FOR MORE INFORMATION

HAWKINS PARNELL & YOUNG, LLP
Atlanta, Georgia
www.hpylaw.com

William H. Major, III
wmajor@hpylaw.com

Warner S. Fox
wfox@hpylaw.com

David H. Wilson
dwilson@hpylaw.com

Garret J. Drogosch
gdrogosch@hpylaw.com

HUNTER MACLEAN
Savannah, Georgia
www.huntermaclean.com

Christopher H. Smith
csmith@huntermaclean.com

Taylor L. Dove
tdove@huntermaclean.com

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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?

In general, the guidelines to determine whether the self-critical analysis privilege applies are that the document must (1) result from a critical self-analysis performed by the party seeking protection, (2) the public must have a strong interest in preserving the free flow of information sought, (3) the information must be the type whose creation would be curtailed if discovery were allowed, and (4) the information must have been created with the expectation that it would be and remain confidential. *Joiner v. Hercules, Inc.*, 169 F.R.D. 695 (S.D. Ga. 1996).

Georgia has taken a restrictive approach when it comes to the self-critical analysis privilege and applies the privilege in limited contexts. For example, under Georgia law, the medical peer-review privilege bars introducing into civil litigation any proceeding or recommendation of a medical review committee reviewing the matters that are a subject of the litigation. O.G.C.A. § 31-7-143; *Emory Clinic v. Houston*, 258 Ga. 434, 435 (1988). Georgia law also narrowly applies a peer review privilege to *medical review organizations*. O.C.G.A. § 31-7-133; *Houston*, 258 Ga. at 435, n.1 (definition of a review organization only includes those working in the healthcare industry).

The narrow approach taken by the Georgia legislature, and the absence of Georgia courts having recognized a self-critical analysis privilege outside of medical malpractice cases, has led many courts to conclude that Georgia does not recognize such a privilege in personal injury cases. *See* e.g. *Ventor v. Interstate Res., Inc.*, 2015 U.S. Dist. LEXIS 146891, at *8 (S.D. Ga. Oct. 29, 2015) (compelling the production of a "supervisor's report" and emails between the defendant and an OSHA investigator regarding the death of a truck driver who was pinned between a fork lift and his truck's trailer); *Lara v. Tri-State Drilling*, 504 F. Supp. 2d 1323, 1328 – 1329 (N.D. Ga. 2007) (compelling a blasting company to produce a "written warning notice" that was issued to its employee). Thus, under Georgia law, internal investigations and reports produced by a transportation/trucking company would likely *not* be protected from discovery by the self-critical analysis privilege.

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?

Georgia courts will permit the discovery of third-party litigation funding documents if a defendant can show that the files will lead to the discovery of relevant facts. For example, evidence of the existence of a medical funding company, the medical funding company's correspondence with plaintiffs and the plaintiffs' medical providers, and the medical funding company's loans and payments may be discoverable.

In *Rangel v. Anderson*, the court considered whether evidence of the existence of a

medical lien funding company was admissible at trial. 202 F. Supp. 3d 1361, 1372 (S.D. Ga. Aug. 23, 2016). The court noted that the medical funding company, unlike a traditional collateral source, "essentially fronted Plaintiff the money for her treatment, and then [the medical funding company] intend[ed] to recover that money from Plaintiff after the lawsuit." *Id.* at 1373. Moreover, the court held that the medical funding company's involvement in the plaintiff's treatment and relationship to the plaintiff's treating physicians is "highly relevant to the issue of Plaintiff's treating physicians' credibility and potential bias." *Id.* at 1373. Thus, the evidence was discoverable and admissible at trial. *Id.*

However, the Georgia Court of Appeals recently denied a defendant's request for documents evidencing the relationship between a third-party funding company, a plaintiff and that plaintiff's medical providers. In *Joiner-Carosi v. Adekoya*, the court upheld the quashing of defendant's subpoena for documents to a third-party funding company. 357 Ga. App. 388 (2020). The court explained that the defendant failed to explore the relationship between the third-party medical funding company and plaintiff's treating physicians before the eve of trial. *Id.* at 392. The court did note that "although *potential bias is an issue to be explored with testifying physicians*, these issues were waived because [plaintiff] was not calling any of his physicians to testify." *Id.* (emphasis added). Thus, the *Adekoya* court did not hold that records evidencing the relationship between a medical funding company and plaintiff's treating physician were always inadmissible, but rather held in that case – where the plaintiff's treating physicians did not testify – the issue of bias had been waived.

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

Unlike deposition taken pursuant O.C.G.A. § 9-11-45, depositions taken pursuant to O.C.G.A. § 9-11-30(b)(6) are not required to be taken in a specific location based on where the witness resides. "The geographical limitations of O.C.G.A. § 9-11-45(b) are not applicable where a notice of deposition has issued under O.C.G.A. § 9-11-30 to a party in the lawsuit." *Pascal v. Prescod*, 296 Ga. App. 359, 361 (2009). Georgia's Civil Practice likewise does not require that a 30(b)(6) deposition be taken within a certain area or geographic location.

Instead, the party desiring to take the deposition must give "reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition, the means by which the testimony shall be recorded, and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person to be examined or the particular class or group to which he or she belongs." O.C.G.A. 9-11-30(b)(1).

Nevertheless, typically when a deposition of the defendant is taken pursuant to O.C.G.A. § 9-11-30(b)(6), the attorney for the plaintiff travels to the witness location as it was the defendant who was sued in the lawsuit and, unlike the plaintiff, did not voluntarily avail itself of the jurisdiction and venue of the court where the action is pending.

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?**

Until recently in Georgia, when an employer admitted that a driver was acting in the course and scope of his/her employment and that it was vicariously liable under the doctrine of respondeat superior if its employee is found negligent, the employer was entitled to summary judgment on the plaintiff's claims for negligent entrustment, hiring, training, supervision, and retention, unless the plaintiff has also brought a valid claim for punitive damages against the employer for its own independent negligence. A plaintiff could shoulder this burden of proof only by showing that an employer had actual knowledge of numerous and serious violations on its driver's record, or, at the very least, when the employer has flouted a legal duty to check a record showing such violations." *Western Indus., Inc. v. Poole*, 280 Ga. App. 378, 380 (2006); *see also*

Hosp. Auth. v. Fender, 342 Ga. App. 13, 21 (2017).

The rationale for the so called "Respondeat Superior Rule" - a decisional rule of law that had been in effect since 1967 - was that "the employer would [already] be liable for the employee's negligence under respondeat superior, [and] allowing claims for negligent entrustment, hiring, and retention would not entitle the plaintiff to a greater recovery, but would merely serve to prejudice the employer." *MasTec N. Am., Inc. v. Wilson*, 325 Ga. App. 863, 865 (2014).

However, the Georgia Supreme Court recently held that Georgia's Apportionment Statute O.C.G.A. § 51-12-33 (2005), abrogated the "Respondeat Superior Rule." *Quynn v. Hulsey*, 850 S.E.2d 725, 727 (2020). The Court reasoned that the language of the apportionment statute requires a jury to apportion fault between the multiple parties and that a plaintiff's claims for negligent entrustment, hiring, training, supervision and retention are controlled by apportionment and survive summary judgment for an apportionment of liability by the jury even where the employer admits the employee was in the course and scope of her employment.

The Court explained that the claims encompassed by the "Respondeat Superior Rule" are claims that the "employer is at 'fault' within the meaning of the apportionment statute" and is inconsistent with the plain language of that statute. *Id.* at 729. Thus, the Court concluded that a claim that an employer was negligent is divisible from a claim that an employee was negligent, and that each party is capable of being assigned percentages of fault. *Id.* at 730.

Thus, the benefits of admitting that a driver was acting within the course and scope of his employment have significantly decreased in Georgia because of the decision in *Quynn* which increases the exposure of employers to claims of negligent hiring/retention claims, increases the likelihood that prior conduct of a driver is admitted into evidence, and which may tip the scale in favor of plaintiffs in contested liability/contributory negligence cases which may otherwise have resulted in "50/50" verdicts (which under Georgia comparative fault law would result in a defense verdict).

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

In August 2019, a jury in Muscogee County, Georgia awarded $280 million in a trucking accident that resulted in the death of five family members, including two young children. *Madere v. Schnitzer Steel Industries Inc.* (State Court of Muscogee County, Ga., case no. SC17CV107). In that case, the truck driver crossed the centerline of a two-lane highway, and collided head-on with a passenger vehicle. Separate lawsuits were filed for each of the five deaths, and three of the suits were settled prior to trial. The *Madere* trial was for the wrongful death of Judy Madere, the children's grandmother.

At trial, evidence was presented that the driver was fatigued, having slept just 5 hours the night before, causing him to cross the center lane of the highway and crashed into the vehicle in which Madere was a passenger. Plaintiff's counsel emphasized the company's responsibility to abide by safety rules and refrain from putting unsafe drivers on the roadway. The jury deliberated for only 45 minutes before returning the $280 million verdict – $150 million for the life of Madere, $30 million for her pain and suffering, $100 million in punitive damages, and $65,00 in attorneys fees. The case was subsequently settled.

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

In Georgia, "[t]he collateral source rule bars the defendant from presenting any evidence as to payments of expenses of a tortious injury paid for by a third party and taking any credit toward the defendant's liability and damages for such payments. This is because a tortfeasor is not allowed to benefit by its wrongful conduct or to mitigate its liability by collateral sources provided by others. The collateral source rule applies to payments made by various sources, including insurance companies, beneficent bosses, or helpful relatives."

Hoeflick v. Bradley, 282 Ga. App. 123, 124 (2006). Moreover, in Georgia a plaintiff is entitled to claim, and blackboard at trial, the full amount of reasonable medical expenses, notwithstanding the portions of the expenses which have been written off as a result of contractual rate reduction or those required by statute. *Olariu v. Marrero*, 248 Ga. App. 824 (2001); *Candler v. Dent*, 228 Ga. App. 421 (1997).

Nevertheless, a defendant may be able to obtain information and documents detailing the amounts actually paid in discovery because, in the discovery context, courts interpret the term 'relevant' broadly to mean any matter that is or may become an issue in litigation. *See Speedy Care Transport, Inc. v. George*, 348 Ga. App. 325 (2018). For example, in *Bowden v. Medical Ctr., Inc.*, a defendant sought to invalidate a medical lien on the grounds that the billed charges were grossly excessive and did not reflect the reasonable value of the care she received. 297 Ga. 285 (2015). The Court held that "where the subject matter of a lawsuit includes the validity and amount of a hospital lien for reasonable charges for a patient's care, how much the hospital charged other patients insured or uninsured, for the same type of care during the same time period is relevant for discovery purposes." *Id.* at 286.

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)

In *Showan v. Pressdee*, 922 F.3d 1211, 1218 (11th Cir. 2019), plaintiff's doctor charged $ 173,213 for a surgery and charged a facility fee of $80,768. Defendants believed those charges were excessive and sought to prove it through the testimony of medical billing experts. Plaintiff argued to exclude the testimony, but the district court admitted it. The Court found that the testimony was not offered to show what plaintiff would have received from an insurer, but instead was offered to show whether the medical bills were reasonable. The district court explained that "there is a difference between presenting evidence of discounted rates a plaintiff could receive on …medical costs based on the plaintiff's specific access to certain advantages, and evidence of market rates as a whole." The district court also acknowledged that, if the testimony had been offered to show what plaintiff would have received from an insurer, it would have been improper under the collateral source rule. The appellate court affirmed this relevant portion of the opinion.

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

Georgia jurisdiction for the purposes of the State Board of Worker's Compensation exists if the injury or disease occurred within the territorial limits of the State of Georgia. The State Board also has jurisdiction with regard to a timely claim for an injury or disease which occurred outside the territorial limits of Georgia, if at least one of the following circumstances exists: (a) the three prerequisites for jurisdiction of O.C.G.A. §34-9-242 are met; (b) the contract provisions of O.C.G.A. § 34-9-7 apply; or (c) the principal locality of the employment is in Georgia.

Under §34-9-242, if an accident occurs while the employee is employed elsewhere than in this state, which accident would entitle him or his dependents to compensation if it had occurred in this state, the employee or his dependents shall be entitled to compensation if the contract of employment was made in this state and if the employer's place of business or the residence of the employee is in this state unless the contract of employment was expressly for service exclusively outside of this state. If an employee receives compensation under another state's laws, Georgia will not permit a total compensation for the same injury greater than is provided for under Georgia law.

Where one or more states, in addition to Georgia, have jurisdiction with regard to a workers' compensation claim, choice of law issues may arise.

In cases involving accidents with commercial trucks, the driver is often a citizen of another state. If the

accident occurs in Georgia, the truck driver impliedly consented to the jurisdiction of Georgia courts by driving on its roads. *See* O.C.G.A. 40-12-1 (Georgia's Nonresident Motorist Statute). Therefore, if the accident occurred on the road in Georgia, Georgia courts can hear the case between the truck driver and the other driver.

Of course, trucking businesses may be headquartered or incorporated outside of Georgia. If the accident is outside the state of Georgia, the court must consider other factors to determine whether they have jurisdiction over a non-resident trucking business or driver. Because commercial truck drivers are often driving through several states, the court will look at the business's presence in Georgia to determine whether it has jurisdiction over them. *See* O.C.G.A § 9-10-91 (Georgia's Long Arm Statute).

The court must find enough of a connection between the trucking business and the state of Georgia to have jurisdiction over them. Courts have found this connection when the trucking business has its headquarters or principle place of business in Georgia. Courts have also found this connection where the trucking business has "minimum contacts" with Georgia, such as having a branch or branches within the state or even if the business advertises here.

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

Georgia law provides for pre-lawsuit depositions in limited circumstances. The Georgia Civil Practice Act sets forth an equitable proceeding to perpetuate a person's own or another person's testimony prior to the filing of a lawsuit by petition to the Superior Court. O.C.G.A.§ 9-11-27. This procedure is rarely used and is limited to circumstances where testimony might be lost to a potential litigant unless immediate steps are taken to preserve the testimony.

However, the petition may only be used to preserve and perpetuate *known* testimony. It cannot be "be used for the purpose of ascertaining facts to be used in drafting a complaint". *Worley v. Worley*, 161 Ga. App. 44 (1982). This is far narrower than the scope of information that may be sought in depositions in the normal course of discovery where a party may seek discovery regarding *any matter*, not privileged, which is relevant to the issues of the case. Given its narrow scope, this pre-lawsuit procedure is most often used when a person essential to a case is seriously ill or injured, or dying, before the suit is filed.

The verified petition seeking to perpetuate testimony must show:

I. That the petitioner expects to be a party to litigation but is presently unable to bring it or cause it to be brought;

II. the subject matter of the expected action and petitioner's interest therein, the facts which the petitioner desires to establish and reasons for desiring to perpetuate the testimony;

III. the names or a description of the persons the petitioner expects will be adverse parties and their addresses;

IV. the names and addresses of the persons to be examined and the substance of the testimony which the petitioner expects to elicit; and

V. a request for an order authorizing the petitioner to take the depositions.

If the order is granted, the depositions may then be taken in accordance with the Civil Practice Act and may be used in any action involving the same parties and subject matter subsequently brought.

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

Georgia has not established a bright line rule for how long a vehicle/tractor-trailer must be held following a motor vehicle accident. However, the owner of a vehicle/tractor should always take into consideration Georgia's spoliation of evidence law before release.

The seminal case in Georgia on spoliation of evidence is *Phillips v. Harmon*, 297 Ga. 386 (2015). In *Phillips*, the Supreme Court of Georgia defined "spoliation" as "the destruction or failure to preserve evidence that is relevant to contemplated or pending litigation." 297 Ga. at 393-394. Accordingly, the failure to adequately preserve evidence may trigger sanctions for spoliation of evidence, including the establishment of a rebuttable presumption that the evidence at issue would have been harmful to the spoliator. *Lane v. Montgomery Elevator Co.*, 225 Ga. App. 523, 525 (1997).

Under Georgia law, a duty to preserve evidence is triggered not only when litigation is pending, but when it is reasonably foreseeable to the party with control of the evidence. *Phillips*, 297 Ga. at 396. In regard to the defending party, the duty arises when it knows or reasonably should know that the injured party (i.e., the plaintiff) is in fact contemplating litigation. *Id*. This knowledge may come when the plaintiff provides actual or constructive notice of litigation. *Id.* In addition, the *Phillips* court held that the defendant's own actions may be relevant to determining whether a duty to preserve evidence has been established. *Id.*

The Supreme Court in *Phillips* listed a series of circumstances that would put a defendant on notice that the plaintiff is contemplating litigation: The type and extent of the injury; the extent to which fault for the injury is clear; the potential financial exposure if faced with a finding of liability; the relationship and course of conduct between the parties, including past litigation or threatened litigation; and the frequency with which litigation occurs in similar circumstances. *Id.* at 397.

In light of Georgia's spoliation rules, it is always a good practice to hold a vehicle for at least thirty (30) days, if litigation is anticipated, and send a letter to a potential plaintiff providing him the opportunity to conduct an inspection of the vehicle/tractor-trailer prior to release.

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

Georgia law requires proof by "clear and convincing evidence" that the defendant engaged in "willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences." O.C.G.A. § 51-12-5.1. Punitive damages in Georgia are statutorily capped at $250,000 for most personal injury and wrongful death cases. *See* O.C.G.A. § 51-12-5.1(g) . No cap exists for defendants who specifically intend to cause harm or acted while "under the influence of alcohol, drugs other than lawfully prescribed drugs administered in accordance with prescription, or any intentionally consumed glue, aerosol, or other toxic vapor to that degree that his/her judgment is substantially impaired". *See* O.C.G.A § 51-12-5.1(f).

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

No. Although many Georgia courts prefer to conduct hearings and trials via remote videoconferencing, there is no mandate to do so in Georgia.

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?

As noted above, in August 2019, a jury in Muscogee County, Georgia rendered a record-setting $280 million verdict (including $100 million in punitive damages) against Schnitzer Steel and its driver in a wrongful death lawsuit involving a tractor-trailer. In this case, the driver crossed over the centerline and collided head-on with the plaintiff's vehicle. The collision resulted in five deaths, including a grandmother, her daughter and her two grandchildren. It was alleged that the driver was fatigued, had only slept five hours the night before

and was asleep at the wheel at the time of the collision. Although Schnitzer Steel admitted liability for its driver's negligence, it attempted to argue at trial that the deceased driver could have done more to get out of the tractor-trailer's way. The case was subsequently settled.