River Elec. Power Co-op., Inc., 488 N.W.2d 892 (S.D. 1992).

Contribution and Implied Indemnity
Contribution: Authorized by S.D. Codified Laws § 15-8-12, *et seq*. Authorized only among joint tortfeasors, which right may be exercised by the defending party in the initial action. Id. and S.D. Codified Laws § 15-6-14(a). There must be joint or several liability rather than the presence of joint or concurring negligence. Burmeister v. Youngstrom, 139 N.W.2d 226 (S.D. 1965). The right of contribution is a derivative right and not a new cause of action. Id. A joint tortfeasor is not entitled to a money judgment for contribution until he has by payment discharged the common liability or paid more than his pro rata share. S.D. Codified Laws § 15-8-13. Liability among joint tortfeasors is determined by pro rata share if there is a disproportion of fault among them. S.D. Codified Laws § 15-8-15. A joint tortfeasor who enters into a settlement with the injured party is not entitled to pursue contribution from another joint tortfeasor whose liability to the injured party is not extinguished by settlement. S.D. Codified Laws § 15-8-14. Recovery by the injured party against one joint tortfeasor does not extinguish liability of the other joint tortfeasors. S.D. Codified Laws § 15-8-16. A joint tortfeasor is not discharged by the release of another and claim is reduced by amount stated in release. S.D. Codified Laws § 15-8-17. A release by the injured party of one joint tortfeasor does not relieve him from liability to make contribution to another joint tortfeasor unless the release is given before the right of the other tortfeasor to secure a money judgment has accrued, and provides for a reduction, to the extent of the pro rata share of the released tortfeasor, of the injured party's damages recoverable against all the other tortfeasors. S.D. Codified Laws § 15-8-18. 6-year statute of limitations. Avera St. Luke's Hosp. v. Karamali, 848 F.Supp.2d 1017 (D.S.D. 2012) (applying S.D. Codified Laws § 15-2-13). Statute of limitations runs from date money is paid. Avera St. Luke's Hosp.

Implied Indemnity: Indemnity is an "all or nothing" proposition. Ebert v. Fort Pierre Moose Lodge No. 1813, 312 N.W.2d 119 (S.D. 1981). The party seeking indemnity has to show a proportionate absence of contributing negligence on his part. S.D. Codified Laws § 15-8-15 and Degan v. Baymanm 200 N.W.2d 134 (S.D. 1972). 6-year statute of limitations. Avera St. Luke's Hosp. (applying S.D. Codified Laws § 15-2-13). Statute of limitations runs from date money is paid. Avera St. Luke's Hosp.

Damages - Measure of Damages to Property
Real Property: Permanent Damage: The difference in fair market value immediately before and immediately after the occurrence. Denke v. Mamola, 437 N.W.2d 205 (S.D. 1989). Temporary

Damage: The reasonable cost of restoration or repair unless such cost is greater than diminution. Denke. When a plaintiff seeks damages for diminution in value, his loss is properly measured at the time of the injury to his property. When the measure of damages is cost of repairs, the focus is on the actual expenditures made by the plaintiff to make the repairs rather than the damaged property itself. Casper Lodging, LLC v. Zakco Commer. Consultants, Inc., 871 N.W.2d 477 (S.D. 2015).

Personal Property: Total Loss: The full market value of the property destroyed. Joseph v. Kerkvliet, 642 N.W.2d 533 (S.D. 2002). Partial Loss: The reasonable expense of necessary repairs, plus loss of use. Joseph.

Experts - States Following the Daubert/Kumho Doctrine
Follows Daubert. S.D. Codified Laws § 19-19-702 (eff. Jan. 1, 2016); see State v. Johnson, 860 N.W.2d 235 (S.D. 2015).

Interest - Pre & Post Judgment
Prejudgment

Contract Actions
Rate: The contract rate or, if none, 10% per year. S.D. Codified Laws §§ 21-1-13.1, 54-3-16.
Accrual Date: Date the loss or damage occurred, i.e., the date of breach. S.D. Codified Laws § 21-1-13.1; Stern Oil Co. v. Brown, 2018 SD 15, 2018 S.D. LEXIS 24 (S.D. 2018).

Tort Actions
Rate: 10% per year. However, interest is not recoverable on future damages, punitive damages, or intangible damages such as pain and suffering, emotional distress, loss of consortium, injury to credit, reputation or financial standing, loss of enjoyment of life, or loss of society or companionship. S.D. Codified Laws § 21-1.13.1. For inverse condemnation actions, the rate is 4.5%. Id.; S.D. Codified Laws § 54-3-16.
Accrual Date: The date the loss occurred, i.e., the date of the tortious conduct, S.D. Codified Laws § 21-1-13.1, unless the date of discovery is the only reasonable date from which to compute interest. Fritzel v. Roy Johnson Constr., 594 N.W.2d 336 (S.D. 1999).

Post Judgment
Rate: 10% per year (exclusive of real estate mortgages and security agreements under Title 57A and exclusive of support debts or judgments under § 25-7A-14). S.D. Codified Laws §§ 54-3-5.1, 54-3-16. For inverse condemnation actions, the rate is 4.5%. Id.
Accrual Date: Date of judgment. S.D. Codified Laws § 54-3-5.1.

Joint and Several Liability
Modified joint and several liability. If the court enters judgment against any party liable on the basis of joint and several liability, any party who is allocated less than 50 percent of the total fault allocated to all the parties may not be jointly liable for more than twice the percentage of fault allocated to that party. S.D. Codified Laws §§ 15-8-11;15-8-15.1.

Judgment Liens
A judgment becomes a lien on real property for a period of 10 years. S.D. Codified Laws § 15-16-7. A judgment may be renewed for an additional period of ten years. S.D. Codified Laws § 15-16-35.

Landlord-Tenant Subrogation ("Sutton Doctrine")
Courts determine whether subrogation against a negligent tenant is allowed by applying contract principles on a case-by-case basis. Under this approach, subrogation may be denied if the lease expressly requires the landlord to maintain fire insurance or the lease exonerates a tenant from losses caused by a fire. American Family Mut. Ins. Co. v. Auto-Owners Ins. Co., 757 N.W.2d 584 (S.D. 2008).

Made Whole Doctrine
Although South Dakoda implicitly recognizes the common law made whole doctrine, it also recognizes that an insurer with a subrogation clause in its contract may pursue subrogation before the insured has been made whole, once payment has been made. Westfield Ins. Co., Inc. v. Rowe ex rel. Estate of Gallant, 631 N.W.2d 175 (S.D. 2001) (UIM case); Julson v. Federated Mut. Ins. Co., 562 N.W.2d 117 (S.D. 1997).

Professional Malpractice Filing Requirements (Affidavit of Merit)
No certificate requirement. However, the Health Care Services Arbitration Panel may hear and decide claims of medical malpractice. S.D. Codified Laws § 21-25B-4. Participation in the panel is optional; arbitration is not a prerequisite to filing a lawsuit for medical malpractice.

Restitution - Crime Victims Restitution Statutes
Discretionary. A court shall order restitution to the extent a defendant is able to pay and the order may be enforced as a civil judgment. S.D. Codified Laws § 23A-28-1. However, a court has broad discretion in determining whether restitution will be imposed. State v. Thayer, 713 N.W.2d 608 (S.D. 2006). Prior to ordering restitution, a court shall consider the defendant's health, age, education, employment or potential for employment, finances, the number of victims and their respective damages, and any other relevant factors. S.D. Codified Laws § 23A-28-5. While a restitution order does not preclude a civil remedy, a subsequent civil judgment is offset by the amount of the restitution order. S.D. Codified Laws
§ 23A-28-9. An insurance company that has made payments to an insured victim is eligible for restitution but is subjugated to the claim of a victim with pecuniary damages. S.D. Codified Laws § 23A-28-2.

Right to Repair/Notice Statutes – Construction Cases
S.D. Codified Laws §§ 21-1-15 to 21-1-16 *Judicial Remedies – Damages.*

Spoliation – Remedies for Spoliation
The S.D. Supreme Court has not addressed whether it would recognize a cause of action for either intentional or negligent spoliation of evidence, but a federal district court has predicted it would decline to do so. O'Neal v. Remington Arms Company, LLC, 2012 WL 3834842 (D.S.D. 2012). Spoliation is the intentional destruction of evidence. When it is established, a fact finder may infer that the evidence destroyed was unfavorable to the party responsible for its destruction. Spoliation

is established along with an unfavorable inference against the spoliator when substantial evidence exists to support a conclusion that the evidence was in existence, that it was in the possession or under the control of the party against whom the inference may be drawn, that the evidence would have been admissible at trial, and that the party responsible for destroying the evidence did so intentionally and in bad faith. Thyen v. Hubbard Feeds, Inc., 804 N.W.2d 435 (S.D. 2011). The spoliator must provide an explanation for the disappearance of any evidence. The burden is on the spoliator to show it acted in a non-negligent, good faith manner in destroying the evidence. If the trial court concludes the spoliator maliciously destroyed the document, it is unavailable because of negligence, or for some other reason evidencing a lack of good faith, the jury should be given an adverse inference instruction. The jury must then determine if the explanation given is reasonable, and if it finds it is reasonable, then the jury may not infer the missing evidence contained unfavorable information to the opposing party. Wuest ex rel. Carver v. McKennan Hosp., 619 N.W.2d 682 (S.D. 2000).

Statutes of Limitation and Repose*

Statutes of Limitation

Tort: Personal injury, 3 years. S.D. Codified Laws § 15-2-14. Property damage, 6 years. S.D. Codified Laws § 15-2-13. Products, 3 years. S.D. Codified Laws § 15-2-12.2.

Contract: 6 years. S.D. Codified Laws § 15-2-13.

Medical Malpractice: 2 years. S.D. Codified Laws § 15-2-14.1 (see also, Statute of Repose, below).

State and Local Government: Written notice is required within 180 days of the injury. S.D. Codified Laws § 3-21-2. 1-year limitation on actions against the state. S.D. Codified Laws § 21-32-2. 2-year limitation on actions against municipalities. S.D. Codified Laws § 9-24-5. 3 years for actions against a sheriff, coroner, or constable. S.D. Codified Laws § 15-2-14.

Statutes of Repose

Improvements to Real Property: 10 years after substantial completion. S.D. Codified Laws § 15-2A-3. If the injury occurs in 10th year, the period is extended 1 year, but not beyond 11 years. S.D. Codified Laws § 15-2A-5. The statute does not apply to persons in control of the improvement, nor in cases of fraud or willful misconduct. S.D. Codified Laws §§ 15-2A-4, 15-2A-7.

Medical Malpractice: 2 years after the alleged error. S.D. Codified Laws § 15-2-14.1.

Legal Malpractice: 3 years after the alleged error. S.D. Codified Laws § 15-2-14.2. (Note: S.D. has a number of other statutes of repose governing various trades and professions. Consult Chapter 15-2 of the Codified Laws for details.)

Subrogating in the Insured's Name – Real Party in Interest

The insurer's right to subrogation is not conditioned on whether the insured is a party to the action where the insurer has indemnified the insured. Maryland Cas. Co. v. Delzer, 283 N.W.2d 244 (S.D. 1979). When the indemnity paid by the insurer covers only part of the loss, leaving a residue to be made good to the insured by the wrongdoer, the right of action remains in the insured for the entire loss. The insured becomes a trustee and holds the amount of recovery,

* For UCC Claims and claims based on improvements to real property and/or claims brought by condominium associations related to construction defects, see the notes at the end of the Table of Contents.

equal to the indemnity for the use and benefit of the insurer. Bowen v. American Family Ins. Group, 504 N.W.2d 604 (S.D. 1993).

TENNESSEE

Anti-Subrogation Rule: Subrogation by Insurer Against Insured
No right of subrogation exists where the wrongdoer is also an insured under the same policy. Dattel Family Ltd. Partnership v. Wintz, 250 S.W.3d 883 (Tenn. Ct. App. 2007); Phoenix Ins. Co. v. Estate of Ganier, 212 S.W.3d 270 (Tenn. Ct. App. 2006); Miller v. Russell, 674 S.W.2d 290 (Tenn. Ct. App. 1984). If the first-party insurer also covers the target for the loss under a liability policy, subrogation is prohibited. Ganier.

Comparative/Contributory Negligence
Modified Comparative – 49%. Mann v. Alpha Tau Omega Fraternity, 380 S.W.3d 42 (Tenn. 2012); McIntyre v. Balentine, 833 S.W.2d 52 (Tenn. 1992).

Contribution and Implied Indemnity
Contribution: Authorized by Tenn. Code Ann. § 29-11-102, *et seq*. Joint tortfeasors are entitled to contribution where they pay more than their proportionate share. Tenn. Code Ann. § 29-11-102(b). There is no right of contribution in favor of a tortfeasor who has intentionally caused or contributed to injury. Tenn. Code Ann. § 29-11-102(c). An action for contribution may be brought in the original action or in a separate action. Tenn. Code Ann. § 29-11-104(a). A settling tortfeasor may not recover from a non-settling tortfeasor whose liability is not extinguished by the settlement or if the amount paid wasn't reasonable. Tenn. Code Ann. § 29-11-102(d). A right to contribution must be based on comparative negligence principles. Berovets v. Harde Ralls Pontiac-Olds, Inc., 891 S.W.2d 905 (Tenn. 1994). 1-year statute of limitations from judgment or payment. Tenn. Code Ann. § 29-11-104.

Implied Indemnity: Indemnity may apply where one party is held liable solely by imputation of law because of a relation to a wrongdoer. An obligation to indemnify may arise by implication from the relationship of the parties. Indemnity claims which are based on the parties' active and passive negligence are barred. Owens v. Truckstops of America, 915 S.W.2d 420 (Tenn. 1996). 6-year statute of limitations. Ind. Lumbermens Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co., 511 S.W.2d 713 (Tenn. Ct. App. 1972); Travelers Ins. Co. v. Fidelity & Casualty Co., 409 S.W.2d 175 (Tenn. 1966); Tenn. Code Ann. § 28-3-109.

Damages - Measure of Damages to Property
Real Property: Permanent Damage: The difference between the reasonable market value immediately prior to and immediately after injury, but if the reasonable cost of repair is less than the depreciation in value, it is the cost of repair. Killian v. Campbell, 760 S.W.2d 218 (Tenn. Ct. App. 1988). Temporary Damage: Cost of repairs, not to exceed diminution in value. Barnett v. Lane, 44 S.W.3d 924 (Tenn. Ct. App. 2000). Loss of use (*i.e.*, rental value) during the period of the injury is also recoverable. Anthony v. Construction Products, Inc., 677 S.W.2d 4 (Tenn. Ct. App. 1984).

Personal Property: If the damages have been repaired then the measure of damages is the reasonable cost of repairs necessary for the restoration plus any loss of use pending the repairs. If the damages have not been repaired the property is not capable of repair so as to restore function, appearance, and value as they were immediately before the incident, then the measure of

damages is the difference in the fair market value of the property immediately before the incident and immediately after the incident. Tire Shredders, Inc. v. Erm-North Cent., Inc.,15 S.W.3d 849 (Tenn. Ct. App. 1999).

Experts - States Following the Daubert/Kumho Doctrine

Daubert not adopted, but Daubert factors are helpful in applying Tenn. R. Evid. 702. McDaniel v. CSX Transp., Inc.**,** 955 S.W.2d 257 (Tenn. 1997). Rule 702's requirement that that the witness's knowledge must "substantially" assist the trier of fact sets a higher admissibility standard than Federal Rule 702. State v. Scott, 275 S.W.3d 395 (Tenn. 2009); Tenn. R. Evid. 702.

Interest - Pre & Post Judgment

Prejudgment

Contract Actions

Rate: Contract rate, up to the maximums established in Tenn. Code Ann. § 47-14-103. Tenn. Code Ann. § 47-14-123. If none, discretionary in accordance with the principles of equity at a rate not to exceed 10% per annum. Id.

Accrual Date: Due date or the date of accrual. Tenn. Code Ann. §§ 47-14-109, 47-3-112.

Tort Actions

Rate: Interest cannot be awarded for personal injury claims. Sterling v. Velsicol Chem. Corp., 855 F.2d 1188 (6th Cir. (Tenn.) 1988). Otherwise, at the court's discretion up to a maximum of 10%. Tenn. Code Ann. § 47-14-123.

Accrual Date: Date on which the tortious conduct effectively operates to destroy or diminish the plaintiff's property. Sterling.

Post Judgment

Rate: 10% per annum, except as otherwise provided by statute, provided that, where the judgment is based on a note, contract, or other writing fixing the amount of interest, the contract rate up to the maximum allowed by Tenn. Code Ann. § 47-14-103. Vooys v. Turner, 49 S.W.3d 318 (Tenn. Ct. App. 2001); Tenn. Code Ann. § 47-14-121. For judgments against a governmental entity paid in installments, 6%. Tenn. Code Ann. § 29-20-312. But cf. Tenn. Code Ann. § 29-17-913 (eminent domain).

Accrual Date: Date of judgment. Tenn. Code Ann. § 47-14-122.

Joint and Several Liability

Modified several liability. For all causes of action accruing on or after 7/1/13: Several liability only, with joint-and-several exceptions for civil conspiracy, claims for strict product liability or breach of warranty among manufacturers, and vicarious liability. Tenn. Code Ann. § 29-11-107. For causes of action accruing before 7/1/13: Joint and several liability abolished by the Supreme Court. McIntyre v. Balentine, 833 S.W.2d 52 (Tenn. 1992).

Judgment Liens
A judgment is enforceable for a period of ten years. Tenn. Code Ann. § 28-3-110. A judgment creditor may renew their judgment by filing a motion within the ten-year period. Tenn. R.C.P. 69.04

Landlord-Tenant Subrogation ("Sutton Doctrine")
Absent an express lease provision to the contrary, a tenant is deemed a coinsured under the landlord's insurance policy, thereby precluding subrogation against the tenant by the landlord's insurer. Dattel Family Ltd. P'ship v. Wintz, 250 S.W.3d 883 (Tenn. Ct. App. 2007).

Made Whole Doctrine
The insured must be made whole before subrogation rights arise in favor of the insurers. Wimberly v. American Cas. Co. of Reading, Pa. (CNA), 584 S.W.2d 200 (Tenn. 1979). The "made whole" rule does not extend to deductibles. Copper Basin Federal Credit Union v. Fiserv Solutions, Inc., 2011 WL 4860043 (E.D. Tenn. 2011).

Professional Malpractice Filing Requirements (Affidavit of Merit)
Actions alleging health care liability and requiring expert testimony to establish the applicable professional standard of care require a certificate of good faith. Where the plaintiff advances such a claim, the certificate must accompany the filing of the complaint. If advanced by a defendant alleging fault by a non-party, the certificate must be filed within 30 days of the responsive pleading by the defendant. Health care providers subject to this provision include physicians, pharmacists and nurses, among others. Additionally, any party intending to file an action alleging health care liability must provide written notice to the target health care provider 60 days prior to filing suit. Tenn. Code Ann. §§ 29-26-121, 29-26-122.

Restitution - Crime Victims Restitution Statutes
Discretionary. The court is to calculate the amount by determining the victim's special damages and out-of-pocket expenses, as well as the defendant's ability to pay. At the end of the court-ordered payment schedule, if unpaid amounts remain, the victim may convert the unpaid balance into a civil judgment. Tenn. Code Ann. § 40-35-304. Insurance companies are not victims entitled to restitution under the statute. State v. Alford, 970 S.W.2d 944 (Tenn. 1998). However, insurance companies may receive restitution in the case of a fraudulent claim by an insured. State v. Cross, 93 S.W.3d 891 (Tenn. Crim. App. 2002).

Right to Repair/Notice Statutes – Construction Cases
Tenn. Code Ann. §§ 66-36-101 to 66-36-103 *Construction Defects.*

Spoliation – Remedies for Spoliation
Tennessee does not recognize an independent tort of first-party spoliation. However, a Tennessee federal court would recognize a negligence claim based on destruction of the evidence, if the victim of the spoliation had to relinquish a cause of action against another party because of the spoliation. Benson v. Penske Truck Leasing Corp., 2006 U.S. Dist. LEXIS 18259 (W.D. Tenn. Mar. 30, 2006). The doctrine of spoliation of evidence permits a court to draw a negative inference against a party that has intentionally, and for an improper purpose, destroyed, mutilated, lost, altered, or concealed evidence. Bronson v. Umphries, 138 S.W.3d 844 (Tenn. Ct. App. 2003); cf. Tatham v.

Bridgestone Ams. Holding, Inc., 473 S.W.3d 734 (Tenn. 2015) (discussing Tenn. R.CP 34A.02 and 37 and holding that intentional misconduct is not a prerequisite to imposing a discovery sanction for spoliation of evidence).

Statutes of Limitation and Repose*

Statutes of Limitation

Products: General statutes of limitation apply. But see Tenn. Code Ann. § 28-3-104(b) (discussing accrual for personal injury actions). However, if an action is dismissed in such a manner that does not conclude plaintiff's cause of action, the action may be refiled within 1 year of dismissal under Tenn. Savings Statute, Tenn. Code Ann. § 28-1-105. Sharp v. Richardson, 937 S.W.2d 846 (Tenn. 1996). No action may be brought more than 6 years after injury. Tenn. Code Ann. § 29-28-103.

Tort: Personal injury: 1 year. Tenn. Code Ann. § 28-3-104; but see Tenn. Code Ann. § 28-3-104(a)(2) (extending statute to two years if criminal charges are brought). Property damage: 3 years. Tenn. Code Ann. § 28-3-105.

Contract: 6 years. Tenn. Code Ann. § 28-3-109.

Medical Malpractice: 1 year. If not discovered within 1 year, 1 year from the date of discovery. No action may be brought more than 3 years from the date of the act or omission, unless involving fraudulent concealment, in which case an action must be brought within 1 year of discovery. In a case involving a foreign object left in patient: 1 year from the date the injury or wrongful act was discovered or should have been discovered. Tenn. Code Ann. § 29-26-116.

Professional Malpractice: Against licensed or certified public accountants or attorneys, 1 year from accrual of the cause of action. Tenn. Code Ann. § 28-3-104. Against real estate appraiser, 1 year from discovery of the act or omission. Id.

State Government: Actions against the state permitted if arising from the operation of motor vehicles, maintenance of streets or structures, or negligent acts or omissions of state employees. Tenn. Code Ann. § 9-8-307. Within the limitation period generally applicable to the type of claim, written notice must be filed with the Div. of Claims and Risk Management. If the claim is denied or if settlement is offered but rejected, the claimant must file a claim with Claims Commission within 90 days of the denial or offer. Tenn. Code Ann. § 9-8-402.

Local Government: Actions against political subdivisions are permitted if arising from the operation of motor vehicles, maintenance of streets or structures, or negligent acts or omissions of government employees. Tenn. Code Ann. § 29-20-101, *et seq.* For an action against a municipal corporation arising from the maintenance of a street, alley, sidewalk or highway, written notice of the injury must be served on the mayor or municipal manager within 120 days of the injury. Tenn. Code Ann. § 7-31-103. The governmental entity or employee has 60 days in which to answer or otherwise respond to any claim, action, or suit. A claim is deemed denied if not approved by the end of the 60-day period. Tenn. Code Ann. § 29-20-304. Suit may be filed if the claim is denied, within 12 months after the cause of action arises. Tenn. Code Ann. § 29-20-305.

* For UCC Claims and claims based on improvements to real property and/or claims brought by condominium associations related to construction defects, see the notes at the end of the Table of Contents.

Statutes of Repose

Products: 10 years from date of purchase or within 1 year after expiration of the anticipated life of the product, whichever is shorter. Tenn. Code Ann. § 29-28-103. The anticipated life of a product is determined by the expiration date placed on the product by the manufacturer when required by law but shall not commence until the date the product was first purchased for use or consumption. Tenn. Code Ann. § 29-28-102. (Note: the Tenn. Products Liability Act was held pre-empted as to generic drugs in Strayhorn v. Wyeth Pharmaceuticals, 737 F.3d 378 (6th Cir. 2013)).

Improvements to Real Property: 4 years after substantial completion. Tenn. Code Ann. § 28-3-202. If injury occurred during the 4th year after substantial completion, the repose period is extended by 1 year from the date of injury, but not longer than 5 years from substantial completion. Tenn. Code Ann. § 28-3-203.

Professional Malpractice: Against licensed or certified public accountants or attorneys, for causes of action accruing 7/1/14 or later: 5 years from act or omission, except if there is fraudulent concealment, in which case the action must be filed 1 year from discovery. Tenn. Code Ann. § 28-3-104. Against a real estate appraiser for causes of action accruing 7/1/17 or later: 5 years after the date the appraisal was conducted. Id.

Subrogating in the Insured's Name – Real Party in Interest

A party to whose rights another is subrogated may sue in his or her own name without joining the party for whose benefit the action is brought. T.R.C.P. 17.01. Upon payment by the insurer of a loss, it becomes the real party in interest with respect to the subrogation claim and has the right to bring suit in the name of the insured or in its own name. The insurer may intervene in an action brought by the insured against a wrongdoer and assert its subrogation claim therein but it cannot bring suit against the wrongdoer after judgment has been rendered in the insured's action. The subrogation claim is the property of the insurer to deal with as it pleases so long as the rights of others, e.g., the insured or the wrongdoer, are not prejudiced. Travelers Ins. Co. v. Williams, 541 S.W.2d 587 (Tenn. 1976).

TEXAS

Anti-Subrogation Rule: Subrogation by Insurer Against Insured
An insurance company, having paid a loss to its named insured, may not subrogate against its own insured or a co-insured on same policy, but if policy does not expressly provide *liability* coverage to co-insured, subrogation may proceed against co-insured for damages in excess of the co-insured's insurable interest. McBroome-Bennett Plumbing, Inc. v. Villa France, Inc., 515 S.W.2d 32 (Tex. App. 1974). When subrogor and target are covered by different policies issued by same insurer, subrogation is permitted if target's liability policy would cover entire amount of damages. State Farm Mut. Auto Ins. Co. v. Perkins, 216 S.W.3d 396 (Tex. App. 2006). However, subrogation is barred when judgment leaves target exposed above liability policy limits. Stafford Metal Works v. Cook Paint and Varnish Co., 418 F.Supp. 56 (N.D. Texas 1976).

Comparative/Contributory Negligence
Modified Comparative – 50%. Tex. Civ. Prac. & Rem. Code § 33.001.

Contribution and Implied Indemnity
Contribution: Authorized by Tex. Civ. Prac. & Rem. Code § 32.001, *et seq.* Available if there is a judgment finding (1) the party seeking contribution to be a joint tortfeasor and (2) the payment by such party of a disproportionate share of the common liability. Beech Aircraft Corp. v. Jinkins, 739 S.W.2d 19 (Tex. 1987). No right of contribution against a settling party, Tex. Civ. Prac. & Rem. Code § 33.015(d), and a settling party has no right to pursue contribution against any other party. Duncan v. Cessna Aircraft Co., 665 S.W.2d 414 (Tex. 1984). A defendant can settle only his proportionate share of common liability. Id. Non-settling defendant's share is to be reduced by share of causation assigned to the settling tortfeasor. Id. The release must specifically discharge the liability of the target. Id. A defendant may recover from each codefendant against whom judgment is rendered an amount determined by dividing the total amount of the judgment by the number of all liable defendants. Tex. Civ. Prac. & Rem. Code Ann. § 32.003(a). Texas courts are split as to whether an action for contribution may be brought in the original action or in a separate action. See Casa Ford, Inc. v. Ford Motor Co., 951 S.W.2d 865 (Tex. App. 1997); In re Martin, 147 S.W.3d 453 (Tex. App. 2004). Statute of limitations is two years, Miller v. Miles, 400 S.W.2d 4 (Tex. App. 1966) (citing predecessor of Tex. Civ. Prac. & Rem. Code § 16.003), and runs from time of judgment or settlement. Goose Creek Consol. Independent School Dist. v. Jarrar's Plumbing, Inc., 74 S.W.3d 486 (Tex. App. 2002).

Implied Indemnity: Implied indemnity is limited to cases involving vicarious liability or products liability claims against an innocent product retailer. Bonniwell v. Beech Aircraft Corp., 663 S.W.2d 816 (Tex. 1984).

Damages - Measure of Damages to Property
Real Property: Permanent Damage: Generally, the difference in value of the property before and after the injury. ExxonMobil Corp. v. Lazy R Ranch, LP, 511 S.W.3d 538 (Tex. 2017); City of Tyler v. Likes, 962 S.W.2d 489 (Tex. 1997). Temporary Damage: The cost of repairs necessary to restore the property to its prior condition, not to exceed the loss in the land's value due to the injury. ExxonMobil; J&D Towing, LLC v. Am. Alternative Ins. Corp., 478 S.W.3d 649 (Tex. 2016).

Personal Property: Generally, the difference in the reasonable market value immediately before and immediately after the damage. Anthony Equipment Corp. v. Irwin Steel Erectors, Inc., 115 S.W.3d 191 (Tex. App. 2003); City of Tyler v. Likes; but see J&D Towing, LLC v. Am. Alternative Ins. Corp., 478 S.W.3d 649 (Tex. 2016) (stating that the owner of personal property that has been totally destroyed may recover loss of use damages in addition to the fair market value of the property immediately before the injury). For items with little/no market value, or which have their primary value in sentiment, it is the loss of value to the individual, but does not include mental anguish. City of Tyler v. Likes. For household goods, clothing and personal effects, factors which may be considered in determining loss of value include, *inter alia*, original cost and cost of replacement, the opinions of value given by qualified witnesses and the gainful uses to which the property has been put. Crisp v. Security Nat. Ins. Co., 369 S.W.2d 326 (Tex. 1963).

Experts - States Following the Daubert/Kumho Doctrine
Follows Daubert. Tex. Evid. R. 702; Merrell Dow Pharm. v. Havner, 953 S.W.2d 706 (Tex. 1997); see Ashby v. State, 527 S.W.3d 356 (Tex. Ct. App. 2017) (citing Daubert).

Interest - Pre & Post Judgment
Prejudgment

Contract Actions

Rate: Contract rate, but at a rate no greater than 10% or, in the absence of an agreement, 6% per year on the principal amount. Tex. Fin. Code §§ 302.001, 302.002.

Accrual Date: Date due (i.e., date of breach). Tex. Fin. Code § 302.002; Lake LBJ Municipal Utility Dist. v. Coulson, 839 S.W.2d 880 (Tex. App. 1992). If no agreed-to rate, on the 30th day after the date on which the amount is due. Tex. Fin. Code § 302.002.

Tort Actions

Interest allowed in wrongful death, personal injury and property damage cases. Tex. Fin. Code § 304.102.

Rate: The post judgment interest rate applicable at the time of judgment. Tex. Fin. Code § 304.103. Interest is computed as simple interest and does not compound. Tex. Fin. Code § 304.104. For condemnation actions, see Tex. Fin. Code § 304.201. Prejudgment interest not allowed on punitive damages. Tex. Civ. Prac. & Rem. Code § 41.007.

Accrual Date: The earlier of the 180th day after the date the defendant receives written notice of a claim or the date suit is filed. Tex. Fin. Code § 304.104.

Post Judgment

Contract Actions

Rate: The lesser of the contract rate or 18% per year. Tex. Fin. Code § 304.002.

Accrual Date: Judgment date. However, if the case is appealed and a motion for extension of time to file a brief is granted for a party who was a claimant at trial, interest does not accrue for the period of extension. Tex. Fin. Code § 304.005.

Tort Actions

Rate: The prime rate, calculated as stated in Tex. Fin. Code § 304.003, with a minimum rate of 5% and a maximum rate of 15%. Tex. Fin. Code § 304.003.

Accrual Date: Judgment date. However, if the case is appealed and a motion for extension of time to file a brief is granted for a party who was a claimant at trial, interest does not accrue for the period of extension. Tex. Fin. Code § 304.005.

Joint and Several Liability

Modified joint and several liability. If a defendant's percentage of the damages is 50% or less of the total liability, the defendant is only responsible for his percentage of responsibility. A defendant is jointly and severally liable, however, if: a) that defendant's percentage of responsibility is greater than 50%, or b) the defendant, with specific intent to do harm to others, acted in concert with another person to commit certain specified, intentional torts, including murder, sexual assault, fraud or other felonies of the third degree or higher. Tex. Civ. Prac. & Rem. Code § 33.013.

Judgment Liens

A judgment becomes dormant and unenforceable if not executed within ten years. Tex. Civ. Prac. & Rem. Code § 34.001. A dormant judgment may be revived within two years after the judgment became dormant. Tex. Civ. Prac. & Rem. Code § 31.006.

Landlord-Tenant Subrogation ("Sutton Doctrine")

A tenant's liability should depend on the parties' intent, as expressed in the lease. Public policy does not restrict a landlord and tenant from agreeing that the tenant will be responsible for damages it negligently causes. Churchill Forge, Inc. v. Brown, 61 S.W.3d 368 (Tex. 2001); cf. Wichita City Lines, Inc. v. Puckett, 295 S.W.2d 894 (Tex. 1956) (holding that a lease stating that the landlord would carry his own insurance against loss by fire did not exonerate the tenant from liability for his own negligence).

Made Whole Doctrine

Insured made whole unless the insurance contract says otherwise. Fortis Benefits v. Vanessa Cantu and Ford Motor Co., 234 S.W.3d 642 (Tex. 2007).

Professional Malpractice Filing Requirements (Affidavit of Merit)

In an action against a licensed architect, licensed professional engineer, registered professional land surveyor, registered landscape architect, or any firm in which such licensed or registered professional practices, an affidavit of merit must be filed with the complaint, or within thirty days thereafter if the filing is within ten days of the statute of limitation. Tex. Civ. Prac. & Rem. Code Ann. § 150.002.

Restitution - Crime Victims Restitution Statutes

Discretionary. Tex. Code. Crim. Proc. art. 42.037. If property damage results, the court may order the offender to return the property, or if return is impractical or impossible, require payment of an amount equal to the value of the property at the time of the offense, or the value at the time of sentencing, whichever is greater. Id. An order of restitution may be enforced in the same manner as a judgment in a civil action. Id. Any amount recovered by a victim in a civil

proceeding is reduced by any amount of restitution paid. Id. The court may not order restitution for a loss for which the victim has received or will receive compensation, if the compensation is not from the state crime victims fund. However, a court may order restitution to any person who compensated the victim for the loss. Id. Insurance companies may recover under the statute. In re M.S., 985 S.W.2d 278 (Tex. App. 1999).

Right to Repair/Notice Statutes – Construction Cases
Tex. Prop. Code §§ 27.001 to 27.007 *Residential Construction Liability.*

Spoliation – Remedies for Spoliation
Texas declines to recognize spoliation as a tort cause of action. To remedy the harm from spoliation, trial judges have broad discretion to take a range of measures including giving a jury instruction on the spoliation presumption – that the factfinder may deduce culpability from the destruction of presumably incriminating evidence. Trevino v. Ortega, 969 S.W.2d 950 (Tex.1998).

Statutes of Limitation and Repose*
Statutes of Limitation

Tort: Personal injury and property damage, 2 years. Tex. Civ. Prac. & Rem. Code § 16.003; but see Tex. Civ. Prac. & Rem. Code § 16.004 (4 years for fraud or breach of fiduciary duty).

Residential Construction Defects: Submission to arbitration has the same effect on the running of the statute of limitations as filing in a court. Tex. Prop. Code § 27.008; see Tex. Prop. Code § 27.005 (chapter does not extend the limitations period).

Contracts: 4 years. Tex. Civ. Prac. & Rem. Code § 16.051; Stine v. Stewart, 80 S.W.3d 586 (Tex. 2002); see also Tex. Civ. Prac. & Rem. Code § 16.004 (4 years for certain types of action).

Medical Malpractice: 2 years from occurrence of breach or tort. Tex. Civ. Prac. & Rem. Code § 74.251.

State and Local Government: Written notice within 6 months. Tex. Civ. Prac. & Rem. Code § 101.101. No separate statutes of limitation.

Statutes of Repose

Products: 15 years after the date of the sale of the product, except for latent health claims and longer express warranties. Tex. Civ. Prac. & Rem. Code § 16.012.

Improvements to Real Property: Against a registered or licensed architect, engineer, interior designer, or landscape architect in Texas, 10 years after substantial completion or the beginning of operation of the equipment. If a written claim is presented within 10 years, the period is extended 2 years from the day of presentation. Tex. Civ. Prac. & Rem. Code § 16.008. Subject to some exceptions, governmental entities must bring suit within 8 years. Tex. Civ. Prac. & Rem. Code § 16.008(a-1). Against a person who constructs or repairs an improvement to real property, 10 years after substantial completion or a deficiency in the construction or repair of the improvement. Subject to some exceptions, governmental entities must bring suit within 8 years. Tex. Civ. Prac. Rem. Code § 16.009(a-

* For UCC Claims and claims based on improvements to real property and/or claims brought by condominium associations related to construction defects, see the notes at the end of the Table of Contents.

1). If a written claim is presented within 10 years, the period is extended 2 years from the day of presentation. Tex. Civ. Prac. & Rem. Code § 16.009.

If a claim arises out of the design, construction, or repair of a new residence, the alteration or repair of an existing residence or appurtenance to a residence and the person sued is a contractor who provides a written warranty (see Tex. Civ. Prac. & Rem. Code § 16.009(a-3)) suit must be brought within 6 years of substantial completion. Tex. Civ. Prac. & Rem. Code § 16.009(a-2). If a claimant presents a written claim during the applicable limitations period, the period is extended for 2 years from presentment for a claim to which subsection (a) applies; or 1 year for claims to which (a-1) or (a-2) apply. Tex. Civ. Prac. & Rem. Code § 16.009(a-4)(c). For purposes of § 16.009(a-2), if the damage or injury occurs during the last year of the applicable limitations period, the claimant must bring suit within 2 years. Tex. Civ. Prac. & Rem. Code § 16.009(a-4)(d).
Medical Malpractice: 10 years from occurrence of the breach or tort. Tex. Civ. Prac. & Rem. Code § 74.251.

Subrogating in the Insured's Name – Real Party in Interest
The insurer need not wait for the insured to assert a claim in order for the insurer to recover. The insurer can assert its subrogation claim independently of the insured, even though that claim is considered derivative of the insured's claim. When an insurer asserts an independent claim without the insured, the insurance carrier may sue in its own name or in the insured's name. If action is brought in the insured's name, the insurer is not required to disclose its involvement. Prudential Property and Cas. Co. v. Dow Chevrolet-Olds, Inc., 10 S.W.3d 97 (Tex. App. 1999). An insured who assigns his cause of action to the insurer may not then commence suit in his own name. Trans-State Pavers, Inc. v. Haynes, 808 S.W.2d 727 (Tex. App. 1991). Causes of action, including personal injury actions, are assignable absent a statutory bar. Charles v. Tamez, 878 S.W.2d 201 (Tex. App. 1994). A loan receipt allows the insured to bring the action in his name. Houston Transit Co. v. Goldston, 217 S.W.2d 435 (Tex. App. 1949).

UTAH

Anti-Subrogation Rule: Subrogation by Insurer Against Insured
An insurer may not recover against its own insured, or a co-insured under the policy. Bd. of Ed. of Jordan School Dist. v. Hales, 566 P.2d 1246 (Utah 1977); McEwan v. Mountain Land Support Corp., 116 P.3d 955 (Utah Ct. App. 2005).

Comparative/Contributory Negligence
Modified Comparative – 49%. Utah Code Ann. § 78B-5-818.

Contribution and Implied Indemnity
Contribution: A defendant is not entitled to contribution. Utah Code Ann. § 78B-5-820. There is no joint and several liability and amount of liability is limited to proportion of fault. Id.

Implied Indemnity: The statutory bar of contribution claims also bars implied indemnity claims. Nat'l Service Industries, Inc. v. B.W. Norton Mfg. Co., Inc., 937 P.2d 551 (Utah Ct. App. 1997).

Damages - Measure of Damages to Property
Real Property: Permanent Damage: The difference between the value before the harm and the value after the harm. Walker Drug Co., Inc. v. La Sal Oil Co., 972 P.2d 1238 (Utah 1998). Temporary Damage: Repair cost plus loss of use compensation, not to exceed diminished value of property. Ault v. Dubois, 739 P.2d 1117 (Utah 1987).

Personal Property: Total Loss: Generally, market value at the time of destruction. Market value is equal to the retail price if the item is marketable. Cost of replacement may be recovered when that is the only evidence available. Ault v. Dubois. Repairable: The difference in value immediately before and immediately after injury. In some instances, proper repair will restore the market value of the property, but the plaintiff can recover not only the reasonable cost of repairs but also depreciation in market value, if any, after repair. Hill v. Varner, 290 P.2d 448 (Utah 1955).

Experts - States Following the Daubert/Kumho Doctrine
Daubert is helpful but not followed. Gunn Hill Dairy Properties, LLC v. Los Angeles Dept. of Water & Power, 269 P.3d 980 (Utah Ct. App. 2012). Utah follows its own test for admissibility. Expert testimony is admissible if there is a threshold showing that the principles or methods underlying in the testimony: 1) are reliable; 2) are based upon sufficient facts or data; and 3) have been reliably applied to the facts. The required threshold showing is satisfied if the underlying principles or methods, including the sufficiency of facts or data and the manner of their application to the facts of the case, are generally accepted by the relevant scientific community. Utah R. Evid. 702; Brewer v. Denver & Rio Grande Western R.R., 31 P.3d 557 (Utah 2001).

Interest - Pre & Post Judgment

Prejudgment

Contract Actions

Rate: For ascertainable damages, the contract rate or, if none, the federal post-judgment interest rate as of January 1 of each year, plus 2%. USA Power, LLC v. PacifiCorp., 372 P.3d 629 (UT 2016); Utah Code Ann.
§§ 15-1-1, 15-1-4(3)(a). For contracts for the loan or forbearance of money, goods, or any chose in action, 10%. USA Power; Utah Code Ann. § 15-1-1(2).
Accrual Date: Date damages due and ascertainable. See Trial Mt. Coal Co. v. Utah Div. of State Lands & Forestry, 921 P.2d 1365 (Utah 1996).

Tort Actions

Rate: For actions brought to recover damages for personal injuries that arose prior to July 1, 2014, 7.5% simple interest allowed on special damages. Utah Code Ann. § 78B-5-824 (2013). Special damages do not include damages for future medical expenses, loss of future wages or loss of future earning capacity. Id.
For actions brought to recover damages for personal injuries that arose on or after July 1, 2014, simple interest on special damages calculated as noted in Utah Code Ann. § 78B-5-824(5) (2018), but only if the plaintiff makes a settlement demand complying with § 78B-5-824(2). Special damages do not include damages for future medical expenses, loss of future wages, or loss of future earning capacity.
Accrual Date: For personal injury actions arising prior to July 1, 2014, the date of the occurrence of the act giving rise to the cause of action. Utah Code Ann. § 78B-5-824. For personal injury actions arising on or after July 1, 2014, the date on which the damages were incurred, as explained in Utah Code Ann. § 78B-5-824 (2018).

Post Judgment

Rate: The contract rate or, if none, the federal post judgment interest rate as of January 1 of each year plus 2%. Utah Code Ann. § 15-1-4.
Accrual Date: Date of judgment. Id.

Joint and Several Liability

Several liability. Defendant is liable only for the percentage or proportion of the damages equivalent to the percentage or proportion of fault attributed to that defendant. Utah Code Ann. § 78B-5-820. However, if the fault attributable to immune defendants is less than 40%, the fault of the immune defendants shall be reallocated to the other at-fault defendants. Utah Code Ann. §§ 78B-5-818(2); 78B-5-819(2).

Judgment Liens

A judgment creates a lien upon real property and continues for eight years. Utah Code Ann. § 78B-5-202. A motion to renew the judgment will extend the judgment for an additional eight years. Utah Code Ann. § 78B-6-1802.

Landlord-Tenant Subrogation ("Sutton Doctrine")
A tenant is presumed to be a coinsured on the landlord's fire insurance policy absent an express agreement between the landlord and the tenant to the contrary. McEwan v. Mountain Land Support Corp., 116 P.3d 955 (Utah Ct. App. 2005); GNS P'ship v. Fullmer, 873 P.2d 1157 (Utah Ct. App. 1994).

Made Whole Doctrine
Insured made whole doctrine followed but can be modified by clear and unambiguous contract terms and can be trumped by contrary statutes such as the Workers' Compensation Act. Anderson v. United Parcel Service, 96 P.3d 903 (Utah 2004).

Professional Malpractice Filing Requirements (Affidavit of Merit)
Section 423 of Utah's Health Care Malpractice Act and all language throughout the Act that refers to affidavits of merit has been declared unconstitutional. Vega v. Jordan Valley Med. Ctr., 449 P.3d 31 (Utah 2019).

Restitution - Crime Victims Restitution Statutes
Mandatory. Utah Code Ann. § 76-3-201. In determining the amount, the court should consider, *inter alia*, the cost of the damage and the defendant's ability to pay. Utah Code Ann. § 77-38a-302. The order shall be considered a legal judgment, enforceable under the Utah Rules of Civil Procedure. Utah Code Ann. § 77-38a-401. Restitution payments are to be credited against civil judgments. Utah Code Ann. § 77-38a-403. An insurance company is a "victim" entitled to restitution. State v. Dominguez, 992 P.2d 995 (Utah Ct. App.1999); Utah Code Ann. § 76-3-201.

Right to Repair/Notice Statutes – Construction Cases
None found.

Spoliation – Remedies for Spoliation
The tort of spoliation of evidence is not recognized. However, in *dicta* the Supreme Court hinted that it might adopt a tort for intentional spoliation of evidence by a third party if the appropriate case came before it. Hills v. United Parcel Service, Inc., 232 P.3d 1049 (Utah 2010). The destruction and permanent deprivation of evidence is on a qualitatively different level than a simple discovery abuse and does not require a finding of willfulness, bad faith, fault or persistent dilatory tactics or the violation of court orders before a court may sanction a party. Sanctions under Rule 37 of the Utah Rules of Civil Procedure include the entry of default judgment against the spoliating party. Daynight, LLC v. Mobilight, Inc., 248 P.3d 1010 (Utah Ct. App. 2011).

Statutes of Limitation and Repose*
Statutes of Limitation

Products: 2 years from when the claimant discovered, or should have discovered, the harm and its cause. Utah Code Ann. § 78B-6-706.

Tort: Personal injury, 4 years. Utah Code Ann. § 78B-2-307; Jenkins v. Percival, 962 P.2d 796 (Utah 1998); but see Utah Code Ann. § 78B-2-304(2) (wrongful death). Property

* For UCC Claims and claims based on improvements to real property and/or claims brought by condominium associations related to construction defects, see the notes at the end of the Table of Contents.

damage, 3 years. Utah Code Ann. § 78B-2-305; but see Utah Code Ann. § 78B-2-307(3) (personal property damage to motor vehicle or personal property from an accident involving a motor vehicle, 4 years); see also Utah Code Ann. § 78B-2-305(2)(b) (personal property damage to motor vehicle or personal property from an accident involving a motor vehicle, including an accident involving a motor vehicle and a bicycle, 4 years)

Contract: Oral, 4 years. Utah Code Ann. § 78B-2-307. Written, 6 years. Utah Code Ann. § 78B-2-309; but see Utah Code Ann. § 31A-22-307(a) (policy or contract for personal injury protection coverage, 4 years after May 3, 2023, unless barred by 3-year statute in § 31A-21-313(a)(1) before May 3, 2023); Utah Code Ann. § 31A-21-313(1)(1) (except as provided in §§ 31A-22-305(11) and 31A-22-307(7), an action on a written policy or contract of first party insurance, 3 years).

Medical Malpractice: Generally, 2 years. Utah Code Ann. § 78B-3-404(1).

Improvements to Real Property: In contract or warranty actions, 6 years from substantial completion, unless an express contractor or warranty establishes a different period. Utah Code Ann. § 78B-2-225. All other actions, 2 years from the date of discovery. Id. If the action is discoverable before completion or abandonment, the 2-year period begins to run upon completion or abandonment. Id. Section 78B-2-225 does not apply to an action for the death or bodily injury to someone while engaged in the design, installation, or construction of an improvement. Id.

Other State: 1 year for liability based upon the statutes of another state. Utah Code Ann. § 78B-2-302; Christensen v. Paramount Pictures, 95 F.Supp. 446 (D. Utah 1950).

State and Local Government: Written notice of a claim must be filed within 1 year after the claim arises. Utah Code Ann. § 63G-7-402. The government unit has 60 days in which to approve or deny claim; if unit does not act, the claim is deemed denied. Utah Code Ann. § 63G-7-403. An action must be filed within 1 year of the denial. Utah Code Ann. §§ 63G-7-403, 78B-2-303. 2-year limitation. Utah Code Ann. § 78B-2-304.

Statutes of Repose

Improvements to Real Property: In contract or warranty actions, 6 years from substantial completion, unless an express contract or warrant establishes a different period. Utah Code Ann. § 78B-2-225. All other actions: 9 years from substantial completion. Id. If discovered in the 8th or 9th year, then 2 additional years. Id. Section 78B-2-225 does not apply to an action for the death or bodily injury to someone while engaged in the design, installation, or construction of an improvement. Id.

Medical Malpractice: Generally, 4 years. Utah Code Ann. § 78B-3-404(1).

Subrogating in the Insured's Name – Real Party in Interest

Subrogation actions may be brought by the insurer in the name of its insured. Utah Code Ann. § 31A-21-108; State Farm Mut. Auto. Ins. Co. v. Northwestern Nat. Ins. Co., 912 P.2d 983 (Utah 1996).

VERMONT

Anti-Subrogation Rule: Subrogation by Insurer Against Insured
An insurer cannot recover by means of subrogation against its own insured. The prohibition extends to co-insureds, both express and implied. However, agreement between subrogor and target must be examined to determine if target is co-insured under subrogor's policy. Travelers Indem. Co. of America v. Deguise, 914 A.2d 499 (Vt. 2006); Union Mut. Fire Ins. Co. v. Joerg, 824 A.2d 586 (Vt. 2003).

Comparative/Contributory Negligence
Modified Comparative – 50%. 12 Vt. Stat. Ann. § 1036.

Contribution and Implied Indemnity
Contribution: There is no right of contribution among joint tortfeasors because each joint tortfeasor is responsible for its proportionate share of liability, so long as the liability of the defendants is greater than the plaintiff's negligence. Howard v. Spafford, 321 A.2d 74 (Vt. 1974).

Implied Indemnity: Available when party-seeking indemnity is vicariously or secondarily liable to the third person because of a legal relationship with the third person or because of the party's failure to discover a dangerous condition caused by the indemnitor. White v. Quechee Lakes Landowners' Ass'n, Inc., 742 A.2d 734 (Vt. 1999). Limited to circumstances where the violation of the duty was the primary fault of the indemnitor. Bardwell Motor Inn, Inc. v. Accavallo, 381 A.2d 1061 (Vt. 1977). 6-year statute of limitations, which runs from the accrual of the underlying action. Investment Properties Inc. v. Lyttle, 739 A.2d 1222 (Vt. 1999) (applying 12 Vt. Stat. Ann. § 511).

Damages - Measure of Damages to Property
Real Property: Permanent Damage: The difference between the fair market value of the property before and after the loss. Bean v. Sears Roebuck & Co., 276 A.2d 613 (Vt. 1971). Temporary Damage: The reasonable cost of repair, unless the costs are so inordinate and excessive as to be unreasonable and wasteful. Langlois v. Town of Proctor, 113 A.3d 44 (Vt. 2014).

Personal Property: Generally, the property's value before the injury less the value after the injury. Scheele v. Dustin, 998 A.2d 697 (Vt. 2010); Turgeon v. Schneider, 553 A.2d 548 (Vt. 1988). To establish the diminution in value, evidence of the reasonable cost of repairs made necessary by the accident, and as to the value of the property as repaired, may be admitted. Kinney v. Cloutier, 211 A.2d 246 (Vt. 1965).

Experts - States Following the Daubert/Kumho Doctrine
Follows Daubert. V.R.E. Rule 702; 985 Associates, Ltd. v. Daewoo Electronics America, Inc., 945 A.2d 381 (Vt. 2008).

Interest - Pre & Post Judgment

Prejudgment

All Actions

Rate: Contract rate or, if none, 12%. V.R.C.P. Rule 54(a); 9 V.S.A. § 41a(a); Greenmoss Builders v. King, 580 A.2d 971 (Vt. 1990). Interest is discretionary unless damages are liquidated or capable of ready ascertainment. Newport Sand &Gravel Co. v. Miller Concrete Constr., Inc., 614 A.2d 395 (Vt. 1992); see Fleming v. Nicholson, 724 A.2d 1026 (Vt. 1998).

Accrual Date: Date action accrues. Pinewood Manor v. Vermont Agency of Transp., 668 A.2d 653 (Vt. 1995).

Post Judgment

Rate: 12%. 12 V.S.A. § 2903(c).

Accrual Date: Date of judgment. Pinewood.

Joint and Several Liability

Modified joint and several liability. Multiple joint tortfeasors are jointly and severally liable except where: a) the plaintiff is comparatively negligent, and b) multiple tortfeasors are found liable in one action. Where the plaintiff is comparatively negligent and recovery is allowed against more than one defendant, each defendant is liable only for his percentage of the negligence attributed to all defendants against whom recovery is allowed. 12 Vt. Stat. Ann. § 1036; Plante v. Johnson, 565 A.2d 1346 (Vt. 1989).

Judgment Liens

A judgment constitutes a lien on any real property of a judgment debtor. 12 Vt. Stat. Ann. § 2901. A judgment lien is effective for 8 years from the issuance of a final judgment. 12 Vt. Stat. Ann. § 2903. An action for the renewal or revival of a judgment must be brought within 8 years after the rendition of the judgment. 12 Vt. Stat. Ann. § 506

Landlord-Tenant Subrogation ("Sutton Doctrine")

A tenant's liability is contingent on the parties' intent, as expressed in the terms of a lease. Where a lease requires the landlord to carry fire insurance on the leased premises, such insurance is for the mutual benefit of the landlord and the tenant and the tenant, and the tenant's resident family members, are deemed co-insureds on the policy. Union Mut. Fire Ins. Co. v. Joerg, 824 A.2d 586 (Vt. 2003).

Made Whole Doctrine

Although older case law suggests that the insurer should be reimbursed for its subrogation interest before the insured, see Cushman & Rankin Co. v. Boston & M.R.R., 73 A. 1073 (Vt. 1909) ("the insured is entitled to the residue"), newer case law suggests that the insured should be made whole in both equitable subrogation cases and in contractual (a.k.a. conventional) subrogation cases unless the contract giving rise to the conventional subrogation claim expressly provides otherwise. See Vermont Indus. Dev. Auth. v. Setze, 600 A.2d 302 (Vt. 1991) (holding

that a party secondarily liable is not subrogated unless all of the principal obligations are discharged, and citing with approval cases from other jurisdictions applying the made whole doctrine's equitable principles even in cases of conventional subrogation unless the contract specifically provides otherwise).

Professional Malpractice Filing Requirements (Affidavit of Merit)
A certificate of merit is required in actions against health care providers. 12 Vt. Stat. Ann. § 1042.

Restitution - Crime Victims Restitution Statutes
Discretionary. 13 Vt. Stat. Ann. § 7043. A court is to determine the total amount of a victim's material loss. The court's restitution unit may bring a civil action to recover payment. Id. When an insurance company is directly damaged by a crime, as in fraud, it may receive restitution as the victim of the crime. State v. Mason, 36 A.3d 659 (Vt. 2011) (TABLE); State v. Bonfanti, 603 A.2d 365 (Vt. 1991).

Right to Repair/Notice Statutes – Construction Cases
27A Vt. Stat. Ann. § 3-124 *Management of the Common Interest Community – Litigation involving declarant.*

Spoliation – Remedies for Spoliation
No separate cause of action exists under Vermont law for spoliation of evidence. Naylor v. Rotech Healthcare, Inc., 679 F.Supp.2d 505 (D. Vt. 2009). However, in Menard v. Cooperative Fire Ins. Ass'n of Vermont, 592 A.2d 899 (Vt. 1991), the state Supreme Court hinted that it might permit a cause of action for tortious spoliation under different circumstances. Willful destruction of evidence gives rise to the presumption, and a jury instruction, that the evidence, if produced, would have been injurious to the one who destroyed it. Ellis J. Gomez & Co. v. Hartwell, 122 A. 461 (Vt. 1923).

Statutes of Limitation and Repose*
Statutes of Limitation

Tort: Personal injury/personal property damage: 3 years. 12 Vt. Stat. Ann. § 512; but see 14 Vt. Stat. Ann. § 1492 (2 years - wrongful death). Damage to real property: 6 years. 12 Vt. Stat. Ann. § 511.

Contract: 6 years. 12 Vt. Stat. Ann. § 511.

Medical Malpractice: 3 years of the date of the incident or 2 years from the date the injury is or reasonably should have been discovered, whichever occurs later, but not later than 7 years from the date of the incident. For foreign objects left in patient which are not discovered within the foregoing period, 2 years from date of the discovery. 12 Vt. Stat. Ann. § 521.

State Government: No special statute of limitation set forth in the Tort Claims Act, 12 Vt. Stat. Ann. § 5601, *et seq.*, although subrogation actions are generally prohibited. For small claims against the state, not exceeding $2000, a grievance must first be filed with state

* For UCC Claims and claims based on improvements to real property and/or claims brought by condominium associations related to construction defects, see the notes at the end of the Table of Contents.

agency. If after 90 days the state agency has not responded, the grievance claim is deemed granted. A claim must be filed with small claims court within 18 months. 32 Vt. Stat. Ann. § 932.

Local Government: General statutes of limitation apply; municipal governmental immunity largely a creation of common law. Morway v. Trombly, 789 A.2d 965 (Vt. 2001).

Statutes of Repose

None for products liability or improvements to real property.

Breach of warranty claims governed by Vermont's Common Interest Ownership Act shall be commenced within 6 years of when the cause of action accrues, but the parties may agree to reduce the period to not less than 2 years. 27A Vt. Stat. § 4-116(a); see 27A Vt. Stat. §§ 4-116(b) (c) and (d) (discussing accrual).

Subrogating in the Insured's Name – Real Party in Interest

An insurer who has paid all or part of a loss may sue in the name of the assured to whose rights it is subrogated. V.R.C.P. 17(a). The provision is permissive only; the insurer may, if it wishes, sue in its own name as the real party in interest. Reporter's Notes to Rule 17. There is no requirement that the subrogee must specify in the complaint that it is bringing the action in the name of the insured. Korda v. Chicago Ins. Co., 908 A.2d 1018 (Vt. 2006). An insurer wishing to proceed in the insured's name must serve the insured with formal notice of its intentions at least fourteen days before filing such a pleading. If the insured also wishes to pursue its own claim, it must advise the insurer in writing within fourteen days after receipt of the insurer's notice. V.R.C.P. 17(c).

VIRGINIA

Anti-Subrogation Rule: Subrogation by Insurer Against Insured

No right of recovery exists against a co-insured. Walker v. Vanderpool, 302 S.E.2d 669 (Va. 1983) (plaintiff which in contract with defendant represented it would obtain insurance to cover co-insured but failed to do so became insurer of defendant and thus cannot recover from defendant). See also Farmers Ins. Exchange v. Enterprise Leasing Co., 708 S.E.2d 852 (Va. 2011); Federal Ins. Co. v. Starr Elec. Co., 410 S.E.2d 684 (Va. 1991) (discussing anti-subrogation rule *per se* but neither adopting nor rejecting it) and Va. Heart Institute v. Northside Electric Co., 1982 WL 215281 (Va. Cir. Ct. 1982) (unpublished trial court opinion holding that while generally no right to subrogation can be asserted against an insured or co-insured, the parties' agreement must be examined to determine whether coverage of co-insured was intended). The anti-subrogation rule does not apply to self-insurers. Farmers Ins. Exch. v. Enterprise Leasing Co., 708 S.E.2d 852 (Va. 2011).

Comparative/Contributory Negligence

Strict Contributory. Moses v. Southwestern Virginia Transit Mgmt. Co., Inc., 643 S.E.2d 156 (Va. 2007).

Contribution and Implied Indemnity

Contribution: Authorized by Va. Code Ann. §§ 8.01-34 and 8.01-35. The right to contribution arises only when one of the joint tortfeasors has paid a claim for which the other wrongdoer is also liable. North River Ins. Co. v. Davis, 274 F. Supp. 146 (W.D. Va. 1967). The payment need not be the result of a judgment which determines negligence. Each wrongdoer is responsible for an equal share of the amount paid in damages for a single injury. Sullivan v. Robertson Drug Co., 639 S.E. 2d 250 (Va. 2007). Only when there are multiple, divisible injuries covered by a compromise settlement is the finder of fact required to attempt an allocation of the amount in contribution a wrongdoer must pay for his negligent act or acts causing one or more of those divisible injuries. Id. Release must extinguish liability to non-settling party in order to recover contribution from non-settling party. Va. Code §§ 8.01-35.1. 3-year statute of limitations, as cause of action arises out of implied promise to pay. Nationwide Mut. Ins. Co. v. Jewel Tea Co., 118 S.E.2d 646 (Va. 1961) (applying Va. Code § 8.01-246). Statute of limitations runs from time of payment or discharge or the obligation. Id.

Implied Indemnity: Indemnity can grow out of a contractual relationship. Virginia Electric & Power Co. v. Wilson, 277 S.E. 2d 149 (Va. 1981). 3-year statute of limitations, which starts to run when the indemnitee has paid or discharged the obligation. Va. Code §§ 8.01-246(4) and 8.01-249. Equitable indemnification is also available and arises when a party without personal fault, is nevertheless legally liable for damages caused by the negligence of another. Carr v. Home Ins. Co., 463 S.E.2d 457 (Va. 1995). See also International Surplus Lines Ins. Co. v. Marsh & McLennan, Inc., 838 F.2d 124 (4th Cir. 1988) (discussing both types of indemnity). The innocent party may recover from the negligent actor for the amounts paid to discharge the liability. A prerequisite to recovery is the initial determination that the negligence of another person caused the damage. Carr.

Damages - Measure of Damages to Property

Real Property: Fair market value diminution, if it can be reasonably ascertained and if it will adequately compensate the plaintiff for the injury done. If fair market value diminution cannot be ascertained or is inadequate, some other measure of damage must be applied. Younger v. Appalachian Power Co., 202 S.E.2d 866 (Va. 1974).

Personal Property: Unrepairable: Generally, the difference between the market value of the property immediately before and immediately after the accident. Averett v. Shircliff, 237 S.E.2d 92 (Va. 1977). Repairable: The measure of damage is the reasonable cost of repairs, with reasonable allowance for depreciation. Averett.

Experts - States Following the Daubert/Kumho Doctrine

Does not follow either Frye or Daubert. Instead, Virginia follows its own set of rules and precedent. John v. Im, 559 S.E.2d 694 (Va. 2002); Va. Code Ann. § 8.01-401.3. Expert testimony is inadmissible if it is speculative or founded on assumptions that have an insufficient factual basis. Such testimony is also inadmissible when an expert has failed to consider all variables bearing on the inferences to be drawn from the facts observed. John.

Interest - Pre & Post Judgment

Prejudgment

All Actions

Rate: 6%, or amount provided in contract, if higher. Va. Code Ann. §§ 8.01-382, 6.2-302. However, the award of interest is discretionary. Va. Code Ann. § 8.01-382; Dairyland Ins. Co. v. Douthat, 449 S.E.2d 799 (Va. 1994).

Accrual Date: Fixed at the discretion of the trier of fact. Upper Occoquan Sewage Auth. v. Blake Constr. Co., 655 S.E.2d 10 (Va. 2008).

Post Judgment

Rate: 6% or amount provided in contract, if higher. Va. Code Ann. §§ 8.01-382, 6.2-302.

Accrual Date: Entry of judgment. Va. Code Ann. § 8.01-382; Upper Occoquan Sewage Auth.

Joint and Several Liability

Joint and several liability. Where separate and independent acts of negligence of two parties are the direct cause of a single injury to a third person and it is impossible to determine in what proportion each contributed to the injury, either or both are responsible for the whole injury. Dickenson v. Tabb, 156 S.E.2d 795 (Va. 1967); Va. Code Ann. § 8.01-443.

Judgment Liens

A judgment is a lien on real estate. VA Code Ann. § 8.01-458. A judgment is enforceable for a twenty-year period from the date it is rendered or 20 years from the date of such extension or renewal of such judgment, whichever is later, unless the period is extended as provided in this section. VA Code Ann. § 8.01-251(A). A creditor may prevent expiration of his judgment lien by making a motion to extend within the twenty-year period. VA Code Ann. § 8.01-251(B).

Landlord-Tenant Subrogation ("Sutton Doctrine")
A tenant's liability depends on the parties' intent looking at the lease as a whole. Monterey Corp. v. Hart, 224 S.E.2d 142 (Va. 1976). A tenant's common law liability for losses due to his negligent, reckless or willful acts is preserved absent a provision in the lease to the contrary. Allstate Ins. Co. v. Fritz, 452 F.3d 316 (4th Cir. 2006) (applying Virginia law).

Made Whole Doctrine
In PRC, Inc. v. O'Bryan, 47 Va. Cir. 81 (Fairfax County 1998), the court suggested, but did not hold, that an insurer cannot recover via subrogation until the insured has been fully compensated for its loss, unless the terms of a contract or policy state otherwise. See Sustainable Sea Prods. Int'l, LLC v. Am. Empire Suprlus Lines Ins. Co., 2022 U.S. Dist. LEXIS 149405 (D. Va.) (finding that Virginia law recognizes the equitable principles of subrogation and holding that an insurer could not enforce its right to subrogation before it fully compensated the insured for its loss); see also Obici v. Furcron, 168 S.E. 340 (Va. 1933) (recognizing that subrogation is a creature of equity and cannot be enforced to the injury or prejudice of others).

Professional Malpractice Filing Requirements (Affidavit of Merit)
In a medical malpractice action, at the time of service of process, the plaintiff must obtain a written opinion signed by an expert witness that the defendant deviated from the applicable standard of care and the deviation was a proximate cause of the injuries claimed. Within ten days of a request by the defendant, the plaintiff must certify that the opinion was obtained. Va. Code. § 8.01-20.1.

Restitution - Crime Victims Restitution Statutes
Generally discretionary but may be imposed only in conjunction with probation or parole. Va. Code Ann. § 19.2-305; Baker v. Com., 335 S.E.2d 276 (Va.1985); Com v. Washington, 55 Va. Cir. 358 (Rockingham Co. 2001). In cases of property damage, restitution and/or community service is mandatory as a condition of probation or a suspended sentence. Va. Code Ann. § 19.2-305.1 In property damage cases, a court may require the offender to return the property, or if return is impractical, pay an amount equal to the value of the property at the time of the offense, or the value at the time of sentencing, whichever is greater. Va. Code Ann. § 19.2-305.2. An order of restitution may be enforced as a civil judgment. Id. An insurance company may seek restitution. Alger v. Com, 450 S.E.2d 765 (Va. Ct. App. 1994).

Right to Repair/Notice Statutes – Construction Cases
Va. Code Ann. § 55.1-357 *Implied warranties on new homes.*

Va. Code Ann. § 55.1-1955 *Upkeep of condominiums; warranty against structural defects; statute of limitations for warranty; warranty review committee.*

Spoliation – Remedies for Spoliation
A party or potential litigant has a duty to preserve evidence. Va. Code § 8.01-379.2:1. If a party fails to take reasonable steps to preserve evidence, the court, upon a finding of prejudice may order measures no greater than necessary to cure the prejudice or, upon finding that a party acted recklessly or with intent to deprive another party of the evidence's use, may: a) presume that the evidence was unfavorable to the party; b) instruct the jury that it may or shall presume that the

evidence was unfavorable, or c) dismiss the action or enter a default judgment. Va. Code § 8.01-379.2:1. Section 8.01-379.2:1, however, does not create an independent cause of action for negligent or intentional spoliation of evidence. Va. Code § 8.01-379.2:1. There is no cause of action against an employer for tortious spoliation of evidence in the aftermath of a work-related injury. Austin v. Consolidation Coal Co., 501 S.E.2d 161 (Va. 1998).

Statutes of Limitation and Repose*

Statutes of Limitation

Tort: Personal injury: 2 years. Property damage: 5 years. Va. Code Ann. § 8.01-243; see also Va. Code Ann. § 8.01-246 (§ 8.01-243 applies to products liability actions governed by U.C.C. § 8.2-725, except for damage to the product); but see Va. Code Ann. § 8.01-242(D2) (sexual abuse).

Medical Malpractice: In case of a foreign object left within patient, the 2-year limitation period for personal injuries is extended for a period of 1 year from discovery or the date the object should have been discovered. If fraud, concealment or intentional misrepresentation prevented discovery of the injury within the 2-year period, the limitation period is extended for 1 year from the date the injury is discovered or should have been discovered. Extensions may not exceed 10 years from the date the cause of action accrued. Va. Code Ann. § 8.01-243.

Contract: Written: 5 years. Oral: 3 years. Va. Code Ann. § 8.01-246.

State Government: Tort: Written notice to the Director of Div. of Risk Mgmt. or Attorney General, or to the chairman of the commission of the transportation district, if applicable, within 1 year of accrual. Va. Code Ann. § 8.01-195.6. Suit may be filed upon the denial of the claim or 6 months after the filing of the notice, but not later than 18 months from the filing of the notice. Va. Code Ann. § 8.01-195.7. Contract: A claim must be presented in writing to the comptroller or other authorized person no later than 5 years after the right to the claim arises. Suit must be filed within 3 years after the claim is disallowed in whole or in part. Va. Code Ann. § 8.01-255.

Local Government: Written notice of tort claim to unit's attorney or chief executive within 6 months. Va. Code Ann. §15.2-209.

Statutes of Repose

Improvements to Real Property: 5 years after performance. Va. Code Ann. § 8.01-250. Statutory warranty actions related to condominiums, 5 years after the date the warranty began or one year after the formation of any warranty review committee, whichever occurs last. Va. Code Ann. § 55.1-1955. Implied warranties in new homes, within 2 years after the breach. Va. Code Ann. § 55.1-357.

Subrogating in the Insured's Name – Real Party in Interest

Except for certain health insurance and motor vehicle medical payments policies, a subrogation action may be brought in the name of the insurer, in the name of the insured, or in the name of the insured's personal representative. Va. Code § 38.2-207.

* For UCC Claims and claims based on improvements to real property and/or claims brought by condominium associations related to construction defects, see the notes at the end of the Table of Contents.

WASHINGTON

Anti-Subrogation Rule: Subrogation by Insurer Against Insured
No right of subrogation can arise in favor of an insurer against its own insured since, by definition, subrogation exists only with respect to rights of the insurer against third persons to whom the insurer owes no duty. Sherry v. Financial Indem. Co., 160 P.3d 31 (Wash. 2007). This rule extends to co-insureds – all those for whose benefit the insurance was written. General Ins. Co. of America v. Stoddard Wendle Ford Motors, 410 P.2d 904 (Wash. 1966). The parties' agreement must be examined to determine whether the subrogor and target intended the target to be covered for liability under the subrogor's policy. Western Washington Corp. of Seventh-Day Adventists v. Ferrellgas, Inc., 7 P.3d
861 (Wash. Ct. App. 2000). Insurer that issued separate policies to subrogor and target may not subrogate. Royal Exchange Assur. of
America, Inc. v. SS President Adams, 510 F.Supp. 581 (W.D. Wash. 1981).

Comparative/Contributory Negligence
Pure Comparative. Wash. Rev. Code § 4.22.005; see Wash. Rev. Code § 4.22.015 (defining "fault"); see also Wash. Rev. Code § 4.16.326 (discussing affirmative defenses and comparative fault in construction defect claims).

Contribution and Implied Indemnity
Contribution: Authorized by Tort Reform Act, Wash. Rev. Code § 4.22.040. A right of contribution exists between or among two or more persons who are jointly and severally liable upon the same indivisible claim for the same injury, death or harm, whether or not judgment has been recovered against all or any of them. Wash. Rev. Code § 4.22.040(1). It may be enforced either in the original action or by a separate action brought for that purpose. The basis for contribution among liable persons is the comparative fault of each such person. Id. Contribution is available to a person who enters into a settlement with a claimant only (a) if the liability of the person against whom contribution is sought has been extinguished by the settlement and (b) to the extent that the amount paid in settlement was reasonable at the time of the settlement. Wash. Rev. Code § 4.22.040(2). Statute does not apply to intentional torts but does apply to strict liability torts. Porter v. Kirkendoll, 449 P.3d 627 (Wash. 2019). However, a release entered into by a claimant and a person liable discharges that person from all liability for contribution, but it does not discharge any other persons liable upon the same claim unless it so provides. Wash. Rev. Code § 4.22.060(2). 1-year statute of limitations starts the date a judgment becomes final. Wash. Rev. Code § 4.22.050.

Implied Indemnity: The common law right of indemnity between active and passive tortfeasors has been abolished. Wash. Rev. Code § 4.22.040(3). Common law indemnity remains available between non-joint tortfeasors. Sabey v. Howard Johnson & Co., 5 P.3d 730 (Wash. 2000). The party seeking indemnity must establish (1) a breach of a duty causing the plaintiff's injuries by the person against whom indemnity is sought and (2) the person seeking indemnity must not have been an active participant in the acts which caused injury. Weston v. New Bethel Missionary Baptist Church, 598 P.2d 411 (Wash. Ct. App. 1978). 3-year statute of limitations running from payment. Universal Underwriters Ins. Co. v. Security Industries, Inc., 391 F.Supp. 326 (W.D. Wash. 1974) (applying Wash. Rev. Code § 4.16.080(3)).

Damages - Measure of Damages to Property

Real Property: Permanent damage: Generally, the difference between the market value of the property immediately before the damage and its market value immediately thereafter. Colella v. King County, 433 P.2d 154 (Wash. 1967). Temporary damage: The lesser of the cost of repair plus any depreciation after repair or fair market value diminution. The plaintiff may also collect for loss of use during repairs. Colella v. King.

Personal Property: Total loss: The market value of the property destroyed or damaged. If the property does not have a market value, the measure of damages is the replacement cost. If the property cannot be replaced, then its value to the owner may be considered in fixing damages. McCurdy v. Union Pac. R. Co., 413 P.2d 617 (Wash. 1966). Damaged but not destroyed: The difference between the market value of the property before the injury and its market value after the injury. McCurdy.

Experts - States Following the Daubert/Kumho Doctrine

Follows Frye and rejects Daubert. State v. Copeland, 922 P.2d 1304 (Wash. 1996); Wash. ER 702.

Interest - Pre & Post Judgment

Prejudgment

All Actions

Rate: If damages are liquidated, prejudgment interest is allowed at contract rate or, if none, an amount that does not exceed the higher of 12% per annum or 4 percentage points above the equivalent coupon issue yield as stated in Wash. Rev. Code § 19.52.020. Wash. Rev. Code § 4.56.110; Mahler v. Szucs, 957 P.2d 632 (Wash. 1998); Hansen v. Rothaus, 730 P.2d 662 (Wash. 1986) (tortious conduct); but see RRW Legacy Mgmt. v. Walker, 2016 U.S. Dist. LEXIS 183096 (W.D. Wash.) (suggesting that Wash. Rev. Code § 19.52.010 governs contract actions where there is no rate in the contract). For tortious conduct by individuals or entities other than a "public agency," 2% above the prime rate as stated in Wash. Rev. Code § 4.56.110(3)(b). Generally, absent its consent, the State is not liable for prejudgment interest. Norris v. State, 733 P.2d 231 (Wash. Ct. App. 1987); see Wash. Rev. Code § 4.56.115 (discussing awarding interest against the state and its political subdivisions from the date of judgment).

Accrual Date: The date the claim becomes liquidated. Walla Walla County Fire Prot. Dist. No. 5 v. Wash. Auto Carriage, 745 P.2d 1332 (Wash. Ct. App. 1987).

Post Judgment

Rate: The contract rate or, if none, an amount that does not exceed the higher of 12% per annum or 4 percentage points above the equivalent coupon issue yield as stated in Wash. Rev. Code § 19.52.020. Wash. Rev. Code § 4.56.110. For tortious conduct by individuals or entities other than a "public agency," 2% above the prime rate as stated in Wash. Rev. Code § 4.56.110(3)(b). For tortious conduct claims against a "public agency," 2% above the equivalent coupon issue yield, established as stated in Wash. Rev. Code §§ 4.56.110(3)(a); 4.56.115. For criminal conduct by an entity, see Wash. Rev. Code § 10.01.090.

Accrual Date: Date of entry. Wash. Rev. Code §§ 4.56.110; 4.56.115; 10.01.090.

Joint and Several Liability
Modified joint and several liability. Liability is several, but joint and several liability applies if the defendants acted in concert; if a person acted as an agent or servant of the party; if the plaintiff was not at fault; as well as in cases of hazardous waste, tortious interference with contracts or business relations, and the manufacture or marketing of fungible products which contain no clearly identifiable shape, color or marking. Wash. Rev. Code § 4.22.070.

Judgment Liens
A judgment expires ten years from the date of entry. Wash. Rev. Code § 4.56.190. The judgment can be extended for an additional ten-year period by filing within ninety days of the expiration of the ten-year period. Wash. Rev. Code § 6.17.020(3).

Landlord-Tenant Subrogation ("Sutton Doctrine")
A landlord is presumed to carry insurance for the tenant's benefit absent an express lease provision to the contrary. A "yield up" clause stating that the tenant will surrender the premises in the same condition as received does not overcome the presumption. Cascade Trailer Court v. Beeson, 749 P.2d 761 (Wash. Ct. App. 1988). Subrogation is barred for damage to the entire building, not just to the leased premises, and is also precluded against the tenant's visiting spouse. Trinity Universal Ins. Co. of Kansas v. Cook, 276 P.3d 372 (Wash. Ct. App. 2012). Before pursuing a tenant for subrogation, however, review Wash. Rev. Code § 59.18.670(3) (which details some circumstances and procedural requirements related to pursuing a tenant).

Made Whole Doctrine
Absent contract language to the contrary, an insured is entitled to recover his general damages from the tortfeasor before allowing subrogation, provided that in so doing he does not prejudice the rights of his insurer. Thiringer v. Am. Motors Ins. Co., 588 P.2d 191 (Wash. 1978). Any subrogation recoveries must first be allocated to reimburse the full amount of the insured's deductible. Wash. Admin. Code 284-30-393.

Professional Malpractice Filing Requirements (Affidavit of Merit)
No certificate requirement. See Putnam v. Wenatchee Valley Med. Ctr., 216 P.3d 374 (Wash. 2009) (holding that a state statute requiring a certificate of merit for medical malpractice actions violated the Washington Constitution).

Restitution - Crime Victims Restitution Statutes
Mandatory, unless extraordinary circumstances exist which make restitution inappropriate in the court's judgment. In setting the amount, the court should base the order on, *inter alia*, easily ascertainable damages and lost wages, and should take into account the offender's ability to pay. The restitution order may be enforced in the same manner as a judgment in a civil action. Wash. Rev. Code § 9.94A.753. The court may order the offender to pay restitution to an insurer without regard to whether the company could pursue a subrogation claim. State v. Ewing, 7 P.3d 835 (Wash. Ct. App. 2000).

Right to Repair/Notice Statutes – Construction Cases
Wash. Rev. Code §§ 64.50.005 to 64.50.060 *Construction Defect Claims – Construction Defect Action – Notice of Claim – Response – Procedure for negotiations – Commencing an Action.*

Spoliation – Remedies for Spoliation
Washington appellate courts have not yet recognized an independent tort of spoliation. Weaver v. Hanson, 2007 WL 2570337 (E.D. Wash. 2007). Spoliation is defined as the intentional destruction of evidence. In deciding whether to apply a sanction, courts consider the potential importance or relevance of the missing evidence and the culpability or fault of the adverse party. Ripley v. Lanzer, 215 P.3d 1020 (Wash. Ct. App. 2009). To determine whether a sanction is appropriate, the trial court weighs: (1) the potential importance or relevance of the missing evidence; and (2) the culpability or fault of the adverse party. Where relevant evidence which would properly be a part of a case is within the control of a party in whose interests it would naturally be to produce it and he fails to do so, without satisfactory explanation, the only inference which the finder of fact may draw is that such evidence would be unfavorable to him. Henderson v. Tyrrell, 910 P.2d 522 (Wash. Ct. App. 1996). The more severe sanctions, such as entry of default judgment, are reserved for cases in which the violation is particularly deplorable. Cashman v. Pacific Scientific Co., 2010 WL 428807 (Wash. Ct. App. 2010).

Statutes of Limitation and Repose[*]
Statutes of Limitation

Tort: Personal injury and property damage, 3 years. Wash. Rev. Code § 4.16.080. Intentional torts, including assault and battery, 2 years. Wash Rev. Code § 4.16.100.
Contract: Oral, 3 years. Wash. Rev. Code § 4.16.080. Written, 6 years. Wash. Rev. Code § 4.16.040.
Medical Malpractice: 3 years, or 1 year from discovery, whichever is later. Wash. Rev. Code § 4.16.350
Products: 3 years from discovery of the harm, or from when the harm should have been discovered. Wash. Rev. Code § 7.72.060.
Improvements to Real Property: Written notice of construction defects must be given to construction professionals 45 days before filing of suit. If the construction professional denies the claim within 21 days, the claimant may file suit. A professional's failure to respond is deemed a denial. Wash. Rev. Code § 64.50.020.
State and Local Government: Written notice of claim must be filed 60 days before filing suit. The limitation period is tolled during the 60-day period. Wash. Rev. Code §§ 4.92.110, 4.96.020. Limitations periods governing personal actions apply to actions against the state. Wash. Rev. Code § 4.92.050. For actions against local governments, the Revised Code does not provide for a separate limitation period.

Statutes of Repose

Products: 12 years from delivery. A claimant may recover beyond 12 years by establishing by a preponderance of evidence that the product was still within its useful safe life. Wash. Rev. Code § 7.72.060.

[*] For UCC Claims and claims based on improvements to real property and/or claims brought by condominium associations related to construction defects, see the notes at the end of the Table of Contents.

Improvements to Real Property: 6 years from substantial completion or the termination of services, whichever is later. Wash. Rev. Code §§ 4.16.310; 4.16.326(g).

Subrogating in the Insured's Name – Real Party in Interest

The insurer, standing in the shoes of its insured, may pursue an action in the insured's name against the third party to enforce its subrogation right. Trinity Universal Ins. Co. of Kansas v. Ohio Cas. Ins. Co., 312 P.3d 976 (Wash. Ct. App. 2013).

WEST VIRGINIA

Anti-Subrogation Rule: Subrogation by Insurer Against Insured
No right of subrogation can arise in favor of the insurer against its own insured, since by definition subrogation arises only with respect to rights of the insured against third persons to whom the insurer owes no duty. Richards v. Allstate Ins. Co., 455 S.E.2d 803 (W.Va. 1995). An insurer may not subrogate against one to whom it has issued an applicable policy of liability insurance. Id.

Comparative/Contributory Negligence
Modified Comparative – 50%. W. Va. Code § 55-7-13c. Contributory negligence if injury was sustained during the commission of a felony. W. Va. Code § 55-7-13d(c)(1).

Contribution and Implied Indemnity
Contribution: Abolished as of May 25, 2015, because joint and several liability is no longer recognized by West Virginia. Defendants are only responsible for their proportion of fault. W. Va. Code § 55-7-13(a)-(d).

Implied Indemnity: Available as an equitable remedy to address unfairness when a person, without personal fault, has become subject to tort liability for the conduct of another. Hill v. Joseph T. Ryerson & Son, Inc., 268 S.E.2d 296 (W.Va. 1980). The party seeking indemnification must be without fault. Sydenstricker v. Unipunch Products, Inc., 288 S.E.2d 511 (W.Va. 1982). Three elements must be established for an implied indemnity claim: (1) an injury was sustained by a third party; (2) for which a putative indemnitee has become subject to liability because of a positive duty created by statute or common law, but whose independent actions did not contribute to the injury; and (3) for which a putative indemnitor should bear fault for causing because of the relationship the indemnitor and indemnitee share. Harvest Capital v. W.Va. Dept. of Energy, 560 S.E.2d 509 (W.Va. 2002).

Damages - Measure of Damages to Property
Real Property: Repairable: The cost of repairs plus consequential damages including loss of use; however, the cost of repairs may not exceed market value. Jarrett v. E. L. Harper & Son, Inc., 235 S.E.2d 362 (W.Va. 1977). Not repairable or repairs exceed market value: Fair market diminution plus consequential damages including loss of use. Jarrett v. E. L. Harper & Son, Inc. When residential real property is damaged, the reasonable cost of repair even if the costs exceed fair market value before the damage. Brooks v. City of Huntingdon, 768 S.E.2d 97 (W.Va. 2014). The owner of residential property may also recover related expenses stemming from the injury, annoyance, inconvenience and aggravation, and loss of use during the repair period. Brooks. Where necessary to make the plaintiff whole and to the extent not duplicative, the owner of a home can also recover for any residual diminution in value after repairs are made. Brooks; see W.Va.P.J.I. §§ 804-05.

Personal Property: Not Repairable: Fair market value at the time property is destroyed. Carbasho v. Musulin, 618 S.E.2d 368 (W.Va. 2005). Repairable: Reasonable cost of repairs plus consequential damages and any depreciation in value after repairs; however, the total of repairs

and any depreciation cannot exceed the market value of the property before the loss. Ellis v. King, 400 S.E.2d 235 (W.Va. 1990).

Experts - States Following the Daubert/Kumho Doctrine
Follows Daubert to assess scientific evidence. Anstey v. Ballard, 787 S.E.2d 864 (W.Va. 2016); Wilt v. Buracker, 443 S.E.2d 196 (W.Va.1993); W.V.R.E. 702. Non-scientific testimony is assessed under W.V.R.E. 702. Anstey.

Interest - Pre & Post Judgment
Prejudgment

All Actions

Rate: Court may award prejudgment interest on special or liquidated damages. W. Va. Code § 56-6-31(b). Effective January 1, 2018, the rate will be the contract rate or, if none, 2% above the discount rate as stated in W. Va. Code § 56-6-31(b)(1), but not greater than 9% or less than 4% per annum. Id. For cases accruing prior to 2009, see W. Va. Code § 56-6-31(b)(2).

Accrual Date: Date cause of action accrues. W. Va. Code § 56-6-31; Jackson v. Brown, 801 S.E.2d 194 (W. Va. 2017).

Post Judgment

Rate: Effective January 1, 2018, 2% above the discount rate as stated in W. Va. Code § 56-6-31(c), but not greater than 9% or less than 4% per annum. Id.

Accrual Date: Entry of judgment. W. Va. Code § 56-6-31.

Joint and Several Liability
Modified joint and several liability. Effective May 25, 2015, several liability for compensatory damages. However, joint liability for two or more defendants who conspire or design to commit a tortious act or omission. W. Va. Code
§ 55-7-13c(a). Joint liability also applies to a vicariously liable defendant, W. Va. Code § 55-7-13d(b), and to a defendant driving under the influence, who committed a crime, or whose conduct constituted an illegal disposal of hazardous waste. W. Va. Code § 55-7-13c(h). Uncollectible judgments may be reallocated among other parties found to be at fault. W. Va. Code § 55-7-13c(d)(1). In cases of medical malpractice, liability is several, not joint. W. Va. Code § 55-7B-9. In a case in which a political subdivision is a defendant, each defendant is jointly and severally liable if 25 percent or more negligent; severally liable if less than 25 percent negligent. W. Va. Code § 29-12a-7.

Judgment Liens
A judgment creates a lien on all the real estate. W. Va. Code § 38-3-6. The lien will continue for 10 years from the date of entry. W. Va. Code
§ 38-3-7. The judgment may be renewed for an additional 10 years. Id.

Landlord-Tenant Subrogation ("Sutton Doctrine")
Rejecting the "equitable insured" theory, the Supreme Court of Appeals held that a carrier may seek subrogation against a tenant not named on the landlord's insurance policy. Farmers & Mechanics Mut. Ins. Co. v. Allen, 778 S.E.2d 718 (W.Va. 2015). An insurance policy is a

contract between the insurer and only the persons named on the policy. Mazon v. Camden Fire Ins. Ass'n, 389 S.E.2d 743 (W.Va. 1990)

Made Whole Doctrine
An insured must be fully compensated for injuries or losses sustained before the subrogation rights of an insurance carrier arise unless there is a valid contractual obligation to the contrary. Kanawha Valley Radiologists, Inc. v. One Valley Bank, N.A., 557 S.E.2d 277 (W.Va. 2001); Porter v. McPherson, 479 S.E.2d 668 (W.Va. 1996). In a personal injury case, when applying the made whole doctrine to a health insurer's claims, the court should consider: 1) the ability of parties to prove liability; 2) the comparative fault of all parties involved in the accident; 3) the complexity of the legal and medical issues; 4) future medical expenses; 5) the nature of injuries; and 6) the assets or lack of assets available above and beyond the insurance policy. Provident Life & Acc. Ins. Co. v. Bennett, 483 S.E.2d 819 (W.Va. 1997).

Professional Malpractice Filing Requirements (Affidavit of Merit)
A notice of claim and screening certificate of merit signed by a qualified health care provider shall be served on all parties 30 days prior to the filing of a medical malpractice lawsuit. The certificate shall state: 1) the expert's experience with the applicable standard of care; 2) the expert's qualifications; 3) the expert's opinion on how the standard of care was breached; and 4) the expert's opinion as to how the breach caused the injury or death. A separate certificate must be provided for each party against whom a claim is asserted. W. Va. Code § 55-7B-6.

Restitution - Crime Victims Restitution Statutes
Mandatory unless the court finds restitution to be impractical due to the amount of the damages and the defendant's ability to pay. W. Va. Code §§ 61-11A-4, 61-11A-5; State v. Lucas, 496 S.E.2d 221 (W.Va. 1997). The amount of restitution shall be equal to the greater of the fair market value of the property on the date of sentencing or the fair market value of the property on the date of the damage less the value of any part of the property that is returned. State v. Kristopher G., 500 S.E.2d 519 (W.Va. 1997). The court may grant restitution to an insurer to the extent the insurer compensated the victim. W. Va. Code § 61-11A-4. Restitution shall be reduced by the amount of any civil award. Restitution order may be enforced in the same manner as a judgment in a civil action. Id. A court may reduce a civil award by the amount of restitution but is not required to do so. Moran v. Reed, 338 S.E.2d 175 (W.Va. 1985).

Right to Repair/Notice Statutes – Construction Cases
W. Va. Code §§ 21-11A-1 to 21-11A-17 *Notice and Opportunity to Cure Construction Defects.*

W. Va. Code § 21-9-11a *Inspection of manufactured housing; deferral period for inspection and administrative remedies; notification of consumer rights.*

Spoliation – Remedies for Spoliation
West Virginia does not recognize spoliation of evidence as a stand-alone tort when the spoliation is the result of the negligence of a party to a civil action. West Virginia recognizes spoliation of evidence as a stand-alone tort when the spoliation is the result of the negligence of a third party, and the third party had a special duty to preserve the evidence. A duty to preserve evidence for a pending or potential civil action may arise in a third party through a contract, agreement, statute,

administrative rule, voluntary assumption of duty by the third party, or other special circumstances. The tort of negligent spoliation of evidence by a third party consists of the following elements: (1) the existence of a pending or potential civil action; (2) the alleged spoliator had actual knowledge of the pending or potential civil action; (3) a duty to preserve evidence arising from a contract, agreement, statute, administrative rule, voluntary assumption of duty, or other special circumstances; (4) spoliation of the evidence; (5) the spoliated evidence was vital to a party's ability to prevail in the pending or potential civil action; and (6) damages. Once the first five elements are established, there arises a rebuttable presumption that but for the fact of the spoliation of evidence, the party injured by the spoliation would have prevailed in the pending or potential litigation. The third-party spoliator must overcome the rebuttable presumption or else be liable for damages. Hannah v. Heeter, 584 S.E.2d 560 (W.Va. 2003).

West Virginia recognizes intentional spoliation of evidence as a stand-alone tort when done by either a party to a civil action or a third party. Intentional spoliation of evidence is defined as the intentional destruction, mutilation, or significant alteration of potential evidence for the purpose of defeating another person's recovery in a civil action. The tort of intentional spoliation of evidence consists of the following elements: (1) a pending or potential civil action; (2) knowledge of the spoliator of the pending or potential civil action; (3) willful destruction of evidence; (4) the spoliated evidence was vital to a party's ability to prevail in the pending or potential civil action; (5) the intent of the spoliator to defeat a party's ability to prevail in the pending or potential civil action; (6) the party's inability to prevail in the civil action; and (7) damages. Once the first six elements are established, there arises a rebuttable presumption that but for the fact of the spoliation of evidence, the party injured by the spoliation would have prevailed in the pending or potential litigation. The spoliator must overcome the rebuttable presumption or else be liable for damages. For intentional spoliation, punitive damages are available. Hannah.

Before a trial court may give an adverse inference jury instruction or impose other sanctions against a party for spoliation of evidence, the following factors must be considered: (1) the party's degree of control, ownership, possession or authority over the destroyed evidence; (2) the amount of prejudice suffered by the opposing party as a result of the missing or destroyed evidence and whether such prejudice was substantial; (3) the reasonableness of anticipating that the evidence would be needed for litigation; and (4) if the party controlled, owned, possessed or had authority over the evidence, the party's degree of fault in causing the destruction of the evidence. The party requesting the adverse inference jury instruction based upon spoliation of evidence has the burden of proof on each element of the four-factor spoliation test. If, however, the trial court finds that the party charged with spoliation of evidence did not control, own, possess, or have authority over the destroyed evidence, the requisite analysis ends, and no adverse inference instruction may be given or other sanction imposed. Hannah.

Statutes of Limitation and Repose*

Statutes of Limitation

Tort: Personal injury or property damage: 2 years. W. Va. Code § 55-2-12.

* For UCC Claims and claims based on improvements to real property and/or claims brought by condominium associations related to construction defects, see the notes at the end of the Table of Contents.

Contract: If written and signed by the defendant: 10 years. If written but unsigned or oral: 5 years. W. Va. Code § 55-2-6.
Medical Malpractice: 2 years from the date of injury, or 2 years from discovery of the injury or the date the injury should have been discovered. W. Va. Code § 55-7B-4. Claims against nursing homes, 1 year from date of injury. W. Va. Code § 55-7B-4(b). At least 30 days before filing an action, written notice, containing an expert's certificate of merit, must be given to the defendant. W. Va. Code § 55-7B-6.
State Government: Written notice must be filed with the clerk of the Court of Claims within the limitation period applicable to similar claims against private parties. W. Va. Code §14-2-21.
Local Government: Against any political subdivision, 2 years from the date of injury or from the date the injury was discovered or should have been discovered. W. Va. Code § 29-12A-6(a). (Note: § 29-12A-6(b), on minors' claims, was held unconstitutional in Whitlow v. Board of Educ., 438 S.E.2d 15 (W.Va. 1993)).

Statutes of Repose

Improvements to Real Property: 10 years after occupation or acceptance by owner. W. Va. Code § 55-2-6a.
Medical malpractice: 10 years after the date of the medical injury. W. Va. Code § 55-7B-4(a). Claims against nursing homes. W. Va. Code § 55-7B-4(b).

Subrogating in the Insured's Name – Real Party in Interest

A subrogated insurer may bring its action in the insured's name. Capitol Fuels, Inc. v. Clark Equip. Co., 342 S.E.2d 245 (W.Va. 1986).

WISCONSIN

Anti-Subrogation Rule: Subrogation by Insurer Against Insured
The equitable nature of subrogation does not permit an insurer to exercise a right of subrogation against its own insured or an additional insured. First Nat. Bank of Columbus v. Hansen, 267 N.W.2d 367 (Wis. 1978). Subrogation against an insured is acceptable where the insured committed arson. Madsen v. Threshermen's Mut. Ins. Co., 439 N.W.2d 607 (Wis. Ct. App. 1989).

Comparative/Contributory Negligence
Modified Comparative – 50%. Wis. Stat. § 895.045.

Contribution and Implied Indemnity
Contribution: Cause of action arises at common law. The basic elements are that both parties must be joint negligent wrongdoers, they must have common liability because of such negligence to the same person, and one such party must have borne an unequal proportion of the common burden. Farmers Mut. Auto. Ins. Co. v. Milwaukee Auto. Ins. Co., 99 N.W.2d 746 (Wis. 1959). Available for payments made by a joint tortfeasor, irrespective of a judgment. State Farm Mut. Auto. Ins. Co. v. Schara, 201 N.W.2d 758 (Wis. 1972). A settlement by one tortfeasor does not alter the right to contribution. Id. Non-settling party's share is to be allocated by a jury. Pachowitz v. Milwaukee Suburban Transport Corp., 202 N.W.2d 268 (Wis. 1972). Target can be joined as a defendant in the initial case or sued in a second action. Johnson v. Heintz, 243 N.W.2d 815 (Wis. 1974). 1-year statute of limitations from the date of payment for an action for contribution based on tort, if the right of contribution does not arise out of a prior judgment allocating the comparative negligence between the parties. Wis. Stat. § 893.92.

Implied Indemnity: The doctrine of equitable indemnification shifts the entire loss from one person who has been compelled to pay it to another who, on the basis of equitable principles, should bear the loss. Estate of Kriefall v. Sizzler United States Franchise, Inc., 816 N.W.2d 853 (Wis. 2012). An indemnification claim involves shifting the entire loss, not just part of it, from one party to another. Id. The two basic elements of equitable indemnification are the payment of damages and lack of liability. Brown v. LaChance, 477 N.W.2d 296 (Wis. Ct. App. 1991). 6-year statute of limitations for an implied contract, Wis. Stat. § 893.43, which runs from the time of payment of the underlying claim, payment of a judgment thereon, or payment of a settlement thereof by the party seeking indemnity.

Damages - Measure of Damages to Property
Real Property: The lesser of the cost of repair or the fair market value diminution. Laska v. Steinpreis, 231 N.W.2d 196 (Wis. 1975). If cost of repair is awarded, plaintiff may also recover any residual diminution in value after repairs are complete. Hawes v. Germantown Mut. Ins. Co., 309 N.W.2d 356 (Wis. Ct. App. 1981).

Personal Property: The difference between the value before and the value immediately after the injury, under which the reasonable cost of repair may be shown as bearing upon the diminution in the value of the article resulting from the injury. Krueger v. Steffen, 141 N.W.2d 200 (Wis. 1966); cf. Smith v. Wis. Mut. Ins. Co., 880 N.W.2d 183 (Wis. Ct. App. 2016) (stating

that the general rule for repairable property is that recovery is limited to the lesser of (1) the diminution in value and (2) the cost of repair, but that, in any event, recovery is limited to pre-injury fair market value). If cost of repair is awarded, plaintiff may also recover any residual diminution in value after repairs are complete, plus loss of use. Hellenbrand v. Hilliard, 687 N.W.2d 37 (Wis. Ct. App. 2004).

Experts - States Following the Daubert/Kumho Doctrine
Follows Daubert. State v. Jones (In re Jones), 911 N.W.2d 97 (Wis. 2018); Wis. Stat. Ann. § 907.02.

Interest - Pre & Post Judgment
Prejudgment

All Actions

Rate: For liquidated damages or damages that can be measured to a reasonably certain standard, 5% or amount agreed to, but not to exceed 12%. Wis. Stat. §§ 138.04, 138.05; Betty Andrews Revocable Trust v. Vrakas/Blum, S.C., 779 N.W.2d 723 (Wis. Ct. App. 2009). Prejudgment interest not available where the existence of multiple defendants prevents any single defendant from knowing the precise amount of their liability. Id. If an offer of judgment is made, interest at the rate noted in Wis. Stat. § 807.01(4) may apply.
Accrual Date: From the date due or the date of the breach. First Wisconsin Trust Co. v. L. Wiemann Co., 286 N.W.2d 360 (Wis. 1980) (contract action – date of breach); Thermal Design, Inc. v. Project Coordinators, Inc., 730 N.W.2d 460 (Wis. Ct. App. 2007) (liquidated damages – date due). If an offer of judgment is made and interest applies, it runs from the date of the offer. Wis. Stat. § 807.01(4).

Post Judgment

Rate: 1% plus the prime rate as determined in Wis. Stat. § 814.04(4).
Accrual Date: Entry of judgment. Id.

Joint and Several Liability
Modified joint and several liability. The liability of each person found to be causally negligent whose percentage of causal negligence is less than 51% is limited to the percentage of causal negligence attributed to him. A person whose percentage of liability is 51% or greater is jointly and severally liable. Two or more persons who act in accordance with a common scheme or plan are jointly and severally liable. Wis. Stat. § 895.045. Joint and several liability does not apply to punitive damages. Wis. Stat. § 895.043. In products liability cases, the liability of a party in the chain of distribution may be several, not joint. See Wis. Stat. § 895.046.

Judgment Liens
A judgment creates a lien on all real property for 10 years from the date of entry. Wis. Stat. § 806.15. In order to renew, the judgment creditor must obtain permission from the court and refile an action against the judgment debtor within 20 years. Wis. Stat. §§ 806.23; 893.40; 893.415. An execution on a judgment may be issued, if proper steps are taken, for 20 years. Wis. Stat. § 815.04.

Landlord-Tenant Subrogation ("Sutton Doctrine")
In light of Wis. Stat. Ann. § 704.07(3)(a), which requires tenants to repair damage caused by their negligence, a residential tenant is not an implied co-insured on the landlord's insurance policy. Bennett v. West Bend Mut. Ins. Co., 546 N.W.2d 204 (Wis. Ct. App. 1996). Section 704.07(3)(a) may not be waived in a residential tenancy but may be waived in writing in a nonresidential tenancy. Wis. Stat. Ann. § 704.07(1).

Made Whole Doctrine
The insured must be made whole, meaning compensated for all elements of damages notwithstanding merely the interests insured, before the subrogee may pursue subrogation. Muller v. Society Ins., 750 N.W.2d 1 (Wis. 2008). Parties may not contract around the applicability of the made whole doctrine even by express and unambiguous language illustrating an intent to do so. Ruckel v. Gassner, 646 N.W.2d 11 (Wis. 2002).

Professional Malpractice Filing Requirements (Affidavit of Merit)
No certificate requirement. In actions against health care providers, a request for mediation must be filed within fifteen days of filing the complaint. Wis. Stat. § 655.445.

Restitution - Crime Victims Restitution Statutes
Discretionary. Wis. Stat. § 973.20. If the property cannot be returned, a court may award the greater of its value at the time it was damaged or its value at the time of sentencing, less the value of any part returned to the victim, as well as any special damages and lost income. Id. A restitution order is enforceable in the same manner as a judgment in a civil action. Id. Restitution amounts paid will reduce the amount of recovery in a civil action. Id. Insurers may seek restitution. Id.

Right to Repair/Notice Statutes – Construction Cases
Wis. Stat. § 895.07 *Claims against contractors and suppliers;* see Wis. Stat. § 101.148 *Regulation of Industry: General Provisions – Contractor Notices.*

Spoliation – Remedies for Spoliation
The tort of spoliation is not recognized. Johnston v. Metropolitan Property & Cas. Ins. Co., 2005 WL 3159558 (Wis. Ct. App. 2005). The primary remedies used to combat spoliation are pretrial discovery sanctions and the spoliation inference. Where the inference is applied, the trier of fact is permitted to draw an inference from the intentional spoliation of evidence that the destroyed evidence would have been unfavorable to the party that destroyed it. Estate of Neumann ex rel. Rodli v. Neumann, 626 N.W.2d 821 (Wis. Ct. App. 2001). The inference is reserved for deliberate, intentional actions and not mere negligence. Jagmin v. Simonds Abrasive Co., 211 N.W.2d 810 (Wis. 1973).

Statutes of Limitation and Repose*

Statutes of Limitation

Tort: Personal injury, 3 years. Wis. Stat. Ann. § 893.54. Wrongful death action arising from a motor vehicle accident, 2 years. Id. Property damage, 6 years for property damage, but 3 years for damage arising from a motor vehicle accident. Wis. Stat. Ann. § 893.52. Home Inspections, 2 years, which cannot be reduced by agreement. Wis. Stat. Ann. § 440.977.

Contract: 6 years. Wis. Stat. Ann. 893.43. For sale of goods, 6 years. Wis. Stat. Ann. § 402.725. Home Inspections, 2 years, which cannot be reduced by agreement. Wis. Stat. Ann. § 440.977.

Medical Malpractice: 3 years from injury or 1 year from discovery, whichever is later. Foreign objects, 1 year from discovery. Wis. Stat. Ann. § 893.55.

Other State: For causes of action arising in another state, the other state's statute or Wisconsin's applies, whichever is shorter. Wis. Stat. Ann. § 893.07.

State and Local Government: Written notice within 120 days of the event. The government unit is to send a notice of disallowance within 120 days after presentation. Failure to respond is deemed a disallowance. Suit must be filed within 6 months of service of the notice of disallowance. For the negligent inspection of any property, premises, place of employment or construction site, for the violation of any statute, rule, ordinance or health and safety code, 1-year limitation from discovery of the act or omission. Wis. Stat. Ann. § 893.80.

Statutes of Repose

Products: Strict liability actions – 15 years from the date of manufacture, unless the manufacturer specifically represents that the product will last longer. Wis. Stat. § 895.047 (stating that the section does not apply to claims based on negligence or breach of warranty). The 15-year period does not apply to actions based on a claim for damages caused by a latent disease. Id. In cases where the plaintiff cannot identify the manufacturer, distributor, seller, or promoter of the specific product alleged to have caused the plaintiff's injury, 25 years after the defendant last manufactured, distributed, sold, or promoted the specific product chemically identical to the specific product that allegedly caused the plaintiff's injury and the date the cause of action accrued. Wis. Stat. § 895.046.

Improvements to Real Property: 7 years from substantial completion. For damage occurring in the 5th through 7th year, the period is extended 3 years from occurrence. Fraud, misrepresentation, and owners/occupiers in control of the premises on the date of loss excepted. Wis. Stat. Ann. § 893.89.

Home Inspections: 2 years. Wis. Stat. Ann. § 440.97.

Medical Malpractice: 5 years from act or omission. Wis. Stat. Ann. § 893.55.

Subrogating in the Insured's Name – Real Party in Interest

If an insurer pays a claim to its insured, even though the insurer may call the transaction a "loan," the insured is not the real party in interest because any rights the insured has against the defendant belong to the insurer by virtue of subrogation. A loan receipt and agreement is unavailable and

* For UCC Claims and claims based on improvements to real property and/or claims brought by condominium associations related to construction defects, see the notes at the end of the Table of Contents.

improper to conceal a suit based on subrogation or to obtain the same results as the enforcement of subrogation rights. Kopperud v. Chick, 135 N.W.2d 335 (Wis. 1965)

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Anti-Subrogation Rule: Subrogation by Insurer Against Insured
In the aftermath of an environmental loss which implicates an insured's property and liability insurance policies, a property insurer who has paid benefits may recover them from the liability insurer. Compass Ins. Co. v. Cravens, Dargen and Co., 748 P.2d 724 (Wyo. 1988) (permitting a property insurer to subrogate against its insured).

Comparative/Contributory Negligence
Modified Comparative – 50%. Wyo. Stat. § 1-1-109.

Contribution and Implied Indemnity
Contribution: Wyoming abolished joint and several liability and repealed its contribution statute in 1986. Schneider Nat'l v. Holland Hitch Co., 843 P.2d 561 (Wyo. 1992).

Implied Indemnity: Available as implied contractual indemnity, also known as implied-in-fact indemnity, and as equitable implied indemnity, also known as implied-in-law indemnity or common-law indemnity. Schneider. A cause of action for equitable indemnity arises when two persons are liable for the same harm and one of them would be unjustly enriched by the other's discharge of the liability of both. Id. Liability is to be allocated in proportion to their comparative degrees of fault. Id. The claim may be asserted as a crossclaim or in a separate third-party proceeding. Id. A cause of action for implied contractual indemnity may arise if there is an independent legal relationship between the party seeking indemnity and the party from whom indemnity is sought, under which the indemnitor owes a duty either in contract or tort to the indemnitee apart from the joint duty they owe to the injured party. Id. An implied contract of indemnity is subject to an 8-year statute of limitations. Wyo. Stat. § 1-3-105.

Damages - Measure of Damages to Property
Real Property: No measure of damages is preferred over the other, but generally: Permanent Damage/Cost of Repair High: Difference between the value of the property before and after the injury. Anderson v. Bauer**,** 681 P.2d 1316 (Wyo. 1984). Temporary Damage/Cost of Repair Low: The cost of the repair has often been held to be the measure of damages. Anderson v. Bauer. When damage is to a dwelling house used for the personal purpose of the owner, the cost of repair may be recoverable even if it exceeds the diminution in value. The residual diminution of value after repairs is also recoverable. Anderson.

Personal Property: Total Loss: Generally, market value at the time and place the property was taken or destroyed. Reposa v. Buhler, 770 P.2d 235 (Wyo. 1989). Partial Loss: Generally, the difference between the value at the place the property was taken or destroyed immediately before and immediately after the injury. Meredith GMC, Inc. v. Garner, 328 P.2d 371 (Wyo. 1958.)

Experts - States Following the Daubert/Kumho Doctrine
Follows Daubert and Kumho Tire. Bunting v. Jamieson, 984 P.2d 467 (Wyo. 1999); W.R.E. Rule 702.

Interest - Pre & Post Judgment

Prejudgment

Liquidate Claims

Rate: 7%, or amount agreed to. Wyo. Stat. § 40-14-106. Interest allowed on liquidated, readily computable claims. Rissler & McMurry Co. v. Atlantic Richfield Co., 559 P.2d 25 (Wyo. 1977).

Accrual Date: Date notice of amount due is provided. Rissler

Conversion Claims

A court may award interest, at its discretion, from the date of the origin of the cause of action. Amoco Prod. Co. v. EM Nomine Pshp. Co., 2 P.3d 534 (Wyo. 2000).

Post Judgment

Rate: The contract rate or, if none, 10%. Wyo. Stat. § 1-16-102.

Accrual Date: Date of judgment. Id.

Joint and Several Liability

Several liability. Each defendant is liable only to the extent of its proportion of total fault. Wyo. Stat. § 1-1-109.

Judgment Liens

A judgment becomes dormant if execution is not issued within 5 years. Wyo. Stat. § 1-17-307. A dormant judgment generally may be revived within 10 years. Wyo. Stat. §1-16-503.

Landlord-Tenant Subrogation ("Sutton Doctrine")

Wyoming looks to the lease, and any other admissible evidence, to determine the parties' reasonable expectations as to who should bear the risk of loss if a tenant negligently damages the leased premises. W. Am. Ins. Co. v. Black Dog Consulting Inc., 538 P.3d 973 (WY 2023) (discussing a commercial property).

Made Whole Doctrine

No case on point.

Professional Malpractice Filing Requirements (Affidavit of Merit)

No certificate requirement. Medical malpractice claims must be initiated with an independent review panel unless the parties waive submission of the claim to the panel. Wyo. Stat. § 9-2-1518. However, this statute was repealed in 2021, effective July 1, 2022. As of this date, all activities related to the Wyoming Medical Review Panel Act of 2005 shall cease except as necessary to finalize decisions on malpractice claims against health care providers filed with the panel prior to July 1, 2022. See 2021 Wy. ALS 99.

Restitution - Crime Victims Restitution Statutes

Mandatory, unless the court finds that the defendant has no ability to pay and that no reasonable probability exists that the defendant will have an ability to pay. Wyo. Stat. § 7-9-102. The court shall fix a reasonable amount as restitution owed to each victim for actual pecuniary damage resulting from the defendant's criminal activity. The court shall issue execution in the same manner as in a civil action. The defendant shall be given credit against his restitution obligation

for payments made to the victim by the defendant's insurer for injuries arising out of the same facts or event. Wyo. Stat. § 7-9-103. Any restitution payment by the defendant to a victim shall be set off against any judgment in favor of the victim in a civil action arising out of the same facts or event. Wyo. Stat. § 7-9-110. An insurer which paid any part of a victim's pecuniary damages shall be regarded as the victim only if the insurer has no right of subrogation and the insured has no duty to pay the proceeds of restitution to the insurer. Wyo. Stat. § 7-9-101; Meerscheidt v. State, 931 P.2d 220 (Wyo. 1997); Hudson v. State, 466 P.3d 839 (Wyo. 2020) (affirming a restitution order to an insured victim because there was no evidence in the record of a subrogation right).

Right to Repair/Notice Statutes – Construction Cases
None found.

Spoliation – Remedies for Spoliation
Wyoming courts have not recognized an independent tort for spoliation of evidence. Coletti v. Cudd Pressure Control, 165 F.3d 767 (10th Cir. 1999). A party's bad-faith withholding, destruction, or alteration of physical evidence relevant to proof of an issue at trial gives rise to a presumption or inference that the evidence would have been unfavorable to the party responsible for its nonproduction, destruction, or alteration. Walters v. Walters, 249 P.3d 214 (Wyo. 2011). Other available sanctions include the preclusion of evidence and the striking of pleadings. Abraham v. Great Western Energy, LLC, 101 P.3d 446 (Wyo. 2004).

Statutes of Limitation and Repose*

Statutes of Limitation

Tort: Personal injury and property damage, 4 years. Wyo. Stat. § 1-3-105. Wrongful death, 2 years. Wyo. Stat. § 1-38-102.

Contract: Written, 10 years. Oral, 8 years. Wyo. Stat. § 1-3-105.

Medical Malpractice: 2 years of act/omission or 2 years of discovery, whichever is greater. Wyo. Stat. § 1-3-107.

Other State: If the state or country where the cause of action arose bars the action, it is also barred in Wyoming. Wyo. Stat. § 1-3-117.

State and Local Government: Written notice must be filed within 2 years of the act or omission. Wyo. Stat. § 1-39-113. 1-year limitation after claim is filed, but not to exceed any other applicable statute of limitation. In the absence of applicable insurance coverage, if the claim was properly filed, the statute is tolled 45 days after a decision by the governmental entity, if the decision was not made and mailed to the claimant within the applicable statutory time limitation. Wyo. Stat. § 1-39-114.

Statutes of Repose

Improvements to Real Property: 10 years from substantial completion. If the injury occurs during the 9th year, an action may be brought within 1 year after the date of injury. Wyo. Stat.

* For UCC Claims and claims based on improvements to real property and/or claims brought by condominium associations related to construction defects, see the notes at the end of the Table of Contents.

§ 1-3-111. A person in possession or control of property at time of injury is excluded. Wyo. Stat. § 1-3-112.

Subrogating in the Insured's Name – Real Party in Interest

Actions must be prosecuted in the name of the real party in interest. WY R. Civ. Proc. Rule 17. If the insurer pays the loss in full, it must bring an action in its name as the real party in interest. If the insurance covers only a portion of the loss, the action must be brought in the name of insured. Gardner v. Walker, 373 P.2d 598 (Wyo. 1962). The court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action. After ratification, joinder, or substitution, the action proceeds as if it had been originally commenced by the real party in interest. WY R. Civ. Proc. Rule 17.