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NEW YORK

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 so-called "self-critical analysis privilege" has never been recognized under New York Law (*see Lamitie v. Emerson Elec. Co.-White Rodgers Div.*, 142 A.D.2d 293, 535 N.Y.S.2d 650 (3rd Dept. 1988). *lv. dismissed* 74 N.Y.2d 650 (1989). The privilege is designed to protect an entities internal reviews and investigations from disclosure based on the policy encouraging companies to assess their compliance with regulations and laws without fear of reprisal in future litigation.

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?

In New York State, there is no statutory obligation requiring a party to disclose the existence of a litigation funder or litigation funding agreement to the opposing party or to the court. However, third-party litigation funding is permitted subject to conditions. This can occur when the party seeking such relevant files has a substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means, *see CPLR 3101(d)(2)*. If deemed relevant, a party would be compelled to disclose some information concerning the third-party funder, including the identity, *see In re Nassau County*, 4 N.Y.3d 665 (NY 2005).

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

Generally, Federal Courts in New York will conduct an analysis based upon the burdens and hardships placed upon the parties and counsel when proceeding with a Rule 30(b)(6) deposition. For example, in *Buzzeo v. Bd. Of Educ.*, 178 F.R.D. 390 (E.D.N.Y. 1998), there was a greater burden to the defendant of producing multiple witnesses at plaintiff's counsel's office as compared to the burden on plaintiff of having just his attorney travel to the school district to conduct depositions. Conducting court proceedings, including Rule 30(b)(6) depositions, remotely has become the "new normal" since the advent of the public health emergency created by the spread of the coronavirus and COVID-19. In that context, Courts will obligate plaintiff's counsel and counsel for the corporate deponent to share in the costs, *see Rouviere v. Depuy Orthopaedics, Inc.*, 471 F.Supp,3d 571 (S.D.N.Y. 2020).

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?

As a starting point, it is incumbent to determine the legal status of the driver for

the purposes of determining whether the driver is truly independent or, alternatively, whether the driver is acting within the "scope of employment" for the trucking company. The reason for making this distinction is because a trucking company is generally not liable for wrongful acts committed by independent contractor drivers if the acts were committed outside of the "scope of employment".

When it is admitted that a driver was in the "course and scope" of employment for a direct negligence claims, the benefit is that the company has control over the driver. This is especially beneficial if the driver's actions confirm the driver was not culpable in bringing about the accident. The detriment in making such an admission is that the company is bound by the negligent actions of the driver.

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

In December 2018, an $85 million jury verdict was obtained for a pedestrian who sustained catastrophic injuries after being hit by a double decker sightseeing tour bus in downtown Manhattan. After a 5 week trial a jury of 2 men and 4 women took less than one day to reach their verdict, $45 million for past pain and suffering and $40 million for future pain and suffering. As a result of the crash, plaintiff had a complete transection of the superficial femoral artery which was repaired, complete transection of the femoral vein which could not be repaired, and some loss of use of both sensory and motor function of the left extremity. He suffered a foot drop along with degloving injuries. He also sustained a fracture to his right clavicle which was repaired with surgery as well as an injury to his adrenal gland resulting in partial adrenal insufficiency requiring him to take steroids for the rest of his life. Plaintiff, once an avid runner, is now able to walk with an AFO brace, but still suffers from chronic neurological pain.

In October of 2017, a sanitation worker obtained a $41.5 million dollar verdict when he was fatally hit by a sweeper truck. At the time of his fatal accident, plaintiff was in a city garage making adjustment to his sweeper truck when another truck arrived in the garage and fatally struck him. The victim left behind him a wife and four young children. The jurors, 4 men and two women awarded to Frosh's family $1.5 million for conscious pain and suffering, $15 million for past losses of parental care and guidance and financial support and $25 million for future lost guidance and financial support.

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

The general rule in New York is a plaintiff who has sustained an injury by way of a defendant's wrongful conduct is permitted to recover the "reasonable value of all medical expenses that are necessary to treat or cure the injury." Plaintiff may seek to recover the amount charged by medical providers so long as the amount charged is fair, reasonable and necessary. *See* N.Y. PJI 2:285. Evidence of what the plaintiff expended for medical services may be used to determine the reasonable value, although the plaintiff is not automatically entitled to the amount actually paid. *See Clarke v. Westcott*, 1 A.D. 503, 506 (1st Dept 1896). Evidence of future medical expenses are admissible and such expenses are recoverable, provided that they are "reasonably certain to be incurred" and are necessitated by the plaintiff's injuries. *See, Lloyd v. Russo*, 273 A.D.2d 359 (2d Dep't 2000)

Nonetheless, pursuant to CPLR § 4533-a itemized invoices or bills up to $2,000 which are marked paid and are accompanied by a statement that the rates charged are usual and customary will become prima facie evidence of the reasonable value and necessity of the services. Defendants are entitled to engage in pre-trial discovery relative to the amounts paid to challenge the reasonableness and necessity of the medical expenses.

New York's collateral source statute (CPLR §4545) provides for a post-trial hearing before the judge to determine if any past or future cost of medical care, custodial care or rehabilitation services, loss of earnings,

or "other economic loss" will, with reasonable certainty, be indemnified or replaced in whole or in part by a collateral source such as medical and property insurance reimbursements. However, discovery related to collateral sources is generally required to be completed pre-trial. *See Eaton v. Chahal,* 146 Misc.2d 977, 984 (Sup. Ct. Rensselaer County Mar. 26, 1990).

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)

In *McCulloch v. Group Health Inc*., the plaintiff, an out of network physician, challenged the amount the defendant, the patient's insurer, reimbursed the plaintiff for performing orthopedic surgery. 2014 WL 6634048, No. 155939/2013 (Sup. Ct. New York County 2014). Plaintiff argued that he reached out to the defendant prior to performing surgery regarding reimbursement rates and was informed that the reimbursement rate was 100% of the usual and necessary costs for performance of the surgery in the geographic location. *Id*. However, the defendant only paid plaintiff half of what he believed should have been reimbursed based on this promise.

In furtherance of his position, plaintiff requested the reimbursement rates for in-network physicians, and also requested the reimbursement rates related to certain billing codes for equipment plaintiff used in the surgery. *Id.* The Supreme Court, New York County refused to compel production of either of the billing rates finding that they were not material and relevant to the litigation because the in-network rates were not relevant to determining the reasonable rate to be paid to an out-of-network physician and did not relate to a certain rate allegedly promised to this particular plaintiff. *Id*. The First Department modified and affirmed this decision, finding that the reimbursement rates for in-network physicians was not relevant, but modified the decision to allow the plaintiff discovery as to the reimbursement rates for the billing codes actually used. 128 A.D. 3d 494 (1st Dept 2015).

Unlike other states where discovery into insurance rates has been permitted, especially in the context of discovering the reasonableness of rates charged under medical liens, it does not appear New York has addressed this issue. This may be because New York's Medicaid rates and State hospital reimbursement rates are publicly available through the New York State Department of Health. However, plaintiffs seeking reimbursement rates in discovery from a private insurer will face a void of case law in New York.

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

New York choice of law approaches differ based upon the subject matter of the litigation. However, the first step is always to determine whether a conflict exists between the law of the forum (e.g. the place of injury), and the competing jurisdiction (e.g. the domicile of the employee).

If an employee is injured, but the litigation centers around interpretation of an insurance policy or some other contractual issue, then the litigation is contract based and the court will determine which state has the most significant relationship based on a grouping of contacts. Courts will consider (1) the place of contracting, (2) the place of negotiation and performance, (3) the location of the subject matter of the contract (4) the domicile of the contracting parties, and (5) the state's interest in having its law apply. *See Matter of Allstate Ins. Co. (Stolarz),* 81 NY.2d 219 (1993). In insurance litigation, the state with the "most significant relationship" is typically where "the parties understood was to be the principal location of the insured risk" unless some other factor weighs stronger. *Jimnez v. Monadnock Const., Inc.,* 109 A.D.3d 514, 517 (2d Dept 2013).

However, where the litigation centers around a tort, the applicable choice of law standard will depend on whether the conflict involves a conduct regulating or loss allocating rule. If the rule is conduct regulating (i.e.

standard of care) then the law of the place of the tort typically applies. If the rule is loss allocating (i.e. whether comparative negligence can be apportioned against the employer covered by worker's compensation) then the series of rules set forth in *Neumeier* will apply. *See Neumeier v. Kuehner*, 31 N.Y.2d 121 (1972). The Neumeier rules are a set of three rules:

1. If the domicile of the parties is the same, the law of the common domicile controls.
2. If the parties have different domiciles, the situs of the tort is in a state where one of the parties is domiciled, and the substantive law in that state favors the domiciliary, the law of the place of injury will apply.
3. If the parties are domiciled in different states, and none of the foregoing rules apply, the law of the place of the tort will control unless "it can be shown that displacing that normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for litigants."

Neumeier, 31 N.Y.2d at 128

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

In very limited circumstances, a court may permit a pre-suit deposition to preserve testimony for an impending claim via CPLR 3102(c). *See Matter of Davis*, 178 Misc.2d 65 (Ct. Cl. 1998). With leave of court, a party may request disclosure to preserve information, to aid in an arbitration, or to aid in bringing the action prior to filing an action. CPLR 3102(c). In order to commence a miscellaneous proceeding for pre-suit disclosure to aid in bringing an action, the potential plaintiff must "present facts that fairly indicate a cause of action exists". *See Matter of Manufacturers & Traders Trust Co. v. Bonner*, 84 A.D.2d 678, (4th Dept 1981). This rule also permits potential plaintiffs to conduct pre-suit discovery to determine the proper defendants. *See Konig v. CSC Holdings, LLC,* 112 A.D.3d 934 (2d Dept 2013).

New York does have an early deposition rule, permitting depositions, with leave of court, to be taken after filing the complaint, but before a party's time to serve a responsive pleading has expired CPLR 3106(a). This rule is not frequently used but is an exception to New York's rule that discovery may not begin until issue is joined.

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

Spoliation of evidence is a legal consideration in determining how long a vehicle/tractor trailer must be held prior to release. Under New York law a duty to preserve evidence arises when the defendant is aware of the potential for litigation, even if suit has not yet been filed.

The applicability of spoliation sanctions involves a fact-specific analysis of each case. New York Courts are required to consider the prejudice caused by the spoliation of evidence in determining what type of sanction, if any, is required as a matter of "fundamental fairness." *Merrill v. Elmira Heights Central School District*, 77 A.D.3d 1165 (3rd Dept. 2010).

Where independent evidence such as photographs exist that permit a party to adequately prepare its case, spoliation sanctions are not necessarily warranted. *Rodriquez v. 551 Realty*, 35 A.D.3d 221 (1st Dept. 2006)

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

Under New York law punitive damages are awarded only in exceptional cases. The "conduct justifying such an award must manifest spite or malice, or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called willful or

wanton." *Marinaccio v. Town of Clarence*, 20 N.Y. 3d 506 (2013)

There is no cap on punitive damages.

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

The State of New York has not mandated Zoom trials at this time

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?**

Cases where punitive damages are claimed in the context of trucking generally arise out of accidents involving intoxicated drivers. Evidence that a defendant was driving while intoxicated is *per se* insufficient to justify the imposition of punitive damages. *Rodgers v. Duffy*, 95 A.D.3d 864 (2nd Dep't 2012)

To recover punitive damages, it must be established that the acts of the defendant were wanton, reckless or malicious. In *Chiara v. Dernago*, 128 A.D.3d 999 (2nd Dep't 2015), the Court found that the defendant driver's conduct was wonton and reckless where he admitted to consuming numerous beers and had a blood alcohol level of .172 when he drove his employer's box truck onto the George Washington Bridge and caused a multi-vehicle accident. There was evidence that the defendant was incoherent at the scene. At his deposition he testified that he did not recall taking a field sobriety test right before he was arrested. The Appellate Division affirmed punitive damages in the sum of $70,000.