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Mississippi

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

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).

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?

There is no clear answer in Mississippi. Argument supporting discovery is that the 3rd party funding agreement may be relevant to attack the bias, credibility and motivation of the provider. *Woulard v. Greenwood Motor Lines*, 2019 WL 3311752 (S.D. Miss. Feb. 4, 2019). Discovery of a 3rd party litigation funding agreement is broader than admissibility at trial.

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

Any minor settlement regardless of the amount must be approved by a Chancery Court to be a valid settlement. The statutory age of majority is 21. However, Mississippi law provides that persons 18 years or older may enter into valid contracts such as releases. Our practice is to have any settlement with a person under 18 years approved by the appropriate court.

Miss. Code Ann. 15-1-59 provides that a minor may bring the cause of action within the specified time after the disability shall be removed as provided by law. The statute of limitations for a minor begins to run when the minor reaches the age of 21, so for a negligence claim the statute is when the minor reaches 21 plus three (3) years.

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

Admission that a driver was in the "course and scope" of employment and vicarious liability 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.

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

The Mississippi Supreme Court has held that "[w]hen evidence is lost or destroyed by one party . . . thus hindering the other party's ability to prove his case, a presumption is raised that the missing evidence would have been unfavorable to the party responsible for its loss." *Thomas v. Isle of Capri Casino*, 781 So. 2d 125, 133 (Miss. 2001). The Thomas court further held, "Because the presumption of unfavorability is not solely confined to the specific issue of what information was contained in the missing evidence, the fact finder is free to draw a general negative inference from the act of spoliation, regardless of what the spoliator's rebuttal evidence shows." *Id*.; *See also DeLaughter v. Lawrence County Hosp*., 601 So. 2d 818, 822 (Miss. 1992). The negative inference applies in cases of both intentional or fraudulent spoliation and negligent destruction of evidence. *Bolden v. Murray*, 2012 Miss. App. LEXIS 221, *20-21 (Miss.Ct.App. 2012); *Thomas*, 781 So. 2d at 133.

In Mississippi, once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a "litigation hold" to ensure the preservation of relevant documents. *Zubulake IV*, 220 F.R.D. at 218.

The Mississippi Supreme Court has recognized the distinction between a first party and third party spoliator, but refused to allow a separate cause of action for a spoliation claim regardless of whether the spoliator was a first party or third party. *Dowdle Butane Gas Co. v. Moore*, 831 So. 2d 1124, 1127-28 (Miss. 2002).

There is a duty to preserve electronic evidence where a party is aware of potential litigation that would concern the data. *Grand Casino Biloxi v. Hallmark*, 823 So.2d 1185 (Miss. 2002).

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

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.

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

Either by permission of the vehicle owner or by court order.

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

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. There are statutory caps on punitive damages based on the defendant's net worth. The caps are on a sliding scale with the lowest being 2% of the defendant's net worth for a defendant with a net worth of $50,000,000 or less. The highest cap is $20,000,000 for a defendant with a net worth more than $1,000,000,000. The caps are lowered as the net worth diminishes. Miss. Code Ann. 11-1-65.

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

We are not aware of any recent punitive damage awards in trucking cases. However, it should be noted that there were several punitive damage awards in cases tried in 2022. These included a $1milliion punitive damage award in an employment case, $1millon punitive award in a dog bite case, $10 million in a bad faith insurance case, and $5 million in a employment breach of contract case. We are not aware of the specific evidence in each case supporting punitive damages and some are on appeal. It is evident that Mississippi juries will award significant punitive damages in certain cases.

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

The legal standard is that the testimony must be based on scientific or specialized knowledge that will help the trier of fact understand the evidence; the testimony must be based on sufficient facts or data; the testimony is the product of reliable principles and methods; and the expert has reliably applied the principles and methods to the facts of the case. MRE 702. The testimony must also meet *Daubert* criteria to be admissible. Application of these factors to an expert's proposed opinions would be addressed on a case-by-case basis.

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

We have not found any Mississippi cases addressing this issue. The analysis would likely focus on the provisions of any agreement between the broker or shipper and the motor carrier.

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

Mississippi applies a pure comparative fault standard. Miss. Code Ann. 11-7-15. A party may only be responsible for damages proportionate to the percentage of fault allocated by the fact finder. A plaintiff's negligence does not bar recovery, but damages shall be reduced in proportion to the amount of fault allocated to plaintiff.

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

Mississippi's statute of limitations for general negligence and breach of contract is three (3) years. Miss. Code Ann. 15-1-49. Mississippi has a one (1) year statute of limitations for intentional torts such as assault, battery, false imprisonment, malicious arrest, slander and intentional infliction of emotional distress. Miss. Code Ann. 15-1-35.

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

The personal representative of the deceased person's estate, the decedent's surviving spouse, surviving parents or children of the deceased and any surviving siblings of the deceased are permitted to bring a wrongful death action. There can be only one wrongful death lawsuit for the death, but all eligible wrongful death beneficiaries may join in the lawsuit. Miss. Code Ann. 11-7-13.

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

Generally, no. Miss. Code. Ann. 63-2-3 provides that non-usage of seat belts may not be considered contributory or comparative negligence.

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

No.

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

Mississippi uses the center of gravity or “substantial contacts” test to resolve choice of law questions. The court looks to the place where the injury occurred, place where conduct causing injury occurred, domicile or residency of the parties, and place where the relationship, if any, is centered.