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PENNSYLVANIA

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?

Pennsylvania is one of the jurisdictions which has not universally accepted the self-critical analysis ("SCA") privilege, nor has it fully defined the precise scope and applicability of the SCA privilege. Under the SCA privilege, information and material can be protected as privileged when the following conditions exist:

A. The material must have been prepared for mandatory government reports or for a critical self-analysis and undertaken by the party seeking protection;

B. The privilege extends only to subjective evaluative materials, and does not protect objective data in reports; and

C. The policy favoring application of the SCA privilege and exclusion must clearly outweigh plaintiff's need for the documents or material.

Melhorn v. New Jersey Transit Rail Opers., Inc., 203 F.R.D. 176, 178-179 (E.D. Pa. 2001) (*citing Clark v. Pennsylvania Power & Light Co., Inc.*, 1999 WL 225888, at *2 (E.D. Pa., April 14, 1999)).

In a railroad personal injury case, the Eastern District of Pennsylvania applied the SCA privilege to a portion of a railroad accident report with analysis and recommendations, but not to portions of the reports concerning causes and contributing factors. *Granger v. Nat'l R.R. Passenger Corp.*, 116 F.R.D. 507, 508 (E.D. Pa. 1987). The *Granger* court recognized the public interest in safer operations of railroads, but found that producing portions of accident report which contained analyses and recommendations might hamper the railroad's candid self-evaluation which is directed to prevent future railroad accidents. *Id.*, 116 F.R.D. at 510.

The Third Circuit has not recognized the SCA privilege and appears unlikely to do so based upon its disfavor of "judicially-created privileges." *Davis v. Kraft Foods North America*, 2006 WL 3486461 at *1 (E.D. Pa. Dec. 1, 2006). The Third Circuit has indicated its reluctance to accept the existence of the SCA privilege, referring to the doctrine as "the so-called self-critical analysis privilege," in *Armstrong v. Dwyer* 155 F.3d 211, 214 (3d Cir. 1998). However, the Middle District of Pennsylvania seemed to imply that a SCA privilege was cognizable, but held nonetheless held that the at issue guest claim investigation and prevention report which was compiled by the defendant resort's safety office, did not fall within the scope of the privilege in

Paladino v. Woodloch Pines, Inc., 188 F.R.D. 224 (M.D. Pa. 1999).

A. The subject report was completed after the plaintiff was injured on the resort's property.
   1. The report included an analysis of the accident and steps which could have been taken to prevent it. *Id.*
   2. The *Paladino* court concluded that the privilege does not apply to self-studies which are not mandated by a governmental agency. *Id.*, at 225.

B. *Paladino* also rejected the defendant's argument that permitting discovery would have a chilling effect upon voluntary, honest self-evaluations which are undertaken to prevent future accidents. The *Paladino* court reasoned that, because companies have an external market incentive to improve safety, and because safety reviews are generally not confidential in nature, no chilling effect would result from disclosure. *Id*.

A Philadelphia County Common Pleas court recognized the SCA privilege in a medical-related employment discrimination case in *Anderson v. Hahnemann Medical College*, 1985 WL 47218 (Phila.C.C.P., 1985).

A. The *Anderson* court was "hesitant to find a 'privilege' where none is legislatively or generally recognized . . . " *Id.*, at *2.

B. The *Anderson* court allowed a very limited SCA privilege, but required the production of objective material, including data and statistical information. *Id.*

The Pennsylvania Superior Court applied the SCA privilege in a medical malpractice action to protect from disclosure certain peer review information which was not directly related to the plaintiff's case, and which also was protected by statute, in *Sanderson v Frank S. Bryan, M.D., Ltd.*, 522 A2d 1138, 1140 (Pa. Super. 1987), *app denied,* 538 A2d 877 (Pa. 1988). The Pennsylvania Commonwealth Court commented that the SCA privilege has not been defined by Pennsylvania courts, which also have not fully and universally recognized the SCA privilege, in *Van Hime v. Dep't of State of Commw. of Pennsylvania*, 856 A.2d 204, 212 (Pa. Commw. 2004). To the extent Pennsylvania would recognize the SCA privilege, it would protect "'only subjective analysis designed to have a positive societal effect and does not apply to objective or statistical information.'" *Id.* (*citing Joe v. Prison Health Services, Inc.*, 782 A.2d 24, 34 (Pa. Commw. 2001).

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?

Generally speaking, a third party litigation funder provides a non-recourse "loan" to a law firm or client in exchange for an interest in the outcome of the case. The Superior Court of Pennsylvania concluded that a litigation funding arrangement was champertous — and therefore unenforceable in *WFIC, LLC v. Labarre*, 148 A.3d 812, 2016 WL 4769436 (Pa. Super. 2016):

A. Champerty is defined as "the unlawful maintenance of a suit in consideration of some bargain to have a part of the thing in dispute or some profit out of the litigation." *Id.*, 148 A.3d at 818 (internal citations omitted).

B. Champerty agreements are generally disfavored as against public policy and Pennsylvania courts frown upon permitting a financial agreement that allows a third party without an actual interest in the lawsuit to profit from backing a party in litigation.

In *WFIC, LLC v. Labarre*, an attorney entered into a contingency fee agreement with the plaintiff where a

third-party litigation funding ("TPLF") company that loaned money to pursue the litigation would be paid out of counsel's fees, assuming a successful result. *Id*.

A. After termination of the litigation, a dispute arose among the creditors concerning priority of the distribution of assets obtained through the litigation. *Id.*
   1. In attempting to determine priority of creditors, the appellate court concluded that counsel's agreement to pay the funder out of his fees was invalid and unenforceable. *Id.*
   2. The *WFIC* court stated "the common law doctrine of champerty remains a viable defense in Pennsylvania." *Id.*
   3. The *WFIC* court found that the elements of champerty existed in the TPLF arrangement where the TPLF are unrelated parties to the litigation and had no legitimate interest in the litigation. *Id.*
      a. The TPLF company loaned their own money to finance litigation costs and were to be paid principal, interest, and an incentive out of the proceeds of the litigation.
      b. The *WFIC* court concluded that the TPLF arrangement was invalid. *Id.*

Presumably, the holding of *WFIC, LLC v. Labarre* would make TPLF companies reconsider expending resources by funding litigation in Pennsylvania, however TPLF companies do exist and actively advertise their services throughout the Commonwealth.

The 3rd Circuit affirmed the Western District of Pennsylvania's decision when it applied New York law to determine that the TPLF agreement was not champertous because the transaction occurred after commencement of the lawsuit—and therefore was not for the intent of causing the action to be brought, in *Obermayer Rebman Maxwell& Hippel LLP v. West*, 2015 U.S. Dist. LEXIS 172922, *7–8 (W.D. Pa. 2015), aff'd, 725 Fed.Appx. 153, 2018 U.S. App. LEXIS 4861 (3rd Cir. 2018) (not selected for publication).

A. The Western District applied New York law due to forum selection clauses in the TPLF agreements that some courts have refused to enforce on public policy grounds. *Id.*
B. At issue was the enforceability of a TPLF agreement which was a non-recourse purchase agreement (not a loan), where the recipient of funds had no obligation to make payments except from the proceeds of the litigation. *Id.*, 725 Fed.Appx. at 154.
C. The TPLF agreement was not usurious because it was not a "loan agreement" and therefore not governed by usury laws. *Id.* at 155.

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

Generally the attorney(s) will travel to the location of the 30(b)(6) deposition. With the recent prevalence and acceptance of depositions being conducted remotely via Zoom or Microsoft Teams, much of the corporate representative deposition travelling that was previously required for attorneys, has been minimized, or can be avoided altogether. Fed.R.Civ.P. 29 gives the parties to a lawsuit great latitude in conducting depositions, and allows the parties to stipulate that a deposition may be taken at any time or place, unless the court orders otherwise. Fed.R.Civ.P. 29. The noticing party may unilaterally choose the deposition location, but that choice is subject to the court's power to grant a protective order pursuant to Fed.R.Civ.P. 26(c). *Philadelphia Indem. Ins. Co. v. Federal Ins. Co.*, 215 F.R.D. 492 (E.D.Pa. 2003).

Where counsel are unable to come to an agreement as to the proper place for the taking of a deposition, if a local rule of court exists which specifies the place where depositions are to be taken in the absence of an

agreement, that local rule will be enforced. *Lynn Engineering & Manufacturing Company Inc. v. Achey*, 331 A.2d 690 (Pa.Super. 1975).

With respect to a motion for a protective order concerning a requested corporate representative deposition, "[t]he court may, for good cause, enter an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense," and Rule 26 provides several options to the court. Fed.R.Civ.P. 26(c). The court may specify terms for the deposition, including the time and place or the allocation of expenses. Fed.R.Civ.P. 26(c)(1)(B). Fed.R.Civ.P. 30(b)(6), was adopted by Pennsylvania in Pa.R.Civ.P. 4007.1(e), as such, Pennsylvania will generally follow the guidance of the Federal Courts on issues related to corporate representative depositions. *See* Pa.R.C.P. No. 4007.1(e), Explanatory Comment (1978).

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?

When an employer admits that its driver was in the course and scope of employment, (and is vicariously liable for the conduct of its employee), dismissal of any independent negligence claims against the employer is appropriate, when no punitive damages are claimed. *See Sullivan v. Crete Carrier Corp.*, No. 8716-cv-2015 (C.P. Monroe Co. Jan. 18, 2019); *see also Pineda v. Chromiak*, 2019 WL 175135, at *3-4 (E.D. Pa. January 10, 2019); *Dempsey v. Bucknell University*, 2012 WL 1569826 (M.D. Pa. May 3, 2012).

This rule applies because evidence relating to negligent hiring, supervision, and entrustment serves no purpose other than to prejudice the jury. *See Holben v. Midwest Emery Freight System*, 525 F.Supp. 1224, 1225 (W.D. Pa. 1981); *see also Fortunato v. May,* 2009 WL 703393 (W.D. Pa. March 16, 2009).

This rule also applies because evidence relating to the inclusion of the independent negligence claim against the employer could not add any additional liability or damages in the case. *See Allen v. Fletcher*, 2009 WL 154276, *5 (M.D. Pa. June 2, 2009).

A benefit of admitting a driver was in the "course and scope" of employment is conservation of resources:

A. When the employer admits that a driver was in the course and scope of employment, the employer should be able to limit discovery and associated litigation costs on that issue.

B. By admitting, where appropriate, that a driver was in the course and scope of employment, discovery into matters relating to determining whether the driver was an independent contractor or an employee should be excluded.

In a transportation-related lawsuit, the plaintiff will often send form discovery requests which include inquiries which are designed to test whether the driver was acting within the course and scope of employment at the time of an accident. An objection can be made that any such inquiry is irrelevant where it is admitted that the driver was acting in the course and scope of his employment. *Holben v. Midwest Emery Freight Systems*, 525 F. Supp. 1224 (W.D. Pa. 1981). An obvious detriment to admitting course and scope of employment is that the employer then becomes vicariously liable for the actions of the driver under the doctrine of *respondeat superior*. It is recommended that, before course and scope of employment are admitted, a detailed inquiry be conducted to confirm that at the time of the accident, the driver was, in fact, conducting business activities on behalf of the employer.

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

Due to COVID, Pennsylvania state and federal courts cancelled or postponed trial terms throughout most

of 2020, resulting in a limited number of cases tried to verdict. There were no noteworthy nuclear verdicts (by its traditional definition) in the trucking and transportation industry in 2020. However, in Philadelphia County, Pennsylvania in 2019, a verdict in excess of $8 billion was awarded in a products liability case against pharmaceutical companies and a verdict for $120 million was entered in a case involving personal injuries from a medical mesh implant.

Several prior large verdicts arising out of trucking or automobile accidents include:

Espinoza v. J.B. Hunt Transport, Inc., Ricky Hatfield, Hatfield Trucking, et al. - Court of Common Pleas of Philadelphia County, Pennsylvania, Case No. 1506002656

Jury verdict for plaintiff and judgment entered for $15,579,429, arising out of personal injuries sustained by an adult plaintiff after being struck by a tractor truck operated by defendant Ricky Hatfield of Hatfield Trucking, who was reportedly hauling cargo for defendant J.B. Hunt Transport, Inc. Plaintiff alleged he was on a highway shoulder, assisting a friend who had run out of gas, when Hatfield's truck left the travel lane and entered the shoulder striking plaintiff. Plaintiff contended Hatfield was speeding, fled the scene of the accident, and was later criminally charged for DUI and other violations, and additionally contended that J.B. Hunt was vicariously liable for failing to perform a background check on and investigate the fitness of Hatfield and Hatfield Trucking to operate a tractor truck. J.B. Hunt denied liability on grounds Hatfield was using his tractor for personal reasons and was taking a "joy ride" entirely for his own pleasure. A jury assigned 60 percent negligence to Hatfield and 40 percent to J.B. Hunt. Plaintiff was awarded $12,229,429, and plaintiff's spouse received $3,350,000 for loss of consortium claim.

Berger v. Wilson - Court of Common Pleas of Allegheny County, Pennsylvania, Case No. GD 17-0072

Jury verdict for plaintiff for $2,100,000, arising out personal injuries, including paralysis, sustained by 62 year old male after being involved in a head on automobile accident with defendant.

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

Title 12, In Pennsylvania, only the amount actually paid by provider (or amount found by jury to be reasonable) is recoverable in a personal injury action. *Moorhead v. Crozer Chester Medical Center*, 765 A.2d 786 (Pa. 2001). Additionally, Pennsylvania courts have addressed state statutes precluding the introduction into evidence or recovery of any amounts paid or payable in private disability benefits for injuries, including Social Security benefits for lost wages. *See* 75 Pa.C.S.A. §§ 1720 and 1722; *Tannenbaum v. Nationwide Insurance Co*., 992 A.2d 859, 866 (Pa. 2010); *Steel v. William Benjamin Trucking*, No. 687-cv-2017 (C.P. Westmoreland Co. May 14, 2020) (granting trucking company's motion for summary judgment and holding trucking company is entitled by law to an offset from amounts received by plaintiff in Social Security benefits against plaintiff's wage loss claim). Consequently, defendants have a meritorious defense to damages that they are entitled to a setoff against a plaintiff's wage loss claim of amounts paid and/or payable in private disability benefits for injuries and/or in Social Security benefits.

Defendants are routinely entitled to obtain discovery of the amounts actually billed and paid to establish its defenses to damages based upon the following primary discovery rules:

Pennsylvania Rule of Civil Procedure 4003.1 (Scope of Discovery Generally)

(a) Subject to the provisions of Rules 4003.2 to 4003.5 inclusive and Rule 4011, a party 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, content, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

(b) It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Pa.R.Civ.P. 4003.1.

Pennsylvania Rule of Civil Procedure 4011 (Limitation on Scope of Discovery)

No discovery, including discovery of electronically stored information, shall be permitted which

(a) is sought in bad faith;

(b) would cause unreasonable annoyance, embarrassment, oppression, burden or expense to the deponent or any person or party;

(c) is beyond the scope of discovery as set forth in Rules 4003.1 through 4003.6;

. . .

(d) would require the making of an unreasonable investigation by the deponent or any party or witness. Pa.R.Civ.P. 4011.

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)

Healthcare providers typically produce documentation showing the amounts charged and paid by an insurer through standard discovery requests or via signed authorization by the plaintiff. However, based upon the application of *Moorhead v. Crozer Chester Medical Center*, provider-insurer contracts are not requested as a matter of course in Pennsylvania, and any such request would likely be met with objections under Pennsylvania Rules of Civil Procedure 4003.1 and 4011.

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

The Pennsylvania Workers Compensation Act is applicable to all injuries occurring within Pennsylvania, no matter where the contract of hire was made. Section 101; 77 P.S. Section 1.

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

Upon the proper filing of a writ of summons, Pennsylvania Rule of Civil Procedure No. 4003.8 permits a

plaintiff to serve discovery before filing a complaint; much like pre-complaint discovery in federal court. However, the permitted discovery is narrow in scope. In other words, a plaintiff will not have free reign to seek any and all information that they desire before filing a complaint. Instead, Rule 4003.8 limits the plaintiff to information that is necessary to file a complaint. Pennsylvania state courts usually interpret this limitation to mean identifying information, such as the name of a party, company, or key witness. Therefore, a plaintiff likely will be unable to gather other, potentially useful, information before filing a complaint, e.g. information as to insurance coverage, liens, defenses to potential claims, etc. Lastly, even if the pre-complaint discovery requests only include identifying information, the adverse party may object to the discovery requests and seek the court's protection. In that case, the requesting party would have to convince the court that the requests seek only necessary information and that the requests would not cause substantial burden, annoyance, oppression, or embarrassment to the opposing party.

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/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?**

The applicable standard jury instruction imposes a clear and convincing burden of proof in determining whether punitive damages will be assessed. Pennsylvania Selected Standard Jury Instruction (Civil) § 14.00 – Punitive Damages (1984). However, punitive damages awarded under "preponderance of the evidence" have been upheld. *Martin v. Johns-Manville Corp.*, 494 A.2d 1088 (Pa. 1985), *abrogated on other grounds*, *Kirkbride v. Lisbon Contractors, Inc*., 555 A.2d 800 (Pa.1989); *Sprague v. Walter*, 656 A.2d 890 (Pa. Super. 1995); *McDermott v. Party City Corp*., 11 F. Supp. 2d 612 (E.D. Pa. 1998). Other cases upheld on appeal have correctly applied the "clear and convincing evidence" burden of proof. *See, e.g., Hepps v. Phila. Newspapers, Inc*., 485 A.2d 374 (Pa. 1984) (clear and convincing standard for defamation actions), *reversed on other grounds*, 475 U.S. 767 (1986); *Rutkowski v. Allstate Ins. Co*., 69 Pa. D. & C.4th 10 (2004) (under insurer bad faith statute, plaintiff must prove bad faith on part of insurer by clear and convincing evidence).

There is no statutory cap on punitive damages in Pennsylvania. The Pennsylvania Superior Court has upheld a punitive damages award of $2.8 million which represented a 10 to 1 ratio over the compensatory award which was limited to attorney's fees, costs and interest, stating "the United States Supreme Court has expressly rejected the assertion that a punitive damages award must bear a certain proportionality to the amount of compensatory damages." . The Superior Court considered "[the defendant's] reprehensible conduct, its significant wealth, and the limited compensatory award." *Hollock v. Erie Ins. Exchange*, 842 A.2d 409 (Pa. Super. 2004). On a case by case basis, the court may entertain a motion for remitter when a punitive damages award can arguably be said to shock the court's sense of conscience. The Third Circuit Court of Appeals applying Pennsylvania law has taken into account the United States Supreme Court's admonition that few awards exceeding the single-digit threshold will satisfy due process. See, *CGB Occupational Therapy, Inc. v. RHA Health Services, Inc.*, 499 F. 3d 184 (3d Cir. 2007)(Reducing punitive award from 18:1 ration to less than 7:1 ratio)

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

No. Pennsylvania has been approaching this on a county by county basis. In fact, Philadelphia County is currently scheduling in-person jury trials as early as April 2021. The Court is making every effort to ensure

safe practice, and these logistics are discussed in great detail during pre-trial conferences.

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?

The Pennsylvania Supreme Court has denied efforts by drugmaker Janssen Pharmaceuticals to overturn a $70 million verdict out of the Risperdal mass tort in Philadelphia. The decision paves the way for the trial court to reconsider whether the facts of the case merit a punitive damages trial.

The justices issued a per curiam order denying Janssen's appeal in *A.Y. v. Janssen Pharmaceuticals*, which involved a male plaintiff who claimed that the anti-psychotic medication caused him to grow excessive breast tissue. The ruling affirms a decision by a three-judge Superior Court panel that last year determined the $70 million award was not excessive, and remanded the case so the Philadelphia Court of Common Pleas could take a fresh look at whether there should be a punitive damages trial in light of recent precedent on the issue. The first—and, so far, only—Risperdal case to go to a punitive damages trial resulted in an $8 billion verdict last year, which has since been reduced to $6.8 million.

In November, a three-judge Superior Court panel, led by Judge Correale Stevens, said the jury's decision in the case with regard to compensatory damages was consistent with the evidence presented at trial.

> "A.Y. was just 4 1/2 years old when first prescribed Risperdal, and he has never since known life without gynecomastia. At 16 years of age when the jury considered its award, A.Y. was living with severe and permanent disfigurement," Stevens said. "The undisputed record confirms he has been routinely bullied and teased by peers and is too humiliated to ever remove his shirt in recreational or social situations where it would be customary for boys to do so when enjoying ordinary pleasures of youth."

However, the panel, which also included Judges Deborah Kunselman and Jack Panella, reversed the portion of the lower court's ruling that had said New Jersey law applied to the case and therefore foreclosed the possibility of punitive damages. The panel pointed to rulings in Stange v. Janssen and Murray v. Janssen Pharmaceuticals, which held, respectively, that New Jersey law does not apply to the Risperdal litigation globally and that each case needed to be assessed individually to determine whether New Jersey law or the law of the plaintiff's home state applied.