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VERMONT

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 Vermont Supreme Court has not yet had occasion to determine directly whether Vermont recognizes the self-critical analysis privilege. However, Federal courts applying state law have predicted that it will not. *Lawson v. Fisher Price, Inc.*, 191 F.R.D. 381, 382 (D. Vt. 1999). *Lawson* noted that the Vermont Supreme Court has consistently used the four-part test in Dean Wigmore's treatise, Wigmore on Evidence, to determine whether a privilege should be recognized. *Id.* The Wigmore factors are:

> (1) The communications must originate in a confidence that they will not be disclosed.
>
> (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
>
> (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.
>
> *Douglas v. Windham Superior Court*, 157 Vt. 34, 40, 597 A.2d 774, 777-78 (1991), quoting 8 Wigmore on Evidence § 2285, at 527 (McNaughton ed. 1961).

Applying the Wigmore factors in *Lawson*, the federal court concluded that the self-critical analysis privilege did not meet the Wigmore standard, and therefore the Vermont Supreme Court would likely not recognize the self-critical analysis privilege as it has been laid out in other states. *Lawson* at 386. However, it should be noted that the communications in *Lawson* involved communications between the defendant corporation and the Consumer Product Safety Commission, and Judge Sessions concluded that because such communications are mandatory, the facts in *Lawson* did not require confidentiality to maintain the relation between the parties. However, *Weatherly v. Gravel & Shea, P.C.*, 2012 WL 12991459 (Vt. Super. Ct.) (Trial Order) cited *Lawson* as "rejecting creation of 'self-critical analysis' privilege" in Vermont regardless of the particular facts. *Weatherly* at n. 2.

Two other points need to be taken into account when considering whether the Vermont Supreme Court may recognize the self-critical analysis privilege. The first is that while the Court has not had the opportunity to address the issue directly, it did do so indirectly in *Wheeler v. Central Vermont Medical Center, Inc.*, 155 Vt. 85 (1989). In *Wheeler*, the Court – while addressing a separate issue – cited with approval a note from the Harvard Law Review stating "[n]either should factual materials that are otherwise discoverable be protected merely because they also

happen to be contained in a critical self-analysis." *Wheeler* at 90-91, citing Note, *The Privilege of Self-Critical Analysis*, 96 Harv.L.Rev. 1083, 1095 (1983).

Similarly, the *Lawson* decision concluded in dicta that "even if self-critical analysis privilege had been adopted in this case, it would have exclusively protected subjective or conclusory materials." *Lawson* at 386. Therefore, even if the Vermont Supreme Court did recognize this privilege, it would be unlikely to extend it beyond the limits placed in *Lawson*.

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?

There is limited caselaw on this topic, and neither the Vermont Supreme Court nor Vermont Federal Courts have ruled on this matter.

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

In Vermont, the attorney typically travels to the corporate headquarters or the location of the witness with respect to a Rule 30(b)(6) witness deposition. Nationally, Rule 30(b)(6) depositions generally occur at the employer's principal place of business (this includes foreign entities). *Nat'l Cmty. Reinvestment Coalition v. Novastar Fin*., Inc., 604 F. Supp. 2d 26, 32 (D.D.C. 2009). However, parties may stipulate (or the court may order) that the deposition be taken within the forum, at an alternate location, or by remote means. If the deposition is being taken by remote means such as telephone or teleconference, the deposition location is where the deponent answers questions. Fed. R. Civ. P. 30(b)(4). Vermont generally follows the national standard in such matters (in fact Vt. R. Civ. P. 30(b)(4) parallels the Federal rule exactly. Given that the plaintiff selects the forum, it is generally considered fair that the corporate witness be deposed locally to them. However, the lessons learned from many remote depositions during the COVID-19 pandemic may affect how such matters are determined in future.

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?

The benefits of admitting a driver was in the "course and scope" of employment lie largely in avoiding extraneous discovery. Specifically, this admission can hamper a plaintiff's attempts to use "Reptile Theory" to obtain a wide swathe of irrelevant discovery that might assist the plaintiff in putting the defendant on trial instead of litigating the circumstances of case. The intention is to trigger a response from jurors in the hope they will view the defendant corporation as a threat to public safety and act out of an emotional desire to protect themselves, and society at large.

If the plaintiff attempts this tactic, defendants should respond with a motion for a protective order to limit discovery based on Fed.R.Civ.P. 26(b)(1) for federal cases or the corresponding Vermont rule, which both state that the scope of discovery must be relevant to the claim or defense, as well as proportional to the case and non-privileged. While the defendant has the burden of showing good cause for the protective order, the plaintiff must first show that the discovery sought is relevant. See Fed.R.Civ.P. 26(b)(1) and V.R.Civ.P 26(b)(1). The court can limit discovery if it finds a request to be outside the permissible scope of Rule 26(b)(1) or in order "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." *Patient A. v. Vermont Agency of Human Servs.*, No. 5:14-cv-000206, 2016 U.S. Dist. LEXIS 27486 at *3 (D. Vt. Mar. 1, 2016). To ensure the discovery rules are complied with a court may issue a protective order upon a showing of good cause. *US. Fidelity and Guaranty Co. v. Roman Catholic Diocese of Burlington*, No. 1:11-cv-168, 2012 U.S. Dist. LEXIS 16697 at *3 (D. Vt. Feb. 10, 2012); see also Fed. R. Civ. P. 26(c).

However, it should be noted that if a defendant corporation admits that the driver was in the course and

scope of employment, it naturally waives any defenses based on the driver's potential *ultra vires* actions (intoxication, frivolity, horseplay, etc.) relating to the case that additional discovery might demonstrate to be outside the course and scope of employment.

5. Please describe any noteworthy nuclear verdicts in your State?
    1. *Heco v. Foster Motors*, 2015 VT 3: Injured driver brought claims for strict liability, negligence, and breach of warranty alleging a defective seating system against an automobile dealer. A child was paralyzed in the back seat of the car. The Chittenden Superior Court entered judgment in favor of manufacturer, and the award was upheld on appeal. Total award: $43,000,000.00 (thought to be the largest award in Vermont state court).
    2. *Hemond v. Frontier Communications of America, Inc.*, 2012 VT 94 and 2015 VT 66: An electrical utility's employee sued the utility and its independent contractor, alleging their negligence in design and construction of electrical substation caused his electrocution injuries sustained when opening substation's switch. Employee settled with the contractor, but the utility did not settle. After verdict, the trial court ruled the utility had a nondelegable duty to design a safe environment and thus was not entitled to indemnification. Total award: $22,497,211.24.
    3. In 2014, a Vermont Superior Court also ordered a man who had repeatedly sexually abused a young woman to pay $35 million, but that case is an extreme instance unlikely to apply in most civil trucking cases.
6. What are the current legal considerations in terms of obtaining discovery of the amounts actually billed or paid?

Vermont trial courts generally allow plaintiffs to recover the full, undiscounted value medical services, rather than the amount actually paid to satisfy the medical bills. See *Buker v. King*, Docket No. 523-11-05 Wrcv (Vt. Super. Ct. Jun. 23, 2008)(Morris, J.)(refusing to limit the reasonable value of plaintiff's medical services to the amounts plaintiff's medical providers agreed to accept as a recipient of Medicaid funds); See also *Beaudin v. Kupersmith*, Docket No. S 0803-07 CnC, (Vt. Super. Ct. Oct. 26, 2010) (Skoglund, J.) ("To the extent that Defendant's argument is that reasonable value of medical services can most accurately be proven through market transaction, i.e. the amount of payment the providers accepted, it is unavailing.") The general reasoning is based on the collateral source doctrine, and that a third party's arrangement with a medical provider should not benefit the torfeasor in a civil action. This can result in a considerable windfall for a plaintiff, but courts in Vermont consider that more just than a perceived "discount" for a tortfeasor.

No off-sets are available, other than for the percentage of plaintiff's own comparative negligence. Vermont's collateral source rule bars evidence of the amount received by an insured party from a collateral source (e.g., plaintiff's health insurer) not connected with the tortfeasor from being introduced at trial. *Sherman v. Ducharme*, Docket No. 334-5-08 Wrcv (Vt. Super. Ct. Nov. 10, 2009)(Eaton, J.) (citing *Hall v. Miller*, 143 Vt. 135, (1983)).

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)

As demonstrated in the cases cited in the previous question, not very successful. Vermont courts have consistently disallowed consideration of plaintiff's actual cost and instead determine recovery based on the full undiscounted value of the services. This extends to rulings denying defendants from obtaining lien amounts in discovery.

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

Vermont asserts jurisdiction for workers' compensation purposes over any employee injured in the state working for an employer with WC coverage, regardless of where the corporation is based or where the employee was hired. 21 V.S.A. § 616 (vesting jurisdiction in the commissioner to apply Vermont's workers' compensation law to "all employment in this state"); *Letourneau v. A.N. Deringer*, 2008 VT 106 ¶2 (2008) (acknowledging the application of
§616 to persons employed in Vermont); *Florez Diaz v. Letourneau*, Op. No. 10-14WC (Vt. Dept. of Labor, July 25, 2014) ("Construing together §§601(4), 616 and 618, the Legislature thus intended to confer subject matter jurisdiction over an employee who is injured in Vermont while engaged in the services of a covered employer, regardless of where he or she was hired.)

Claimants have the right to pick the forum in which they wish to bring a claim, and many claimants choose Vermont to bring their workers' compensation claim if possible because of Vermont's claimant-friendly decisions and benefits. Therefore, it is worth noting that a worker injured outside of Vermont may apply for benefits in Vermont if the employee was hired in the state. 21 V.S.A. § 619. Naturally, an injured worker may only pursue benefits in one state.

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

In Vermont, pre-suit depositions are regulated under Rule of Civil Procedure 27. A person who wants to obtain a pre-suit deposition files a petition asking the court for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition in the superior court in the county of the residence of any expected adverse party. The petition must show: (1) that the petitioner expects to be a party to an action in Vermont but is presently unable to bring it or cause it to be brought; (2) the subject matter of the expected action and the petitioner's interest therein; (3) the facts which the petitioner desires to establish by the proposed testimony or other discovery and the petitioner's reasons for desiring to perpetuate or obtain it; (4) the names or a description of the persons the petitioner expects will be adverse parties and their addresses and (5) the names and addresses of the persons to be examined or from whom other discovery is sought and the substance of the testimony or other discovery which the petitioner expects to elicit or obtain from each. V. R. Civ. P. 27(a). The petition must be noticed in compliance with V. R. Civ. P. 27(b).

The petitioner must satisfy the court that the deposition may prevent a failure or delay of justice. If a deposition is taken under these rules or if, although not so taken, it would be admissible in evidence in the courts of the state in which it is taken, it may be used in any action involving the same subject matter subsequently brought in Vermont. V. R. Civ. P. 27(b). This standard is still open for interpretation as there is very little case law on this point, but attorneys in our firm have succeeded in obtaining pre-suit depositions where the proposed deponent was terminally ill, and the deposition prevented a failure of justice because without it the deponent's testimony would not be taken due to their death.

The deposition, together with notice and the petition, must be recorded in the office of the clerk of the county where the land or any part of it lies, if the deposition relates to real estate; if not, of the county where any of the parties reside within 90 days of the deposition. V. R. Civ. P. 27(c).

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

No. The only Vermont case discussing destruction of evidence in a civil context requires that a party must have reason or obligation to preserve evidence before a "presumption of falsity" will arise. *Lavalette v. Noyes*, 205 A.2d 413, 415 (Vt. 1964). Other cases have implied without ruling on the matter that an instruction on lost evidence or spoliation may be appropriate at a civil trial. See e.g. *In re Campbell's Will*, 102 Vt. 294 (1929).

The Second Circuit has defined spoliation as "the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999). Vermont federal courts would be bound by this definition and would likely issue jury instructions and orders similarly to other states in the circuit, i.e., New York and Connecticut.

One legal consideration for how long a vehicle/tractor-trailer must be held prior to release, independent of discovery requests and orders of the court, concerns a situation in which a prosecutor is involved in the case bringing criminal charges. In such instances, Vermont courts as a rule defer to the prosecutors, and it is very difficult to obtain the release of a vehicle/tractor-trailer that a prosecutor alleges is evidence, or part of a criminal investigation.

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

Punitive damages are meant to punish a defendant for its behavior and to stop others from acting similarly in the future. Punitive damages may be awarded if it is found find that the defendant acted recklessly or wantonly without regard for the plaintiff's rights, or showed personal ill will to the plaintiff in injuring her/him or acted with evident insult or oppression towards the plaintiff. It is not enough for the acts of the defendant to have been simply wrong or unlawful. Instead, punitive damages are used when a defendant's actions have the character of outrage frequently associated with a crime. A plaintiff must prove two distinct elements: (1) "wrongful conduct that is outrageously reprehensible" and (2) "malice." *Fly Fish Vermont, Inc. v. Chapin Hill Estates*, Inc., 2010 VT 33, ¶ 18.

To award punitive damages against a corporate defendant, the jury must find that the behavior justifying punitive damages were corporate acts. Generally, where responsible management of the corporation has knowledge of a wrongdoing on the part of lower-level employees or was involved in the acts itself, the corporation will be determined to have permitted the act. "The fact that the defendant is a corporation does not prevent an award of punitive damages in an appropriate case, but the malicious or unlawful act relied upon must be that of the governing officers of the corporation or one lawfully exercising their authority, or, if the act relied upon is that of a servant or agent of the corporation, it must be clearly shown that the governing officers either directed the act, participated in it, or subsequently ratified it." *Shortle v. Central Vt. Pub. Svc. Corp.*, 137 Vt. 32, 33 (1979). There is no cap on punitive/exemplary damages in Vermont. However, as the answers to Questions #5 and 13 demonstrate, large verdicts are rare in Vermont, as are so-called "runaway" juries.

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

No, at the time of writing Vermont has not mandated teleconferencing trials, though the parties may agree to one. Superior courts may schedule and hold criminal and civil jury trials only with the authorization of the Chief Superior Judge and the Court Administrator. However, we knos that consideration is being given to mandatory teleconferenced jury trials. As a matter of note, Vermont state courts do not use Zoom; they use Webex exclusively.

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 "nuclear verdicts" in *Hemond v. Frontier Communications of America, Inc.*, 2012 VT 94 and 2015 VT 66 and *Heco v. Foster Motors*, 2015 VT 3 reported in #5, above, were, in part, premised on punitive damage awards. Evidence of the extreme nature of the injuries in both cases, combined with evidence of extensive high-level corporate involvement with the decisions leading to the injuries, and with evidence of the financial condition of the defendant corporations, was all introduced. Neither of these cases are on appeal.