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LOUISIANA

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

Liberative prescription is Louisiana's version of the common law statute-of-limitations. The liberative prescriptive periods for transportation related tort and contractual claims are outlined below:

Tort: The liberative prescriptive period for most torts in Louisiana is one year. *See* La. C. C. art. 3492. For personal injury and property damage claims, the one-year period prescribes 1 year from the date of the subject accident. *Id.* For wrongful death claims, the one-year period prescribes 1 year from the death of the deceased. *See* La. C. C. art. 2315.2.

Contract: Contractual actions are generally governed by a ten-year prescriptive period if the contract is silent as to the same. *See* La. C. C. art. 3499.

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?**

In light of the COVID pandemic, Louisiana Governor John Bel Edwards issued several emergency proclamations which suspended liberative prescription for all claims that prescribed between March 17, 2020 and July 5, 2020. The Louisiana legislature thereafter enacted Louisiana Revised Statute § 9:5829, which provides as follows:

> All prescriptions, including liberative...shall be subject to a limited suspension or extension during the time period of March 17, 2020, through July 5, 2020; however, the suspension or extension of these periods shall be limited and shall apply only if these periods would have otherwise expired during the time period of March 17, 2020, through July 5, 2020. The right to file a pleading or motion to enforce any right, claim, or action which would have expired during the time period of March 17, 2020, through July 5, 2020, shall expire on July 6, 2020.

According to Article 3472 of the Louisiana Civil Code, "the period of suspension is not counted toward accrual of prescription . . . [and] [p]rescription commences to run again upon the termination of the period of suspension." Therefore, when the period of suspension ends, the time which preceded suspension is typically added to the time which it follows to compute the necessary period, meaning only the period of suspension is deducted. *See Shannon v. Vannoy*, 2017-1722 (La. App. 1 Cir. 6/1/18), 251 So.2d 442, 448.

Similarly, Louisiana's Supreme Court halted jury trials statewide from March 2020 until April 2021 because of the COVID pandemic. Local courts were given the choice of whether to continue moratoriums after that. It appears that jury trials in New Orleans just resumed on March 8, 2022.

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

Louisiana follows a pure "comparative fault" regime, whereby a plaintiff's recoverable damages are reduced in proportion to his degree of negligence. *See* La. C. C. art. 2323(A). The fault of all actors, including the plaintiff, immune parties, and absent parties, is considered when determining the plaintiff's degree of fault. *Id*.

In *Watson v. State Farm Fire & Cas. Ins. Co*., 469 So.2d 967, 974 (La. 1985), the Supreme Court of Louisiana outlined several factors to be considered when assigning fault for purposes of comparative fault. Those factors include:

(1) Whether the conduct resulted from inadvertence or involved an awareness of the danger;
(2) How great a risk was created by the conduct;
(3) The significance of what was sought by the conduct;
(4) The capacities of the actor, whether superior or inferior;
(5) Extenuating circumstances which might require the actor to proceed in haste, without proper thought; and
(6) The relationship between the fault/negligent conduct and the harm to the plaintiff.

Until recently, a plaintiff's failure to wear a seat belt in violation of state law was not admissible as evidence of comparative fault. However, this evidentiary bar was repealed by the Civil Justice Reform Act of 2020 ("CJRA"), which became effective on January 1, 2021. Under the CJRA, evidence that a plaintiff failed to wear his or her seatbelt is admissible at trial for all relevant purposes, including comparative fault.

However, there is an exception to Louisiana's comparative fault rule for intoxicated plaintiffs. Pursuant to Louisiana Revised Statute § 2798.4, a party who was operating a motor vehicle with a blood alcohol level at or above .08% is not permitted to recover damages if he was more than 25% at fault for the resulting injuries.

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

Joint-tortfeasor liability is recognized in Louisiana pursuant to Louisiana Civil Code article 2324(B). Under this article, the liability for damages caused by two or more persons is considered a "joint and divisible obligation," meaning that each tortfeasor may only be held responsible for paying the share of fault allocated to him. *See* La. C. C. art. 2324(B).

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

We are not aware of any obligation to provide policy limit information pre-suit.

However, legislation is currently pending before the Louisiana State Legislature that may impose an obligation for insurers to disclose policy limits to third-party claimants pre-suit if requested. According to the text of Proposed House Bill No. 220, automobile insurers would be required to provide liability policy limits to third-party insurance claimants or their attorney within 30 days of receipt of a written request from a claimant or his attorney.

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

Compensatory Damages:

Louisiana generally does not limit the amount of recoverable compensatory damages in transportation cases, but there are a few exceptions.

For example, pursuant to the Civil Justice Reform Act of 2020 ("CJRA"), compensatory damages for medical expenses are limited to the amount paid by a plaintiff's private health insurer or Medicare when the amount paid is less than the amount billed by the healthcare provider. *See* La. Rev. Stat. § 9:2800.27. As a result, the

plaintiff is unable to recover any amounts that were discounted or written off pursuant to a contract between the healthcare provider and third-party payor, such as a third-party litigation funding company. *Id*. The judge has the discretion to award up to 40% of the difference between the amount billed and the amount paid by insurance to compensate the plaintiff for the cost of procurement. *Id*.

Additionally, in cases where a plaintiff's medical expenses are paid pursuant to the Louisiana Workers' Compensation Law as provided in Louisiana Revised Statute § 23:1020.1, recoverable medical expenses are limited to the amount paid under the medical payment fee schedule of the Louisiana Workers' Compensation Law. *Id*.

There are other exceptions that arise outside the realm of transportation cases. For example, in medical malpractice claims, plaintiffs can receive no more than $500,000 in total compensatory damages. *See* La. Rev. Stat. § 40:1231.2. The cap does not apply to costs for future medical care.

Punitive and Exemplary Damages:

Louisiana similarly does not cap the amount of recoverable punitive or exemplary damages, but there are limited situations in which these damages may be awarded.

Louisiana is against punitive damages as general public policy. *See Chauvin v. Exxon Mobil Corp*., 2014-0808, p. 10 (La. 12/9/14); 158 So.3d 761, 768 (citing *Ross v. Conoco, Inc*., 2002-0299, p. 14 (La. 10/15/02); 828 So.2d 546, 555). Punitive or other penalty damages are not permitted in Louisiana unless expressly authorized by statute. *Id*. Any statute which authorizes the imposition of punitive damages is subject to strict construction. *Id*.

With respect to transportation cases, Louisiana Civil Code Article 2315.4 provides:

> In addition to general and special damages, exemplary damages may be awarded upon proof that the injuries on which the action is based were caused by a wanton or reckless disregard for the rights and safety of others by a defendant whose intoxication while operating a motor vehicle was a cause in fact of the resulting injuries.

The Supreme Court of Louisiana has not specifically decided whether a plaintiff can recover exemplary damages under article 2315.4 against a vicariously liable employer. However, a review of the jurisprudence indicates that Louisiana courts are reluctant to levy punitive damages against the employer of an intoxicated driver under the theory of vicarious liability.

In 2001, the Supreme Court of Louisiana in *Berg v. Zummo*, 786 So.2d 708 (La. 2011) found that Louisiana Civil Code article 2315.4 cannot be applied to award exemplary damages to persons who have contributed to the driver's intoxication since Louisiana Civil Code article 2315.4 does not target the conduct of anyone except the intoxicated driver. *See Berg v. Zummo*, 786 So.2d 708 (La. 2011).

After *Berg*, Louisiana appellate courts have generally found that an employer cannot be held vicariously liable for exemplary damages under article 2315.4. *See Romero v. Clarendon America Insurance Co*., 54 So.3d 789 (La. App. 3d Cir. 2010), *rehearing denied*, *writ denied* 62 So.3d 96 (La. 2011); and *Darby v. Sentry Ins. Auto Mut. Co*., 960 So.2d 226 (La. App. 1st Cir. 2007). Recently, federal district courts examining this issue under Louisiana law have additionally all found that a plaintiff cannot recover exemplary damages against a vicariously liable employer under Louisiana Civil Code article 2315.4. *See Spiker v. Salter*, 3:20-CV-00517, 2022 WL 214344, at *3 (W.D. La. Jan. 24, 2022); *see also Thompson v. Travelers Indem. Co*., CV 19-11221, 2020 WL 6888280, at *4 (E.D. La. Oct. 16, 2020).

However, in 2019, the Louisiana Fifth Circuit Court of Appeal, in *Landry v. Nat'l Union Fire Ins. Co. of Pittsburg*, 19- 337 (La. App. 5 Cir. 12/30/19), found "that an employer may be held liable for exemplary damages awarded

against an employee under La. C.C. art. 2315.4, particularly, where the evidence shows that the employer contributed to or might have prevented the employee from driving while intoxicated." *Landry v. Nat'l Union Fire Ins. Co. of Pittsburg*, 19- 337 (La. App. 5 Cir. 12/30/19), 289 So. 3d 177, 184, *writ denied sub nom.*, *Landry v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 2020-00188 (La. 5/1/20); 295 So. 3d 945. However, the court predicated its decision upon specifically asserted facts in the pleadings that presented genuine issues of material fact as to whether the employer may have prevented the employee from driving while intoxicated (i.e., the defendant-employer failed to carry out appropriate screening and training; that the employee had a history of drug use; and that this employee had a deteriorating driving performance). *Id.*

The *Landry* decision has been considered an "outlier" in the applicable jurisprudence that some courts have declined to follow. *See Spiker*, 2022 WL 214344 at *3.

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

In July 2020, the Civil Justice Reform Act of 2020 ("CJRA") was signed into law and is considered Louisiana's largest tort reform package since the 1990s. The CJRA resulted in a few key changes that affect transportation litigation in Louisiana, as summarized below:

Evidence of Seatbelt Usage:

Prior to the CJRA, evidence of a plaintiff's use or nonuse of a seatbelt was inadmissible at the trial of civil matters. *See* La. Rev. Stat. § 32:295.1(E). The CJRA repealed this statute, meaning that the failure of a plaintiff to wear his or her seatbelt is now admissible evidence at trial for all relevant purposes.

Access to Jury Trials:

The CJRA lowered the threshold amount in controversy for a jury trial from $50,000 to $10,000, exclusive of interest and costs. *See* La. Code Civ. Proc. article 1732. A party seeking a jury trial must post the required $5,000 jury bond within 60 days of filing a jury demand. *See* La. Code Civ. Proc. article 1733. The new law doesn't change the jurisdictional limits of city and parish courts; however, defendants may seek a transfer to district courts to obtain the right to jury if the matter is more than $10,000 and the transfer is timely made. *See* La. Code Civ. Proc. article 4873.

Recoverable Medical Expenses:

The CJRA limits a plaintiff's recoverable medical expenses where the amount paid by a collateral source is less than the amount billed by the healthcare provider. *See* La. Rev. Stat. § 9:2800.27. Prior to the new law, a plaintiff could recover the total amount billed by his health provider regardless of any discounts or write offs. Under the CJRA, a plaintiff may only recover the amount paid by his private health insurer or Medicare. *Id*. As a result, the plaintiff is unable to recover any amounts that were discounted or written off between the health provider and the payor. *Id*. The judge has the discretion to award up to 40% of the difference between the amount billed and the amount paid by insurance to compensate the plaintiff for the cost of procurement. *Id*.

Disclosure of Insurance Coverage:

The CJRA prohibits litigants from mentioning any insurance coverage or involvement by an insurer to the jury unless (a) the amount of coverage is a disputed fact which the jury will decide; (b) the existence of insurance coverage is admissible to attack the credibility of a witness; or (c) the cause of action is brought against the insurer under the Direction Action Statute (R.S. 22:1269(B)(1)(a) through (f)) or under Louisiana Revised Statute § 22:1973 for a breach of good faith duty. *See* La. Code Evid. art. 411.

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

The time periods between the filing of complaints and jury trials varies depending upon many factors. Those factors include: the parish where the lawsuit was filed; whether the lawsuit is pending in state or federal court; the complexity of the case; the number of parties; discovery issues; claimant's medical treatment; presiding judge; COVID restrictions; etc. Currently, we estimate a one and a half to two-year time period from the filing of the complaint until trial.

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

With regard to tort claims in Louisiana, pre-judgment interest begins accruing from the date of judicial demand. *See* La. Rev. Stat. § 13:4203; *see also Corbello v. Iowa Prod*., 850 So.2d 686 (La. Feb. 25, 2003).

The applicable rate of interest is fixed pursuant to Louisiana Revised Statute § 13:4202. According to the statute, the applicable rate for any demand filed after January 1, 2002, is equal to the rate published annually by the Louisiana Commissioner of Financial Institutions. *See* La. Rev. Stat. § 13:4202. Currently, the rate of interest for 2022 is fixed at 3.5% percent per annum.

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

Under Louisiana law, a tort victim may recover both past and future medical expenses caused by tortious conduct, provided that the plaintiff can establish that past medical expenses were incurred in good faith as a result of an injury, and that future medical expenses will more probably than not be incurred. *See Menard v. Lafayette Ins. Co*., 31 So. 3d 996 (La. 2010). Thus, the admissible evidence for both past and future medical expenses is discussed below.

Past Medical Expenses:

In Louisiana, a plaintiff must prove that his or her injuries and associated treatments were the result of the accident at issue in order to collect past medical expenses. *Levy v. Lewis, 2016-0551*, p. 16 (La. App. 4 Cir. 5/17/17); 219 So.3d 1150, 1160. Unless there is bad faith, it is error for the trier of fact to fail to award the full amount of medical expenses that are proven by a preponderance of the evidence that were incurred as a result of an accident. *See Ochoa v. Aldrete*, 21-632, p. 12 (La.App. 5 Cir. 12/8/21); *Watson v. Hicks*, 2015-0046, p. 26 (La. App. 4 Cir. 5/27/15), 172 So.3d 655, 675 (quoting *Earls v. McDowell*, 2007-2017, p. 8 (La. App. 5 Cir. 5/15/07), 960 So.2d 242, 248).

Generally, the following evidence may be introduced to the jury to support past medical expenses:

A. *Medical and Hospital Records*. These generally can be offered into evidence to verify that the claimed medical services, supplies, and medication were actually provided and the reasons for the plaintiff's treatment. However, these records are inadmissible if obtained without following the formalities provided in Louisiana Revised Statute § 13:3715.1 (providing that a health care provider shall disclose records of patient who is party to litigation pursuant to subpoena issued in that litigation and patient's authorization to release). *See State v. Skinner*, 2008-2522 (La. 5/5/09); 10 So.3d 1212.

B. *Testimony from the Plaintiff's Treating Physicians*. *See McCloskey v. Higman Barge Lines, Inc*., 2018-1008, p. 5 (La. App. 4 Cir. 4/10/19); 269 So.3d 1173, 1178.

C. *Billing Records that Reflect Total Amount Billed by Medical Provider for Medical Treatment.* As of January 1, 2021, only the amount billed by a medical provider for medical treatment may be introduced to the jury to establish past medical expenses. *See* La. Rev. Stat. § 9:2800.27(F).

Furthermore, as of January 1, 2021, ***evidence that any person, health insurance issuer, or Medicare has paid or***

agreed to pay any of the plaintiff's medical expenses cannot be disclosed to the jury for the purpose of establishing recoverable past medical expenses. *See* La. Rev. Stat. § 9:2800.27(F). Louisiana Revised Statute § 9:2800.27(F) states as follows:

> In a jury trial, only after a jury verdict is rendered may the court receive evidence related to the limitations of recoverable past medical expenses provided by Subsection B or D of this Section. The jury shall be informed only of the amount billed by a medical provider for medical treatment. Whether any person, health insurance issuer, or Medicare has paid or has agreed to pay, in whole or in part, any of a claimant's medical expenses, shall not be disclosed to the jury. In trial to the court alone, the court may consider such evidence.

Therefore, the statute effectively limits the scope of evidence that may be introduced to the jury regarding past medical expenses when payments made by collateral sources are involved. This evidence may still be considered by the court but only after the jury renders a verdict.

Future Medical Expenses

The proper standard for determining whether a plaintiff is entitled to future medical expenses is proof by a preponderance of the evidence that the future medical expense will be medically necessary. *See Menard v. Lafayette Ins. Co*., 2009-1869, p. 13 (La. 3/16/10); 31 So.3d 996, 1006. The probability of future medical expenses is established with supporting medical testimony and estimations of the probable cost. *Id*.

Louisiana courts recognize that an award for future medical expenses is highly speculative and "not susceptible to calculation with mathematical certainty;" therefore, awards for future medical expenses generally turn on questions of expert credibility and inferences rather than determining the exact value of the future expenses. *Id.* As a result, expert medical testimony is key to establishing future medical expenses. *Id*. at 16.

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

The "self-critical analysis" privilege promotes the compelling public interest of observance of the law by encouraging employers to be candid in their self-evaluations. The Privilege protects the employer's internal reports, investigations and plans. Courts that have recognized the self-critical analysis privilege hold that the employer waives the privilege when it uses the report or plan as a defense. *Jamison v. Storer Broadcasting Co*., 511 F. Supp. 1286 (E.D. Mich. 1981); *Coates v. Johnson & Johnson*, 756 F.2d 524 (7th Cir.1985); *Volpe v. US Airways, Inc*., 184 F.R.D. 672 (M.D. Fla.1998).

The concept of the self-critical analysis is most commonly applied by Louisiana state courts in the context of medical malpractice lawsuits and hospital committee meetings. *See Smith v. Lincoln Gen. Hosp*., 605 So. 2d 1347, 1348 (La. 1992). With respect to transportation cases, one Louisiana Supreme Court case indicates that internal evaluations of whether and accident was "preventable" and any post-accident disciplinary actions against a driver are not discoverable. *Rader v. Reg'l Transit Auth*., 595 So. 2d 644 (La. 1992). However, that case does not appear to have been relied upon by any Louisiana appellate courts.

Further, the Federal Fifth Circuit in *Dennis v. Collins*, No. CV 15-2410, 2016 WL 11678221, at *1 (W.D. La. Sept. 19, 2016) has rejected the self-critical analysis privilege discussed in Rader, stating:

> as it turns out, "[n]either Louisiana courts nor the Fifth Circuit has embraced a self-critical analysis privilege ..." *Hawthorne Land Co. v. Occidental Chem. Corp*., Civ Action No. 01-0881, 2003 WL 21510426, at *1 (E.D. La. June 24, 2003). Further, "[a]ll of the courts in this Circuit confronting the issue have declined to find that the self critical analysis privilege exists, even in the instance of a post-accident investigation." *Ganious v. Apache Clearwater Operations, Inc.*, No. 98-207, 2004 WL 287366, at *2 (E.D. La. Feb. 11, 2004).

From a practical perspective, while a defendant may object in discovery to producing certain documents (e.g. preventability assessments) on the basis of self-critical analysis, if pressed with a motion to compel, a defendant should realize that a Court may reject the objection and order production.

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?

While the Supreme Court of Louisiana has not directly addressed this issue, the position adopted by most of Louisiana's appellate courts is that a plaintiff cannot maintain independent negligence claims, such as negligent hiring, entrustment, supervision, against a motor carrier/employer when the motor carrier/employer has stipulated to the driver having been in the course and scope of employment at the time of the alleged accident. *See Wheeler v. United States Fire Insurance Company*, 2018-1422 (La. App. 1st Cir. 6/13/19), 2019 WL 2612903, *2 (unpublished) (per curiam); *Elee v. White*, 2019-1633 (La. App. 1st Cir. 7/24/20), —— So.3d ——, 2020 WL 4251974, *4, writ denied, 2020-01048 (La. 11/10/20), 303 So.3d 1038; *Brandon v. Richard*, 20-0738, p. 1 (La. App. 1 Cir. 10/26/20), 2020 WL 6275825, *1, *writ denied*, 20-01357 (La. 1/26/21), 309 So.3d 343; *Perro v. Alvarado*, 20-339, p. 8 (La. App. 3 Cir. 9/30/20), 304 So.3d 997, 1001; *Landry v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 19-337, pp. 12-14 (La. App. 5 Cir. 12/30/19), 289 So.3d 177, 185-86, *writ denied sub nom. Landry v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 20-00188 (La. 5/1/20), 295 So.3d 945.

However, the Louisiana Supreme Court recently granted writs in a case presenting this very issue. *See Martin v. Thomas*, 54,009 (La. App. 2 Cir. 8/11/21), 326 So.3d 334, *reh'g denied* (9/16/21), *writ granted, 21-01490* (La. 12/21/21), 328 So.3d 1164. In *Martin v. Thomas*, the Louisiana Second Circuit Court of Appeal ruled that a plaintiff could not sustain an independent negligence claim against a logging truck company after it judicially admitted that its driver was acting in the course and scope of his employment at the time of a motor vehicle accident. *Martin*, 326 So.3d at 340. As a result, the Second Circuit granted partial summary dismissal of the plaintiff's claims for "negligent hiring, training, supervision, and entrustment." *Id.*

The Supreme Court of Louisiana heard oral arguments in *Martin* on March 21, 2022. Therefore, controlling authority on this issue is forthcoming.

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

Louisiana recognizes a tort cause of action for intentional spoliation of evidence. *See Ritter v. Loraso*, 234 So.3d 1096 (La. Ct. App. 2017). However, Louisiana does not recognize negligent spoliation of evidence as an independent tort claim. *See Reynolds v. Bordelon*, 172 So.3d 589 (La. 2015). In light of Louisiana's position on negligent spoliation, Louisiana courts have held that discovery and criminal sanctions may be available for first-party spoliators, as well as the adverse presumption that the evidence would have been detrimental to a litigant's case when he fails to produce evidence within his reach. *Id*.