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# Pennsylvania

1. **What are the statute of limitations for tort and contract actions as they relate to the transportation industry.**

   Pennsylvania has a two (2)-year statute of limitations for tort claims, including product liability claims. The statute of limitations for contract actions in Pennsylvania is four (4) years.

2. **What effects, if any, has the COVID Pandemic had on tolling or extending the statute of limitation for filing a transportation suit and the number of jurors that are sat on a jury trial.**

   While the Pennsylvania Supreme Court declared a general statewide judicial emergency on March 16, 2020, and did suspend time calculations and deadlines for certain filings and other deadlines, this did not toll the statue of limitations for any claims which would have expired during the judicial emergency. Parties were specifically ordered to file a praecipe for a writ of summons by the applicable statute of limitation deadline if a party was unable to file a complaint due to the pandemic, which would preserve one's cause of action. While statewide, jury trials were only suspended during part of 2020, individual counties now determine the progression of jury trials.

3. **Does your state recognize comparative negligence and if so, explain the law.**

   In Pennsylvania, a plaintiff's comparative negligence is not a bar to recovery unless the plaintiff is found to be 51% or more negligent. Any recovery is reduced by the portion of negligence attributed to the plaintiff. However, a defendant cannot use contributory negligence concepts to excuse a product's defect or reduce recovery by comparing fault in a strict product's liability action.

4. **Does your state recognize joint tortfeasor liability and if so, explain the law.**

   Under the Pennsylvania Fair Share Act, each defendant is only liable for the percentage of negligence the jury attributed to it. A defendant's liability is several, not joint; however, a defendant found to be 60% or more negligent will be joint and severally liable. Liability is apportioned equally among strictly liable joint tortfeasors.

   However, in March, 2021, a two-judge panel of the Superior Court issued an Opinion with potentially wide-ranging legal and practical implications regarding the scope and application of the Fair Share Act. In *Spencer v. Johnson*, the Pennsylvania Superior Court issued an Opinion regarding implications of the Fair Share Act in a case involving significant injuries sustained by a pedestrian who was struck by an automobile owned by his wife's employer. A reading of the Opinion may suggest that the Fair Share Act does not apply *unless* there is a finding that the plaintiff was comparatively negligent.

Implications of this reading of the Fair Share Act suggest a return to traditional joint and several liability, allowing for a non-negligent plaintiff to recover a judgment against any defendants that are jointly and severally liable regardless of their percentage of liability assessed by the jury, exposing "deep-pocket" defendants to substantially greater liability in cases such as medical malpractice matters where a plaintiff is not typically found comparatively negligent. This issue has gained great appellate attention.

5. **Are either insurers and/or insureds obligated to provide insurance limit information pre-suit and if so, what is required.**

Not in Pennsylvania. Disclosure of insurance policy limits are only required to be disclosed after litigation has commenced in discovery, or, depending on the county, mandated court filings (i.e. case management conference memorandum in Philadelphia County).

6. **Does your state have any monetary caps on compensatory, exemplary or punitive damages.**

In Pennsylvania, only with respect to governmental entities. There is a $250,000 limit on personal injury damages recoverable in a lawsuit against a government agency (such as the Commonwealth or the Pennsylvania Department of Transportation), and a $500,000 limit on damages in a case against local agencies or parties (such as the City of Philadelphia or a school district).

7. **Has your state recently implemented any court reforms which may affect transportation lawsuits or is your state planning to, and if so explain the reforms.**

A. Pennsylvania has not recently implemented any tort reforms that could directly affect transportation lawsuits, nor are we aware of any such reforms that have been proposed.

B. The "fair share" act was implemented as recently as June 28, 2011, which says that, in negligence lawsuits, the fact that the plaintiff may have been contributorily negligent does not bar recovery so long as the plaintiff's negligence was not greater than the causal negligence of the defendant(s), but any damages sustained by the plaintiff are reduced in proportion to the plaintiff's negligence. 42 Pa.C.S.A. § 7102.

C. Within the past ten (10) years, tort reform laws were enacted which apply in medical malpractice cases, however those reforms are not directly applicable to transportation-related lawsuits.

D. Referring to a recent publication by the ATRA (American Tort Reform Association), which ranks jurisdictions where laws and court procedures are applied unfairly, and which are generally unfavorable to the defense, law.com stated:

> Pennsylvania topped the "Judicial Hellholes" list for the second year in a row, only this time tort reform advocates pointed their finger at both the Philadelphia Court of Common Pleas and the Pennsylvania Supreme Court.
>
> The American Tort Reform Association's "Judicial Hellholes 2020-2021" report, released on Tuesday, ranks states, courts and legislatures based on their lawsuit climate.

Pennsylvania Maintains No. 1 Rank on Tort Reform Group's 'Judicial Hellholes' List, Law.com, https://www.law.com/2020/12/08/pennsylvania-maintains-no-1-rank-on-tort-reform-groups-judicial-hellholes-list/, referring to: American Tort Reform Foundation, Judicial Hellholes 2020-2021 (2020),

available at: https://www.judicialhellholes.org/wp-content/uploads/2020/12/ATRA_JH20_layout_08.pdf

## 8. How many months generally transpire between the filing of a transportation related complaint and a jury trial.

A. Many of Pennsylvania's sixty-seven (67) counties in have their own local rules which govern the manner in which a case is scheduled for trial, and it is highly recommended that the local rules be consulted and reviewed for timelines, procedure, and the manner in which cases are scheduled for trial.

B. Trial scheduling differs county-by-county, with some counties having implemented case management procedures that set fixed deadlines for the completion of discovery, the production of expert reports, the scheduling of court-initiated conferences, and the placement of the case on the trial list.

C. In counties that do not have a formal case management administrative procedure, the counties often require a case to be scheduled for arbitration and/or trial through the filing of an Arbitration/Trial Praecipe, which often requires all parties involved in a case to agree and/or consent and/or certify that the case is ripe to be listed for arbitration/trial, and which generally includes representing to the Court, as well as to the other parties, that all relevant discovery has been completed.

D. There has been a movement within the more populated and docket-intense counties for civil actions to be "trial ready" within approximately 15-18 months of the initial pleading being filed. Prior to COVID-19, a rough rule of thumb was that, in many counties, a case was likely to be scheduled for trial within approximately one and one half (1 ½) to two (2) years after the complaint was filed. Of course, COVID-19 has created backlogs and delays in many counties, so it is difficult to currently determine the amount of time between filing a complaint and when a case is likely to be scheduled for trial until the backlogs are resolved.

E. A sampling of Pennsylvania county specific trial readiness requirements follows:

   a. Adams County: When discovery is substantially complete, a party may, by praecipe request a pre-trial conference, at the conclusion of which the court shall schedule for trial at least 30 days after the conference (unless waived by parties). Adams C.Civ.R. No. 212.

   b. Allegheny County: After the expiration of sixty (60) days from service of the complaint, and after all pleadings are closed, any party may file a praecipe to place the case at issue. Allegheny County Local Rule 214.

   c. Armstrong County: When discovery is substantially complete, a party file a praecipe to place the case on a pre-trial conference list. At the pre-trial conference, the court can set a date certain for trial or place the case on a ready for trial list. Armstrong L.R.C.P. No. 212.1 & 212.3.

   d. Beaver County : For cases filed after January 1, 2019, the court will schedule an initial case management conference. At the conclusion of the case management conference, the court shall issue a case management order, setting forth deadlines and which will place the case on a pre-trial conference list. Beaver County L.R. No. 301.

   e. Bedford County : The parties notify the court when a case is ready to proceed to trial through a

motion which requests the judge to schedule a pre-trial conference and place the case on the civil trial list. Bedford County L.R. No. 212.7.

f. Berks County: The parties notify the court when a case is ready to proceed to trial through filing a certificate of readiness signed by all parties or attorneys, after which a pretrial conference shall be scheduled. B.R.C.P. No. 212.1

g. Blair County: A status conference may be scheduled by the court or at the request of parties. B.C.L.R. No. 300

h. Bucks County: All cases shall be ordered on a general trial list by praecipe which shall contain an express certification by counsel that the case is at issue and ready for trial. Before certifying a case as ready for trial, counsel who intends to certify shall serve a written certification notice upon opposing counsel which shall indicate the intention to certify the case as being ready for trial and to order the same onto the general trial list. Within fifteen days after service of a written certification notice, if appropriate, the adverse attorney or party shall indicate his intention to pursue discovery by sending a written discovery notice which designates the scope and nature of any intended discovery. All discovery shall be completed within sixty days of the transmittal of the discovery notice. Bucks County L.R. No. 261

i. Butler County: Within sixty (60) days following the filing of a praecipe for trial, a pre-trial conference will be scheduled. Trial should be scheduled within ninety (90) days to one hundred twenty (120) days from the filing of the praecipe. Butler County R. L. 212.1(c)(1)

j. Chester County: A matter shall be presumptively deemed ready for trial twelve (12) months from the date of the initiation of the suit. C.C.R.C.P. No 249.3(a). To avoid the initial automatic trial listing and thereafter from any deferred trial listing, a party must file a request for an administrative conference to be held in accordance with Rule 249.1. C.C.R.C.P. No 249.3(b).

k. Cumberland County: Cases are listed for trial by filing a praecipe directing the Prothonotary to list the case for trial. C.C.R.P. No. 214.1

l. Dauphin County: Cases are listed for trial by filing a certificate of readiness. The party certifying the case for trial must attest that all discovery has been completed, serious settlement negotiations have been conducted and that the case is ready in all respects for trial. Dauphin County Local R. No. 215.1

m. Delaware County: The Court Administrator assigns the case to a trial judge who thereafter handles the case, including scheduling the case for trial. Delaware County Local R. No. 241.

n. Erie County: Erie County provides for specific time limitations to be set forth in a case management order which depend upon whether the case is a standard case, or whether it is designated as "complex" or "expedited." Erie L.R. 212.1(b). The parties must certify the case as ready for trial by filing a certification. Erie L.R. 212.1(b).

o. Lackawanna County: After a certificate of readiness is filed, the case is assigned to a judge to conduct a status conference, schedule a pre-trial conference and establish a trial date. Lacka. Co. R.C. P. 212(b). No certificate for readiness may be filed until all discovery has been completed and depositions for use at trial have been scheduled, nor may a certificate for readiness be filed where

dispositive motions are pending. Lacka. Co. R.C. P. 214(b).

p. Lancaster County: Cases are assigned to one of three tracks: expedited, standard or complex, which sets forth certain deadlines for completion of discovery and when the case will be deemed at issue. L.C.R.C.P. No. 212.1.

q. Luzerne County : After a certificate of readiness is filed, the case is assigned to a judge who will schedule a pre-trial conference and establish a trial date. Luz. Co. R.C.P. 212.3(b). No certificate for readiness may be filed until all discovery has been completed, nor may a certificate for readiness be filed where dispositive motions are pending. Luz. Co. R.C.P. 214(b).

r. Montgomery County: Civil actions shall be praeciped for trial by the parties, pursuant to Mont. Co. Local Rule 212.1*(d), within 18 months of the date of filing of said action. Mont. Co. L.R. 200(4). Counsel must file a praecipe containing a certification that all counsel consent to the filing of the trial praecipe, that no motions are outstanding and that all discovery has been completed. Mont. Co. Local Rule 212.1*(d).

s. Philadelphia County: Jury trials are listed for trial by the Judicial Team Leader for the program to which a case is assigned in accordance with the case management order. Protracted and complex cases are listed for dates certain, which is within the discretion of the Program Team Leader. Phila. Civ. R. 215. Philadelphia Judges expect the parties to have the case ready to be placed in a civil jury trial pool between 12-18 months after the initial filing.

t. Schuylkill County: After completion of discovery and settlement efforts, a certificate of readiness shall be filed and served. The failure to object to the certificate of readiness is an assertion that counsel is available to try the case within the next two civil terms. Sch.R.C.P. 212.1

u. Washington County: At least three (3) court conferences will be scheduled, an initial case management conference, after which a case management order shall issue, a status conference at the conclusion of discovery, and a pre-trial conference, among other things, setting the date for trial. Wash.L.R.C.P. 212.1.

v. Westmoreland County: A certificate of readiness must be filed, however the certificate must be served upon opposing counsel at least twenty (20) days prior to filing. A case is ready for trial when the pleadings are closed, witnesses are available to appear at trial, discovery is complete, except for depositions for use at trial. Rule W212.1

w. York County: Cases are placed on a trial list by the Court Administrator pursuant to a judge's scheduling order, or by a party filing a praecipe after a case has been certified by a judge as ready for trial. York R.C.P. 214(b).

F. The Pennsylvania counties not individually listed above include the smaller, less populated, more remote and more rural counties in Pennsylvania, and it is recommended that counsel consult the local rules specific to that county, if available. Those counties include: Cambria, Cameron, Carbon, Centre, Clarion, Clearfield, Clinton, Columbia, Crawford, Elk, Fayette, Forest, Franklin, Fulton, Greene, Huntingdon, Indiana, Jefferson, Juniata, Lawrence, Lebanon, Lehigh, Lycoming, McKean, Mercer, Mifflin, Monroe, Montour, Northampton, Northumberland, Perry, Pike, Potter, Snyder, Somerset, Sullivan, Susquehanna, Tioga, Union, Venango, Warren, Wayne, Wyoming.

Where no local rules exist, Pa.R.Civ.P. 212.1 et seq. requires notice to be provided by the court of the earliest date on which a case may be tried, which may include a date when discovery shall be completed and sets forth dates upon which pre-trial statements shall be filed. Pa.R.Civ.P. 212.1. Of course, the dates set forth in Pa.R.Civ.P. 212.1 may be modified by local rule, and Pa.R.Civ.P. 212.1 does not provide any particular timeframe within a jury trial is to be required to be conducted

## 9. When does pre-judgment interest begin accumulating and at what percent rate of interest.

A. For contract actions, where the damages are liquidated and certain, interest accrues at the contract rate, or, if no interest rate is stated in the contract, at 6% per annum. *Pittsburgh Construction Co. v. Grimm*, 834 A.2d 572 (Pa.Super. 2003); 41 Pa.C.S.A. §202.

   a. Interest begins to accrue from the date monies are wrongfully withheld. *Pittsburgh Const*., *id*.

   b. Post-judgment interest begins to accrue from the date of the verdict. 42 Pa.C.S.A. §8101.

B. In tort actions, the prevailing party may seek delay damages as provided by Pa.R.Civ.P. 238 et seq.

   a. The Third Circuit determined that "the terms 'delay damages' and 'prejudgment interest' are interchangeable under Pennsylvania law," in Travelers Cas. and Sur. Co. v. Insurance Co. of North America, 609 F.3d 143 (3d Cir. 2010).

C. Delay damages accrue at the prime rate, pursuant to Pa.R.Civ.P. 238(a)(3). (The prime rate list on January 3, 2022 and January 4, 2021 was 3.25%). The plaintiff must request delay damages within ten (10) days of the verdict or decision. Pa.R.Civ.P. 238(c).

   a. "Damages for delay shall be awarded for the period of time from a date one year after the date original process was first served in the action up to the date of the award, verdict or decision. " Pa.R.Civ.P. 238(a)(2).

   b. Delay damages can be affected (and potentially reduced) by a written settlement offer and by the exclusion of periods of time when plaintiff caused the delay. Pa.R.Civ.P. 238(b)(1).

      i. The written settlement offer must contain an express clause continuing the offer for the earlier of: at least ninety (90) days or until the start of trial and either:

         1. Be in a specified sum with prompt cash payment, or

         2. Contain a structured settlement plus any cash payment.

      ii. The plaintiff's recovery, exclusive of delay damages, shall not be more than one hundred twenty-five percent (125%) of the written settlement offer.

D. Under the Pennsylvania rule allowing delay damages in tort actions, the delay damages which were awarded were in nature of prejudgment interest, and are awardable even if defendant did nothing to delay trial and was not at fault for the length of time between the filing of the complaint and trial, if trial scheduling was delayed due to crowded court docket, or due to other factors which were not fault of any party. *Sealover v. Carey Canada*, 791 F.Supp. 1059 (M.D.Pa. 1992), *reversed on other grounds* 996 F.2d 42.

Delay damages are in nature of prejudgment interest, and are added to compensatory damages. Tort-feasors who are jointly and severally liable for entire amount of verdict, are jointly and severally liable for all delay damages regardless of jury's apportionment of fault. *Wirth v. Miller*, 580 A.2d 1154 (Pa.Super. 1990), *appeal granted* 592 A.2d 1296, *appeal granted* 592 A.2d 1303, *appeal granted* 592 A.2d 1304, *appeal dismissed as improvidently granted* 632 A.2d 309.

## 10. What evidence at trial are the parties allowed to enter into evidence concerning medical expense related damages.

A. In Pennsylvania, only the amount actually paid by a provider (or amount found by jury to be reasonable) is recoverable in a personal injury action. *Moorhead v. Crozer Chester Medical Center*, 765 A.2d 786 (Pa. 2001). In addition, Pennsylvania statutes relating to evidence of medical bills in actions arising out of the use of a motor vehicle preclude the introduction into evidence or recovery of any amounts paid or payable in private disability benefits for injuries, including Social Security benefits for lost wages. *See* 75 Pa.C.S.A. §§ 1720 and 1722; *Tannenbaum v. Nationwide Insurance Co.*, 992 A.2d 859, 866 (Pa. 2010); *Steel v. William Benjamin Trucking*, No. 687-cv-2017 (C.P. Westmoreland Co. May 14, 2020) (granting trucking company's motion for summary judgment and holding trucking company is entitled by law to an offset from amounts received by plaintiff in Social Security benefits against plaintiff's wage loss claim). Notably, defendants may assert setoff against a plaintiff's wage loss claim of amounts paid and/or payable in private disability benefits for injuries and/or in her Social Security benefits.

B. In regard to the admissibility of future medical expenses into evidence, Pennsylvania courts hold:

> It is well-settled that "[a]n item of damage claimed by a plaintiff can properly be submitted to the jury only where the burden of establishing damages by proper testimony has been met." *Cohen v. Albert Einstein Medical Center,* 405 Pa.Super. 392, 410, 592 A.2d 720, 729 (1991). In the context of a claim for future medical expenses, the movant must prove, by expert testimony, not only that future medical expenses will be incurred, but also the reasonable estimated cost of such services. *Id. See also, Berman v. Philadelphia Board of Education,* 310 Pa.Super. 153, 161–65, 456 A.2d 545, 550–51 (1983). Because the estimated cost of future medical services is not within the layperson's general knowledge, the requirement of such testimony eliminates the prospect that the jury's award will be speculative. *Cohen,* 405 Pa.Super. at 410–11, 592 A.2d at 729.

*Mendralla v. Weaver Corp.*, 703 A.2d 480, 485 (Pa. Super. 1997).

## 11. Does your state recognize a self-critical analysis or similar privilege that shields internal accident investigations from discovery?

A. Pennsylvania is a jurisdiction that has not fully accepted the self-critical analysis ("SCA") privilege, nor has it completely defined the precise scope and applicability of the SCA privilege to shield internal accident investigations from discovery.

B. Under the SCA privilege, information and material can be protected as privileged when the following conditions exist:

   a. The material must have been prepared for mandatory government reports or for a critical self-analysis and undertaken by the party seeking protection;

   b. The privilege extends only to subjective evaluative materials, and does not protect objective data

in reports; and

c. The policy favoring application of the SCA privilege and exclusion must clearly outweigh plaintiff's need for the documents or material.

Melhorn v. New Jersey Transit Rail Operations., Inc., 203 F.R.D. 176, 178-179 (E.D. Pa. 2001) (citing Clark v. Pennsylvania Power & Light Co., Inc., 1999 WL 225888, at *2 (E.D. Pa., April 14, 1999)).

C. In a railroad personal injury case, the Eastern District of Pennsylvania applied the SCA privilege to a portion of a railroad accident report with analysis and recommendations, but not to portions of the reports concerning causes and contributing factors. *Granger v. Nat'l R.R. Passenger Corp.*, 116 F.R.D. 507, 508 (E.D. Pa. 1987). The *Granger* court recognized the public interest in safer operations of railroads, but found that producing portions of accident report which contained analyses and recommendations might hamper the railroad's candid self-evaluation which is directed to prevent future railroad accidents. *Id.*, 116 F.R.D. at 510.

D. The Third Circuit has not recognized the SCA privilege and appears unlikely to do so based upon its disfavor of "judicially-created privileges." *Davis v. Kraft Foods North America*, 2006 WL 3486461 at *1 (E.D. Pa. Dec. 1, 2006). The Third Circuit has indicated its reluctance to accept the existence of the SCA privilege, referring to the doctrine as "the so-called self-critical analysis privilege," in *Armstrong v. Dwyer* 155 F.3d 211, 214 (3d Cir. 1998).

E. However, the Middle District of Pennsylvania seemed to imply that a SCA privilege was cognizable, but held nonetheless held that the at issue guest claim investigation and prevention report which was compiled by the defendant resort's safety office, did not fall within the scope of the privilege in *Paladino v. Woodloch Pines, Inc.*, 188 F.R.D. 224 (M.D. Pa. 1999).

a. The subject report was completed after the plaintiff was injured on the resort's property.

i. The report included an analysis of the accident and steps which could have been taken to prevent it. Id.

ii. The Paladino court concluded that the privilege does not apply to self-studies which are not mandated by a governmental agency. Id., at 225.

b. Paladino also rejected the defendant's argument that permitting discovery would have a chilling effect upon voluntary, honest self-evaluations which are undertaken to prevent future accidents. The Paladino court reasoned that, because companies have an external market incentive to improve safety, and because safety reviews are generally not confidential in nature, no chilling effect would result from disclosure. Id.

F. A Philadelphia County Common Pleas court recognized the SCA privilege in a medical-related employment discrimination case in *Anderson v. Hahnemann Medical College*, 1985 WL 47218 (Phila.C.C.P., 1985).

a. The Anderson court was "hesitant to find a 'privilege' where none is legislatively or generally recognized . . . " Id., at *2.

b. The Anderson court allowed a very limited SCA privilege, but required the production of objective material, including data and statistical information. Id.

G. The Pennsylvania Superior Court applied the SCA privilege in a medical malpractice action to protect from disclosure certain peer review information which was not directly related to the plaintiff's case, and which also was protected by statute, in *Sanderson v Frank S. Bryan, M.D., Ltd.*, 522 A2d 1138, 1140 (Pa. Super. 1987), *app denied,* 538 A2d 877 (Pa. 1988).

H. The Pennsylvania Commonwealth Court commented that the SCA privilege has not been defined by Pennsylvania courts, which also have not fully and universally recognized the SCA privilege, in *Van Hine v. Dep't of State of Commw. of Pennsylvania*, 856 A.2d 204, 212 (Pa. Commw. 2004).

I. To the extent Pennsylvania would recognize the SCA privilege, it would protect "'only subjective analysis designed to have a positive societal effect and does not apply to objective or statistical information.'" *Id.* (*citing Joe v. Prison Health Services, Inc.*, 782 A.2d 24, 34 (Pa. Commw. 2001)

## 12. Does your state allow independent negligence claims against a motor carrier (i.e. negligent hiring, retention, training) if the motor carrier admits that it is vicariously liable for any fault or liability assigned to the driver?

A. In Pennsylvania, when an employer admits that its employee driver was in the course and scope of employment, and is vicariously liable for the conduct of its employee under the doctrine of respondeat superior, dismissal of any independent negligence claims against the employer is appropriate, when no punitive damages are claimed. *See Sullivan v. Crete Carrier Corp.*, No. 8716-cv-2015 (C.P. Monroe Co. Jan. 18, 2019); *see also Pineda v. Chromiak,* 2019 WL 175135, at *3-4 (E.D. Pa. January 10, 2019); *Dempsey v. Bucknell University*, 2012 WL 1569826 (M.D. Pa. May 3, 2012).

B. Pennsylvania courts apply this rule because evidence relating to negligent hiring, supervision, and entrustment serves no purpose other than to prejudice the jury. *See Holben v. Midwest Emery Freight System*, 525 F.Supp. 1224, 1225 (W.D. Pa. 1981); *see also Fortunato v. May*, 2009 WL 703393 (W.D. Pa. March 16, 2009). This rule also applies because evidence relating to the inclusion of the independent negligence claim against the employer could not add any additional liability or damages in the case. *See Allen v. Fletcher*, 2009 WL 154276, *5 (M.D. Pa. June 2, 2009).

## 13. Does your jurisdiction have an independent claim for spoliation? If not, what are the sanctions or repercussions for spoliation?

A. Pennsylvania does not recognize an independent claim for the tort of negligent spoliation. *Pyeritz v. Commonwealth of Pennsylvania, State Police Department of the Commonwealth of Pennsylvania*, 32 A.3d 687, 695, n. 7 (Pa. 2011); *see Boris v. Vurimindi*, 2022 WL 214487, *9 (Pa. Super. January 25, 2022) (memorandum opinion) (holding Pennsylvania does not recognize a separate cause of action in tort for spoliation).

B. Pennsylvania appellate courts have not addressed whether an independent claim for intentional spoliation exists in Pennsylvania. *See Camili v. Wal-Mart Stores, Inc.*, 2019 WL 1432481, *5 (E.D. Pa. March 28, 2018). In *Camili*, the Eastern District Court of Pennsylvania held:

> No Pennsylvania appellate court has reached the question of whether intentional spoliation of evidence may be a cause of action in Pennsylvania. *See Kelly v. St. Mary Hosp.*, 694 A.2d 355, 357 (Pa. Super. Ct. 1997) ("The only appellate court to have considered the issue declined on procedural grounds to decide whether spoliation of evidence constitutes a valid cause of action in Pennsylvania.... We, like the court in *Olson*, find that we do not reach the question of whether

Appellant has presented a new cause of action...." (citing *Olson v. Grutza*, 428 Pa.Super. 378, 631 A.2d 191 (Pa. Super. Ct. 1993).

*See Camili, supra.* (emphasis in original).

C. The Supreme Court of Pennsylvania defines spoliation as "the non-preservation or significant alteration of evidence for pending or future litigation[,]" and has authorized "trial courts to exercise their discretion to impose a range of sanctions against the spoliator." *Pyeritz,* 32 A.3d at 692; *see Schroeder v. Commonwealth Department of Transportation*, 710 A.2d 23, 27 (Pa. 1998). "The duty to retain evidence is established where a party 'knows that litigation is pending or likely' and 'it is foreseeable that discarding the evidence would be prejudicial' to the other party." *Marshall v. Brown's AI, LLC*, 213 A.2d 263, 268 (Pa. Super. 2019), *citing Mt. Olivet Tabernacle Church v. Edwin L. Wiegand Division*, 781 A.2d 1263, 1270-71 (Pa. Super. 2001). The doctrine of spoliation applies "where 'relevant evidence' has been lost or destroyed." *Marshall, supra.* at 268, *citing Mt. Olivet*, *supra.* at 1270.

D. "Where a party destroys or loses proof that is pertinent to a lawsuit, a court may impose a variety of sanctions, among them 'entry of judgment against the offending party, exclusion of evidence, monetary penalties such as fines and attorney fees, and adverse inference instructions to the jury.'" *Marshall*, *supra.* at 268, *citing Hammons v. Ethicon, Inc.*, 190 A.3d 1248, 1281 (Pa. Super. 2018), *quoting Mt. Olivet*, *supra.* at 1272-73. The doctrine of spoliation "attempts to compensate those whose legal rights are impaired by the destruction of evidence by creating an adverse inference against the party responsible for the destruction." *Marshall*, *supra.* at 268, *citing Duquesne Light v. Woodland Hills School District*, 700 A.2d 1038, 1050 (Pa. Cmwlth. 1997). "When pursuing a cause of action for a manufacturing defect, the preservation of the product is even more crucial than when pursuing an action on the basis of a design defect." *Tenaglia v. Proctor & Gamble, Inc.*, 737 A.2d 306, 309 (Pa. Super. 1999), *citing Sebelin v. Yamaha Motor Corp.*, 705 A.2d 904, 909 (Pa. Super. 1998).

E. Pennsylvania courts address the following standards to be applied regarding sanctions and penalties for spoliation of evidence: (1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party and, where the offending party is seriously at fault, will serve to deter such conduct by others in the future. *See Marshall*, *supra*. at 268, *citing Parr v. Ford Motor Co.*, 109 A.3d 682, 701, 702 (Pa. Super. 2014); *see also Tenaglia*, *supra*. at 308, *citing Schroeder v. Commonwealth Department of Transportation*, 710 A.2d 23, 27 (Pa. 1998), *citing Schmid v. Milwaukee Electric Tool Corp.*, 13 F.3d 76 (3d Cir.1994).