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LOUISIANA

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 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.

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?

In most state courts, the litigation funding documents are discoverable. However, most often, securing the funding documents comes with a great fight from the funding companies, plaintiff's counsel, and the doctors who have contracted with the companies.

The Louisiana First Circuit Court of Appeal recently held in *Dantzler v. Delacerda*, 2020-1108 (La. App. 1 Cir. 12/30/20) 2020 WL 786443 that "evidence of the financial arrangement between [a funding company] and the plaintiff's health care providers[is admissible] for the purpose of impeaching the credibility of the plaintiff's treating physicians."

Most courts in the Federal Fifth Circuit are in accord, noting not only that the evidence was *discoverable* but also that it was *admissible*. The United States District Court in *Thomas v. Chambers*, No. CV 18-4373, 2019 WL 8888169, at *4 (E.D. La. Apr. 26, 2019) noted:

> [T]he financial arrangement between plaintiffs' healthcare providers and the third-party funding companies could create an incentive for plaintiffs' treating physicians to want plaintiffs to win their case, because a victory could result in more referrals from [the finance companies]. That incentive could lead a jury to question the treating physicians' testimony regarding causation. This evidence is thus relevant under Rule 401 because it is probative of whether a witness at trial is biased.

Despite this opinion on *admissibility*, one Federal Court, after reviewing the documents in an in-camera inspection, found that the funding documents were not subject to discovery. *See Dupont v. Costco Wholesale Corp.*, No. CV 17-4469, 2019 WL 5959564, at *2 (E.D. La. Nov. 13, 2019)(affirming the Magistrate Judge's ruling that neither the funding agreement nor the actual amounts received were relevant nor probative of any claim in the case and thus were not subject to production). The *Dupont* opinion is an outlier. *See e.g. Collins v. Benton*, No. CV 18-7465, 209 WL 6769636, at *6 (E.D. La. Dec. 12, 2019)(applying the rationale of *Thomas* and rejecting the comparison to *Dupont*). Yet, it is frequently argued by Plaintiffs as to why a litigation finance contract should not be discoverable.

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

It depends upon several factors. La. Code of Civil Proc. Art 1352 governs subpoenas issued to witnesses who reside outside the parish in which the case is proceeding. The Louisiana Fourth Circuit construed La. C.C.P. art. 1352 in *Hayden v. 3M Co.*, 16-1030 (La. App. 4 Cir. 2/3/17), 211 So.3d 528 and defined the issue as "whether Louisiana subpoena power extends to nonresident parties participating in litigation in Louisiana courts." *Id.*, 16-1030, p. 1, 211 So.3d at 529. Answering that question in the affirmative, the Court reasoned that "[i]n the same way that Louisiana exercises personal jurisdiction over parties participating in litigation in the state, those parties may, upon the discretion of the court, be compelled to appear in Louisiana for discovery depositions, hearings, and/or trial." *Id.*, 16-1030, p. 6, 211 So.3d at 532. *Hayden*, thus, stands for the proposition that a nonresident-party defendant may be subpoenaed to appear at trial in a Louisiana state court.

However, *Hayden* recognized that the subpoena power over a nonresident-party defendant is not unlimited. *Id.* The Court observed that "fundamental fairness [dictates that] the court must consider the same [four] factors that are relevant to compelling nonresident party plaintiffs to appear in Louisiana." *Id.,* 16-1030, p. 6, 211 So.3d at 532. Those factors are as follows: (i) travel costs, (ii) complexity of the case, (iii) the potential recovery, and (iv) whether other methods of discovery have been attempted. *Id.*

The Louisiana First Circuit Court of Appeal has declined to answer whether *Hayden* properly interpreted the Code of Civil Procedure as it applied to depositions of out-of-state corporate defendants. No other circuits have weighed in on the issue.

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?**

The benefits to admitting that a driver is within his course and scope of employment, when the underlying

claim is for his negligence *only* (i.e. no allegations that the driver acted intentionally) is to eliminate any claim of direct negligence against the employer. Further, such an admission can be used as a method to limit discoverability and/or potential admissibility of corporate documents at trial.

In *Wheeler v. United States Fire Ins. Co.*, 2019 WL 2612903 (La.App.1st Cir. June 13, 2019), the court stated:

> We find the reasoning provided in *Dennis v. Collins*, 15-240 (W.D.La. Nov. 9, 2016), 2016 WL 6637973, *7, persuasive – that a negligent hiring claim against an employer ***is subsumed*** in a direct negligence claim against an employee, ***when course and scope are stipulated to***, based at least in part on the elements of ***cause-in-fact and legal cause.*** In essence, we believe, as the *Dennis* court reasoned, that should Mr. Henderson be found to be negligent, that finding ***will include the negligence of Max Freight*** in Mr. Henderson's hiring, training, supervision, etc. Likewise, should Mr. Henderson be found not to be negligent, then no amount of negligence on the part of Max Freight in hiring, training or supervising Mr. Henderson ***could be the cause-in-fact or legal cause of the accident that occurred.***

See also *Liberstat v. J&K Trucking, Inc*., 00-192 (La. App. 3 Cir. 10/11/00), 772 So.2d 173*, writ denied*, 01-458 (La.4/12/01), 789 So.2d 598, (wherein trial court refused to instruct the jury on the issue of the employer's alleged negligent hiring and training and noted that if the employee breached a duty to the plaintiffs, then the employer is liable under *respondeat superior*).

Further, in state district courts, Defendants have asserted the *Dennis v. Collins* and *Liberstat v. J&K Trucking, Inc.* holdings as a method to foreclose discovery and assert that "corporate documents," such as policies and procedures, handbooks etc., are irrelevant when the only issue between the parties is whether or not the driver is negligent. There are no reported opinions on the discoverability issue, however.

Additionally, admitting to "course and scope" and eliminating claims of independent negligence can potentially be used as a method to limit evidence at trial. For example in *Snider v. New Hampshire Insurance Co.*, the court denied plaintiffs the ability to present evidence of negligent hiring, training, and supervision when the plaintiffs' complaint contained only allegations of vicarious liability. No. CV 14-2132, 2016 WL 3278695, at *3 (E.D. La. June 15, 2016).

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

In *Cushenberry v Barber Brothers Contracting Co.*, 19th Judicial District Court, Parish of East Baton Rouge (1/21/2021), a man and his family were awarded $18,946,634.65 in damages by an East Baton Rouge Parish jury after the man suffered severe and permanently disabling injuries, including traumatic brain injury, multiple facial fractures, shoulder and spine injuries requiring multiple surgeries in a March 27, 2018 motor vehicle crash. After a nearly three-week jury trial, the jury determined that Mr. Cushenberry's damages totaled $13,446,634.65 while awarding his wife and two young children a combined $5.5 million for loss of consortium. This was one of the first jury trials tried since the pandemic.

The facts are as follows: a collision occurred in the pre-dawn hours as the plaintiff, Cushenberry, was on his way to make deliveries in New Orleans. As he drove down Interstate 10, the defendant road contractor was late in picking up the construction cones that morning. An employee of the defendant road contractor reversed into the eastbound lane of travel on Interstate 10 and into Mr. Cushenberry's path just as he was nearing the end of the three-mile bridge. The collision caused Mr. Cushenberry's box truck to careen from the roadway, overturn and flip before coming to rest in the tree line. The plaintiff was transported by helicopter to a New Orleans hospital where he remained in an induced coma for six days before beginning a long road of recovery.

Fault was contested and, in fact, the defendant road contractor filed the first lawsuit arising from this accident blaming the plaintiff for property damages to the road contractor's truck which had backed into the

lane of travel on Interstate 10. The jury found the construction vehicle 100% at fault for backing into the roadway without the use of a flashing amber light to alert on-coming drivers, proper flagmen and other safety precautions.

In *Brown v. Fireman's Fund, et al*, Civil District Court for the Parish of Orleans (9/10/20) a jury awarded $11,929,722 to the plaintiff, a man with a mental disability and a low IQ, but who otherwise was high functioning and working at a manual labor job. The man suffered severe and disabling injuries when a motorist struck him while he was riding a bicycle – the plaintiff settled with the tortfeasor and her insurer as the trial began, the case then proceeding to a verdict only against an excess policy provider.

The facts are as follows: Frederick Brown, age 58, had a low IQ and was described as having a mental handicap. He led an active lifestyle and held job working for the railroad company, which he rode his bright yellow bike to and from every day. Brown was riding his yellow bike when he was struck from behind by Tiana Ell. Brown was thrown onto the hood of Ell's car. She then came to a quick stop and he flew off and landed on the pavement. There was an independent witness, who indicated Ell was solely at fault and simply failed to see Brown – she was perhaps distracted by a cellphone. Ell maintained that as she safely overtook Brown on the left, he suddenly turned left into her car. Thus, from Ell's perspective she acted carefully and Brown was solely at fault.

Brown suffered serious injuries which included a T5-9 transverse fracture, a broken hip and fibula, a dislocated shoulder and a rotator cuff tear, four broken ribs and finally a deep laceration to his head. Additionally, Brown's most persistent injury was a traumatic brain injury and a concussive syndrome. This manifested as depression, a diminished language expression, memory loss and headaches among other symptoms. The brain injury was confirmed by a neuropsychologist, who described how it affected Brown's already limited mental capacity.

The jury awarded Brown medicals of $247,671 and $8.75 million more for his future care. His lost wages were $90,000, while those in the future totaled $142,051. Brown's past and future suffering (in separate categories) were $350,000. Past loss of enjoyment of life was $200,000 – that in the future was $400,000. The jury continued and awarded $400,000 for past mental anguish and $250,000 more for in the future. Brown's award for permanent disability was $750,000. The noneconomic damages were $2,700,000 million. The verdict totaled $11,929,722.

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

The current legal arguments are that the amounts billed versus paid are relevant to (1) whether the collateral source rule applies and (2) to bias.

Collateral Source issues:

According to Louisiana's Supreme Court, the Collateral Source Rule is a rule of evidence and damages. *Kadlec Med. Center v. Lakeview Anesthesia Associates*, 527 F.3d 412, 425 (5 Cir 2008). In *Louisiana Dept. of Transp. & Dev. V. Kansas City Southern Railway Co.*, 02-2349, p. 6 (La. 5/20/03), 846 So.2d 734, 739, the Louisiana Supreme Court held:

> Under the collateral source rule, a tortfeasor may not benefit, and an injured plaintiff's tort recovery may not be reduced, because of monies received by the plaintiff from sources independent of the tortfeasor's procuration or contribution. Under this well-established doctrine, the payments received from the independent source are not deducted from the award the aggrieved party would otherwise receive from the wrongdoer.

Subsequently, in *Bozeman v. State*, 03-1016 (La. 7/2/04), 879 So.2d 692, the Louisiana Supreme Court considered whether the collateral source rule applied to medical expenses which were "written off" under the Medicaid program. In analyzing this issue, the court noted that the plaintiff paid no consideration for the "written off' amount. The court provided:

> [W]here the plaintiff pays no enrollment fee, has no wages deducted, and otherwise provides no consideration for the collateral source benefits he received, we hold that the plaintiff is unable to recover the "written off" amount. This position is consistent with the often-cited statement in Gordon v. Forsyth County Hospital Authority, Inc., 409 F. Supp. 708 (M.D.N.C. 1975), affirmed in part and vacated in part, 544 F.2d 748 (4th Cir. 1976), that "it would be unconscionable to permit the taxpayers to bear the expense of providing free medical care to a person and then allow that person to recover damages for medical expenses from a tortfeasor and pocket the windfall." (emphasis by the court).
>
> After a careful review, we conclude that Medicaid is a free medical service, and that no consideration is given by the patient to obtain Medicaid benefits. His patrimony is not diminished, and therefore, a plaintiff who is a Medicaid recipient is unable to recover the "write off" amounts.

The Louisiana Supreme Court in *Bozeman* "embrace[d]" the reasoning of courts that have awarded for plaintiffs "the full value of their medical expenses, including the 'write-off' amount, where the plaintiff has paid some consideration for the benefit of the 'write-off' amounts." *Id.* at 703-04 (citing *Griffin v. The Louisiana Sheriff's Auto Risk Assoc.*, 1999 CA 2944 (La. App. 1 Cir. 6/22/01), 802 So.2d 691, 715*; Acuar v. Letourneau*, 260 Va. 180, 531 S.E.2d 316, 322–323 (Va. 2000*); Helfend v. S. California Rapid Transit District*, 2 Cal.3d 1, 84 Cal.Rptr. 173, 465 P.2d 61, 66–67 (Ca. 1970)).

In *Bellard v. Amer. Cent. Ins. Co.*, 07-1335 (La. 4/18/08), 980 So.2d 654, the Louisiana Supreme Court was tasked with deciding whether an employer's uninsured motorist carrier was entitled to a credit in the amount of workers' compensation payments paid to or on behalf of the plaintiff. In making the determination, the court again focused on whether the plaintiff's patrimony was diminished, stating:

> *After Bozeman, two primary considerations guide our determination with respect to the collateral source rule. The first consideration is whether application of the rule will further the major policy of tort deterrence. The second consideration is whether the victim, by having a collateral source available as a source of recovery, either paid for such benefit or suffered some diminution in his or her patrimony because of the availability of the benefit, such that no actual windfall or double recovery would result from application of the rule. An analysis of these two considerations in the instant case leads to the conclusion that the collateral source rule does not apply under the circumstances presented.*

Id. at 669.

In *Cutsinger v. Redfern,* 08-2607 (La. 5/22/09), 12 So.3d 945, the Louisiana Supreme Court found the collateral source rule did not apply to prevent the plaintiff's uninsured motorist carrier from receiving a credit for workers' compensation benefits paid by her employer, even though the plaintiff paid for the UM coverage herself. In so ruling, the court relied on a finding of solidary liability between the UM carrier and the workers compensation insurer and a secondary finding that the workers' compensation benefits were not paid for with consideration by the plaintiff and, thus, did not diminish her patrimony. Accordingly, it concluded the collateral source rule did not override the principles of solidarity.

More recently, the Supreme Court discussed the issue in *Hoffman v. 21st Centry North American Ins. Co.*, 14-2279 (La. 10/2/15), 209 So.3d 702. The justices declined applying the collateral source rule to an attorney-negotiated medical discount. The court cited several reasons for not applying the collateral source rule:

> We decline to extent the collateral source rule to attorney-negotiated medical discounts obtained

> through the litigation process. We hold that such a discount is not a payment or a benefit that falls within the ambit of the collateral source rule. First, allowing the plaintiff to recover an amount for which he has not paid, and for which he has no obligation to pay, is at cross purposes with the basic principles of tort recovery in our Civil Code. The wrongdoer is responsible only for the damages he or she has caused. La. Civ. Code. art. 2315. The plaintiff has suffered no diminution of his patrimony to obtain the write-off, and therefore, the defendant in this case cannot be held responsible for any medical bills or services that plaintiff did not actually incur and which the plaintiff need not repay. Because the evidence before the trial court was that Mr. Hoffman paid $950.00 for the MRIs, he is not entitled to recover any additional amount. Any recovery above $950.00 for the MRIs would amount to a windfall and force the defendant to compensate the plaintiff for medical expenses the plaintiff has neither incurred nor is obligated to pay.
>
> Second, we reject plaintiff's argument that consideration for the benefit is given for attorney-negotiated medical discounts by virtue of the contractual obligation of the plaintiff to pay attorney fees, albeit only in the event of a recovery. This argument is based on the assumption that the payment of an attorney's fee is additional damage suffered by the tort victim. However, "[i]t is … well recognized in the jurisprudence of this state that as a general rule attorney fees are not allowed except when authorized by statute or contract." Killebrew v. Abbot Laboratories, 359 So.2d 1275, 1278 (La. 1978). Because the tortfeasor is not liable for, and the tort victim has no right to recover, attorney fees, the payment of an attorney fee is not additional damage to the plaintiff's patrimony so as to justify the "windfall" or "double recovery" represented by the attorney-negotiate discount. (emphasis added).

Following *Hoffman*, the concept of patrimony was discussed by the Louisiana Fifth Circuit in *Lockett v. UV Ins. Risk Retention Group*, 180 So.3d 557 (La. App. 5th Cir. 11/19/15). In Locket, plaintiff brought a personal injury action against the lessor and lessee of a semi-truck and trailer, seeking damages arising from a motor vehicle accident. The plaintiff personally paid Ochsner, one of her healthcare providers, a reduced amount of her total bill, for which she was personally liable, and the remaining amount was written off by Ochsner. Defendants argued that, because the plaintiff paid the reduced amount as a private-pay patient, as opposed to using a collateral source for the payment that she procured through payment of insurance premiums or through some other diminution in her patrimony, the collateral source rule had no application to the amount of her medical expenses that Ochsner "wrote-off." The district court found, and the Louisiana Fifth Circuit affirmed, that the collateral source rule applied.

In reaching that conclusion, the Fifth Circuit relied on evidence that the plaintiff had incurred significant medical expenses and that she had health insurance available, but did not file a claim. Instead, the plaintiff, a nurse, personally negotiated a reduction in the bill from $55,146.70 to $13,786.66 "in exchange for immediate payment of the reduced amount." *Id.* at 569 (internal quotation marks omitted). The Fifth Circuit cited the district court's own explanation:

> In the instant matter, Ms. Lockett negotiated the reduction of her medical expenses of her own initiative. The consideration for that reduction was immediate payment of the reduced amount. The benefit was derived from Ms. Lockett's individual efforts, totally independent of the tortfeasor's procuration or contribution. It would be contrary to the collateral source rule if [Defendants were] allowed to benefit from the bargain struck between the victim and her healthcare provider. To hold otherwise would endorse a policy of shifting the benefit of the bargain made between an injured plaintiff and their service providers, during the pendency of litigation, from the injured party to the tortfeasor. *Id.* at 569 (emphasis added).

The Fifth Circuit distinguished the actions of Ms. Lockett from *Hoffman*, wherein the attorney negotiated all of the medical discounts, and the plaintiff was unaware of the write-off, or of whether he had paid or given

up anything in exchange for the write-off. In *contrast*, Locket reduced her medical expenses through her own effort. *Id.* at 571.

Most recently, in *Simmons v. Cornerstone Investment, LLC,* 2018-0735 2019 WL 2041377 at *3 - *5 (La. 5/8/19), the Louisiana Supreme Court confronted the issue of whether the trial court properly granted Defendants' Motion in Limine prohibiting evidence of the amount of medical expenses written off due to workers' compensation payments and properly denied Plaintiff's Motion in Limine seeking to have the entire amount of medical bills admitted into evidence as a collateral source. Affirming the trial court's grant of Defendant's Motion in Limine and finding that only the paid amounts were admissible evidence, the court analyzed the collateral source rule as follows:

> Thus, it is clear the collateral source rule is tethered to payments actually received by the plaintiff. Importantly, we note Defendants are not objecting to the introduction into evidence of the underlying incurred medical expenses of $18,435, which were paid by Cintas. The discounted medical amount, which is not the subject of the instant motion in limine, undoubtedly qualified for application of the collateral source rule, as it is "monies from [an] independent source" that Plaintiff actually received." … The "written off" amount, that Plaintiff has not ever paid nor one he will ever be obligated to pay. In fact, such payment by Plaintiff is expressly forbidden by law. … Thus, it cannot be said Plaintiff's patrimony was diminished in any way when he did not actually incur these fictional expenses. In Hoffman, we found "a discount is not a payment or benefit that falls within the ambit of the collateral source rule." Hoffman, 14-2279, p. 7, 209 So.3d at 706.
>
> Furthermore, we reject the notion that Plaintiff "paid consideration" in the form of being subjected to the Workers' Compensation scheme in the first place. … Moreover, Hoffman makes clear that we take a strict view of the requirements for diminishing a plaintiff's patrimony. Thus, such an indirect diminution, i.e., the loss of the employee's right to file a tort suit particularly when there are reciprocal benefits to the employee, is insufficient to satisfy the stringent definition that is being jurisprudentially developed.
>
> Last, we find if Plaintiff prevails on the merits a recovery of the reduced amount of medical bills will make him whole, which is an important consideration of both tort recovery and the application of the collateral source rule. La. Civ. Code. art. 235. The plaintiff was never obligated to pay more than the discounted amount and under our civilian code of liability, Plaintiff should not profit from a tortfeasor in the absence of the availability and proof of punitive damages…
>
> We acknowledge the important role of tort deterrence within our tort system; however, to stretch the argument to include the award of un-incurred medical expenses, in addition to those actually paid, is to effectively authorize the assessment of punitive damages in the absence of statutory authority. This, in this case, we find there is no true deterrent effect to allowing Plaintiff to recover expenses over and above what was actually paid…
>
> To conclude, there is no basis to differentiate between the "written off" amount created by a reduced reimbursement fee under the Workers Compensation Act and those of a Medicaid program or an attorney-negotiated medical discount. (See Bozeman, supra and Hoffman, supra). The bottom line is that the plaintiffs in each of these situations did not actually incur, and need not repay the "written off" amounts at issue. Such amount are illusory in that they are never statutorily susceptible of being paid by the plaintiffs. In the instant case, Plaintiff did not contribute to his employer's workers' compensation insurance premiums nor did he otherwise pay any consideration for the benefits.

Specifically, and with respect to litigation funding companies, such as HMR, in *Williams v. IQS Ins. Risk Retention*, CV 18-2472, 2019 WL 937848, at *3 (E.D. La. Feb. 26, 2019), a district

judge in the Eastern District of Louisiana held that the collateral source rule did not apply to the difference between the charged amount of plaintiffs' medical expenses and the amounts paid by a third-party litigation funding company to acquire the accounts receivable from plaintiffs' healthcare providers. The court reasoned that the plaintiffs could not "establish that they paid any benefit or suffered any diminution in their patrimony in order to obtain the discounted medical payments. The discounts were obtained via a series of contractual agreements that apparently triggered no obligations on [the] [p]laintiffs' part." Analyzing the most recent Louisiana state court cases on the collateral source rule, the Court noted:

> But the common thread that runs through all of these decisions is that in order to recover the undiscounted or full billed medical charge (when the physician has accepted a lesser amount), the **plaintiff must have either paid for the benefit or be able to demonstrate that she suffered some diminution in her patrimony in order to be in a position to receive the benefit. This is the principle that the Supreme Court's decisions in *Hoffman* and *Bozeman* recognize.**

Therefore, the court determined that the collateral source rule did not apply to the difference.

Bias Issues: See Answer to Question 2.

Considering the above, generally, Courts have been willing to find that the billing / payment arrangements are discoverable (if not admissible). However, as discussed above, one Federal Court, after reviewing the documents in an in-camera inspection, found that the funding documents were not subject to discovery. *See Dupont v. Costco Wholesale Corp.*, No. CV 17-4469, 2019 WL 5959564, at *2 (E.D. La. Nov. 13, 2019)(affirming the Magistrate Judge's ruling that neither the funding agreement nor the actual amounts received were relevant nor probative of any claim in the case and thus were not subject to production). The *Dupont* opinion is an outlier.

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 have not been any cases to our knowledge where an insurance contract with a health care provider has been produced in order to obtain the charged and accepted amount by the health care provider.

There are several potential reasons for this under Louisiana law – first, under the collateral source rule – the tortfeasor is not allowed to benefit from the victim's foresight in purchasing insurance and other benefits. The injured party is entitled to the entire billed amount. Bozeman v. State, 2003-1016 (La. 7/2/04), 879 So. 2d 692, 698.

Second, when a plaintiff alleges that he or she has incurred medical expenses as a result of injuries suffered in an accident and that medical treatment is evidenced by a bill, *the bill is sufficient to support an award* for past medical expenses "unless there is sufficient contradictory evidence or reasonable suspicion that the bill is unrelated to the accident." *Earls v. McDowell,* 07–17, pp. 7–8 (La.App. 5 Cir. 5/15/07), 960 So.2d 242, 248 (citing *Stiltner v. National Union Fire Ins. Co.,* 00–2230 (La.App. 4 Cir. 10/3/01), 798 So.2d 1132).

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

It depends upon the nature of the suit. If this question relates to workers' compensation, then the rules governing workers' compensation claims apply. Louisiana Revised Statute 23:1310.4, which governs the place workers' compensation proceedings are to be held, provides:

> A. (1) At the time a claim is initiated with the director, the claimant shall elect the situs of necessary hearings by the workers' compensation judge.

(2) If the claimant is a domiciliary of the state of Louisiana, he shall be required to elect either the judicial district of the parish of his domicile at the time he sustained his injury, the judicial district of the parish where the injury occurred, or the judicial district of the parish of the principal place of business of the employer.

(3) In the event that the claimant is not a domiciliary of the state of Louisiana, the necessary hearings shall be held in the judicial ***3**district of the parish of the principal place of business of the employer, provided, that if the injury occurred within the state, the hearings shall be held in the judicial district of the parish where the injury occurred.

(4) In the event the claimant is not a domiciliary of the state of Louisiana and the accident resulting in injury occurred outside the territorial limits of the state, the hearings shall be held in the judicial district of the parish in this state wherein the contract of employment was made or in which the employment was principally localized.

B. After the election has been made as provided above, all future hearings affecting the claimant's case shall be held in the judicial district so designated unless the workers' compensation judge, upon agreement by the claimant and the employer, shall transfer such cause for hearing to any other judicial district agreed upon. In addition, hearings may be held in any location if the workers' compensation judge determines that good cause has been shown.

If the case involves an employee of another company, suing a trucking defendant in tort, then the rules applicable would be the general rules of venue. Plaintiffs may choose any venue available under the Code of Civil Procedure or any other supplementary venue provided by law that fits the particular circumstances of their claims. *Cacamo v. Liberty Mut. Fire Ins. Co.,* 99-3479 (La. 6/30/00), 764 So.2d 41, 44. Although a suit must generally be filed in the parish where a defendant is domiciled under Article 42, Articles 71 through 85 provide optional venue alternatives that supplement the general rule. *Jordan v. Central Louisiana Electric Co., Inc.,* 95-1270 (La. 6/23/95), 656 So.2d 988, 989 (relying on *Kellis v. Farber,* 523 So.2d 843 (La. 1988)). La Code of Civ. Proc. Art 74 provides that an action for the recover of damages may be brough in the parish where the wrongful conduct occurred or in the parish where the damages were sustained. Thus, in the context of a transportation suit, the appropriate forum is generally where the defendant is domiciled or where the accident occurred.

For cases in which a defendant is a nonresident, venue is proper wherever in the state the defendant or his agent, representative, or employee can be found. If no such person can be found, the Louisiana Secretary of State's office is sufficient for service of process. If the defendant is a nonresident insurer, the parish of East Baton Rouge is the only proper venue. If the venue is proper as to one of the obligors, then it is proper as to the others. La. Code CIV. Proc. Art 44 Proper venue can exist in more than one parish if more than one of the general rules apply.

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

Louisiana's current position is that pre-suit depositions are an extraordinary measure only to be used to preserve testimony that would otherwise be lost.

Louisiana is governed by a specific procedural article, La. Code of Civ. Proc. Art. 1429, which provides:

> A person who desires to perpetuate his own testimony or that of another person regarding any matter that may be cognizable in any court of this state may file a verified petition in a court in which the anticipated action might be brought. The petition shall be entitled in the name of the petitioner and shall show:

(1) That the petitioner expects to be a party to an action cognizable in a court of this state but is presently unable to bring it or cause it to be brought.

(2) The subject matter of the expected action and his interest therein.

(3) The facts which he desires to establish by the proposed testimony and his reasons for desiring to perpetuate it.

(4) The names or a description of the persons he expects will be adverse parties and their addresses so far as known.

(5) The names and addresses of the persons to be examined and the substance of the testimony which he expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

A petition for pre-litigation preservation of testimony under La. C.C.P. art. 1429 is an extraordinary discovery method to be used where resort to normal discovery is made impossible by the absence of pending litigation. *Marine Shale Processors Inc. v. State, Through Department of Health and Hospitals,* 572 So.2d 280 (La.App. 1st Cir.1990). The perpetuation of testimony under this rule is not a substitute for discovery, but is made available in special circumstances to preserve testimony that would otherwise be lost. *Marine Shale Processors Inc. v. State, Through Department of Health and Hospitals, supra.* This unusual device is not to be used in a fishing expedition to determine whether to file suit. *In the Matter of Vermilion Parish School Board,* 357 So.2d 1295 (La.App. 3d Cir.1978); *Petition of Miranne,* 626 So.2d 744 (La.App. 5th Cir.1993); *Gaines v. Bruscato*, 30,340 (La. App. 2 Cir. 4/8/98), 712 So. 2d 552, 556, writ denied, 98-1272 (La. 6/26/98), 719 So. 2d 1059.

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

Louisiana law considers the failure to hold a vehicle as a potential spoliation of evidence. However, there is no specific rule regarding "how long" a vehicle must be held. A duty "arises when the party has notice that the evidence is relevant to the litigation." If a party having the duty destroys evidence, then the Court analyses whether the destruction was intentional or not.

The theory of spoliation of evidence refers to the "intentional destruction of the evidence for the purpose of depriving the opposing parties of its use." *Constans v. Choctaw Transport, Inc.,* 97–0863, p. 36 (La.App. 4 Cir. 12/23/97), 712 So.2d 885, 902 citing *Randolph v. General Motors Corp.,* 93–1983, p. 12 (La.App. 1 Cir. 11/10/94), 646 So.2d 1019, 1027. A court may either exclude the spoiled evidence or allow the jury to infer that the party spoiled the evidence because the evidence was unfavorable to that party's case. *Lafayette Ins. Co. v. CMA Dishmachines,* 2005 WL 1038495, at *3 (U.S.D.C., E.D.La.4/26/05). Before a court may exclude spoiled evidence or provide for an adverse inference to arise from the intentional destruction of evidence, "the party having control over the evidence must have had an obligation to preserve it at the time it was destroyed." *Kronisch v. U.S.,* 150 F.3d 112, 126 (2d Cir.1998). Such a duty "arises when the party has notice that the evidence is relevant to the litigation." *Id.* Once a court concludes that a party was obliged to preserve the evidence, it must then consider whether the evidence was intentionally destroyed and the likely contents of that evidence. *See Id.* at 127. *See also Caparotta v. Entergy Corp.,* 168 F.3d 754, 756 (5th Cir.1999)(adverse inference "predicated on bad conduct"); **8 *Vodusek v. Bayliner Marine Corp.,* 71 F.3d 148, 156 (4th Cir.1995)(requiring intentional and willful conduct); *Anderson v. Production Management Corp.,* 2000 WL 492095 at *3 (U.S.D.C., E.D.La.4/25/00)(no adverse inference absent a showing of bad conduct). Furthermore, the presumption that evidence that a litigant fails to produce is detrimental to his case is not applicable when

the failure to produce the evidence is adequately explained. *Constans, supra* at p. 12, 712 So.2d at 902; *Boh Brothers Constr. Co. v. Luber–Finer, Inc.,* 612 So.2d 270, 274 (La.App. 4 Cir.1992). *Everhardt v. Louisiana Dep't of Transp. & Dev.,* 2007-0981 (La. App. 4 Cir. 2/20/08), 978 So. 2d 1036, 1044; *Tonlinson v. Landmark American Ins. Co.* 2015-0276 (La. App. 4 Cir. 3/23/16) 192 So.3d 153 (no adverse inference when surveillance films recorded over pursuant to routine business practices).

In *Everhardt,* the Fourth Circuit analyzed an evidentiary ruling on spoliation when the Plaintiff sold her truck for scrap materials following an accident. The accident occurred in July of 1998, and Plaintiff filed suit in August of 1998. Seven months and one week post-accident, Defendant propounded written discovery to Plaintiff seeking to know the location of the truck and requested that the truck be produced for inspection. Plaintiff responded that it was previously sold for scrap materials. Thereafter, Defendants deposed Plaintiff and sought information relating to the sale of the truck. Plaintiff testified that the truck was sold "about a year" after the accident occurred. Defendant averred that based upon the deposition testimony, Plaintiff did not sell the truck until *after* Defendant requested to inspect the truck. Plaintiff maintained that it was sold *before* Defendant requested to inspect it.

The trial court denied Defendant's request for a spoliation instruction, finding that Defendant failed to establish that the Plaintiff intentionally destroyed evidence, depriving Defendant of its use. Further, the trial court held that the evidence presented at the hearing did not conclusively establish that the Plaintiff had notice that the truck was relevant to the litigation and therefore, she had not obligation to preserve it. Finally, the trial court found that *even if*, the Plaintiff was obliged to preserve the truck, she reasonably explained its destruction, precluding the application of the adverse presumption. The appellate court agreed, finding that there was no evidence that Plaintiff intentionally disposed of the truck to deprive Defendants from inspecting it.

While the *Everhardt* opinion supports that obtaining an adverse presumption may be an uphill battle, best practices would be to place a vehicle on litigation hold following an accident if there is the potential for litigation arising out of an auto-accident. During the litigation hold, a Defendant or their representative should contact a potential Plaintiff to advise them that they have a certain amount of time to conduct the inspection, after which the vehicle will be released into service. For all practical purposes, the letter could stave off any potential spoliation claims.

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

In Louisiana, there is a general public policy against punitive damages; thus a fundamental tenet of our law is that punitive or other penalty damages are not allowable unless expressly authorized by statute. *Ricard v. State, 390 So.2d 882 (La.1980)*; *Killebrew v. Abbott Labs., 359 So.2d 1275 (La.1978)*. Furthermore, when a statute does authorize the imposition of punitive damages, it is subject to strict construction. *International Harvester Credit,* 518 So.2d at 1041; *State v. Peacock, 461 So.2d 1040, 1044 (La.1984)*.

Ross v. Conoco, Inc., 02–299, p. 14 (La.10/15/02), 828 So.2d 546, 555.

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.

Louisiana courts are reluctant to levy punitive damages against the employer of an intoxicated driver under the theory of respondeat superior. In 2001, the Louisiana Supreme Court, in *Berg*, held "the legislative history [of Article 2315.4] reflects the legislature's intent to penalize only the intoxicated driver of motor vehicle and

is in line with the narrow construction that this Court gives to penal statutes." *Berg v. Zummo, 2000-1699 (La. 4/25/01), 786 So. 2d 708, 717—18*; *see also Romero v. Clarendon Am. Ins. Co., 2010-338 (La. App. 3 Cir. 12/29/10), 54 So. 3d 789, 794*, *writ denied*, 2011-0551 (La. 4/25/11), 62 So. 3d 96 (deciding punitive damages provided for in La. C.C. art. 2315.4 could not be assessed against the employer).

More recently, however, in 2019, the Louisiana Fifth Circuit, in *Landry*, 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*. The *Landry* court, however, predicated its decision upon the specifically asserted facts within the pleadings that present genuine issues of material fact as to whether the employer may have prevented the employee from driving while intoxicated. *Id.*

Federal courts in the Fifth circuit have consistently held where there is no evidence that the employer contributed to the intoxication of the employee any claim for punitive damages is futile. *See, e.g., Benoit v. Landstar Inway, Inc., No. CV 17-01794-BAJ-RLB, 2018 WL 4224896, at *2 (M.D. La. Sept. 5, 2018)*, *Deliphose v. United States Fire Ins. Co., No. CV 18-39-SDD-RLB, 2019 WL 2358930, at *1 (M.D. La. June 4, 2019)*, *Phelps v. Daimler Trucks N. Am., LLC, No. CV 13-6685, 2015 WL 12564180, at *1 (Engelhart, D.J.)* (E.D. La. June 26, 2015).

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

No. There have been some isolated Zoom trials in state courts, but they are not mandated. Further, federal courts have continued trials until at least March 2021 due to the ongoing pandemic.

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?**

None recently.

The need for punitive damages is premised upon statutory authorization. The factors relevant in determining the amount of exemplary damages are: (1) the nature and extent of the harm to the plaintiff(s); (2) the financial situation of the defendant; (3) the character of the conduct involved; and (4) the extent to which the conduct offends a sense of justice and propriety. *Angeron v. Martin*, 93–2381 at pp. 5–6 (La.App. 1 Cir. 12/22/94), 649 So.2d 40, 44; *Lacoste v. Crochet*, 1999-0602 (La. App. 4 Cir. 1/5/00), 751 So. 2d 998, 1005.