FOR MORE INFORMATION

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DISTRICT OF COLUMBIA

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?

Although the District of Columbia has never truly addressed the self-critical analysis privilege, it has recognized that Federal Courts apply the privilege in certain circumstances. *See Plough Inc. v. Nat'l Acad. of Scis.*, 530 A.2d 1152, 1158 (D.C. 1987). In applicable circumstances, District of Columbia Courts are likely to look to local Federal Courts for guidance. In this regard, the District of Columbia Circuit has recognized a limited "self-evaluative privilege [] designed to protect the opinions and recommendations of corporate employees engaged in the process of critical self-evaluation of the company's policies for the purpose of improving health and safety." *Felder v. Washington Metro. Area Transit Auth.*, 153 F. Supp. 3d 221, 224–25 (D.D.C. 2015). The privilege, however, is very rarely invoked successfully. *English v. Washington Metro. Area Transit Auth.*, 323 F.R.D. 1, 10 (D.D.C. 2017). The applicability of the privilege is confined exclusively to cases "implicating public health or safety." *Id.* Further, the self-criticism must be contained in a document "created for the purpose of retrospective self-criticism to improve health and safety." *Id.* Some courts have gone so far as to suggest that the criticism must be contained in "critique[s] submitted as part of a mandatory government report." *Id.* (quoting *Wainwright v. Wash. Metro. Area Transit Auth.*, 163 F.R.D. 391, 396 (D.D.C. 1995)). Finally, the privilege "applies only to the conclusions, subjective judgments, or mental impressions reached during the evaluative process, and 'does not protect purely factual material appearing alongside self-critical analysis.'" *Id.* (quoting *Felder*, 153 F. Supp. 3d at 225).

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?

Third Party Litigation Funding, also known as "alternative litigation funding" or "ALF," is an unexplored area of District of Columbia law, but merits close attention. In a recent attorney discipline action, the District of Columbia Board of Professional Responsibility considered whether an attorney's use of ALF constituted a violation of Rule 1.15 of the District of Columbia Rules of Professional Conduct. *In re Dailey*, 230 A.3d 902, 906 n.1 (D.C. 2020). The Board ultimately did not find a violation "because the substantive law relating to alternative litigation financing arrangements was undeveloped and the application of ethical rules to those circumstances raises 'weighty policy questions.'" *Id.* As such, this is a developing area of law that has not yet addressed the discoverability of such arrangements. Further, use of ALF in the District of Columbia may yet raise issues related to the requirements of the Rules of Professional Responsibility. *See id.*

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

The District of Columbia has adopted a substantially identical version of Federal Rule of Civil Procedure 30. *See* D.C. R. Civ. Pro. 30. There are very few cases interpreting this specific Rule, but the District of Columbia interprets its Rules *in pari materia* with the Federal Rules. *In re Ak. V.*, 747 A.2d 570, 574 n. 10 (D.C. 2000). Under applicable Federal precedent, "[i]n considering where the deposition of a corporate agent is to take place, there is a general presumption that the deposition will occur at the corporation's principal place of business." *Rundquist v. Vapiano SE*, 277 F.R.D. 205, 212 (D.D.C. 2011). Thus, the presumption is that the attorney will travel for a Rule 30(b)(6) deposition. The presumption is nevertheless rebuttable, and the Court may analyze several factors in determining whether the deposition should take place at some other location. *Id.* "These factors include: 'location of counsel for both parties; size of defendant corporation and regularity of executive travel; resolution of discovery disputes by the forum court; and the nature of the claim and the relationship of the parties.'" *Id.* (quoting *Nat'l Cmty. Reinvestment Coalition*, 604 F. Supp. 2d 26, 31 (D.D.C. 2009)).

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?

Scope of employment remains a viable defense to a *respondeat superior* claim. *See, e.g., Blair v. D.C.*, 190 A.3d 212, 225 (D.C. 2018). In addition, this issue can raise insurance coverage concerns. For these reasons, this defense certainly should not be waived if warranted by the circumstances. Assuming, however, that there is no genuine dispute that the employee was acting within the scope of employment, there may actually be a strong benefit to such an admission. The District of Columbia often looks to cases from Maryland as persuasive authority. Maryland Courts have held that, where scope of employment is admitted, negligent hiring, retention, and supervision claims are no longer viable. *See Houlihan v. McCall*, 197 Md. 130 (1951); *Nesbit v. Cumberland Contracting Co.*, 196 Md. 36 (1950); *Nelson v. Seiler*, 154 Md. 63 (1927). Consequently, if scope of employment is admitted, there is a strong argument that any evidence of any adverse employment history is no longer relevant or admissible. This can be an effective tactic to avoid the admissibility of potentially prejudicial evidence. It is possible that the District of Columbia could adopt Maryland's reasoning in this regard.

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

There do not appear to be any recent large trucking verdicts in the District of Columbia. However, it should be noted that jury trials have not been conducted in Maryland for the majority of the past year due to the Covid-19 pandemic.

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

No statute or rule expressly prohibits the discovery of amounts actually charged and accepted by healthcare providers. There is also no rule prohibiting the admission of evidence of the amounts actually billed. Evidence of any payments, however, would not be admissible under the District of Columbia's collateral source rule, which permits an injured party to recover full compensatory damages from a tortfeasor regardless of the payment of any amount of those damages by an independent party, such as an insurance carrier. *Bushong v. Park*, 837 A.2d 49, 57 (D.C. 2003).

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)

No District of Columbia Court has yet addressed the discoverability of such information, but there is no statute or rule that expressly prohibits the discovery of such information

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

is injured in your State?

There is only one jurisdiction in the District of Columbia, so any concern in this regard is directed solely towards whether an employee is entitled to workers' compensation or to bring a civil lawsuit. The District of Columbia maintains a no-fault workers' compensation scheme that is designed to compensate employees for any injury they suffer while on the job. *See* D.C. Code §§ 32-1501–1545. *Accord Kelly v. D.C. Dep't of Employment Servs.*, 214 A.3d 996, 1001 (D.C. 2019). If an employee is injured while acting within the scope of their employment, they are entitled to workers' compensation and may not maintain a civil lawsuit against their employer. *See USA Waste of Maryland, Inc. v. Love*, 954 A.2d 1027, 1031 (D.C. 2008). The District of Columbia's worker's compensation scheme also bars any claims against fellow employees related to workplace injuries. *McGregor v. Grimes*, 884 A.2d 605, 608 (D.C. 2005). The statutory scheme does not, however, bar claims against at-fault third parties. *See Travelers Ins. Co. v. Haden*, 418 A.2d 1078, 1081 (D.C. 1980).

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

The District of Columbia has adopted a substantially identical version of Federal Rule of Civil Procedure 27. *See* D.C. R. Civ. Pro. 27. There are very few cases interpreting this specific Rule, but the District of Columbia interprets its Rules *in pari materia* with the Federal Rules. *In re Ak. V.*, 747 A.2d 570, 574 n. 10 (D.C. 2000). Thus, similar to in Federal Court, litigants in the District of Columbia may file a verified petition seeking to depose an individual with knowledge "about any matter cognizable in" the Superior Court for purposes of perpetuating that testimony. *See* D.C. R. Civ. Pro. 27(a)(1). The Rule governs the requirements of the verified petition. *See id.* The Court may order the deposition to be taken orally or by written interrogatories. D.C. R. Civ. Pro. 27(a)(3). The testimony generated by any such deposition may be used "in any later-filed action in [the District of Columbia] involving the same subject matter." D.C. R. Civ. Pro. 27(a)(4).

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

There are no specific rules governing the period of time for which a vehicle or tractor-trailer must be held prior to release. However, the typical District of Columbia rule regarding the spoliation of evidence would still apply. Where a trial court finds that a party lost or destroyed potential evidence within its exclusive control with "gross indifference to or reckless disregard for the relevance of the evidence to a possible claim," the court "must submit the issue of lost evidence to the trier of fact with corresponding instructions allowing an adverse inference." *Williams v. Wash. Hosp. Ctr.*, 601 A.2d 28, 31 (D.C. 1991) (quoting *Battocchi v. Wash. Hosp. Ctr.*, 581 A.2d 759, 767 (D.C. 1990)). However, "[w]here the negligence is not intentional or reckless, the court is accorded discretion in determining whether to give an adverse inference instruction and we will not disturb its decision absent an abuse of that discretion." *Williams*, 601 A.2d at 31. In determining whether the failure to give an instruction was error, the District of Columbia looks to the degree of prejudice, if any, to a party's ability to mount its case. *Id*. at 34.

Negligent or reckless spoliation of evidence is also an independent and actionable tort in the District of Columbia. Under District of Columbia law, a plaintiff may recover against a defendant who has negligently or recklessly destroyed or allowed to be destroyed evidence that would have assisted the plaintiff in pursuing a claim against a third party. To prevail under an independent action for negligent or reckless spoliation of evidence, a plaintiff must show: (1) the existence of a potential civil action; (2) a legal or contractual duty to preserve evidence which is relevant to that action; (3) destruction of that evidence by the duty-bound defendant; (4) a 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. *Id.* at 854. Thus, spoliation of evidence can give rise to additional liability under this theory.

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

"Punitive damages may be awarded 'only if it is shown by clear and convincing evidence that the tort committed by the defendant was aggravated by egregious conduct and a state of mind that justifies punitive damages.'" *Oliver v. Mustafa*, 929 A.2d 873, 878 (D.C. 2007) (quoting *Chatman v. Lawlor*, 831 A.2d 395, 400 (D.C.2003)). "[I]n order to sustain an award of punitive damages, the plaintiff must prove, by a preponderance of the evidence, that the defendant committed a tortious act, and by clear and convincing evidence that the act was accompanied by conduct and a state of mind evincing malice or its equivalent." *Jonathan Woodner Co. v. Breeden*, 665 A.2d 929, 938 (D.C. 1995). Punitive damages are also expressly authorized by statutes in several circumstances, such as under the Consumer Protection Procedures Act (D.C. Code, § 28-3901 *et seq.*). The District of Columbia does not have any caps on non-economic of punitive damages. Punitive damages are, however, subject to *de novo* review to determine if they are excessive. *Howard Univ. v. Wilkins*, 22 A.3d 774, 781-82 (D.C. 2011).

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

The District of Columbia has not mandated Zoom trials.

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 do not appear to be any recent large verdicts premised on punitive damages in the District of Columbia. However, it should be noted that jury trials have not been conducted in the District of Columbia for the majority of the past year due to the Covid-19 pandemic.