FOR MORE INFORMATION

GERMAN, GALLAGHER & MURTAGH, P.C.
Philadelphia, Pennsylvania
www.ggmfirm.com

Matthew J. McColgan
mccolganm@ggmfirm.com

ALFA International
The Global Legal Network
Local Relationships Worldwide

NEW JERSEY

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 self critical analysis privilege, or self evaluative privilege, has been recognized in a broad variety of cases in the District of New Jersey, in which the privilege is "essential to the free flow of information and ... the free flow of information is essential to promote recognized public interests." *Harding v. Dana Trans., Inc*., 914 F. Supp. 1084 (D.N.J. 1996)(*citing* Note, The Privilege of Self-Critical Analysis, 96 HARV. L. REV. 1083, 1087 (1983)). The privilege originated in *Bredice v. Doctors Hospital, Inc*., and was created to foster self-evaluation and the benefits derived therefrom. 50 F.R.D. 249, 250 (D.D.C. 1970), aff'd 479 F.2d 920 (D.C. Cir. 1973). "The value of self critical evaluations would be destroyed if not shielded from the discovery process." *Brunt v. Hunterdon Cty*., 183 F.R.D. 181, 185 (D.N.J. 1998)(citing Bredice, 50 F.R.D. at 250).

The development of the self-critical analysis privilege has primarily been at the federal level. Although some state courts recognize the self-critical analysis privilege, others do not. For instance, the New Jersey Supreme Court held that the self-critical analysis privilege does not exist in the common law. *Payton v New Jersey Turnpike Auth*., 691 A2d 321 (NJ 1997) (holding that a court may consider the interest of protecting self-critical analysis in balancing the need for discovery against the prejudice to the party resisting it). In New Jersey, the state legislature has adopted a privilege for an insurance company's voluntary compliance review reports, which have been defined as reviews, assessments, audits and evaluations not required by law. N.J. Rev. Stat. §17:23C-2 (2001). Other similar protections will stem primarily from statutory authority.

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?

United States Courts have largely shielded funding-related documents from disclosure on the basis of privilege. These courts have held that case-related communications with a funder are entitled to work-product or common interest protection, or both. Claims to work-product are enhanced when materials are shared following execution of a non-disclosure agreement. Courts have also found that documents related to litigation funding are irrelevant as a matter of law and therefore not subject to disclosure. *See, e.g*., *In re Valsartan N-Nitrosodimethylamine (NDMA) Contamination Prods. Liab. Litig*., No. 19-2875 (RBK/JS), 2019 U.S. Dist. LEXIS 160051, at *29-39 (D.N.J. Sept. 18, 2019). However, the relevance for disclosure will vary on a case to case basis.

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

Typically, the witness noticed to testify on behalf of an organization travels to the jurisdiction of the suit. However, the rule that "the deposition of a corporation by its agents and officers should ordinarily be taken at its principal place of business" may be modified. When peculiar circumstances exist that warrant the taking of depositions outside the jurisdiction where the deponent resides, or at a location other than the corporation's principal place of business, then a court may order depositions be taken elsewhere. These peculiar circumstances should not be limited to the relative financial burdens of the parties to the litigation. *D'Agostino v. Johnson & Johnson,* 242 N.J. Super. 267, 277 (App. Div. 1990).

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?

New Jersey has no specific benefits or detriments by a company admitting that a driver was acting within the course and scope of his employment for the company. However, in the majority of states that have addressed the argument, it has been held as a matter of law that a plaintiff cannot pursue a claim against an employer for negligent entrustment, hiring, supervision, or training when the employer admits that its employee was acting within the scope of employment when the accident occurred." *Peterson v. Johnson,* No. 11 CV804, 2013 WL 5408532, at *1 (D.Utah Sept. 25, 2013) (citing *Coville v. Ryder Truck Rental, Inc.,* 30 A.D.3d 744, 817 N.Y.S.2d 179 (N.Y.App.Div.2006); *Brown v. Larabee,* No. 04–1025, 2005 WL 1719908, at *1 (W.D.Mo. July 25, 2005); *Hoch v. John Christner Trucking, Inc.,* No. 05–0762, 2005 WL 2656958, at *1 (W.D.Mo. Oct.18, 2005); *Clooney v. Geeting,* 352 So.2d 1216 (Fla.Dist.Ct.App.1977); *Bartja v. National Union Fire Ins. Co.,* 218 Ga.App. 815, 463 S.E.2d 358 (Ga.Ct.App. 1996); *Gant v. L.U. Transport, Inc.,* 331 Ill.App.3d 924, 264 Ill.Dec. 459, 770 N.E.2d 1155 (Ill.App.Ct. 2002); *Wise v. Fiberglass Systems, Inc.,* 110 Idaho 740, 718 P.2d 1178 (Idaho 1986)); *see also Adele v. Dunn,* No. 12–cv–597, 2013 WL 1314944, at *1–*2 (D.Nev. Mar.27, 2013); *Brown v. Tethys Bioscience, Inc.,* No. 10–1245, 2012 WL 4606386, at *6 (S.D.W.Va. Oct.1, 2012); *Davis v. Macey,* 901 F.Supp.2d 1107, 1111 (N.D.Ind. 2012). "The rationale is that the employer's liability is a derivative claim fixed by a determination of the employee's negligence. Therefore, courts following the majority rule have determined that evidence of negligent hiring, training, supervision or retention becomes unnecessary, irrelevant, and prejudicial if the employer has already admitted vicarious liability under *respondeat superior." Zibolis–Sekella v. Ruehrwein,* No. 12–cv–228, 2013 WL 3208573, at *2 (D.N.H. June 24, 2013) (citations, internal citations, and internal quotations omitted). An exception to this rule exists, however, when a plaintiff has a valid claim for punitive damages. *See, e.g., Perry v. Stevens Transp., Inc.,* No. 11CV0048, 2012 WL 2805026, at *6 (E.D.Ark. July 12, 2012). This can be persuasive law used in New Jersey matters.

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

1. In 2019, the A Middlesex County jury awarded $5 million to a boy, now 9, who suffered severe burns in a motor vehicle accident. The verdict, in *N.P. v. Tristate Trucking*, brings the total recovery in the case to $6.7 million after two other defendants settled before trial for $1.25 million and $450,000.

2. Other notable resolutions:

    a. A woman who had 14 surgical procedures for injuries sustained in a head-on

crash received a $1.49 million settlement in her Morris County suit, *Van Orden v. Stampone*.

b. A man who underwent two spinal surgeries after his car was involved in a chain-reaction crash was paid a $750,000 settlement in his Hudson County suit, *Broderick v. DJM Transport*.

c. A truck driver who sustained spinal injuries and has experienced post-traumatic stress disorder following a crash on the New Jersey Turnpike agreed to a $1.1 million settlement in his Union County suit, *Smyth v. Cruz*.

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

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, electronically stored information, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. New Jersey Rule of Court 4:10.

Based upon the collateral source rule, medical bills paid by insurance may be introduced into evidence but then must be deducted from the verdict post-trial by the judge molding the verdict. N.J.S.A. 2A:15-97. The collateral source rule does not apply to Medicaid benefits because the plaintiff must reimburse Medicaid.

The Appellate Division in *Ribeiro v. Sintra* found that medical expenses "incurred" were equivalent to the amount accepted by the medical providers in full payment, rather than the actual amount billed. *Ribeiro v. Sintra*, A-0701-07T1, 2008 WL 2677536, at *1 (N.J. Super. Ct. App. Div. July 10, 2008)

The Court of *Wise v. Marienski* ruled that the medical expenses not paid by PIP are recoverable in a tort action. *Wise v. Marienski*, 425 N.J. Super. 110 (Law Div. 2011). The full amount of those bills, without any reduction per the PIP Fee Schedule, were admissible into evidence at trial. Thus, they are fully "boardable" to the extent they were not paid by PIP.

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)

Amounts actually charged and accepted by a healthcare provider are routinely produced in response to a subpoena or a request for records accompanying a claimant's signed HIPAA authorization. Treatment providers produce payment ledgers which indicate amounts charged, accepted, and even adjusted by an insurer.

Further, the New Jersey Fee Schedule is set out at N.J.A.C. 11:3-29.4. The amount that a provider can be reimbursed for a certain charge is broken down into three different regions of the state. Certain medical procedures are given "CPT" codes based on the American Medical Association's current procedural terminology coding system. Some procedure's CPT codes are listed on the New Jersey Fee Schedule, some are not. If a given procedure is listed on the fee schedule, the amount payable is the amount listed for that CPT code for the provider's region in the state. For procedures whose CPT codes are not listed within the New Jersey Fee Schedule, the Act provides that the insured's limit of liability shall be a reasonable amount considering the fee schedule amount for similar services or equipment in the region where the service or

equipment was provided for, in the case of elective services or equipment provided outside the state, the region in which the insured resides. Where the fee schedule does not contain a reference to similar services or equipment, the insurer's limit of liability for any medical expense benefit for any service of equipment not set forth in the fee schedule shall not exceed the usual, customary, and reasonable fee." The provider's "usual, customary and reasonable fee" is determined by the medical provider. This information is generally discoverable and necessary during court-mandated settlement conferences.

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

Relevant case law establishes the general principal that New Jersey Courts will assert jurisdiction and apply its Act when New Jersey has a substantial interest in the accident/injury or treatment of its resident employee. More specifically, jurisdiction for an accidental injury can be laid in the New Jersey Division of Workers' Compensation when:

1. The injury occurs in New Jersey, or
2. New Jersey is the place of contract of hire, or
3. The employee resides in New Jersey, and there are some employment contacts in New Jersey.

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

All parties' ability, including, most significantly, insurance carriers and their attorneys', to seek discovery before suit is filed is limited to situations where there exists *a genuine risk* that testimony would be lost or evidence destroyed before suit can be filed. *Liberty Mutual Insurance Co. v. Borgata Hotel Casino & Spa*, 195 A. 3d 538, 456 NJ Super. 471 - NJ: Superior Court, Law Div., 2017. This decision is not binding on New Jersey courts but can be cited as persuasive authority.

Otherwise, New Jersey Rule of Court 4:11-1 provides that a person who desires to perpetuate his or her own testimony or that of another person or preserve any evidence or to inspect documents or property or copy documents may file a verified petition in the Superior Court, seeking an appropriate order. The petitioner must show 1) that the petitioner expects to be a party to an action cognizable in a court of this State but is presently unable to bring it or cause it to be brought; 2) the subject matter of such action and the petitioner's interest therein; 3) the facts which the petitioner desires to establish by the proposed testimony or evidence and the reasons for desiring to perpetuate or inspect it; 4) the names or a description of the persons the petitioner expects will be opposing parties and their addresses so far as known; 5) the names and addresses of the persons to be examined and the substance of the testimony which the petitioner expects to elicit from each; and 6) the names and addresses of the persons having control or custody of the documents or property to be inspected and a description thereof.

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

There are no specific statutes which govern how long a vehicle or tractor-trailer must be held prior to release.

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

According to NJ Rev Stat § 2A:15-5.12 (2013) , punitive damages may be awarded to the plaintiff only if the plaintiff proves, by clear and convincing evidence, that the harm suffered was the result of the defendant's acts or omissions, and such acts or omissions were actuated by actual malice or accompanied by a wanton and willful disregard of persons who foreseeably might be harmed by those acts or omissions. This

burden of proof may not be satisfied by proof of any degree of negligence including gross negligence

The New Jersey Punitive Damages Act limits punitive damages to five (5) times the amount of compensatory damages awarded or $350,000, whichever is greater – except in specific cases involving public policy and social concerns. N.J.S.A. 2A:15-5.9.

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

No. The Supreme Court in its January 7, 2021 Order authorized a two-phase approach to virtual civil jury trials during the ongoing COVID-19 pandemic, which has forced New Jersey courts to transition from in-person to remote operations in mid-March 2020. In-person jury trials were among the first types of court events suspended during the pandemic – and among the last to resume in an in-person format. A few hybrid jury trials were completed in October-November 2020, before the Court's November 16, 2020 Order suspending in-person jury selections and trials based on worsening COVID-19 trends statewide. Phase 1 implementation Starts on or after February 1, 2021 Atlantic/Cape May Cumberland/Gloucester/Salem; Monmouth; Passaic; and Union. Consent is required to such a trial and cannot be withdrawn within 10 days of selection. Phase 2 implementation starts on or after April 5, 2021, statewide, with no requirement of consent.

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?

A jury in Middlesex County, New Jersey ordered Johnson & Johnson to pay $750,000,000 in punitive damages in connection with a consolidated trial of four plaintiffs claiming to have developed mesothelioma as a result of using talc powder products contaminated with asbestos fibers. These cases had been tried to verdict on liability in September 2019, which resulted in a combined compensatory damages verdict of almost $40,000,000 (and remarkably, Johnson & Johnson's entire closing argument was stricken from the record as inappropriate). The punitive damages verdict was subsequently reduced to $186,000,000 by the trial judge in accordance with New Jersey law limiting punitive damages verdicts to no more than five times a compensatory damages verdict in the same case. Johnson & Johnson's CEO Alex Gorsky was compelled to testify in the punitive damages phase of this trial with respect to statements he had made regarding the company's knowledge of talc-related hazards and his sale of stock in the company following a Reuters article detailing the company's alleged internal knowledge of such hazards.