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South Carolina

1. **What are the statute of limitations for tort and contract actions as they relate to the transportation industry.**

   In South Carolina, the statute of limitations for tort and contract claims is three years. See S.C. Code Ann. § 15-3-530.

   Generally, the statute of limitations for tort actions begins to run on the date that the accident occurred, except in the case of wrongful death whereby the statute begins to run upon the death of the person on account of whose death the action is brought. S.C. Code Ann. § 15-3-530(6). The running of any statute of limitations on a cause of action belonging to a decedent that was not barred at time of death is tolled for eight months following the decedent's death and resumes thereafter. S.C. Code Ann. § 62-3-109. For an actions based on an expressed or implied contractual obligation, the three year statute of limitations begins to run at the moment the contract or obligation is breached. S.C. Code Ann. § 15-3-530(1).

2. **What effects, if any, has the COVID Pandemic had on tolling or extending the statute of limitation for filing a transportation suit and the number of jurors that are sat on a jury trial.**

   Statutes of limitations were not tolled or extended in any way due to the COVID-19 Pandemic. The South Carolina Supreme Court issued Order No. 2020-04-03-01 on April 3, 2020 to address the operation of the trial courts during the coronavirus emergency, but explicitly stated that statutes of limitations were not tolled or extended as a result of the same. The number of jurors to be empaneled for a trial has not been affected by the COVID-19 pandemic, though trial courts retain discretion with respect to COVID-19 precautions taken during active court proceedings.

3. **Does your state recognize comparative negligence and if so, explain the law.**

   South Carolina has adopted a modified comparative negligence system. The jury apportions fault between or among the plaintiff and all defendants. The plaintiff is barred from recovery if his or her negligence exceeds fifty percent of the total fault. *Nelson v. Concrete Supply Co.*, 303 S.C. 243, 399 S.E.2d 783 (1991). Where there are multiple defendants, a plaintiff must prove her comparative negligence is less than 50% of all the defendants' total fault combined.

   As with standard negligence, comparative negligence is ultimately a question for the jury. *Youmans ex rel. Elmore v. S.C. Dep't of Transp.*, 380 S.C. 263, 281–82, 670 S.E.2d 1, 10 (Ct. App. 2008). Once a plaintiff proves she is not more at fault than the defendant or defendants, her damages will be reduced by any percentage of plaintiff's negligence as determined by the jury.

4. Does your state recognize joint tortfeasor liability and if so, explain the law.

Yes. South Carolina provides for the apportionment of damages under S.C. Code Ann. § 15-38-15, also known as the Uniform Contribution Among Tortfeasors Act ("the Act"). Under the Act a defendant who is found to be less than 50% at fault as compared to the total fault for damages (including any fault of the plaintiff), will only be liable for its percentage of the damages as determined by a jury or trier of fact. A defendant found to be more than 50% at fault is jointly and severally liable for the entire award (less any fault apportioned to the plaintiff).

Where there are two or more defendants, a defendant may make a motion to specify the percentage of liability attributable to each defendant. Upon such a motion, the court will after the initial verdict awarding damages but before the special verdict on percentages of liability is rendered, allow each defendant time for oral argument on the determination of percentage of attributable fault. No additional evidence may be entered. The jury will then apportion damages among the defendants.

This section does not apply to a defendant whose conduct is determined to be willful, wanton, reckless, grossly negligent, or intentional or conduct involving the use, sale, or possession of alcohol or the illegal or illicit use, sale, or possession of drugs.

A defendant may also argue that a non-party had liability for the alleged injury (including a party who has already settled out of the case). However, a non-party tortfeasor will not be included on a verdict form for the purposes of apportionment of fault/liability by the jury.

5. Are either insurers and/or insureds obligated to provide insurance limit information pre-suit and if so, what is required.

The requirement for disclosure of insurance limit information is dependent upon the type of insurance policy at issue. South Carolina law provides that upon proper written request from a claimant's attorney, an insurer must provide a statement under oath for each known *nonfleet* private passenger insurance policy (1) the name of the insurer, (2) the name of each insured, and (3) the limits of coverage (or a copy of the policy declaration page). Disclosure of umbrella or excess coverage is not required. S.C. Code Ann. § 38-77-250 (1976).

6. Does your state have any monetary caps on compensatory, exemplary or punitive damages.

Generally, there is no cap on compensatory damages in South Carolina except in cases involving a state or governmental entity. Under those circumstances, the South Carolina Tort Claims Act provides caps of $300,000.00 per person or $600,000.00 per occurrence. S.C. Code Ann. § 15-78-120(a)(1) – (2). Additionally, neither punitive/exemplary damages nor interest prior to judgment are recoverable against a governmental entity. S.C. Code Ann. § 15-78-120(b).

There are limitations applicable to punitive damages sought under South Carolina law. A defendant may request a bifurcated trial on the issue. Punitive damage awards are capped to the greater of either three times the amount of compensatory damages or $500,000. In certain situations, where the defendant's actions could subject the defendant to conviction for a felony and such actions were the proximate cause of the plaintiff's damages or where the wrongful conduct was motivated primarily by unreasonable financial gain and known, or approved by, a person responsible for making policy decisions on behalf of the defendant, the cap can be increased to four times the compensatory damages or $2 million, whichever is greater. Finally, there is no cap on a punitive damages award where the defendant acted with an intent to harm; was convicted of a felony for the same conduct which caused the plaintiff's damages; or acted, or failed to act, while under the influence of alcohol, drugs, or other substances which impaired the defendant's judgment. S.C. Code Ann. § 15-32-530 (C). Note that the limitations and caps on punitive damages must be specifically pled as an affirmative defense or a defendant's right to assert the caps may be deemed waived at the trial of the matter. *See Garrison v. Target*

Corporation, 429 S.C. 324, 838 S.E.2d 18 (S.C. App. 2020).

7. **Has your state recently implemented any tort reforms which may affect transportation lawsuits or is your state planning to, and if so explain the reforms.**

None at this time.

8. **How many months generally transpire between the filing of a transportation related complaint and a jury trial.**

Per SC Rule of Civil Procedure Rule 40, a case may be placed on a jury trial roster as early as 180 days after Plaintiff files the initial summons and complaint but only by special motion and only with the consent of all parties. Cases can be automatically transferred to the jury trial roster by the clerk of court after one year passes following Plaintiff's filing of the Summons and Complaint.

Though the rules are straightforward regarding civil trial timelines, the actual time between filing and trial is far more speculative and heavily venue dependent. There are 46 counties in South Carolina that are all experiencing substantial Covid-related trial backlogs. Prior to the 2020 court closures, it was estimated that most jurisdictions in SC were running approximately 1-2 years behind the trial timeline set out in the SC Rules of Civil Procedure. After the lengthy closures, the civil trial backlog is substantially more severe and trial delays have doubled or tripled in many jurisdictions. It is important to note that each juridical circuit holds a different number of trial terms in a given court year. While more populous counties have monthly jury trial terms, many of the more rural venues might only have two or three trial terms each year. Communication with local counsel on the trial timeline and current court backlog in any specific venue is crucial.

9. **When does pre-judgment interest begin accumulating and at what percent rate of interest.**

Pre-Judgment Interest Rate

South Carolina Code Ann. § 34-31-20 (B) (2020) provides that the legal rate of interest on money decrees and judgments "is equal to the prime rate as listed in the first edition of the Wall Street Journal published for each calendar year for which the damages are awarded, plus four percentage points, compounded annually. The South Carolina Supreme Court shall issue an order by January 15 of each year confirming the annual prime rate. This section applies to all judgments entered on or after July 1, 2005. For judgments entered between July 1, 2005, and January 14, 2006, the legal rate of interest shall be the first prime rate as published in the first edition of the Wall Street Journal after January 1, 2005, plus four percentage points."

This year, the first edition of The Wall Street Journal was published on January 3, 2022, and listed the prime rate as 3.25%. Thus, the 2022 legal interest rate applicable to money decrees and judgments will be 7.25%, compounded annually, beginning on January 15, 2022. While this rate remains constant from 2021, it is markedly lower than the rates from 2019 and 2020 (8.75% and 9.5% respectively). In fact, 7.25% marks South Carolina's lowest legal interest rate since 2009.

Interest Accrual Dates

1. Prejudgment Tort Actions Accrual Date: When, by agreement or operation of law, the payment was demandable. *Dixie Bell, Inc. v. Redd*, 656 S.E.2d 765 (S.C. Ct. App. 2007); S.C. Code Ann. § 34-31-20(A).

2. Offer of Judgment: An offer of judgment can impact the recovery of interest. *See* § S.C. Code Ann. 15-35-400; SCRCP Rule 68.

3. Post Judgment Accrual Date: Date of judgment. *Renaissance Enters., Inc. v. Ocean Resorts, Inc.*, 513 S.E.2d

617 (S.C. 1999); S.C. Code Ann. § 34- 31-20(B).

10. What evidence at trial are the parties allowed to enter into evidence concerning medical expense related damages.

South Carolina is a "bills incurred" rather than a "bills paid" jurisdiction. At trial, a Plaintiff may present all the medical expenses they believe they incurred that are reasonably related to treatment of the injuries they sustained in the accident underlying the case; regardless of their medical insurance status or actual out of pocket medical expenses. *See Covington v. George*, 359 S.C. 100, 597 S.E.2d 142 (2004) (holding that evidence that amount motorist's medical provider accepted in payment was less than what it charged for its services was inadmissible in negligence action, under the collateral source rule, where actual payment amounts were made by a collateral source.) Under the collateral source rule, compensation received by an injured party from a source wholly independent of the wrongdoer will not reduce the damages owed by the wrongdoer. Id. Under the collateral source rule, a tortfeasor cannot take advantage of a contract between an injured party and a third person, no matter whether the source of the funds received is an insurance company, an employer, a family member, or other source. *Id*. While a defendant is permitted to attack the necessity and reasonableness of medical care and costs, he cannot do so using evidence of payments made by a collateral source. *Id*.

11. Does your state recognize a self-critical analysis or similar privilege that shields internal accident investigations from discovery?

The South Carolina Supreme Court has not ruled on the self-critical privilege question, and it remains an open question of law. Federal Magistrate Judge Shiva Hodges recently noted in *Maseng v. Tuesday Morning, Inc.*, No. CV 3:19-3245-SAL-SVH, 2020 WL 3130261, at 6 (D.S.C. June 12, 2020), that "the self-critical evaluation privilege is a privilege of recent origin and one that is narrowly applied even in those jurisdictions where it is recognized." *In re Air Crash at Charlotte, N.C. on July 2, 1994*, 982 F. Supp. 1052, 1054 (D.S.C. 1995). Although this privilege has rarely been invoked in South Carolina:

> [o]ther courts have generally required that the party asserting the privilege demonstrate that the material to be protected satisfies at least three criteria: 'first, the information must result from a critical self-analysis undertaken by the party seeking protection; second, the public must have a strong interest in preserving the free flow of the type of information sought; finally, the information must be of the type whose flow would be curtailed if discovery were allowed.' Note, The Privilege of Self–Critical Analysis, 96 Harv.L.Rev. 1083, 1086 (1983). To these requirements should be added the general proviso that no document will be accorded a privilege unless it was prepared with the expectation that it would be kept confidential, and has in fact been kept confidential. See James F. Flanagan, Rejecting a General Privilege for Self–Critical Analyses, Geo.Wash.L.Rev. 551, 574–576 (1983) ....

Id. (citing *Dowling v. American Hawaii Cruises, Inc.*, 971 F.2d 423, 425–426 (9th Cir. 1992)); *see also Crosby v. United States*, C/A No. 3:07-3668-JFA, 2009 WL 10678824, at 3 (D.S.C. Jan. 22, 2009) (same). Additionally, and as a general matter, the proponent of a privilege has the burden to prove the elements of the privilege, *see In re Grand Jury Subpoena*, 415 F.3d at 338–39, and the privilege is to be construed narrowly, *see Fisher v. United States*, 425 U.S. 391, 403 (1976).

A request for an insurance company's internal claim log/internal investigations must be subpoenaed directly from the insurance company, not obtained as a discovery request sent to an insured Defendant. Claims

logs/investigation files are the property of the insurance carrier rather than the named insured defendant and the insurance carrier is not a case party. Therefore, a Plaintiff seeking a non-party claims file should be governed by Rule 45 (subpoenas) rather than by Rule 26 (discovery). It is important to note that this is a hotly contested and often litigated proposition between the Plaintiff's bar and the Defense bar in South Carolina.

12. Does your state allow independent negligence claims against a motor carrier (i.e. negligent hiring, retention, training) if the motor carrier admits that it is vicariously liable for any fault or liability assigned to the driver?

Yes. South Carolina law does not prohibit a plaintiff from pursuing a negligent hiring, training, supervision, or entrustment claim once respondeat superior liability has been admitted, *James v. Kelly Trucking Co.*, 377 S.C. 628, 634, 661 S.E.2d 329, 332 (2008).

Under South Carolina law, where an employer knew or should have known that its employment of a specific person created an undue risk of harm to the public, a plaintiff may claim that the employer was itself negligent in hiring the employee. On a claim of negligent supervision, South Carolina case law requires plaintiff show that the upstream employer knew or should have known about the specific conduct of the employee in question that resulted in the harm suffered by Plaintiff if the employee was acting in the scope of their employment when the accident occurred.

Negligent Hiring Case Law

"[W]here an employer knew or should have known that its employment of a specific person created an undue risk of harm to the public, a plaintiff may claim that the employer was itself negligent in hiring ... the employee." *James v. Kelly Trucking Co*., 377 S.C. 628, 661 S.E.2d 329, 330 (2008). "Negligent hiring cases 'generally turn on two fundamental elements—knowledge of the employer and foreseeability of harm to third parties.' " *Kase v. Ebert*, 392 S.C. 57, 707 S.E.2d 456, 459 (2011) (*quoting Doe v. ATC, Inc.*, 367 S.C. 199, 624 S.E.2d 447, 450 (2005)); *see also Williams v. Preiss–Wal Pat III, LLC*, 17 F.Supp.3d 528, 538 (D.S.C. 2014) ("The issue of an employer's knowledge concerns the employer's awareness that the employment of a specific individual created a risk of harm to the public." *(citing Kase*, 707 S.E.2d at 459)). In *Doe*, the South Carolina Court of Appeals explained that these two elements:

> are not necessarily mutually exclusive, as a fact bearing on one element may also impact resolution of the other element. From a practical standpoint, these elements are analyzed in terms of the number and nature of prior acts of wrongdoing by the employee, and the nexus or similarity between the prior acts and the ultimate harm caused.
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> 624 S.E.2d at 450 (citations omitted).

Negligent Supervision Case Law

In *Degenhart v. Knights of Columbus*, the South Carolina Supreme Court found that an employer may be liable for negligent supervising an employee who, acting outside the scope of his employment, intentionally harms another while using a chattel of the employer, if the employer knew or should have known that it had the ability to control its employee and that there was the need and opportunity for it to exercise such control. 309 S.C. 114, 420 S.E.2d 495, 496 (1992). *See, e.g., Doe v. Bishop of Charleston*, 407 S.C. 128, 754 S.E.2d 494, 500 (2014); *Kase*, 707 S.E.2d at 459. However, when the state Supreme Court revisited the concept of supervisory liability in *James v. Kelly Trucking Co.*, it cited *Degenhart* and yet left intentional harm out of the discussion:

> [W]here an employer knew or should have known that its employment of a specific person created an undue risk of harm to the public, a plaintiff may claim that the employer was itself negligent in hiring, supervising, or training the employee.... *See* Restatement (Second) of Torts § 317 (1965) ([c]ited with approval in *Degenhart v. Knights of Columbus*, 309 S.C. 114, 116, 420 S.E.2d 495, 496

(1992)). As this recitation suggests, the employer's liability under such a theory does not rest on the negligence of another, but on the employer's own negligence.

377 S.C. 628, 661 S.E.2d 329, 330–31 (2008) (internal citations omitted). Rather than hinging negligent supervision liability on the existence of intentional harm, that foreseeability-based standard "requires the court to focus specifically on what the employer knew or should have known about the specific conduct of the employee in question." *Hoskins v. King*, 676 F.Supp.2d 441, 448 (D.S.C. 2009) (discussing *James*, and collecting cases).

Negligent Training Case Law

Negligent training is merely a specific negligent supervision theory by another name. *See Gainey v. Kingston Plantation*, No. 4:06-3373-RBH, 2008 WL 706916, at 7 n. 4 (D.S.C. Mar. 14, 2008) ("It does not appear that South Carolina recognizes a claim for negligent training separate and apart from one for negligent supervision."). *Holcombe v. Helena Chem. Co*., 238 F. Supp. 3d 767, 772 (D.S.C. 2017).

13. Does your jurisdiction have an independent claim for spoliation? If not, what are the sanctions or repercussions for spoliation?

No. Spoliation in SC is defined as the destruction or material alteration of evidence or to the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001). The SC Supreme Court has declined to recognize the tort of negligent spoliation of evidence as an independent cause of action. *Cole Vision Corp. v. Hobbs*, 394 S.C. 144, 154, 714 S.E.2d 537, 542 (2011). This does not preclude parties from asserting spoliation as a defense. *Id*. "[T]he effect of the doctrine of spoliation, when applied in a defensive manner, is to allow a defendant to exculpate itself from liability because the plaintiff has barred it from obtaining evidence...." Robert L. Tucker, *The Flexible Doctrine of Spoliation of Evidence: Cause of Action, Defense, Evidentiary Presumption, and Discovery Sanction,* 27 U. Tol. L.Rev. 67, 75 (1995). A party may also be sanctioned for spoliation where the party had a duty to preserve material evidence and willfully engaged in conduct that resulted in the loss or destruction of such evidence at a time when the party knew—or should have known—that the destroyed evidence was or could be relevant in litigation. *Turner v. United States*, 736 F.3d 274, 282 (4th Cir. 2013).

A party seeking sanctions based on the spoliation of evidence must establish, inter alia, that the alleged spoliator had a duty to preserve material evidence. This duty arises "not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation." *Silvestri v. Gen. Motors Corp.,* 271 F.3d 583, 591 (4th Cir.2001). Generally, it is the filing of a lawsuit that triggers the duty to preserve evidence. *Victor Stanley, Inc. v. Creative Pipe, Inc.,* 269 F.R.D. 497, 522 (D.Md.2010). Moreover, spoliation does not result merely from the "negligent loss or destruction of evidence." *Vodusek,* 71 F.3d at 156. Rather, the alleged destroyer must have known that the evidence was relevant to some issue in the anticipated case, and thereafter willfully engaged in conduct resulting in the evidence's loss or destruction. *See id.* Although the conduct must be intentional, the party seeking sanctions need not prove bad faith. *Id. See Id, Turner v. United States*, 736 F.3d 274, 282 (4th Cir. 2013). Any particular sanctions imposed by the court would vary case by case.