

MISSISSIPPI

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 Mississippi Supreme Court refused to recognize a self-critical analysis privilege when a defendant was seeking to protect documents created for “self-analysis and criticism – that is, documents it created in an attempt to identify and address its problems.” *Roman Catholic Diocese of Jackson v. Morrison*, 905 So. 2d 1213, 1245 (2005).

No reported Mississippi decisions were found regarding to discovery of preventability determinations as related to trucking companies. In an unreported decision, *Cameron v. Werner Enters.*, 2016 U.S. Dist. LEXIS 68711, *9 (S.D. Miss. 2016), the Defendants argued that no evidence to show the preventability of the accident should be admitted “because preventability of an accident is part of the accident review required of the motor carrier industry.” The Defendants cited 49 USCS § 504(f) which states:

No part of a report of an accident occurring in operations of a motor carrier, motor carrier of migrant workers, or motor private carrier and required by the Secretary, and no part of a report of an investigation of the accident made by the Secretary, may be admitted into evidence or used in a civil action for damages related to a matter mentioned in the report or investigation.

The Court agreed that the report was inadmissible; but held “it does not believe that it necessarily follows that all references to the preventability of the accident should be excluded. Therefore, though the report will be excluded, other evidence of preventability will not be excluded at this time.” *Id.* As such, evidence of preventability may be admissible in trial; however, the report is not.

While admissibility may be contested, Mississippi courts generally allow discovery of reports or records that are prepared in the ordinary course of business and would most likely allow discovery of preventability determinations. *Haynes v. Anderson*, 597 So.2d 615 (Miss. 1992). Discovery of post-accident investigation by opposing counsel depends on the circumstances of what the investigation consisted of and when and by whom it was conducted. As a general rule, if the investigation was done in the ordinary course of business, regardless of whether a claim or lawsuit had been made, then it is likely discoverable. If investigation was done at the request of counsel or after notice of a claim, then the investigation is likely not discoverable. *Haynes v. Anderson*, 597 So.2d 615 (Miss. 1992). The analysis under Mississippi law is whether the materials were prepared in the anticipation of litigation. *Dunn v. State Farm Fire & Cas. Co.*, 927 F.2d 869 (5th Cir. 1991).

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?

The only Mississippi case found addressing this is *James v. Antarctic Mechanical Services, Inc.*, Cause No. 3:18-CV-678-CWR-FKB, 2020 WL 557524 (S.D. Miss. Feb. 4, 2020). Defendant cites the 11th Circuit decision in the trucking law article, *ML Healthcare Services v. Publix Supermarkets, Inc.*, 881 F.3d 1293 (11th Cir. 2018). The plaintiff in *James* was involved in an automobile accident, and the plaintiff treated with Dr. Goel. Dr. Goel made an arrangement with the plaintiff that he would pay certain bills up front, as a discounted price, and then charge his full price to the patient. (The briefing in the lower court notes that the bill was inflated somewhere between 583% and 700%.) The plaintiff also signed an agreement that assigned her rights to proceeds arising from the suit to Dr. Goel's clinic to cover her medical bills.

The defendant sought to introduce the assignment agreement and evidence of Dr. Goel's agreement with the medical providers to show bias. *James*, 2020 WL 557524, at *2. The defendant characterized the plaintiff's "bills from Dr. Goel as fabrications meant to inflate her potential damages" and "that the true cost of Dr. Goel's services are the lower amounts he paid to third-party providers." The Court denied the motion without prejudice because the introduction of the evidence to prove reasonableness and bias might violate the collateral source rule and left open for the defendant to show how they could raise this evidence without violating the collateral source rule. *Id.* at *3. The Court stated, as follows:

Here, Dr. Goel is operating as some combination of a health insurance company and a litigation finance company. But evidence of insurance or of an assignment of proceeds to a litigation finance company is typically not admissible. Defendants' characterization of Dr. Goel's services as free, evidence that Dr. Goel has already paid third-party providers for James's medical care, and the suggestion that Dr. Goel will write off these expenses should James not prevail would all fall under the collateral source rule.

Id. Argument could be made that the discovery of a funding agreement is relevant to show bias and to attack credibility of the physician.

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

The Mississippi Rules of Civil Procedure do not specify who travels. Typically, the attorneys travel to the location of the 30(b)(6) witness because the witness, party or non-party, has not selected the forum and it is less burdensome for the lawyer to travel.

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?

Admission that a driver was in the "course and scope" of employment prevents a negligent hiring/supervision/training claim against the employer. *Hood v. Dealer's Transport Co.*, 459 F. Supp. 684(N.D. Miss. 1978). Multiple Mississippi federal courts have addressed the issue and reached the same result. There is no such definitive holding from Mississippi state courts, but we anticipate the holding would be the same.

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

Few cases were tried in 2020 due to COVID-19. There were a few significant verdicts in trucking cases:

1. November 9, 2020 -- Leverette v Wray Trucking Federal Court , Jackson, MS
 - a. \$639,000 verdict for plaintiff who was rear ended by truck driver and knocked plaintiff's vehicle into a third vehicle. Plaintiff suffered C4-5 disc injury and rotator cuff tear. Surgery was not performed but recommended. Verdict broken down to \$39,000 for past medicals, \$200,000 for future medicals, \$100,000 past suffering, \$300,000 future suffering.
2. October 3, 2020 -- Osby v L&T Construction Circuit Court DeSoto County, MS
 - a. \$4,999,717 verdict for plaintiff reduced by 50% for plaintiff's comparative fault
 - b. Plaintiff was rear ended by truck driver. Liability was disputed contending plaintiff either suddenly slammed on his brakes or stopped in the highway. Primary injury was permanent brain injury with incurred medicals of \$580,114 with life care plan of \$7.1 million. Components of the verdict were \$580,114 past medicals, \$1,530, 398 for future medicals, \$ 389,205 past and future lost wages, and \$2.5 million for non-economic damages.
3. March 7, 2020 -- Williams v Graham Circuit Court Warren County, MS
 - a. \$210,102 verdict for plaintiff who was rear ended by truck driver. Defense argued aggravation of pre-existing back condition. Plaintiff had incurred medicals of \$20,102 and projected future medicals of \$55,000. Verdict was for \$20,102 past medicals, \$35,000 future medicals and \$155,000 in non-economic damages.

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

Mississippi recognizes the collateral source rule which provides that compensation received by a plaintiff from a collateral source, wholly independent of the wrongdoer, cannot be used by a defendant in mitigation or reduction of damages. *Burr v. Mississippi Baptist Medical Center*, 909 So. 2d 721 (Miss. 2005). However, the rule is not absolute. "If evidence is introduced for a purpose other than to mitigate damages, the collateral source rule is not violated and the evidence may be admitted." *Burr*, 909 So. 2d at 729.

Under current Mississippi law, a plaintiff may recover for expenses written off by healthcare providers. Mississippi courts have recognized this as a form of the collateral source rule. *Williams v. Manitowoc Cranes, LLC*, 216 U.S. Dist. LEXIS 3553 (S.D. Miss. January 12, 2016); *Wal-Mart Stores, Inc. v. Frierson*, 818 So. 2d 1135 (Miss. 2002); *Brandon HMA, Inc. v. Bradshaw*, 809 So. 2d 611 (Miss. 2001).

Mississippi allows the plaintiff to submit evidence of incurred medicals to the jury. *McCary v. Caperton*, 601 So. 2d 866 (Miss. 1992). Plaintiff can "board" the face amount of the bills regardless of adjustments/amount actually paid. Miss. Code Ann. Section 41-9-119 establishes a rebuttable presumption that the face amount of the bills are reasonable and necessary medical expenses incurred by plaintiff. A defendant is entitled to "rebut the necessity and reasonableness of the bills, and the ultimate question is for the jury to determine." *Herring v. Poirrier*, 797 So. 2d 797, 809 (Miss. 2000). Defendants in Mississippi are increasingly retaining medical billing experts to audit the face amount of medical bills and testify that the face amounts are unreasonable and have no relation to the cost of the service performed nor to the expected payment

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)

Relevancy would be the primary issue in obtaining documentation of amounts actually charged and accepted by a healthcare provider, such as an insurance contract with the provider. Argument could be made the documentation is needed to analyze the reasonableness of the amount charged/billed and to show bias of the physician. Discovery and admissibility of this information would have to be shown not to violate the

collateral source rule.

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

A person injured in Mississippi may bring suit in the county where the accident occurred or county where the defendant resides.

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

Mississippi Rule of Civil Procedure 27(a)(1) states:

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 the circuit or chancery court in the county of the residence of any expected adverse party. 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, and (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.

The petitioner is required to serve notice on all interested parties of the court hearing. If the court is satisfied the perpetuation of testimony is necessary to prevent a failure or delay of the justice system, the court shall order that the deposition be taken specifying the subject matter of the examination and whether the deposition be upon oral examination or written questions. A deposition to perpetuate testimony may be used in any action involving the same subject matter in a Mississippi court in accordance with Mississippi Rule of Civil Procedure 32 proscribing use of depositions in court proceedings. It is very similar to Federal Rule of Civil Procedure 27.

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

There is a duty to preserve evidence where a party is aware of or reasonably anticipates potential litigation that would concern the evidence. *Grand Casino Biloxi v. Hallmark*, 823 So.2d 1185 (Miss. 2002). Mississippi does not provide a specific time for holding a vehicle or tractor/trailer outside the general rules regarding preservation of evidence. Once notice and an opportunity is given to opposing parties to inspect and document the vehicles, an owner should hold the vehicle for a reasonable amount of time. If the owner has no reason to anticipate litigation and has not received a request to preserve/hold the vehicle, the owner should preserve all perishable data and photograph the vehicle extensively before releasing or placing the vehicle back in service. It would be prudent to consult with counsel in this situation. This evidence should be preserved in the event a claim is made.

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

Punitive damages must be proven by clear and convincing evidence that the defendant against whom punitive damages are sought acted with actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud. Miss. Code. Ann. 11-1-65(1). Punitive damages are limited to 2% of a defendant's net worth for a defendant with a net worth of \$50,000,000. or less. Percentages and amounts increase on a sliding scale as a defendant's net worth exceeds \$50,000,000.

Miss. Code Ann. § 11-1-65(3).

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

We are not aware of any Zoom trials being conducted in Mississippi. Courts are conducting Zoom hearings in some cases.

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 were no reported significant punitive damage verdicts in 2020.