FOR MORE INFORMATION

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MONTANA

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?

Montana has not recognized the self-critical analysis privilege. The U.S. District Court for the District of Montana has addressed the issue and determined that even if the privilege were recognized by the Montana Supreme Court, it would only protect opinions or recommendations and not the factual content contained in the report. *Parrick v. FedEx Grounds Package System,* CV 09-95-M-DWM-JCL, 2010 WL 2854314, at *4–5 (D. Mont. July 19, 2010). A later U.S. District Court decision analyzed the issue under the work-product doctrine and held the report would be discoverable if prepared in the ordinary course of business, but protected if prepared "in anticipation of litigation." *Exxon Mobil Corp. v. N.W. Corp.,* 116CV00005BLGBMM, 2017 WL 4287204, at *1 (D. Mont. Sept. 27, 2017).

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?

Montana courts have not yet addressed the issue of discoverability of third-party litigation funding information. Montana's Rule 26(b)(1) and caselaw regarding discovery scope and limits is substantially similar to Federal Rule 26(b)(1) and caselaw. Therefore, Montana courts could be expected to follow the apparent majority rule on the issue and hold that information regarding third-party litigation funding is not discoverable, unless the party seeking such discovery could clearly show that the information is relevant to the claims and defenses and not protected work product.

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

The attorney generally travels to the location of the witness being deposed. The Montana Rules of Civil Procedure provide that a witness's presence at a deposition is governed by Rule 45, which allows a subpoena to command a witness's presence at a deposition within 100 miles of where that person resides or is employed or transacts business. Non-residents served within the state must be deposed within 100 miles of where they were served or at another convenient location as fixed by order of court.

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?

Admitting the driver was in the course and scope of his or her employment will generally shield the driver from personal liability for acts within the course and scope, while exposing the company to vicarious liability for his negligence. *Sherner v. Natl. Loss Control Servs. Corp.,* 124 P.3d 150, 155 (Mont. 2005); *Parrick v. FedEx Grounds Package System, Inc.*, CV 09-95-M-DWM-JCL, 2010 WL 1981451, at *3 (D.

Mont. Apr. 21, 2010), report and recommendation adopted sub nom. *Parrick v. FedEx Ground Package System, Inc.*, CV 09-95-M-DWM-JCL, 2010 WL 1981422 (D. Mont. May 14, 2010); *Mann v. Redman Van & Storage Co., Inc.*, CV 10-128-M-DWM-JCL, 2011 WL 5553044, at *3 (D. Mont. Oct. 17, 2011), report and recommendation adopted, CV 10-128-M-DWM-JCL, 2011 WL 5553241 (D. Mont. Nov. 15, 2011). However, the driver may be held personally liable if he engaged in knowing, active tortious conduct. *Castro v. ExxonMobil Oil Corp.,* 2012 WL 523635, *3 (Feb. 16, 2012 D. Mont.).

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

Answer: A few noteworthy verdicts (non-trucking) are addressed in response to question 13. There have not been any nuclear trucking verdicts that we're aware of in the past 10 years. In 2020, a commercial truck driver was awarded a $2.5 million verdict in a case in which he injured his back when a pickup rear-ended the semi-truck he was driving. *Shuman v. Highmark Traffic Service,* Yellowstone Co. DV-19-271 (9/18/20).

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

The Montana Supreme Court decided this issue in *Meek v. Mont. Eight Judicial Dist. Ct.,* 2015 Mont. 130, 379 Mont. 150, 349 P.3d 493. In Meek the defendants moved in *limine* to restrict the plaintiff's medical expense recovery to the amounts actually paid by Medicare and insurance, and prohibit the plaintiff from presenting evidence of the "inflated" amounts actually billed by the providers. The Supreme Court noted that Mont. Code Ann. § 27-1-302 requires that damages be reasonable and that it is for the jury to determine what is reasonable under the circumstances. The Court then noted that this statute must be construed along with Montana's collateral source statute to as to give effect to both.

The Court held that if the plaintiff introduces evidence of the actual medical bills then the defendants may contest the reasonableness of the bills as a measure of damages, in which case the amount that Medicare or other insurance pays to other health care providers for the same or similar services would be relevant to that issue. However, the defendants would still be prohibited from offering any evidence or argument that the plaintiff herself was covered by Medicare or other insurance, or that Medicare or other insurance paid any part of her medical expenses. Under Mont. Code Ann. § 27-1-308, Montana's collateral source statute, those matters may be considered only by the trial court following the jury's verdict. Amounts billed are relevant to the issue of general damages and reasonableness, including the nature and severity of injuries, and the medical procedures and treatments that were required. *See Chapman v. Mazda Motor of Am..,* 7 F.Supp.2d 1123, 1125 (D.Mont. 1998). Amounts actually paid are relevant for consideration, post-verdict, of collateral source payments. Therefore, such information is discoverable.

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)

There are no Montana state or federal cases addressing this issue and we are not aware of anyone attempting to discover general contract rates from a treating physician.

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

Montana courts will exercise jurisdiction over any claim that arises from an employer: (1) transacting any business within Montana, (2) committing any act resulting in accrual within Montana of a tort action, or (3) entering into a contract for services to be rendered or for materials to be furnished in Montana. Rule 4(b)(1), M.R.Civ.P. An employee who is injured in Montana can certainly file suit here except, perhaps, if the employee is bound by a contract that establishes exclusive jurisdiction in a different state. *See, e.g., Bjorgen v. Marco Techs., LLC,* 2018 U.S. Dist. LEXIS 73461.

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

Unless the potential parties and witnesses agree, depositions may be taken before a suit is filed only by court order. Rule 27, M.R.Civ.P. A petition for a court order must show that the petitioner expects to file an action in Montana but cannot presently bring it, and also must explain the subject matter of the action, name the expected adverse parties, state the facts the petitioner wants to establish and the reasons to perpetuate the testimony, and identify the deponents and the testimony expected from them. *Id*.

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

There is no set standard for the amount of time a vehicle/tractor-trailer must be held prior to release. Best practice would be to preserve the equipment until you've offered plaintiff's counsel an opportunity to inspect it, but that is not always practical. Plaintiffs have 3 years to file a negligence claim and another 3 years to serve the complaint. In every accident, efforts should be undertaken to download and preserve all the ECM, video recordings, weights, photographs, and any other evidence regarding the accident and the condition of the equipment, so as to avoid allegations of spoliated evidence.

Spoliation is not a stand-alone claim in Montana, but sanctions are appropriate when a party destroys evidence that it knew, or reasonably should have known, was potentially relevant to the litigation. *Peschel v. City of Missoula,* 664 F. Supp. 2d 1137, 1141-42 (D. Mont. 2009) (internal citations omitted). "If the spoliating party intentionally, willfully, or in bad faith destroyed evidence (i.e., with the purpose or intent to conceal unfavorable evidence), a rebuttable presumption arises that the evidence was materially unfavorable to the spoliating party thus resulting in severe prejudice to the other party." *Montana State U.-Bozeman v. Montana First Jud. Dist. Ct.,* 426 P.3d 541, 553 (Mont. 2018).

Moreover, "upon a showing, by direct or circumstantial evidence, of a reasonable probability that the lost evidence would have materially supported an essential element of a claim or defense at issue," negligent spoliation is sufficient to warrant a merits-based sanction. *Id*. As the Montana Supreme Court said in *Spotted Horse v. BNSF R.R. Co.,* 350 P.3d 52, 58, "Whether the spoliation of video footage was a litigation tactic or inadvertent as BNSF claims, BNSF's conduct has effectively undermined the 'search for the truth' of what actually transpired on September 13, 2009."

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

Except in contract cases, a trier of fact may impose punitive damages in addition to compensatory damages. § 27-1-220, MCA. The plaintiff must show, by clear and convincing evidence, the defendant acted with "actual fraud" or "actual malice." § 27-1-221, MCA. Actual fraud occurs when the defendant either makes a representation that it knows is false or purposefully conceals a material fact, and "the plaintiff has a right to rely upon the representation of the defendant and suffers injury as a result of that reliance." § 27-1-221(3)-(4). Actual malice exists when the defendant has knowledge or intentionally disregards facts that create a high probability of injury and proceeds to act regardless. § 27-221(2).

If the plaintiff can meet the standard for punitive damages and the trier of fact is willing to award an amount, except in class action cases, Montana does place caps on what can be awarded. In addition to the due process limitations, punitive damages are capped at "$10 million or 3% of a defendant's net worth, whichever is less." § 27-1-220, MCA; *Bmw of N. Am. v. Gore* (1996), 517 U.S. 559, 568, 116 S. Ct. 1589, 1595 (explaining constitutional limits on punitive damages). In 2017, there was an attempt to amend Montana's punitive damages statute to include an additional cap of no more than three-times a compensatory damage award. HB 165. The bill died in committee.

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

The Montana Supreme Court has not mandated Zoom trials, and does not seem to favor them. The Court recently reversed a guilty verdict in a criminal case because the defendant was denied his confrontation right when the trial court allowed a foundational witness to testify via videoconference. Montana district courts have not tried any cases virtually to our knowledge. In some districts, all civil trials have been continued. In other districts, a half dozen or more civil cases have been tried live, with some witnesses being allowed to appear by video. One case resulted in a $2.48 million verdict for the plaintiff. The other trials we know of resulted in small judgments or defense verdicts. One defense verdict was appealed, but the case settled in mediation.

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?

Montana has seen a few noteworthy punitive damage awards that greatly exceed the amount of compensatory damages. Perhaps most notable is a defective products case in which a jury awarded $8 million in compensatory damages and $240 million in punitives to the estates of two teenage boys who were killed in a car accident. *Olson v. Hyundai Motor Co.*, 2014 Mont. Dist. LEXIS 35. After the jury verdict, the plaintiffs filed a joint motion for the judge to review the punitive damages and enter judgment. As required by state statute, the court reviewed the punitive damage award by considering nine factors:

(i) the nature and reprehensibility of the defendant's wrongdoing;

(ii) the extent of the defendant's wrongdoing;

(iii) the intent of the defendant in committing the wrong;

(iv) the profitability of the defendant's wrongdoing, if applicable;

(v) the amount of actual damages awarded by the jury;

(vi) the defendant's net worth;

(vii) previous awards of punitive or exemplary damages against the defendant based upon the same wrongful act;

(viii) potential or prior criminal sanctions against the defendant based upon the same wrongful act; and

(ix) any other circumstances that may operate to increase or reduce, without wholly defeating, punitive damages.

§ 27-1-221(7)(b). After reviewing these factors, the court decided to reduce the punitive damage award against the Hyundai defendants to approximately $73 million combined. The court was aware the reduced award far exceeded the statutory cap of $10 million, however, the court dismissed that cap as unconstitutional. Neither party appealed.

A year later, a jury awarded $5 million in punitive damages – five times the compensatory damages – to a plaintiff who had lost her home because her bank switched the terms of her loan without her knowledge.

McCulley v. U.S. Bank, 2015 MT 100, 378 Mont. 462, 347 P.3d 247. The bank appealed the award and the Montana Supreme Court affirmed. Evidence the Court relied on included: the extent of emotional harm to the plaintiff; the bank's knowledge of plaintiff's lack of sophistication and financial vulnerability; the bank's awareness that plaintiff would likely lose her home under the terms it applied; and, the bank's financial stability. *Id*. at ¶¶ 42-56.

A more recent case involves a failure to report child sex abuse by entities connected with Jehovah's Witnesses. The plaintiff sued for negligence, breach of fiduciary duty, and negligence *per se*. The plaintiff moved for partial summary judgment on her negligence per se claim and won. A trial was held on damages and the jury awarded the plaintiff $31 million in punitive damages. *Nunez v. Watchtower Bible & Tract Soc'y of N.Y., Inc*., 2020 MT 3, ¶ 8, 398 Mont. 261, 455 P.3d 829. The compensatory damage award was $4 million. *Id*. In a 7-0 decision, the Montana Supreme Court found the church was exempt from mandatory reporting laws, in effect reversing the jury verdict and the court's order on plaintiff's motion for partial summary judgment. *Id*. at ¶ 33. Because that finding was dispositive of the appeal, the Court did not review the punitive damage award. However, the Court may not have seen the last of this case. On remand, the trial court permitted the plaintiff to renew her common law negligence claim even though she had told the court she was dismissing the claim and did not pursue it at trial. The defendants requested supervisory control, and the Montana Supreme Court affirmed finding, after the first appeal, the case was not in a pretrial posture and the trial court could, in its discretion, allow the plaintiff to amend her complaint. So, the plaintiff will have an opportunity for a second trial, and punitive damages are, again, a possible outcome.