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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?

While the self-critical analysis privilege has been considered by the courts of many states, Missouri is not one of them. However, the Supreme Court of Missouri did have the opportunity to rule on the potential privilege of hospital peer review committees in State ex rel. Chandra v. Sprinkle, 678 S.W.2d 804 (Mo. banc 1984). Considering the same arguments which first gave rise to the self-critical analysis privilege in Brendice, the Court rejected these arguments and instead ruled that the public interest in these documents was not in confidentiality but in discoverability to more effectively encourage hospital improvement. Id. at 807. Furthermore, the Court acknowledged Mo. Rev. Stat. 537.035 as a statute providing adequate protection in this manner, as it protected the participants in these committees from individual liability. Id. 806-807.

Subsequent to this finding that medical peer review committees were not privileged, the Missouri legislature has taken it upon themselves to reverse this finding. The amended § 537.035, in pertinent part, states:

> 4. except as otherwise provided in this section, the proceedings, findings, deliberations, reports, and minutes of peer review committees concerning the health care provided any patient are privileged and shall not be subject to discovery, subpoena, or other means of legal compulsion for their release to any person or entity or be admissible into evidence in any judicial or administrative action for failure to provide appropriate care.

Mo. Rev. Stat. 537.035. So, while a general self-critical analysis privilege has not yet been recognized in Missouri, participants in medical peer review committees can rest easy that their candid self-criticism remains confidential before Missouri courts.

While Missouri's state courts remain ambiguous on the existence of a self-critical analysis privilege, the federal courts of the Eighth Circuit have not maintained this ambiguity. Since the privilege's beginning, the Eighth Circuit has declared that it does not recognize this privilege. See In Re Burlington Northern Inc., 679 F.2d 762 n.4 (8th Cir. 1982) ("courts have appeared reluctant to enforce even a qualified 'self-evaluation' privilege); Rice v. St. Louis University, 2020 WL 6158029 at *3 (E.D. Mo. 2020) ("SLU has not cited any precedent of the Eighth Circuit or any district court therein, nor has it shown that 'reason and experience' compel this Court to recognize a novel privilege despite that lack of precedent.") ; West v. Marion Laboratories, Inc., 1991 WL 517230 at *2 (W.D. Mo. 1991) ("Considering the general reluctance of the 8th Circuit to acknowledge the 'self-critical analysis privilege… this Court will grant plaintiff's motion to compel discovery…."). The Eighth Circuit has universally ruled that the reasoning of the self-critical analysis

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privilege does not supersede the Federal common law rule that "recognizes a privilege only in rare situations." In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 918 (8th Cir. 1997).

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?

This issue of third-party litigation funding is well known in Missouri with a tumultuous history; including close to a decade of attempted legislation and an even longer history of informal advisory opinions from the Missouri Office of Chief Disciplinary Counsel warning attorneys against getting involved with such transactions. Nonetheless, today third-party litigation funding remains a near unregulated business in Missouri, with general concerns from common law regarding the risk of champerty and maintenance. Ultimately, judicial opinions on this issue have become scarce in Missouri, perhaps waiting on legislation on the issue, which has been pending for near a decade.

Since at least 2013, several bills have been brought before the Missouri General Assembly on the subject of third-party litigation funding. The purpose of these bills has ranged in scope from SB 440 in 2013, proposing to outright ban consumer loans for the purchase of the proceeds of a consumer's legal action, to HB 519 in 2019, which would create the Litigation Financing Consumer Protection Act requiring disclosure from litigation funding companies and regulating their activities. To date, such a bill has not succeeded in becoming law, leaving the issue open in Missouri.

Perhaps the most helpful guidance on this issue has come from the Missouri Office of Chief Disciplinary Counsel and its informal opinions intended to promote lawful and ethical legal practice. Overall, the Office of Chief Disciplinary Counsel's advice for lawyers regarding third-party litigation funding can be summed up in their own words in a 2003 informal advisory opinion: "Generally, it is permissible for the law firm to borrow money from a third party to fund litigation. However, it is not permissible for the repayment of the loan to be based on the outcome of the lawsuit. An attorney cannot engage in conduct that would amount to champerty or maintenance." Mo. Office of Chief Disciplinary Counsel Informal Op. 2003-0022. This advice specifically directs law firms to refrain from directly funding litigation with contingent loans, but says nothing for the client directly assigning a portion of their interest in the outcome of such a litigation for such a loan. In response to such a circumstance, The Office of Chief Disciplinary Counsel advised that the attorney must use their own judgment in determining if the circumstance constituted champerty, and if so to advise their client they cannot represent them in such a situation. Even if they determined the arrangement did not constitute champerty, the Office of Chief Disciplinary Counsel stated, "Attorney must counsel Attorney's client on the impact of the release and disclosure on confidentiality and the attorney-client privilege. Attorney should advise the client whether Attorney believes that providing the required access to information will also mean that the opposing party may have full access to the same information." Mo. Office of Chief Disciplinary Counsel Informal Op. 2000-0229.

While the guidance from Missouri's legal community on the issue of third-party litigation funding is murky and seemingly contradictory at times, what remains clear is that this issue remains on the minds of Missouri's decision makers. As no conclusion has yet been reached regarding the regulation of litigation funding, practitioners must use the available guidance to make the best decisions available. As it stands, it appears that the issue of third-party litigation funding should specifically raise concerns of confidentiality and discoverability. While no judicial or legislative authority has made it official, disclosure of previously privileged information to third-party litigation funders may make that information fair game in the discovery process, which is not a precedent one wants to set themselves.

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

Generally, in Missouri, the attorney travels to a Rule 30(b)(6) witness deposition because the deposition of a corporation should be taken at its principal place of business. State ex rel. Bunker Res. Recycling & Reclamation, Inc. v. Howald, 767 S.W.2d 76, 81 (Mo. Ct. App. 1989). As a general rule, a party should not be compelled to travel from his/her home to a distant site for a deposition, absent exceptional circumstances. Id.

Bunker is an example of exceptional circumstances. In Bunker, a Florida corporation was named as defendant in a lawsuit pending in Missouri. The managing agent of the corporation, a Canadian resident, was required to give a deposition in Missouri because the Court found this witness frequently traveled to Missouri and it would not be financially burdensome for the witness to travel for his deposition.

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?

A. Benefit

Under McHaffie, once an employer has admitted respondeat superior liability for a driver's negligence, "it is improper to allow a plaintiff to proceed against the employer on any other theory of imputed liability." McHaffie By & Through McHaffie v. Bunch, 891 S.W.2d 822, 826 (Mo. 1995). Missouri law recognizes imputed negligence under other theories such as negligent entrustment and negligent hiring. The benefit of admitting a driver was in the "course and scope" of employment is that vicarious liability is established, and in doing so makes it improper to allow plaintiff to proceed with additional claims of negligent entrustment and negligent hiring. This is a benefit because once the case approaches trial, a motion in limine can be filed citing McHaffie to prohibit Plaintiff from presenting evidence of negligent entrustment and negligent hiring. The Court in McHaffie found that evidence relating to lack of testing, inexperience, and failure to properly maintain log books on unrelated trips was irrelevant, prejudicial and confused the issue of negligence since vicarious liability was admitted.

B. Detriment

Admitting a driver was in the "course and scope" of employment for direct negligence can be detrimental since "the liability of the employer is fixed by the amount of liability of the employee." McHaffie By & Through McHaffie v. Bunch, 891 S.W.2d 822, 826 (Mo. 1995).

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

A. Fowler v. STL Trucking, et al., 2018 WL 7680772, City of St. Louis, MO (2018).

On November 27, 2018, a jury in the City of St. Louis awarded a $65 million dollar judgment against Defendant STL Trucking after a tractor-trailer rear-ended the decedents' vehicle on an interstate. The suit was brought by the estate on behalf of two parents and their child asserting claims of negligence, negligence per se, vicarious liability, alter ego liability, and civil conspiracy. STL Trucking failed to appear and the court found in favor of the plaintiffs, determining that STL Trucking was vicariously liable for the acts of the defendant driver.

B. Holdeman v. Stratman, Brown, and C&G Express, LLC, JVR No. 170310024, Jackson County, MO (2016).

On November 10, 2016, a jury in Jackson County, Missouri awarded Plaintiff a $37.5 million dollar verdict against Defendants Stratman and his employer C&G Express, LLC. Defendant Stratman was driving in front of Plaintiff on an interstate when he placed his vehicle into neutral gear to slow down to exit even though he knew his vehicle had a defect which caused the engine to stall when in neutral. The vehicle stalled, and

Plaintiff attempted to brake but was struck from behind by another vehicle causing his spine to fracture with resulting paraplegia. A jury determined that Defendant Stratman was ninety-nine percent at fault and plaintiff was one percent at fault. In judgment, the awards were reduced to $32,775,000 per fault apportionment and prior settlements.

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

In general, "[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action...." Mo. Sup. Ct. R. 56.01(b)(1). Medical records are generally subject to the physician-patient privilege; however, once plaintiffs put the matter of their physical condition at issue under the pleadings, they waive physician-patient privilege. See State ex rel. Fennewald v. Joyce, 533 S.W.3d 220, 222 (Mo. banc 2017); see also RSMo § 491.060(5). But, defendants are not entitled to any and all medical records, "only those medical records that relate to the physical conditions at issue under the pleadings." Id.

Pursuant to the Health Insurance Portability and Accountability Act ("HIPAA") and Missouri law, in order to request or access an individual's medical records and bills, a medical authorization/release is necessary. The authorization has to be signed by the individual whose medical records and bills are at issue, specified as to the type or place of injury, include a date range, and the name(s) of the treating health care provider or facility. Medical authorizations accompany interrogatories and requests for production of documents to the plaintiff and include requests for medical bills actually billed, or paid.

On August 28, 2017, Missouri enacted a revised section 490.715 which changed the evidentiary requirements for the recovery of medical bills. The amended statute appeared to clarify that recovery of medical bills will be the amount actually paid, not the originally billed amount. See RSMo 490.715. However, in Brancati v. Bi-State Development Agency, the Court of Appeals interpreted the amended statute to allow evidence of the amount of the charged medical bills as recoverable damages at trial. 571 S.W.3d 625 (Mo. App. 2018). The amended statute has not altered obtaining discovery of the amounts actually billed or paid, as both are relevant for the purposes of the extent of a plaintiff's injuries. Additionally, the party claiming damages has the burden of proving the existence and amount of damages with reasonable certainty. See Tribus, LLC v. Greater Metro, Inc., 589 S.W.3d 679, 704 (Mo. App. E.D. 2019).

However, in practice, plaintiff's attorneys have used the revised section to limit the amount of bills they turn over in discovery. For example, a plaintiff with low medical bills may benefit from not producing medical bills actually paid or billed so that plaintiff's counsel can present more abstract damages linked to pain and suffering instead of an amount already paid for medical treatment. Because this is a fairly new revised section, Missouri courts have not had an opportunity to address the issue of plaintiff attorneys refusing to turn over medical bills in support of claimed damages.

Ultimately, the amount of medical bills actually billed or paid is discoverable, and the court may order any party to produce documents or papers which contain evidence relevant to the subject matter involved in the pending action. See Misischia v. St. John's Mercy Med. Ctr., 30 S.W.3d 848, 864 (Mo. Ct. App. 2000). The tendency is to broaden the scope of discovery when necessary to expedite justice and guard against surprise, however the evidence requested must appear relevant and material, or tend to lead to the discovery of admissible evidence. Id.

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)

Under Mo. Rev. Stat. §490.715 (2017), evidence of a plaintiff's charged medical bills and evidence of "actual

costs", i.e., the amount paid plus any outstanding charges, can be admitted into evidence. Efforts to obtain the amounts actually charged and accepted by healthcare providers have been successful in every case as the law currently allows these amounts to be submitted to the jury as described above. Further, the amounts must be reasonable and customary within the medical community and represent the fair value of the medical treatment provided. The jury then decides an amount to award, or a combination of both.

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

Generally, Missouri will have jurisdiction when an employee is injured in Missouri if the accident occurred in the state of Missouri, if the contract for hire of the employee was made in the state of Missouri, or if the employer's principle place of business is within the state of Missouri.

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

Pre-suit depositions are available on a limited basis as they are under the Federal Rules. Missouri Supreme Court Rule 57.02 (a) provides the procedure for taking a pre-suit deposition in limited circumstances, if certain requirements are satisfied. Pursuant to Rule 57.02, a person who desires to perpetuate testimony of any person regarding any matter that may be cognizable in any court of Missouri may file a verified petition in the circuit court in the county of the residence of any expected adverse party. The petition is captioned in the name of the petitioner and must demonstrate: (1) that the petitioner expects to be a party to an action cognizable in a court of Missouri but is presently unable to bring it or cause it to be brought, (2) the subject matter of the expected action and the petitioner's interest therein, (3) the facts desired to be established by the proposed testimony and the reasons for desiring to perpetuate it, (4) the names or a description of the persons expected to 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 that is expected to be elicited from each.

In addition to filing the Petition, the petitioner must seek an order authorizing the taking of the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony. If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written questions. The depositions may then be taken in accordance with the Missouri Rules of Civil Procedure. A deposition to perpetuate testimony taken under Rule 57.02 may be used in any action involving the same subject matter subsequently brought in a court of Missouri.

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

No Missouri court has specifically addressed the length of time that a vehicle/tractor-trailer must be held prior to release. However, in determining whether to release a vehicle/tractor-trailer, it must be remembered that "if a party has intentionally spoliated evidence, indicating fraud and a desire to suppress the truth, that party is subject to an adverse evidentiary inference." Baugher v. Gates Rubber Co. Inc., 863 S.W.2d 905, 907 (Mo. App. E.D.1993) (citing Brown v. Hamid, 856 S.W.2d 51, 56-57 (Mo.1993)).

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

Missouri courts recognize that punitive damages may be awarded to punish wrongdoing and deter similar conduct in the future. Vaughn v. Taft Broad Co., 708 S.W.2d 656, 660 (Mo. 1986). However, punitive damages shall not be awarded unless the claimant proves by clear and convincing evidence that the

defendant intentionally harmed the plaintiff without just cause or acted with a deliberate and flagrant disregard for the safety of others. R.S. Mo. § 510.261. Punitive damages may only be recovered if the trier of fact awards more than nominal damages or if the claim or claims for which nominal damages are solely awarded invoke privacy rights, property rights, or rights protected by the Constitution of the United States or the Constitution of the state of Missouri. Id.

There is no cap on the award of punitive damages. In 2014, the Missouri Supreme Court held that Missouri Revised Statute § 510.265 - which capped punitive damages to the greater of either $500,000 or five times the net amount of the judgment awarded to the plaintiff - was unconstitutional. Lewellen v. Franklin, 441 S.W.3d 136 (Mo. 2014). The Court held that the statute imposed a legislative limit on a jury's assessment of punitive damages and thereby violated a citizen's right to a jury trial. Id.

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

Missouri 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?

Missouri hasn't had any noteworthy verdicts premised on punitive damages recently. Virtually every appellate decision involving punitive damages in recent years holds that the punitive damages were supported by the evidence and are not remitted. In a case decided in Jackson County, Missouri, the trial court applied what it thought was Kansas law. Roger Ross, Lorinda Ross v. Jeschke Ag Service LLC: plaintiff alleged that a driver attempted to pass in no passing zone while farm tractor (plaintiff) made left turn resulting in brain injury, fractured skull/pelvic, cerebral hemorrhage, cognitive/memory losses; $6,300,000 verdict (comparative fault 65% D and 35% P). Damages reduced: $3.9 million in economic reduced to $2.535 million because of comparative fault; $2.4 million in non-economic reduced to $250,000 due to application of Kansas statutory cap (conflict of law issue); $750,000 in punitive. Net result: $3.535 million.