FOR MORE INFORMATION

CLEMENT RIVERS, LLP
Charleston, South Carolina
www.ycrlaw.com

Duke Highfield
dhighfield@ycrlaw.com

Brandt R. Horton
bhorton@ycrlaw.com

Victoria L. Anderson
tanderson@ycrlaw.com

Christian E. Fober
cfober@ycrlaw.com

Matthew K. Harrison
mharrison@ycrlaw.com

ALFA International
The Global Legal Network
Local Relationships Worldwide

SOUTH CAROLINA

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?

Neither South Carolina state courts, nor Fourth Circuit courts have recognized a qualified privilege for self-critical analysis in any field other than health care. *See* S.C. Code § 40-71-10 (*codifying* a privilege for health care providers).

Where a post-accident investigation (inclusive of preventability determinations) is done or created in the ordinary course of business it is likely a South Carolina court may order that it be disclosed pursuant to proper discovery requests. The analysis then turns on whether the plaintiff/claimant is able to prove that he has a substantial need for the work product privileged materials and that he cannot obtain substantially similar materials via alternative means. Written or recorded statements and photographs, communications with law enforcement, and/or investigation of publicly available social media materials done during accident investigation are typically discoverable unless such fall under the category of privilege as discussed above.

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?

South Carolina courts typically have found that 3rd Party Litigation Funding files are not discoverable on the grounds that the "collateral source" rule prevents discovery of these agreements and financial transactions. However, courts in other jurisdictions are becoming increasingly aware that litigation financing poses a threat to the fairness of the litigation process. These agreements can lead to inflated medical specials and demands, which are incongruent to a claimant's actual injuries and only fund the coffers of the litigation financers.

In 2014, the South Carolina Department of Consumer Affairs ruled that entities that fund litigation in exchange for a piece of the recovery are providing loans that must comply with state laws governing lending. Moreover, the Department of Consumer Affairs stated that "the broad concept of a 'loan' under the [Uniform Consumer Credit Code] certainly encompasses those circumstances where the consumer does not have an unconditional obligation to repay."

As such, it is advisable that defense counsel ask in every case whether a plaintiff received litigation financing and, if so, make every effort to obtain the agreements and payment transactions through the discovery process.

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

An attorney will travel to a Rule 30(b)(6) witness deposition. A corporate witness is not required to travel to a County in which he or she does not reside or regularly transact business in person, but it is possible that a corporate witness could be

compelled to appear at a particular location subject to the compelling party's ability to pay the witness and mileage fees. See Rule 30(a)(2), South Carolina Rules of Civil Procedure. In practice, long distance corporate depositions in South Carolina are typically taken by remote electronic means (telephone or videoconference) or in the location of the witness.

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?

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 by the employer. *See James v. Kelly Trucking Co.*, 377 S.C. 628, 634, 661 S.E.2d 329, 332 (2008). Accordingly, there is no real benefit (or detriment) to admitting the employee was in the course and scope of employment with regard to direct negligence claims.

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

Brandon Glover v. David Hill, JHOC Inc., Earl Cuff and Willie Glover (S.C.Com.Pl., 2019)

($35 Million in Interstate Motor Vehicle Accident Lawsuit)

In April 2019, an Orangeburg County jury awarded Brandon Glover a total of $21,000,000 and awarded Willie Glover a total of $14,000,000. In that case, Defendant Cuff was driving west on Interstate 26 in Orangeburg County, S.C. when he attempted to move his disabled vehicle onto the shoulder but parked it partially on the roadway. Willie Glover, driving behind Cuff with passenger Brandon Glover, reportedly made a sudden stop to avoid striking Cuff's vehicle, and Defendant Hill, driving behind Willie in a tractor-trailer owned by his employer JHOC Inc., rear-ended Willie's vehicle, causing it to strike a tree. Brandon reportedly suffered injuries to his neck, back and right shoulder. Brandon filed a lawsuit against Willie, Cuff, Hill and JHOC, asserting that Cuff was negligent in failing to remove his vehicle from the roadway and failing to warn other drivers that his vehicle was disabled on the roadway; that Willie was negligent in stopping suddenly, driving too fast, and failing to take evasive action; and that Hill and JHOC were negligent in following too closely, driving too fast, and failing to maintain a proper lookout. Brandon also claimed JHOC negligently trained and supervised its drivers.

Willie also alleged neck and back injuries in the incident, and he filed a cross-claim against Hill and JHOC, asserting negligence, gross negligence, and negligence per se. He also contended JHOC negligently supervised Hill and negligently entrusted the vehicle to him. JHOC and Hill asserted the sudden emergency doctrine and claimed Willie braked suddenly, Hill tapped Willie's vehicle, and Hill's actions were reasonable. The case proceeded to trial, and the Court granted a directed verdict in Cuff's favor. A jury determined that Willie was ten percent negligent and JHOC and Hill were 90 percent negligent

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

A plaintiff in a personal injury action seeking damages for the cost of medical services is entitled to recover the reasonable value of those medical services, not necessarily the amount paid. *Haselden v. Davis*, 353 S.C. 481, 484, 579 S.E.2d 293, 295 (2003) (citing 22 Am. Jur. 2d *Damages*, § 198 (1988)). Thus, a plaintiff can present to the jury the total medical bills incurred, regardless of payment, Medicare reduction, and like factors. *Id.; Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 595-96, 686 S.E.2d 176, 189 (2009) (holding the trial court did not err in permitting the jury to evaluate the value of the plaintiff's medical care in assessing damages despite the fact that the plaintiff received the medical care for free).

Despite the fact that "the amount paid may be relevant in determining the reasonable value of those services, the trier of fact must look to a variety of other factors in making such a finding." *Haselden*, 353 S.C. at 484, 579 S.E.2d at 295. "Among those factors to be considered by the jury are the amount billed to the plaintiff, and the relative market value of those services." *Id.* (*citing Kashner v. Geisinger Clinic*, 432 Pa. Super. 361, 638 A.2d 980 (Pa. 1994)). Thus, the amount paid for medical services does not alone determine the reasonable value of those medical services. *Haselden*, 353 S.C. at 484, 579 S.E.2d at 295 (*citing Restatement (Second) of Torts* § 924 cmt. F (1979) ("The value of medical services made necessary by the tort can ordinarily be recovered although they have created no liability or expense to injured person, as when a physician donates his services.")).

Offsets are generally not available under South Carolina law. Under the collateral source rule, a plaintiff's damages may not be reduced by benefits received from some source like unemployment compensation or first party insurance. HUBBARD & FELIX, SOUTH CAROLINA LAW OF TORTS 560 (3d ed. 1990); *Citizens & S. Nat'l Bank of S.C. v. Gregory,* 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995) ("compensation received by an injured party from a source wholly independent of the wrongdoer will not reduce the amount of damages owed by the wrongdoer.").

The collateral source rule also applies to Medicaid and Medicare payments "such that the amount a plaintiff is billed by her medical provider may be recoverable as compensatory damages, despite the fact that the Plaintiff's Medicaid may have paid a lower amount." *Haselden*, 353 S.C. at 483, 579 S.E.2d at 294, n.3 (recognizing that, although several courts in other jurisdictions find that allowing a plaintiff to claim the billed amount, as opposed to the paid amount, would result in a windfall, South Carolina courts do not find the amount paid to be dispositive).

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 South Carolina, the collateral source rule effectively prevents discovery of the actual amounts charged or accepted by a heath care provider. However, the billing statements from these providers typically include the amounts that were actually deducted pursuant to any insurance contracts with the provider, and these bills are routinely exchanged in discovery. Nevertheless, an objection based upon the collateral source rule that is made in response to a subpoena or discovery request for these documents, will typically be sustained.

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

South Carolina law (S.C. Code Ann. § 42-15-10) authorizes a claimant to file a claim for benefits in the state where the claimant is hired, injured, or the claimant's employment is located. The South Carolina Workers' Compensation Commission may exercise jurisdiction over claims if 1) the contract of employment was made in South Carolina; 2) the employer's place of business is in the South Carolina; 3) the residence of the employee must be in South Carolina; and 4) the contract of employment must be for services to be performed not exclusively outside South Carolina. *Younginer v. J.A. Jones Const. Co*., 215 S.C. 135, 54 S.E.2d 545 (1949). Regarding the state where employment is located, South Carolina must be the base of operation for the employer's place of business and where the claimant receives his assignments. *Oxendine v. Davis*, 373 SC 438, 646 S.E.2d 143 (2007).

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

Rule 27 of the *South Carolina Rules of Civil Procedure*, provides that guidance for taking pre-suit depositions. A person wishing to take a pre-suit deposition may file a verified petition in the court of the Circuit of the residence of an expected adverse party. The petition must show that 1) the petitioner expects

to be a party to an action cognizable in State court but is presently unable to bring the action or cause it to be brought; 2) the subject matter of the expected action and the petitioner's interest in the action; 3) the facts which the petitioner wants to establish by the proposed testimony and the reasons for wanting the testimony; 4) the names or description of the persons expected to be adverse parties and their addresses; and 5) the names or description of the persons to be examined and the substance of the testimony which is expected to be elicited. Finally, the petition must ask for an order authorizing the petitioner to take the depositions of the persons named in the petition.

Next, the petitioner must serve a notice upon each person named in the petition that is expected to be an adverse party, along with a copy of the petition, stating that the petitioner will apply to the court at a certain time and place for an order described in the petition. The notice must be served at least 20 days before the date of the hearing according to the applicable *South Carolina Rules of Civil Procedure* related to service of summons.

Finally, the court will enter an order designating the persons whose depositions may be taken and the subject matter of the deposition and whether the depositions will be taken by oral examination or written interrogatories if it is satisfied that deposition may prevent a failure or delay of justice. A deposition conducted under Rule 27, *SCRCP*, if admissible in evidence in the court of the state in which it is taken may be used in any subsequent action brought in a South Carolina court in accordance with Rule 32(a), *SCRCP*, which governs the use of depositions in court proceedings

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

South Carolina does not have any unique laws and/or regulations regarding how long a vehicle or tractor-trailer must be held prior to release. As a matter of general practice, if the identity of an adverse party is known then an offer to inspect the vehicle or tractor trailer within a specific amount of time is extended. While there are no specific legal considerations regarding how long a vehicle must be held prior to release, avoiding a claim of spoliation of evidence is paramount. Regarding spoliation of evidence, South Carolina does not recognize an independent tort for the negligent spoliation of evidence. *Cole Vision Corp. v. Hobbs*, 394 S.C. 144, 154, 714 S.E.2d 537, 542 (2011). Sanctions, however, remain a viable mechanism for the party claiming that spoliation of evidence has occurred. Courts in South Carolina have granted various forms of relief as a result of spoliation, including striking a pleading and giving an adverse inference jury instruction. A party bringing a motion for sanctions based on spoliation bears the burden of establishing three independent elements before the court may determine which sanction, if any, is appropriate. These elements are:

(1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed;
(2) that the records were destroyed with a culpable state of mind; and
(3) that the destroyed evidence was relevant to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.

Id. (internal citations omitted). Note that a South Carolina appellate court, affirmed by the Fourth Circuit, has found that negligent spoliation of evidence may be a basis for summary judgment and/or dismissal if such conduct significantly prejudices the other party's ability to prosecute and/or defend the matter. *Silvestri v. General Motors Corp.,* 271 F.3d 583, 590 (4th Cir.2001).

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

"Punitive damages can only be awarded where the plaintiff proves by clear and convincing evidence the defendant's misconduct was willful, wanton, or in reckless disregard of the plaintiff's rights." *Mellen v. Lane*, 377 S.C. 261, 290, 659 S.E.2d 236, 251 (Ct. App. 2008) (internal citation omitted). Additionally, 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 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.

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

No, trials conducted via remote communication technology have not been mandated. The Supreme Court of South Carolina's Order RE: *Operation of the Trial Courts During the Coronavirus Emergency*, as amended on December 16, 2020, states that a non-jury trial may be conducted using remote communication technology but does not indicate the same regarding jury trials. A jury trial and jury selection may only be conducted in person if a judge determines it is appropriate and the trial can be safely conducted.

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 most recent noteworthy verdict premised on punitive damages is *Glover v. Hill*, 2019 WL 4008575, (S.C. Cir. Ct. July 29, 2019). Regarding evidence for punitive damages in the case, the trial court's order on defendants' post-trial motions discusses evidence for the punitive damages award. The Circuit Court noted that there was evidence that the defendant tractor trailer driver was driving a tractor-trailer at a high rate of speed while in heavy traffic and was "tailgating" the plaintiffs' van, which was involved in the accident. There was also evidence that the defendant driver was driving while in violation of the hours of service limits. Evidence in case indicated that Hill had been driving continuously for almost nine hours. The "black box" download on the tractor trailer showed that the defendant driver had been driving continuously for 8.62 hours before the accident in violation of the 8-hour rules. Furthermore, the defendant driver testified that driving over his hours of service was "fatigued" driving, and he would have known he was being reckless and endangering people if he were -driving the tractor trailer in excess of the limits on his hours of service or had been driving with narcotics in his system. Of note, there was also evidence that the defendant driver was driving while taking narcotic medication. The Circuit Court noted there was evidence that the defendant took narcotic medication for prior knee and shoulder problems and that his employer, the defendant trucking company, had the defendant driver undergo a reasonable suspicion test prior to the accident.

The Defendants appealed to the Court of Appeals, but the parties agreed to dismiss the appeal and the matter was remitted back to Circuit Court. In Circuit Court, the defendants' motion to alter or amend was

granted and the judgement based on the jury's verdict was vacated.