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Missouri

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

There is no Missouri authority directly on point as to the admissibility of a carriers' preventability determination. Missouri has a self-critical analysis privilege, but it only applies to health care professionals. Mo. Rev. Stat 537.035. In an unreported decision, the United States District Court for the Eastern District of Missouri excluded expert testimony as to whether an accident was "preventable", finding the opinion would not assist the trier of fact. *Jennings v. Annett Holdings, Inc.,* 2017 U.S. Dist. LEXIS 146398 (Sept. 11, 2017). However, *Jennings* does not directly address the admissibility of a carriers' own preventability determination, and whether such a determination constitutes an admission against interest.

Carriers routinely seek to exclude preventability determinations in Missouri with mixed results. The primary arguments are that a preventability determination constitutes a subsequent remedial measure, and that the FMCSA's definition of a preventable accident is inconsistent with the applicable standard of care. As such, the preventability determination is of limited probative value, and may confuse the jury as to the applicable standard of care. One challenge unique to Missouri is that the duty owed by an operator of a motor vehicle is the "highest degree of care", not that degree of care of a reasonably prudent person. Mo. Rev. Stat. 304.012. In this regard, the Missouri standard of care is arguably much closer to the FMCSA's standard for preventability. 49 C.F.R. 385.3. Ultimately, if the carrier has adopted its own definition of preventability, the likelihood of excluding the preventability determination is greater.

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?

There is no direct authority on the discoverability or admissibility of litigation funding agreements. One would anticipate a Missouri Court being skeptical of discovery of, or admissibility of evidence of a traditional litigation funding agreement under the collateral source rule. *Moore Auto Group, Inc. v. Lewis,* 362 S.W.3d 462 (Mo. Ct. App. 2012).

However, a variation on a litigation funding agreement that is becoming far more prevalent in Missouri is doctors that treat patients pursuant to a "letter of protection." Under such an arrangement, the treating doctor will agree not to collect on his/her bill for treatment rendered until after litigation is resolved. Invariably, the doctor will bill for such care at rates grossly in excess of what is reasonable in the community. After the case resolves, the doctor will then agree to a substantial reduction to his/her bill. It allows a plaintiff to submit grossly inflated damages.

While there are no reported cases on the issue, the discoverability and admissibility of "letter of protection" evidence is hotly contested in Missouri trial courts. Where a plaintiff seeks recovery for past medical expenses, defendants argue that such evidence is discoverable and admissible as the arrangement is relevant to the jury's evaluation of plaintiffs' claimed damages. *See Schieffer v. Decleene*, 539 S.W.3d 798, 804 (Mo. App. E.D. 2017). Defendants also argue that evidence of the arrangement is discoverable and admissible because the arrangements effectively give the treating doctor a stake in the outcome of the litigation and, therefore, the evidence is relevant to the doctor's potential bias. *Mitchell v. Kardesch*, 313 S.W.3d 667, 681 (Mo. banc. 2010).

3. 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?

Effective August 28, 2021, the procedures for settling a minor's claim became substantially less onerous. Court approval of a settlement for $35,000 or less (inclusive of medical expenses, liens, attorney's fees and court costs) do not require Court approval. The settlement may be negotiated by the minor's custodian or parent. The settlement proceeds must still be used to purchase an annuity or paid into a uniform transfer to minors account for the sole benefit of the minor.

For settlements in excess of $35,000, Court approval is required in accordance with Mo. Rev. Stat. 507.184. The settlement must be reached with the "Next Friend" or a "Guardian ad Litem", which is usually the custodial parent of the minor. Mo. Rev. Stat. 507.184. The settlement proceeds do not necessarily need to be used to purchase an annuity, but the Court must be satisfied that the terms of the settlement are fair, reasonable, and in the best interest of the minor. Moreover, the Court must be satisfied that the settlement proceeds will be held or used for the benefit of the minor.

4. 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?

The primary advantage of admitting vicarious liability for the fault a driver is that 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. *State ex rel. McHaffie v. Bunch*, 891 S.W.2d 822, 826 (Mo. 1995). The most obvious disadvantage of admitting vicarious liability for a driver is that once vicarious liability for negligence is admitted under respondeat superior, the person to whom negligence is imputed becomes strictly liable to the third party for damages attributable to the conduct of the driver. *Id.*

It should be noted that despite the Missouri Supreme Court's ruling in *McHaffie*, Missouri Court's have consistently permitted a plaintiff to proceed with derivative claims for negligent hiring, training, retention and entrustment even after a motor carrier admits vicarious liability, if the plaintiff has a viable punitive damages claim.

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

Missouri does not recognize a separate claim for spoliation of evidence. However, it has recognized evidentiary spoliation arising from the intentional destruction of evidence. *Brown v. Hamid*, 856 S.W.2d 51 (Mo. 1993). For spoliation to give rise to an adverse inference, there must be evidence indicating fraud, deceit, or bad faith. In such cases, it may be shown by the proponent that the alleged spoliator had a duty, or should have recognized a duty,

to preserve the evidence. *Wilmes v. Consumers Oil Co. of Maryville,* 473 S.W.3d 705, 718 (Mo .App. W.D. 2015).

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

As part of the 2005 Missouri tort reform R.S. Mo. § 490.715 was amended to include a new subsection 5 that addressed valuation of the medical expenses, including a provision that there was a rebuttable presumption that the "value" of medical treatment is "the dollar amount necessary to satisfy the financial obligation to the health care provider." Plaintiffs were not permitted to introduce evidence of medical expenses that exceeded the reasonable "value" of medical care and treatment. *See id.* Missouri cases, however, significantly undermined this statutory tort reform by allowing evidence of "sticker price" bills to get to the jury upon a very low showing of the "reasonableness" of the full-price bill, which could be satisfied by affidavits or the testimony of the health care providers or their records custodians. *See Deck v. Teasley*, 322 S.W.3d 536 (Mo. banc 2010). The bar to rebut the presumption was so low in practice that the statutory reform failed to have the desired effect.

Revised section 490.715, which went into effect on August 28, 2017, attempts to streamline the evidentiary requirements for recovery of medical bills by eliminating the presumption from the statute and replacing it with an "actual cost" standard. More specifically, Missouri law now defines the "actual cost of the medical care or treatment" recoverable as follows:

> The sum of money not to exceed the dollar amounts paid by or on behalf of a plaintiff or a patient whose care is at issue plus any remaining dollar amount necessary to satisfy the financial obligation for medical care or treatment by a health care provider after adjustment for any contractual discounts, price reduction, or write-off by any person or entity.

In short, Missouri has significantly altered the evidentiary standard for proving the value of medical treatment rendered to an injured party. While the new law appears to be sufficiently clear that medical bill evidence will be the amount actually paid and/or owed, and not the originally billed amount, or including any amounts written off, discounted or adjusted to the bill as a result of contracts with insurers or government programs, *in Brancati v. BiState Development Agency*, the Missouri 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). Accordingly, despite the clear language of the statute, in practice, Missouri Courts still permit both the amounts billed and the amounts paid into evidence.

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

Beyond the federal Driver Privacy Act of 2015, 18 U.S.C. 2721, et seq., there are no additional limitations on obtaining event data recorder data from a vehicle not owned by the party seeking the data. In general, law enforcement is entitled to download the EDR for purposes of an investigation. Other parties are required to obtain a Court Order or an authorization from the owner or lessee of the vehicle.

8. 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?

There are no caps on the award of punitive damages in Missouri. "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 can properly be awarded against an employer or other principal because of an act by an agent if, but only if:

(1) The principal or a managerial agent of the principal authorized the doing and the manner of the act;

(2) The agent was unfit and the principal or a managerial agent of the principal was reckless in employing or retaining him or her;

(3) The agent was employed in a managerial capacity and was acting in the scope of employment; or

(4) The principal or a managerial agent of the principal ratified or approved the act.

9. 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?

In October of 2022, a jury in the Circuit Court of St. Louis, Missouri, awarded $28 million in compensatory damages and $149 million in punitive damages to plaintiff Shannon Dugan in her suit against the Hyatt Corporation.

Dugan, a sheriff's deputy from New Jersey, was visiting St. Louis in 2016 to attend a crime investigation seminar. While staying at the Hyatt Regency St. Louis at the Arch hotel, a colleague who had been unable to get her on the phone asked the hotel to check on her, prompting the hotel to send security guard David White to her room. White used his electronic key fob to access the room and had a maintenance worker open the security latch. He found the plaintiff sleeping but didn't wake her. An hour later, knowing the latch was undone, he returned and assaulted her.

White pleaded guilty in 2018 to first-degree burglary and misdemeanor sexual abuse and received probation. He was also named as a defendant in the civil suit but was dismissed prior to the trial.

Plaintiff alleged that Hyatt was negligent in hiring, training, and supervising White. More specifically, plaintiff alleged that Hyatt's background check concentrated only on criminal convictions and sex-offender registrations but missed White's lengthy criminal history involving suspicion of sexual deviant behavior. Plaintiff argued that while White had no previous convictions, he had a lengthy arrest history. Plaintiff also argued that Hyatt failed to check with White's references to verify his past employment and that the hotel violated its policies, which required wellness checks to be done by two officers — one of whom should have been female. The verdict is currently under appeal.

10. 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?

Effective March 28, 2017, Missouri adopted the *Daubert* standard for the admissibility of expert testimony. Under the earlier statutory standard, which the Missouri Courts were clear was neither the *Daubert* or *Frye* standard, Courts routinely allowed expert testimony on the applicable FMCSRs, and the carriers' alleged failures to comply with those standards. The Courts have generally held that federal regulations, such as the FMCSR, are competent evidence relevant to the question of negligence. *See, e.g., Ratcliff v Sprint Mo., Inc.,* 261 S.W.3d 534 (Mo. Ct. App. 2008)(allowing expert testimony on OSHA regulations). Since the adoption of the Daubert standard, it appears little has changed. Courts routinely allow experts to testify to the contents of FMCSRs and offer opinions as to the carrier's compliance with the regulations

11. 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?

There is no bright-line rule, however, brokers can be held liable as a *joint venturer* for the negligent acts of a co-venturer truck driver. *Johnson v Pacific Intermountain Express Co.,* 662 S.W.2d 237 (Mo. Banc 1983). The courts have established the following test for determining whether a joint venture exists: (1) A consensual arrangement with respect to the undertaking, and (2) equal right to control the enterprise. *Id. Johnson* held that a broker had the requisite "control," so as to impose liability on the broker, insofar as he instructed the drivers where to haul a load and collected payment from the end customer.

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

Missouri is a pure comparative negligence state, so any negligence attributed to the Plaintiff will reduce his recovery proportionately. R.S. Mo. §537.765.

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

Missouri's statute of limitations for personal injury actions ins 5 years from the date of injury. R.S. Mo. § 516.120.

Missouri's statute of limitations for wrongful death claims is three years from the date of negligence leading to death. R.S. Mo. §537.100.

14. 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?

Any one beneficiary that is entitled to bring a wrongful death claim under R.S. MO. §537.080 may file, negotiate and settle a wrongful death claim on behalf the entire class of beneficiaries that are entitled to bring a wrongful death claim. Pursuant to R.S. MO. §537.080, a wrongful death claim may be filed by the spouse or children or the surviving lineal descendants of any deceased children, natural or adopted, or by the father or mother of the deceased, natural or adoptive. R.S. MO. §537.080(1). If no such persons exist, then the brother or sister of the deceased, or their descendants, may file the wrongful death claim. *Id.*

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

Failure to wear a seat belt cannot be admitted as evidence of comparative negligence. However, evidence of seat belt non-use can be admitted to mitigate damages when: (1) defendant has an expert stating that failure to wear seat belt contributed to plaintiff's injuries; and (2) if the trier of fact finds failure to wear a seat belt did contribute. Mo. Rev. Stat. §. 307.178. A plaintiff's damages may be reduced by a maximum of 1% based on the failure to wear a seatbelt. *Id.*

16. 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.

Missouri has a "no pay-no play" statute that prohibits an uninsured motorist from collecting non-economic

damages. R.S. Mo. § 303.390 states in pertinent part that "an uninsured motorist shall waive the ability to have a cause of action or otherwise collect for noneconomic loss against a person who is in compliance with the financial responsibility laws of this chapter due to a motor vehicle accident in which the insured driver is alleged to be at fault."

At least two Missouri Circuit Court judges have held that the "no-pay no-play" statute is unconstitutional as violating a plaintiff's right to trial by jury. *See Tyler v. Kansas City Ice Cream* (Circuit Court of Jackson, County Missouri) & *Gilmore v. Page* (Circuit Court of Pettis County, Missouri. Subsequent to both the *Tyler* and *Gilmore* decisions, the United States District Court for the Western District of Missouri applied the statute and held that the statute did not violate the plaintiff's constitutional right to a trial by jury. *Hassell v. Howard*, No. 20-05042-CV-S-BP, 2021 U.S. Dist. LEXIS 253916 (W.D. Mo. Aug. 12, 2021).

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

Choice of law is often an issue in vehicle accident cases filed in Missouri because a substantial part of the Kansas City metropolitan area is in Kansas. There are important differences between Kansas and Missouri substantive law that can affect case value.

Missouri applies the "most significant relationship test" of the *Restatement (second) of Conflict of Laws 145* to choice of law questions. As such, Missouri Courts make choice of law determinations based upon the predominance of contacts with the state whose law is to prevail. *Hicks v. Graves Truck Lines, Inc.,* 707 S.W.2d 439, 442 (Mo. Ct. App. 1986). Contacts used in determining which state has the most significant relationship to an issue include:

1. The place where the injury occurred;
2. The place where the conduct causing injury occurred;
3. The domicile, residence, nationality, place of incorporation and place of business of the parties; and
4. The place where the relationship, if any, between the parties is centered.

The contacts are evaluated according to their relative importance with respect to the particular issue. *Id.*

When evaluating the relative importance of the four factors, Section 6 of the *Restatement (Second) of Conflict of Laws* sets forth the following guiding principles to be considered as a part of the Court's analysis:

1. The needs of the interstate and international systems;
2. The relevant policies of the forum;
3. The relevant policies of other interested states and the relative interests of those states in the determination of the particular issue;
4. The protection of justified expectations
5. The basic policies underlying the particular field of law;
6. Certainty, predictability and uniformity of result; and
7. Ease in the determination and application of the law to be applied.

See Livingston v. Baxter Health Corp., 313 S.W.3d 717, 721-722 (Mo. Ct. App. 2010).

Under Section 146 of the *Restatement (Second) of Conflicts of Laws*, which specifically addresses personal injury actions, the state where injury occurred generally determines the rights and liabilities of the parties.

Under the most significant relationship standard, there have been cases filed in Missouri arising out of Kansas accidents where Kansas "rules of the road" (i.e. standard of care, etc.) applied, but the damages laws of Missouri applied. For example, *Hicks v. Graves* arose out of property damage occurring in a collision in Kansas between a Missouri resident, and a Kansas trucking company and a Kansas truck driver. The Missouri trial court applied Kansas' statutory comparative fault scheme, and the jury found the Missouri resident driver to be 60% at fault, and the Kansas defendants to be 40% at fault. Under Kansas' 50% rule (K.S.A. 60-258a), the Missouri resident was barred from recovering. The Missouri Court of Appeals reversed the trial court and remanded the case to the trial court for a new trial on all issues. In short, the Court found that Missouri had the most significant relationship to the issue of fault allocation in that the location of the accident was fortuitous, and application of Kansas' comparative fault scheme was contrary to the public policy and interests of the state of Missouri, the forum state, in ensuring a Missouri resident obtains a ratable recovery for his damages. Missouri has adopted a system of pure comparative fault.