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South Carolina

Are preventability determinations and internal accident reports discoverable or admissible in your state? What factors determine discoverability or admissibility?

The scope of discovery is very broad in South Carolina, in that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." Rule 26(b)(1), *SCRCP*. South Carolina does not recognize a specific exemption from discovery for preventability determinations and internal accident reports; rather, a party must assert attorney-client privilege or privilege under the work-product doctrine with regard to any materials it seeks to preserve in confidence. The essential elements giving rise to the [attorney-client] privilege [are]:"(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived." *State v. Doster*, 276 S.C. 647, 651, 284 S.E.2d 218, 219-20 (1981) (internal citations omitted). The attorney work product doctrine protects from discovery documents prepared in anticipation of litigation, unless a substantial need can be shown by the requesting party. See Rule 26(b)(3), *SCRCP*; *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947). Generally, in determining whether a document has been prepared "in anticipation of litigation," most courts look to whether or not the document was prepared because of the prospect of litigation. *Tobaccoville USA, Inc. v. McMaster*, 387 S.C. 287, 294, 692 S.E.2d 526, 530 (2010) (internal citation omitted).

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. Therefore, preventability determinations and internal accident reports are discoverable and admissible unless such fall under the category of privilege as discussed above.

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 seek identification of information and/or materials as to whether a plaintiff received litigation financing and, if so, make every effort to obtain the agreements and payment transactions through the discovery process.

What is the procedure for the resolution of a claim for injuries to a minor in your state? Does the minor's age affect the statute of limitations for a personal injury claim?

S.C. Code Ann. § 62-5-433 governs the approval of settlements involving minors.

For settlements involving minors in claims that exceed twenty-five thousand dollars ($25,000.00), the petitioner must file with the court a verified petition setting forth all pertinent facts concerning claim, payment, attorneys' fees and expenses, and why in the opinion of the petitioner the settlement should be approved. The court may require a hearing on the matter, after which an order will be issued. If settlement requires the payment of money or delivery of personal property for the benefit of the minor, the order must require that payment or delivery be made through a conservator, upon which a proper receipt and release or covenant not to sue will be executed, which will be binding on the minor.

For settlements that do not exceed twenty-five thousand dollars ($25,000.00), if a conservator has been appointed he may settle the claim without court authorization or confirmation. The conservator shall receive the payment or delivery of money and/or property and execute a proper receipt and release or covenant not to sue which is binding on the minor. If no conservator has been appointed the guardian or guardian ad litem must petition the court for approval.

The settlement of a claim not exceeding two thousand five hundred dollars ($2,500.00) may be effected by a minor's parent/guardian without court approval and without appointment of a conservator. The parent shall receive any payment or delivery of money and or property and execute a proper receipt and release or covenant not to sue which is binding on the minor.

While the statute of limitations in South Carolina is typically three years for a bodily injury claim, a minor has until his or her nineteenth birthday to file suit. S.C. Code Ann. § 15-3-40. This is not applicable for claims involving medical malpractice and/or wrongful death.

What are the advantages or disadvantages in your State of admitting that a motor carrier is vicariously liable for the fault of its driver in the context of 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 that a motor carrier is vicariously liable for the fault of its driver with regard to direct negligence claims.

What is the standard applied for spoliation of physical and/or documentary evidence in your state?

Spoliation occurs when three elements are met. First, the altered or destroyed evidence must have been relevant to the litigation. Second, the party must have been under a duty to preserve the evidence at the time it was altered or destroyed. Third, the spoliating party must have acted with the requisite level of intent, which varies depending on the sanction imposed and prejudice must be shown.

Relevance is proved by establishing that the allegedly spoliated material addressed topics, or falls into categories of documents, that would be favorable to the movant's case. The moving party must be prepared to make a showing that the document or evidence might reasonably have supported whatever presumption is being requested of the fact finder. Once the moving party shows that the material is likely to be relevant, the burden shifts to the party charged with spoliation to demonstrate the irrelevance of the evidence. A party has a duty to preserve evidence during litigation and at any time before the litigation when a party reasonably should know that evidence may be relevant to anticipated litigation. A showing of bad faith is not required. Rather, the moving party must establish that there was willful conduct.

Is the amount of medical expenses actually paid by insurance or others (as opposed to the amounts billed) discoverable or admissible in your State?

The collateral source rule provides "that compensation received by an injured party from a source wholly independent of the wrongdoer will not reduce the damages owed by the wrongdoer." Citizens and S. Natl. Bank of South Carolina v. Gregory, 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995). 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.' " Pustaver v. Gooden, 350 S.C. 409, 413, 566 S.E.2d 199, 201 (Ct.App.2002) (citations omitted). Covington v. George, 359 S.C. 100, 103-04, 597 S.E.2d 142, 144 (2004). Accordingly, a party may admit medical expenses to the jury in the amount billed but not in the amount actually paid. Given that the amount of medical expenses paid, rather than billed, is not admissible at trial, the discoverability of medical expenses paid by insurance is often not permitted, unless an alternative reason (such as the potential bias of the medical provider) for the discovery is asserted and accepted by the court, which is addressed on a case by case basis.

What is the legal standard in your state for obtaining event data recorder ("EDR") data from a vehicle not owned by your client?

South Carolina does not have a specific legal requirement and/or standard for obtaining EDR data from a vehicle not owned by the client; accordingly, standard discovery rules will typically apply. If the owner of the vehicle is a party to the litigation, available EDR data may be requested and potentially obtained directly via the discovery process. If the owner of the vehicle is not a party to the litigation, the consent of the owner of the vehicle will typically be required to perform a download. There are no unique South Carolina laws and/or regulations regarding the length of time a vehicle, or its data, must be held prior to release.

What is your state's current standard to prove punitive or exemplary damages against a motor carrier or broker and is there any cap on same?

"Punitive damages can only be awarded where the plaintiff proves by clear and convincing evidence that 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 $500,000.00. S.C. Code Ann. § 15-32-520, 530 .

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.

Has your state had any noteworthy recent punitive damages verdicts? If so, what evidence was admitted supporting issuance of a punitive damages instruction? Finally, are any such verdicts currently on appeal?

One recent noteworthy verdict premised on punitive damages is *Glover v. Hill*, 2019 WL 4008575, (S.C. Cir. Ct. July 29, 2019). The trial court's order on defendants' post-trial motions discusses evidence for the punitive damages award, and noted that there was evidence the defendant tractor-trailer driver was driving a tractor-trailer at a high rate of speed while in heavy traffic and "tailgating" the plaintiffs' van. There was also evidence that the defendant driver was driving while in violation of the hours of service limits (the EDR download indicated that the defendant driver had been driving continuously for 8.62 hours before the accident). 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 after taking narcotic medication for prior knee and shoulder problems. It was also noted that his employer, the defendant trucking company, required the defendant driver to 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 judgment based on the jury's verdict was vacated.

A second notable case, while it did not involve a trucking company, is indicative of a post-COVID-19 jury verdict trends (in a liberal venue). In *Garvin v. Dominion South Carolina,* the plaintiff was a lineman and filed suit against Dominion South Carolina. He was electrocuted while working as a lineman in 2016 and had to have both arms amputated. He alleged that his employer did not properly train him to wear rubber sleeves to cover his arms and shoulders and to wear protective gloves. His attorney asked for $50 million. After the Plaintiff's attorney asked the jury for $50 million, the jury awarded the Plaintiff a total of $90 million, but assigned 30% comparative negligence to the Plaintiff, reducing the award to approximately $63 million. Following the verdict, Dominion South Carolina filed a motion for judgment notwithstanding the verdict, a motion for new trial and a motion for stay of execution of judgment, arguing that the verdict was excessive and unjustified and that the trial judge failed to give proper instructions to the jury prior to their deliberations; this motion remains pending.

Does your state permit an expert to testify as to content of the FMCSRs or the applicability of the FMCSRs to a certain set of facts?

Yes. South Carolina Rule of Evidence 702 states that: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." South Carolina's court rules regarding expert witnesses is identical to the federal rule. So long as a judge determines that a testifying witness is a qualified expert in FMCSRs, whose testimony will assist the trier of fact in understanding a factual issue, he/she is permitted to testify as to the contents and applicability of FMCSRs.

Does your state consider a broker or shipper to be in a "joint venture" or similar agency relationship with a motor carrier for purposes of personal injury or wrongful death claims?

South Carolina motor carrier jurisprudence does not specifically address the issue of whether a broker and shipper are a "joint venture" under the law. However, South Carolina does have a highly developed line of case law related to general agency relationships. Consequently, the broker and shipper relationship should be analyzed in accordance with general agency law principles in South Carolina.

Provide your state's comparative/contributory/pure negligence rule.

Under South Carolina's doctrine of comparative negligence, a plaintiff may recover damages only if his own negligence is not greater than that of the defendant. Bloom v. Ravoira, 339 S.C. 417, 529 S.E.2d 710 (2000). Ordinarily, comparison of the plaintiff's negligence with that of the defendant is a question of fact for the jury to decide. Id. In a comparative negligence case, the trial court should determine judgment as a matter of law only if the sole reasonable inference that may be drawn from the evidence is that the plaintiff's negligence exceeded fifty percent. Id. *See also* Nelson v. Concrete Supply Company, 303 S.C. 243, 399 S.E.2d 783 (1991).

South Carolina also 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).

However, South Carolina's statutory and case law holds that a jury can only apportion fault to then-existing defendants – non-parties cannot be on the verdict form. Moreover, fault cannot be allocated to any defendant who settles before the jury gets the case.

The result is that Plaintiffs are able to exert significant pressure on over insured defendants in a multi-defendant case – they settle with the primary at fault party and then a minor defendant (who would have originally only been given 1% fault) will be responsible for an entire verdict if the jury finds that minor player was even slightly negligent and that this negligence was a proximate cause of the damages. Often times the Plaintiff will frame the issue to the jury by asking them to determine if the [over insured defendant] "could have avoided the accident."

A defendant may also argue that a non-party had liability for the alleged injury as an "empty-chair" defendant, but such non-party will not be added to the jury verdict form for allocation of fault. In other words, a non-party or even a settling defendant will not be on the verdict form for purposes of allocation of fault. The only way to prevail on an "empty chair" defense is to convince a jury that your defendant was not even 1% negligent – a high

hurdle.

Provide your state's statute of limitations for personal injury and wrongful death claims.

In South Carolina, the statute of limitations for a cause of action based on personal injury is three years. S.C. Code Ann. § 15-3-530 (5).

In South Carolina, the statute of limitations for a cause of action for wrongful death is three years. S.C. Code Ann. § 15-3-530 (6). That "period begin[s] to run upon the death of the person on account of whose death the action is brought." Id. In addition, the statute of limitations is suspended during the eight months following the decedent's death, but resumes thereafter unless otherwise tolled. S.C. Code Ann. § 62-3-109

In your state, who has the authority to file, negotiate, and settle a wrongful death claim and what must that person's relationship to the decedent be?

In South Carolina, only the executors and administrators of the deceased victim's estate can file, negotiate and settle wrongful death claims on behalf of the decedent. S.C. Code Ann. § 15-51-20. Importantly, the beneficiary(ies) of wrongful death actions are the "wife or husband and child or children of the person whose death shall have been so caused, and, if there be no such wife, husband, child or children, then for the benefit of the parent or parents, and if there be none such, then for the benefit of the heirs of the person whose death shall have been so caused." Id. Pursuant to the aforementioned statute, beneficiaries of wrongful death actions in South Carolina are quite similar to South Carolina's probate instate succession laws.

Is a plaintiff's failure to wear a seatbelt admissible at trial?

No. Pursuant to SC Code Ann. §56-5-6540(C), the use or non-use of a seatbelt in a motor vehicle has no consequence as it pertains to "negligence per se or contributory negligence, and is not admissible as evidence in a civil action."

In your state, are there any limitations on damages recoverable for plaintiffs who do not have insurance coverage on the vehicle they were operating at the time of the accident? If so, describe the limitation.

No. There are not any limitations on damages recoverable for Plaintiffs simply because they do not have statutorily required automobile insurance coverage. While there are several statutory damages caps and limitations in South Carolina (including those for punitive damages; medical malpractice cases; and cases in which the State is a party *See* S.C. Code Ann §15-32-220; 15-32-520; and *see generally* §15-78-10), none specifically apply to Plaintiffs who do not have insurance coverage on a vehicle involved in an accident and subsequent lawsuit.

How does your state determine applicable law/choice of law questions in motor vehicle accident cases?

In resolving choice of law problems, the South Carolina courts have generally followed a traditional approach, which applies the law of the place where the cause of action arose or the subject injury occurred to determine substantive matters going to the basis of the right of action, and applies the law of the forum to determine procedural or remedial matters. Under traditional South Carolina choice of law principles, the substantive law governing a tort action is determined by the lex loci delicti, the law of the state in which the injury occurred. Boone v. Boone, 345 S.C. 8, 13, 546 S.E.2d 191, 193 (2001). Therefore, when a motor vehicle collision occurs

within the State of South Carolina, South Carolina substantive law applies. Procedural matters are to be determined in accordance with the law of South Carolina, the lex fori. McDaniel v. McDaniel, 243 S.C. 286, 289, 133 S.E.2d 809, 811 (1963). Lex fori refers to the law of the forum. Black's Law Dictionary 921 (7th ed.1999). Thus, when an action is brought in this state for a tort committed in another jurisdiction, matters related to the right of action are governed by the lex loci delicti. Substantive issues controlled by the law of the place where the tort occurred include the measure of damages as well as issues of liability.