

DELAWARE

1. What are the legal considerations in your State governing the admissibility or preventability in utilizing the self-critical analysis privilege and how successful have those efforts been?

The self-critical analysis privilege has not been recognized by Delaware courts. *Wealton v. Werner Enter., Inc.*, 2000 WL 33115690 at *3 (Del. Super. 2000); *Grimes v. DSC Commc'ns Corp.*, 724 A.2d 561, 570-71 (Del. Ch. 1998). While this privilege has not been recognized, Delaware courts have, in the hypothetical, used a four factor test by looking at whether "(i) the information in question results from a self-critical analysis; (ii) the information was intended to be and has been kept confidential; (iii) the public has a strong interest in preserving the free flow of the type of information sought; and (iv) the free flow of that information would be curtailed if the information were discoverable." *Grimes*, 724 A.2d at 570. In doing so, Delaware courts have stated that in certain instances that, even if this privilege did apply under Delaware law, it would not apply to the factual circumstances that were before the court. *See id.* at 571.

2. Does your State permit discovery of 3rd Party Litigation Funding files and, if so, what are the rules and regulations governing 3rd Party Litigation Funding?

Under Delaware law, documents regarding third party funding are analyzed under Delaware's work product doctrine. *Carlyle Inv. Mgmt. L.L.C. v. Moonmouth Co. S.A.*, 2015 WL 778846 at *9 (Del. Ch. 2015). Under this analysis, third party funding has generally been held to be covered by Delaware's work product doctrine because they were prepared in anticipation of litigation and serve a litigation purpose. *Id.*; *Charge Injection Techs., Inc. v. E.I. DuPont De Nemours & Co.*, 2015 WL 1540520 at *5 (Del. Super. 2015).

3. Who travels in your State with respect to a Rule 30(b)(6) witness deposition; the witness or the attorney and why?

Under Delaware law, the general rule is that a plaintiff should be deposed at the place where the suit was filed. *See Conoco, Inc. v. E.I. DuPont De Nemours & Co.*, 2001 WL 845701 at *1 (Del. Super. 2001); *Barrett Estate*, 1994 WL 274004 at *1-2 (Del. Ch. 1994). For defendants, absent a voluntary agreement otherwise, the deposition is generally taken at the defendant's residence or place of employment. *Schreiber v. Carney*, 1982 WL 8773 at *403-04 (Del. Ch. 1982). However, ultimately, the location of the deposition is in the discretion of the court. Del. Ch. Ct. R. 26(c); Del. Super Ct. Civ. R. 26(c); *Lasher v. Sterwin Labs.*, 1980 WL 10017 at *1 (Del. Ch. 1980).

4. What are the benefits or detriments in your State by admitting a driver was in the "course and scope" of employment for direct negligence claims?

Admitting that an employer is vicariously liable for a driver's actions does not provide any benefit in regards to direct negligence claims. *See Smith v. Williams*,

2007 WL 2677131 at *6-7 (Del. Super. 2007) (holding that a direct negligence claim could proceed despite the fact that the defendant had admitted to vicarious liability). To the extent that this would allow for the plaintiff to introduce unduly prejudicial evidence against the defendant, the court can issue a limiting instruction or sever the trial. *Id.* at *7.

5. Please describe any noteworthy nuclear verdicts in your State?

There was one “nuclear” verdict in a 1990 case called *Ellenberger v. Nanticoke Home, Inc.* In that case, a 41 year old male assembly line worker suffered spinal cord ischemia, a ruptured aorta, partial paralysis from the waist down, numerous infections and underwent nine surgeries after being struck by the defendant’s truck. The plaintiff was unable to walk or sit comfortably, suffered from loss of sexual function, and suffered from depression. The jury awarded \$6.8 million in damages and \$1.9 million for loss of services for a total of \$8.7 million.

6. What are the current legal considerations in terms of obtaining discovery of the amounts actually billed or paid?

No Delaware cases have squarely addressed this issue. Delaware rules allow for the discovery of any non-privileged information that is relevant to a party’s claim or defense and is proportional to the needs of the case. Del. Ch. Ct. R. 26(b)(1); Del. Super Ct. Civ. R. 26(b)(1). Delaware follows the collateral source rule, which provides that a plaintiff can recover the cost of his injury even if those costs have been covered by a third party such as insurance. *Onusko v. Kerr*, 880 A.2d 1022, 1024 (Del. 2005); *Mitchell v. Haldar*, 883 A.2d 32, 37-39 (Del. 2005). However, the collateral source rule does not apply to Medicare and Medicaid write-offs, where plaintiff may only “board” at trial the actual amounts paid by Medicare or Medicaid providers. *Stayton v. Del. Health Corp.*, 117 A.3d 521, 531 (Del. 2015)(Medicare); *Smith v. Mahoney*, 150 A.3d 1200, 1207 (Del. 2016)(Medicaid).

7. How successful have efforts been to obtain the amounts actually charged and accepted by a healthcare provider for certain procedures outside of a personal injury? (e.g. insurance contracts with major providers)

There has not been much litigation regarding in this area and no Delaware cases have squarely addressed this issue.

8. What legal considerations does your State have in determining which jurisdiction applies when an employee is injured in your State?

In determining what jurisdiction’s laws apply in a choice of laws analysis, Delaware uses the test set forth in the Restatement (2nd) of Conflicts. *Travelers Indem. Co. v. Lake*, 594 A.2d 38, 47 (Del. 1991). The relevant considerations under this test are: “(a) needs of interstate and international systems; (b) relevant policies of the forum; (c) relevant policies of other interested states and the relative interests of those states in the determination of the particular issue; (d) protection of justified expectations; e) basic policies underlying the particular field of law; (f) certainty, predictability, and uniformity of result; and (g) ease in the determination and application of the law to be applied.” *Id.* Section 145 of the Restatement lists the following relevant contacts a court should consider this test: “(a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicile, residence, nationality, place of incorporation, and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered.” *Id.*

Delaware has a workers compensation exclusivity provision. 19 *Del.C.* § 2304. This provision requires employees “to accept compensation for personal injury caused by accident arising out of and in the course of employment, regardless of the question of negligence and to the exclusion of all other rights and remedies.”

Histed v. E.I. Du Pont de Nemours & Co., 621 A.2d 340, 342 (Del. 1993); accord *Kofron v. Amoco Chem. Corp.*, 441 A.2d 226, 231 (Del. 1982). However, an employer can be liable under a third party contractual indemnification claim even though the employer has already paid workmen's compensation benefits to an injured worker. *Precision Air, Inc. v. Standard Chlorine of Del., Inc.*, 654 A.2d 403, 407 (Del. 1995) (citations omitted).

9. What is your State's current position and standard in regards to taking pre-suit depositions?

Delaware courts do not allow the taking of depositions before the commencement of an action. Del. Ch. Ct. R. 30(a); Del. Ch. Ct. R. 31(a); Del. Super Ct. Civ. R. 30(a); Del. Super. Ct. Civ. R. 31(a); *Buchanan v. Gay*, 2008 WL 902936 at *2 (Del. Super. 2008).

10. Does your State have any legal considerations regarding how long a vehicle/tractor-trailer must be held prior to release?

A party has an obligation to preserve evidence when it is in litigation or has a reason to anticipate litigation. *Beard Research, Inc. v. Kates*, 981 A.2d 1175, 1185 (Del. Ch. 2009). As such, a party under a duty to preserve evidence may be subject to a spoliation claim if it destroys evidence, which may result in an adverse inference instruction.

11. What is your state's current standard to prove punitive or exemplary damages and is there any cap on same?

Punitive damages are only imposed when the defendant's actions are particularly reprehensible such as being reckless or motivated by malice of fraud. *Jardel Co., Inc. v. Hughes*, 523 A.2d 518, 529 (Del. 1987). Mere inadvertence and mistakes of judgment that constitute negligence do not suffice for an award of punitive damages. *Id.*

An award of punitive damages may not be disproportionate in amount to the award for compensatory damages. *Reynolds v. Willis*, 209 A.2d 760, 764 (Del. 1965). Additionally, punitive damages should not shock the judicial conscience or be manifestly unjust. See *Riegel v. Aastad*, 272 A.2d 715, 718 (Del. 1970).

12. Has your state mandated Zoom trials? If so, what have the results been and have there been any appeals.

Delaware has declared and, on multiple occasions, has extended a Judicial State of Emergency, which is ongoing through at least March 5, 2021, and may be subject to further extensions. This emergency authorizes courts, to the greatest extent possible, to remotely conduct proceedings, except for jury trials. The Superior Court has ordered remote bench trials via web-based video proceedings.

13. Has your state had any noteworthy verdicts premised on punitive damages? If so, what kind of evidence has been used to establish the need for punitive damages? Finally, are any such verdicts currently up on appeal?

There have not been any noteworthy verdicts based on punitive damages in Delaware in Transportation cases.