FOR MORE INFORMATION

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MARYLAND

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 has not been universally accepted or applied by courts in Maryland. Maryland has enacted a medical review committee statute which generally provides that "the proceedings, records, and files of a medical review committee are not discoverable and are not admissible in evidence in any civil action." See Md. Code, Health Occ. § 1-401(d)(1). See also, e.g., Brem v. DeCarlo, Lyon, Hearn & Pazourek, P.A., 162 F.R.D. 94, 101 (D. Md. 1995) (holding physician's opinion regarding the competency of a former resident was not discoverable under the Maryland medical review committee statute in defamation action when the physician's opinion was based on information he acquired by administering hospital's error management conferences involving review of residents' performances). However, the self-critical analysis privilege has not been upheld in other circumstances. See, e.g., Witten v. AH Smith & Co., 100 F.R.D. 446 (D. Md. 1984) (affirmative action plans and EEO-1 reports discoverable and not subject to 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?

Maryland courts do not appear to have issued recent reported decisions squarely addressing the discoverability of third-party litigation funding agreements or files, or rules specifically governing third-party litigation funding. However, the Maryland Commissioner of Financial Regulation has initiated administrative proceedings against companies in the business of making litigation funding advances or other loans to Maryland consumers allegedly without the proper licenses and required disclosures under Maryland law, pursuant to the Maryland Consumer Loan Law (Md. Code, Fin Inst. § 11-201 et seq. and Md. Code, Com. Law § 12-301 et seq.) and the Interest and Usury Law (Md. Code, Com. Law § 12-101 et seq.). See, e.g., Maryland Commissioner of Financial Regulation, Case No. CFR-FY2014-0052.

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

The Maryland Rules provide that a party may be required to attend a deposition "in the county in which the action is pending" as well as "wherever a nonparty could be required to attend." *See* Md. Rule 2-413(b). Regarding where a nonparty could be required to attend, the Maryland Rules provide that a resident of Maryland who is not a party may be required to attend a deposition "in the county in which the person resides or is employed or engaged in business," and that a nonresident who is not a party may be required to attend a deposition "in the county in which the nonresident is served with a subpoena or within 40 miles from the place of service," in addition to "any other convenient place fixed by order of court." *See* Md. Rule 2-413(a)(1).

4. What are the benefits or detriments in your State by admitting a driver was in the "course and scope" of employment for direct negligence claims?

Scope of employment remains a viable defense to a respondeat superior claim, and this issue can raise insurance coverage concerns. Thus, assertion of this defense should be considered if warranted by the circumstances. However, if there is no genuine dispute that the employee was acting within the scope of employment, there may actually be a strong benefit to such an admission. Maryland Courts have held that, where scope of employment is admitted, negligent hiring, retention, and supervision claims may no longer be viable. See, e.g., Houlihan v. McCall, 197 Md. 130 (1951); Nesbit v. Cumberland Contracting Co., 196 Md. 36 (1950); Nelson v. Seiler, 154 Md. 63 (1927). Consequently, if scope of employment is admitted, there is a strong argument that evidence of any adverse employment history is no longer relevant or admissible. This can be an effective tactic to avoid the admissibility of potentially prejudicial evidence.

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

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

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

Pertinent legal considerations include the fact that Maryland follows the collateral source rule, which "permits an injured person to recover the full amount of his or her provable damages, regardless of the amount of compensation which the person has received for his [or her] injuries from sources unrelated to the tortfeasor." Lockshin v. Semsker, 412 Md. 257, 284-85 (2010). Hence, under Maryland law, the collateral source rule "generally prohibits presentation to a jury of evidence of the amount of medical expenses that have been or will be paid by health insurance." Id. Under this rule, a plaintiff generally may seek to recover the full, reasonable value of the medical services rendered to them. See id.; Haischer v. CSX Transp., Inc., 381 Md. 119, 132 (2004). However, there are several exceptions. For example, collateral source evidence may be admissible where there is "evidence of malingering or exaggeration" on the part of a plaintiff (see Kelch v. Mass Transit Admin., 42 Md. App. 291, 296 (1979), aff'd, 287 Md. 223 (1980)), or to rebut a plaintiff's misleading claim of impoverishment. See Abrishamian v. Barbely, 188 Md. App. 334, 346 (2009).

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)

Maryland courts do not appear to have issued recent reported decisions squarely addressing efforts to obtain the amounts actually charged and accepted by a healthcare provider for certain procedures outside of the personal injury context. However, it should be noted that Maryland courts have been closed for a significant portion of the past year due to the Covid-19 pandemic.

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

For purposes of workers' compensation, the Maryland Workers' Compensation Act ("MWCA") provides that an individual is a covered employee under the MWCA while working for the employer of the individual: (1) in Maryland; (2) outside of Maryland on a casual, incidental, or occasional basis if the employer regularly employs the individual within Maryland; or (3) wholly outside the United States under a contract of employment made in Maryland for the work to be done wholly outside of the United States. See Md. Code, Lab. & Empl. § 9-203(a)(1)-(3). However, the MWCA further provides that an individual is not a covered employee under the MWCA while working in Maryland for an employer "only intermittently or temporarily"

if: (i) the individual and employer make a contract of hire in another state; (ii) neither the individual nor the employer is a resident of Maryland; (iii) the employer has provided workers' compensation insurance coverage under a workers' compensation or similar law of another state to cover the individual while working in Maryland; (iv) the other state recognizes the extraterritorial provisions of the MWCA; and (v) the other state similarly exempts covered employees and their employers from its law. See Md. Code, Lab. & Empl. § 9-203(b)(1)(i)-(v).

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

In Maryland, pre-suit depositions are governed by Maryland Rule 2-404 (titled, "Perpetuation of Evidence"), which permits pre-suit depositions, requests for production of documents, and motions for mental or physical examinations under limited circumstances. See Md. Rule 2-404. A party seeking to perpetuate evidence under Maryland Rule 2-404 prior to commencing suit "must make a particularized showing" and "must set forth sufficient facts to demonstrate" that the pre-suit discovery sought "is made necessary because there exists some actual risk" of the evidence sought being "lost by delay" if "it is not secured in advance of the contemplated litigation." Allen v. Allen, 105 Md. App. 359, 368, 373-76 (1995). In Maryland, the use of Rule 2-404 is "reserved for that category of situations in which it is necessary to prevent testimony from being lost or destroyed before a party is able to pursue discovery in the ordinary course of an action," and Rule 2-404 cannot be used "as a discovery device to provide prospective plaintiffs with an opportunity to secure information in order to frame a complaint." Id.

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

While not specific to holding vehicles, Maryland follows the traditional rule regarding spoliation, which is stated as follows:

> The destruction of or the failure to preserve evidence by a party may give rise to an inference unfavorable to that party. If you find that the intent was to conceal the evidence, the destruction or failure to preserve must be inferred to indicate that the party believes that his or her case is weak and that he or she would not prevail if the evidence was preserved. If you find that the destruction or failure to preserve the evidence was negligent, you may, but are not required to, infer that the evidence, if preserved, would have been unfavorable to that party.

Cost v. State, 417 Md. 360, 370 (2010). Under this rule, there is generally a duty to preserve evidence that may be relevant to a later claim, even absent a specific demand. See id. Related to concerns regarding spoliation, it is common in practice for a party to offer all interested parties the opportunity to inspect a vehicle prior to releasing it from preservation.

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

To recover punitive damages in any tort action in Maryland, facts sufficient to show actual malice – which is conduct characterized by evil motive, intent to injure, ill will, or fraud – must be pleaded and proven by clear and convincing evidence, and a specific demand for recovery of punitive damages must be made before an award of such damages may be had. See, e.g., Scott v. Jenkins, 345 Md. 21, 29 (1997); Owens-Illinois, Inc. v. Zenobia, 325 Md. 420, 465-69 (1992); Garcia v. Foulger Pratt Dev., Inc., 155 Md. App. 634, 684-85 (2003). There is no general cap on punitive damages in Maryland. See, e.g., Bowden v. Caldor, 350 Md. 4 (1998).

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

Maryland has not mandated Zoom trials.

13. Has your state had any noteworthy verdicts premised on punitive damages? If so, what kind of evidence has been used to establish the need for punitive damages? Finally, are any such verdicts currently up on appeal?

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