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Illinois

Are preventability determinations and internal accident reports discoverable or admissible in your state? What factors determine discoverability or admissibility?

Illinois does not recognize a self-critical analysis privilege like some other jurisdictions. *See Harris v. One Hope United, Inc.,* 2015 IL 117200, 390 Ill.Dec. 151, 28 N.E.3d 804. Internal incident reports are often admissible under the "business record exception" to the hearsay rule or as an admission against a party interest, unless otherwise covered by privilege. For example, if a company creates an incident report every time one of its drivers occurs, the incident report would be admissible assuming the report is created in the ordinary course of business. However, depending on when contacting outside counsel or the insurance company, other privileges may apply. Once an attorney is involved, all statements are protected under the attorney-client privilege.

Evidence of post-accident remedial measures is not admissible to prove prior negligence. Several considerations support this general rule. First a strong public policy favors encouraging improvements to enhance public safety. *See Schaffner v. Chicago & North Western Transportation Co.,* (1989), 129 Ill.2d 1, 133 Ill.Dec. 432, 541 N.E.2d 643. Second, subsequent remedial measures are not considered sufficiently probative of prior negligence, because later carefulness may simply be an attempt to exercise the highest standard of care. Third, is a general concern that a jury may view such conduct as an admission of negligence. *Id., See also Herzog v. Lexington,* 167 Ill.2d 288, 212 Ill.Dec. 581, 657 N.E.2d 926 (1995).

Regarding admissibility at trial, many times if a company finds the accident to be preventable, plaintiff's counsel will try to illicit that testimony at trial as a sign of negligence. Any evidence of this should be excluded at trial. Even assuming the relevance of evidence demonstrating the violation of internal company policies, the Court should still exclude such evidence because its lack of probative value pursuant to Illinois law is far outweighed by a danger of unfair prejudice, confusion of the issues, and misleading the jury, and the presentation of such evidence will inevitably waste time and cause undue delay. Illinois Rules of Evidence Rule 403.

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?

Illinois state courts have not considered the discoverability of third-party litigation funding files, but there is a growing body of federal court decisions on the issue. As a general matter, courts across the country that have addressed the issue have held that litigation funding information is generally irrelevant to proving the claims and defenses in a case. *In re Valsartan N. Nitrosodimethylamine*, 19-2875, 2019 WL 4485702 at *3 (D.N.J. Sept. 18, 2019); *Benitez v. Lopez*, 17-CV-3827-SJ-SJB, 2019 WL 1578167, at *1 (E.D.N.Y. March 14, 2019); *Miller UK Ltd. v. Caterpillar, Inc.*, 17 F.Supp.3d 711, 742 (N.D.

Ill. 2014); *Kaplan v. S.A.C. Capital Advisors, L.P.*, S.A.C., No. 12-CV-9350 (VM)(KNF), 2015 WL 5730101, at *5 (S.D.N.Y. Sept. 10, 2015), *aff'd,* 141 F. Supp. 3d 246 (S.D.N.Y. 2015); *Space Data Corp. v. Google LLC*, Case No. 16-cv-03260 BLF, 2018 WL 3054797, at *1 (N.D. Cal. June 11, 2018); *MLC Intellectual Property LLC v. Micron Technology, Inc.*, Case No. 14-cv-3657-SI, 2019 WL 118595, at *2 (N.D. Cal. Jan. 7, 2019); *Yousefi v. Delta Electric Motors, Inc.*, No. 13-CV-1632 RSL, 2015 WL 11217257, at *2 (W.D. Wash. May 11, 2015).

One of the most significant issues with obtaining such correspondence is to determine the exchanges between counsel and the funding company regarding the merits of the case. Another way to put it is that it would be supremely helpful for litigants to see how their opponents discuss the strengths and weaknesses of their cases. This seems to be the area where courts draw the line. Courts that have examined this issue have generally held that litigation funding documents are protected by the work product doctrine. *See e.g. Viamedia, Inc. v. Comcast Corp.*, No. 16-cv-5486, 2017 WL 2834535, at *1 (Jun. 30, 2017); *In re Int'l Oil Trading Co., LLC*, 548 B.R. 825, 835–39 (Bankr. S.D. Fla. 2016); *Doe v. Society of Missionaries,* No. 11-cv-02158, 2014 WL 1715376 at *4 (N.D. Ill. May 1, 2014); *United States v. Homeward Residential, Inc.*, CASE NO. 4:12-CV-461, 2016 WL 1031154, at *6 (E.D. Tex. Mar. 15, 2016); *United States v. Ocwen Loan Serv., LLC*, 4:12-CV-543, 2016 WL 1031157, at *6 (E.D. Tex. Mar. 15, 2016); *Mondis Tech., Ltd. v. LG Elecs., Inc.*, Civil Action Nos. 2:07–CV–565–TJW–CE, 2:08–CV–478–TJW, 2011 WL 1714304, at *3 (E.D. Tex. May 4, 2011). This is true even when mental impressions are shared with a third-party because the privilege is only waived when that disclosure substantially increases the opportunities for potential adversaries to obtain that information. *Doe,* 2014 WL 1715376, at *4. When counsel submits materials to secure funding for a litigation matter, that production does not substantially increase the chance that opposing counsel would obtain the information.

Another consideration courts have made is that if litigation funding companies are required turn over documents to an inquiring opposing counsel, it will impact the company's ability to do business and attract future customers. Litigation funding communications are designed to be confidential. Otherwise, no counsel would ever memorialize on paper the relative merits and the chances of success of a piece of litigation and apply for litigation funding. *Miller UK Ltd. v. Caterpillar, Inc.*, 17 F.Supp.3d 711, 738 (N.D. Ill. 2014). Similarly, if litigation funding companies did not maintain confidentiality of documents provided by attorneys about their evaluation of the case, these companies would run out of clients fairly quickly. *Doe*, 2014 WL 1715376, at *4.

What is the procedure for the resolution of a claim for injuries to a minor in your state? Does the minor's age affect the statute of limitations for a personal injury claim?

The procedure for resolving a minor's personal injury claim typically involves either reaching a settlement agreement or proceeding to trial. For settlements involving minors, court approval is generally required to ensure that the settlement is in the best interest of the minor.

- Settlement: If the parties reach a settlement agreement, a petition must be filed with the court seeking approval of the settlement. This petition typically includes information about the facts of the case, the injuries sustained, the medical treatment received, and the proposed distribution of the settlement proceeds. The court may hold a hearing to review the settlement and ensure it is in the best interest of the minor. If the court approves the settlement, the funds may be placed in a restricted account, trust, or structured settlement, with access limited until the minor reaches the age of majority or another specified age. The applicable statute is the Illinois Probate Act of 1975, specifically 755 ILCS 5/19-8.
- Litigation: If the parties cannot reach a settlement, the case may proceed to trial. A guardian ad litem or next friend may represent the minor's interests during the litigation process. The court will make a determination on liability and damages, and if an award is granted, the funds may be managed similarly

to a court-approved settlement, with disbursement restricted until the minor reaches the age of majority or another specified age.

Illinois has specific provisions for personal injury claims involving minors. The statute of limitations for personal injury claims in Illinois is two years from the date of the accident. However, for minors, the statute of limitations is tolled until the minor reaches the age of 18. Once the minor turns 18, he or she has two years to file a personal injury claim. This means that, in most cases, a minor has until his or her 20th birthday to initiate a personal injury lawsuit.

What are the advantages or disadvantages in your State of admitting that a motor carrier is vicariously liable for the fault of its driver in the context of direct negligence claims?

Until very recently, it was generally advantageous for a motor carrier to admit that it was vicariously liable for its driver's fault because doing so precluded plaintiffs from also pursuing direct liability theories against the motor carrier such as negligent hiring, negligent supervision, or negligent entrustment. However, in *McQueen v. Green*, 2022 IL 126666, the Illinois Supreme Court overturned longstanding precedent. Under McQueen, a plaintiff may now proceed on such "direct negligence" theories against a motor carrier along with a claim for vicarious liability if the admitted employee driver is found negligent.

What is the standard applied for spoliation of physical and/or documentary evidence in your state?

Generally, there is no duty to preserve evidence in Illinois. *Martin v. Kelley & Sons, Inc.*, 2012 IL 113270, ¶ 27. However, a plaintiff can establish an exception to the general no-duty rule if it meets the two-prong test set forth in *Boyd v. Travelers Insurance Co*., 166 Ill. 2d 188, 652 N.E.2d 267, 209 Ill. Dec. 727 (1995). A plaintiff must show: (a) that an agreement, contract, statute, special circumstance, or voluntary undertaking has given rise to a duty to preserve evidence on the part of the defendant; and (b) that the duty extends to the specific evidence at issue by demonstrating that 'a reasonable person in the defendant's position should have foreseen that the evidence was material to a potential civil action.' *Boyd*, 166 Ill. 2d at 195. If the plaintiff fails to satisfy both prongs of the *Boyd* test, the defendant has no duty to preserve the evidence at issue. *Kilburg v. Munawar Mohiuddin, Zante Cab Co.*, 2013 IL App (1st) 113408, ¶ 22, 990 N.E.2d 292 (citing *Martin*, 2012 IL 113270, ¶ 27).

Illinois does not recognize a separate, independent tort for spoliation of evidence. *Dardeen v. Kuehling*, 213 Ill. 2d 329, 821 N.E.2d 227 (2004); *Boyd,* 166 Ill. 2d 188, 652 N.E.2d 267 (1995). Illinois recognizes that a claim for negligent spoliation of evidence could be brought under existing negligence principles. *Boyd*, 166 Ill. 2d at 192-93, 652 N.E. 2d at 270. To state a claim for negligent spoliation of evidence, a plaintiff must plead: (1) the existence of a duty to preserve evidence owed by the defendant to the plaintiff; (2) a breach of that duty; (3) an injury or damages proximately caused by the breach; and, (4) damages. *Boyd*, 116 Ill. 2d at 194-95, 652 N.E.2d at 270; *Martin*, 2012 IL 113270, ¶ 26, 979 N.E.2d 22; *Andersen v. Mack Trucks, Inc.*, 341 Ill. App. 3d 212, 215, 793 N.E.2d 962, 966 (2nd Dist. 2003). Illinois courts focus on duty and causation in deciding the sufficiency of a negligent spoliation of evidence claim.

Is the amount of medical expenses actually paid by insurance or others (as opposed the amounts billed) discoverable or admissible in your State?

Illinois employs a "reasonable value" approach whereby a plaintiff may recover the *entire* amount billed, provided the plaintiff establishes the proper foundational requirements to show the bill's reasonableness. *Wills v. Foster*, 229 Ill. 2d 393 (2008). The leading and most difficult case for defense attorneys in Illinois is the *Wills* case, which holds that Plaintiffs can collect the full amount of a bill even if only partially paid. The Court held that the Collateral Source

Rule prohibits Defendants from informing the jury that the medical care provider settled for less than the full amount of the bills. The reasoning includes a comment that Defendant should not get the benefit of the reduced charges because of the Collateral Source Rule. Thus, a Plaintiff may recover sums of money which he or she is not obligated to pay.

The decision of *Perkey v. Portes-Jarol*, a Second District Case, provides some hope that a Defendant will be entitled to a set-off in cases where the injured Plaintiff had insurance which paid a portion of the bills. 2013 IL App (2d) 120470. The court held that Section 2-1205 of the Code of Civil Procedure modifies the Collateral Source Rule such that a Defendant is entitled to a set-off for medical bills which have been paid by an insurer or fund, at a reduced level, to the extent of that reduction. In other words, if the total bill is $100,000.00 and the health insurer pays $40,000.00 to fully satisfy the charges, the remaining $60,000.00 should be set-off from the judgment. The trial court in that case, like most judges in Cook County in the past, refused any set-off finding that no set-off was allowed because the health insurer had a right to recoupment, i.e., a subrogation right. As virtually every health insurance policy has a subrogation clause, the right to a set-off was pretty much non-existent. The *Perkey* decision puts some teeth back into the statute. However, a more recent decision from the Fourth District Appellate Court rejects the *Perkey* analysis and holds that no set-off is allowed even where the bills have been written off and Plaintiff does not have to pay the written off amounts. *See Miller v. Sara Bush Lincoln Health Ctr.*, 2016 IL App. (4th) 150728. Whether our liberal Supreme Court will allow this interpretation to prevail, especially since it contradicts *Wills* and *Miller*, remains to be seen.

What is the legal standard in your state for obtaining event data recorder ("EDR") data from a vehicle not owned by your client?

There is no rule or standard particular to obtaining EDR data from a vehicle not owned by our client. In the event of a an incident resulting in significant injuries, it is advisable to promptly advise the owner and/or insurer of the vehicle of your desire to obtain its EDR data and to request that such data be preserved. Once suit is filed, EDR data is subject to discovery in the same manner as any other type of evidence.

What is your state's current standard to prove punitive or exemplary damages against a motor carrier or broker and is there any cap on same?

There is no cap on punitive damages in Illinois, although the Illinois Supreme Court has found a ratio of 75 to 1 to be unconstitutionally excessive. In *Mathias v. Accor Economy Lodging, Inc.*, the Seventh Circuit held that a jury verdict, in which punitive damages exceeded compensatory damages by more than four times a single-digit ratio, was not unconstitutionally excessive in violation of due process. 347 F.3d 672 (7th Cir. 2003). *Mathias* was the first case in the Seventh Circuit to apply the United States Supreme Court case, *State Farm Mutual Automobile Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1524 (2003), in which the Supreme Court stated that "few awards [of punitive damages] exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." There is no punitive damages standard that applies specifically to motor carriers in Illinois.

Has your state had any noteworthy recent punitive damages verdicts? If so, what evidence was admitted supporting issuance of a punitive damages instruction? Finally, are any such verdicts currently on appeal?

There have not been any recent notable punitive damages verdicts in the realm of transportation-related lawsuits, but a Cook County jury recently awarded $363 million, of which $220 million was for punitive damages, to a woman claiming cancer due to exposure to ethyl oxide gas from a nearby chemical manufacturer over the course of 20 years. Although not a punitive damages verdict, it was recently reported that 7-Eleven agreed to pay $91 million to

settle a lawsuit brought by a man who was struck by a car near the entrance of a convenience store as a result of the store's alleged failure to install bollards; news reports indicated that discovery in the case revealed that there had been over 6,000 similar incidents throughout the United States over the last 15 years.

Does your state permit an expert to testify as to content of the FMCSRs or the applicability of the FMCSRs to a certain set of facts?

The FMCSRs, themselves, are generally admissible, but experts should not be allowed to testify as to the meaning of FMCSRs or the applicability of the FMCSRs to a particular set of facts. *See, e.g., Kucharski v. Orbis Corp.*, 2017 U.S. Dist. LEXIS 68611 (N.D. Ill. May 5, 2017), and cases cited therein. Unfortunately, this principle is not consistently applied throughout our courts.

Does your state consider a broker or shipper to be in a "joint venture" or similar agency relationship with a motor carrier for purposes of personal injury or wrongful death claims?

No.

Provide your state's comparative/contributory/pure negligence rule.

Modified comparative negligence, 735 ILCS 5/2-1116. A plaintiff is barred from recovery if his or her contributory fault is found to be more than 50% of the proximate cause of the injuries or damages for which recovery is sought. If the plaintiff's contributory fault is found to be less than 50% of the proximate cause or the injuries or damages, his or her damages shall be diminished in proportion to the amount of his or her fault.

Provide your state's statute of limitations for personal injury and wrongful death claims.

2 years. 735 ILCS 5/13-202 (personal injury); 740 ILCS 180/2 (wrongful death).

In your state, who has the authority to file, negotiate, and settle a wrongful death claim and what must that person's relationship to the decedent be?

The "personal representative" of the decedent. The Illinois Wrongful Death Act does not specify what that person's relationship to the decedent must be.

Is a plaintiff's failure to wear a seatbelt admissible at trial?

No.

In your state, are there any limitations on damages recoverable for plaintiffs who do not have insurance coverage on the vehicle they were operating at the time of the accident? If so, describe the limitation.

No.

How does your state determine applicable law/choice of law questions in motor vehicle accident cases?

Illinois courts generally apply the "most significant relationship" test set forth in the Restatement (Second) of Conflict of Laws. This seeks to determine which state has the most significant relationship to the occurrence and the parties involved in the case considering such factors as:

- the place where the injury occurred;
- the place where the conduct causing the injury occurred;
- the domicile, residence, nationality, place of incorporation, and place of business of the parties; and
- the place where the relationship, if any, between the parties is centered.

The court will then apply the law of the state that has the most significant relationship to the case. This test allows for flexibility and considers the specific facts of each case to determine the most appropriate law to apply. *See, e.g., Townsend v. Sears, Roebuck & Co.*, 879 N.E.2d 893 (Ill. 2007) (adopting "most significant relationship" test); *Esser v. McIntyre*, 661 N.E.2d 1138 (Ill. 1996) (court applied Indiana law to case involving motor vehicle accident that occurred in Indiana); *Miller v. Long-Airdox Division of Marmon Group, Inc.*, 914 F.2d 976 (7th Cir. 1990) (applying Illinois law even though accident happened in Indiana).