FOR MORE INFORMATION

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VIRGINIA

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 Virginia's legislature nor the Supreme Court of Virginia has explicitly created a "self-critical analysis" privilege. At least one Virginia trial court has held that Virginia does not recognize a self-critical analysis privilege. *See Webb v. Norfolk S. Ry. Co.*, 87 Va. Cir. 1 (Nottoway 2013). The Virginia legislature has enacted a statute creating a limited privilege for peer review documents, but the provision only applies to peer reviews performed in the healthcare context. *See* Va. Code Ann. § 8.01-581.17.

Two federal courts in Virginia have discussed the possible application of a self-critical analysis privilege; however, both courts found that the documents under which a party sought privilege would not qualify for protection under a self-critical analysis privilege without holding whether or not the self-critical analysis privilege exists. In *Etienne v. Mitre Corp.*, Judge Brinkema sitting for the Eastern District of Virginia's Alexandria Division, found that salary and promotion review documents that contained impact ratio analysis relevant to issues of workplace racial discrimination were not privileged because the public interest in disclosure of employment records outweighed the interest in promoting business competitiveness. 146 F.R.D. 145 (E.D. Va., 1993) (distinguishing employment records from hospital and academic peer review). Similarly, in *Deel v. Bank of Am., N.A.*, Judge Turk, sitting for the Western District of Virginia's Roanoke Division questioned the existence of a self-critical analysis privilege and found that even if such a privilege existed, payroll audit records would not be exempt from discovery because of the privilege. 227 F.R.D. 456 (W.D. Va. 2005).

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?

Virginia state courts have not issued any reported decisions regarding the discovery of 3rd Party Litigation Funding files; however, the issue would likely be decided under the Rules of the Supreme Court of Virginia's provisions for relevance.

Federal courts in Virginia have held that information about a party's litigation funding is only discoverable if the requesting party has an actual, rather than speculative, basis for believing the requested discovery would be relevant. *See Ashghari-Kamrani v. United Servs. Auto. Ass'n*, 2016 U.S. Dist. LEXIS 197601 (E.D. Va., May 31, 2016) (denying requested discovery). *See also Centripetal Networks, Inc. v. Keysight Techs., Inc.*, 2018 U.S. Dist. LEXIS 186480 (E.D. Va., Sept. 25, 2018) (holding that Plaintiff's failed attempts to secure litigation funding from a third party could not be mentioned in defendant's opening statement and defendant was required to seek leave of court to mention Plaintiff's attempt to seek litigation

funding at any other time).

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

Where the Rule 30(b)(6) deposition being sought is the deposition of the plaintiff organization or corporation, a rebuttable presumption exists that the plaintiff must travel to the forum state unless such travel would be practically impossible or fundamentally unfair. *See In re Outsidewall Tire Litig.*, 267 F.R.D. 466, 471 (E.D. Va. 2010). The plaintiff's corporate representative is expected to travel to the forum state for deposition because the plaintiff selected the forum and therefore consented to participation in proceedings there. *Id*. In contrast, a defendant corporate representative located outside the forum district's subpoena power should be deposed near their place of residence absent "exceptional or unusual circumstances" because the defendant did not choose the forum. *Id*. There is a presumption that a foreign corporate defendant's corporate representative deposition should be taken at the corporation's principal place of business. *Id*.

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?

In Virginia, there are no legal benefits to admitting a driver was in the "course and scope" of employment for a direct negligence claim. Even if the company admits to course and scope, the prevailing case law allows a plaintiff to continue with a direct negligence claim. The case law also supports a Plaintiff proceeding with a direct negligence claim even if the company admits that its driver's negligence caused the accident and admits liability for the accident.

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

In Virginia, most "nuclear" verdict cases are medical malpractice cases. For example, a plaintiff who had his ureter severed during cancer surgery recovered $6,500,000.00 in front of a jury in the City of Richmond in a case where the medical special damages exceeded $2,300,000 (due to Virginia's cap on medical malpractice recovery, the court reduced the jury's verdict post-trial). However, the following auto negligence verdicts are noteworthy:

- In 2018, a jury sitting for the County of Henrico returned a jury verdict of $1,500,000.00 in a case where the plaintiff claimed that her vehicle was struck by the defendant's vehicle while she drove her vehicle out of a driveway. The total medical special damages were not published, but the plaintiff had multiple surgeries after the accident.
- In 2018, a jury sitting for the Loudon County Circuit Court returned a $700,000 verdict in a case where the defendant ran two stop signs and struck a teacher in the intersection. Plaintiff had alleged $55,000 in medical special damages and $36,000 in lost wages. Notably, this case was a direct liability claim but the vehicle owner claimed that the driver was operating the vehicle as an independent contractor, but the jury found the driver was an employee based on evidence that the driver earned 100% of his income from the vehicle owner and the vehicle owner controlled the "means and methods" by which the driver performed his job.

- In 2018, a jury sitting in Fairfax County Circuit Court returned a $450,950.00 verdict in a t-bone accident case in which the defendant ran a red light. Plaintiff, an attorney, claimed that due to a mild traumatic brain injury, he was prevented from working due to memory loss and inability to comprehend important information. The medical special damages totaled only $25,000.
- In 2019, a jury sitting for the County of Chesterfield rendered a $500,000 verdict in case in which the defendant ran a stop sign and struck plaintiff's SUV causing it to roll over multiple times. The plaintiff, an attorney, sustained minor injuries and a concussion without long-lasting cognitive repercussions. The plaintiff's total special damages were only $24,000.
- In 2019, in a John Doe hit and run case, a jury sitting for the Richmond Circuit Court returned a verdict of $400,000 plus prejudgment interest. The plaintiff alleged prolonged left hip and lower back pain at trial, but she never had surgical intervention. The medical special damages totaled $53,000 and Plaintiff claimed $7,000 in lost wages.
- In February of 2020, a jury sitting in the City of Portsmouth returned a $400,000.00 verdict in an admitted liability case where plaintiff alleged only $30,000 in medical special damages and $25,000 in lost wages.

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

In Virginia, the reasonableness of the charges of a healthcare provider are presumed to be reasonable, and the plaintiff's medical bills will be admissible as evidence of the plaintiff's medical special damages. *See* Va. Code Ann. § 8.01-413.01. Further, under Virginia's collateral source rule, the plaintiff may offer evidence of the full amount of her medical bills rather than an amount reduced or credited by insurance deductions or other discounts. *See Burks v. Webb, Adm'x*, 199 Va. 296, 304, 99 S.E.2d 629 (1957) *See also Kelly v. Thomasson*, 48 Va. Cir. 100 (Roanoke City 1999) (citing Owen v. Dixon, 162 Va. 601, 175 S.E. 41 (1934)); *Hill v. Tuttle*, 45 Va. Cir. 296 (Roanoke County 1998). However, Virginia trial courts have permitted discovery on medical write-offs. *See Hepper v. Mende*, 46 Va. Cir. 395 (Richmond 1998).

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)

Virginia strictly follows the collateral source rule for personal injury claims. Courts have allowed discovery of contractual charges and actual amounts paid for certain services. Often, this information will be produced under a protective order. However, there has been little success in decreasing a plaintiff's damages by proof of the amounts accepted as full payment by healthcare providers.

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

Under Virginia Code's Worker's Compensation Provision, employers must accept and pay compensation for personal injury or death by accident arising out of and in the course of employment. *See* Va. Code Ann. § 65.2-300. The Virginia Worker's Compensation Commission has

the power to adjudicate all issues and controversies related to issues of workers' compensation. *See* Va. Code Ann. § 65.2-201. An employee's rights to recover workers' compensation exclude all other rights, including the right to bring a civil law suit in a Virginia trial court. *See* Va. Code Ann. § 65.2-307. However, if the Virginia Worker's Compensation Commission or a court on appeal from a decision of the Commission "makes a finding in a final unappealed order based on an evidentiary hearing, hearing on the record, or a factual stipulation of the parties that the claims relating to an accident, injury, disease, or death did not arise out of or in the course of such employee's employment, then that finding shall be res judicata and estop those same parties from arguing before a court of the Commonwealth that the accident is barred by the exclusivity provisions of the Act." *Id*. Similarly, if a court in Virginia determines that a civil lawsuit is barred under the exclusivity provision, that finding shall also be res judicata between the parties and estop them from arguing before the Worker's Compensation Commission that the injury did not arise out of employment.

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

Rule 4:2 of the Rules of the Supreme Court of Virginia provides a specific procedure for the taking of pre-suit depositions. According to the rule, a person seeking to preserve either her own testimony or the testimony of another may file a petition in the Circuit Court of the city or county of the residence of the expected adverse party seeking such a deposition. *See* Sup. Ct. Va. R. 4:2(a). The petition must state the following:

a) That the petitioner expects to be a party to an action in a court of the Commonwealth but is currently unable to bring it or cause it to be brought;

b) The subject matter of the expected action and the petitioner's interest therein;

c) The facts which the petitioner desires to establish by the proposed testimony and the petitioner's reasons for desiring to perpetrate the testimony;

d) The names of persons the petitioner expects will be adverse parties; and

e) The names of the persons to be deposed and the substance of the testimony the petitioner expects to elicit from each.

The petition must be properly served on the expected adverse party and each person named in the petition. After a hearing, the court may order the depositions to occur. The petitioner must pay the costs of the proposed depositions. Once taken, the depositions must be certified and filed with the court. In a subsequent lawsuit, the depositions may be admissible in evidence in the same manner as any other deposition.

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

Virginia has no specific rule that mandates that a vehicle/tractor trailer must be held for any period of time prior to release. The Virginia legislature recently promulgated a new statute to evaluate spoliation claims. Under the new Va. Code § 8.01-379.2:1, a party or potential litigant has a duty to preserve evidence "that may be relevant to reasonably foreseeable litigation." *See* Va. Code § 8.01-379.2:1(A). Courts asked to consider claims of spoliation must consider the totality of the circumstances, including notice that litigation was likely and notice that evidence such as a vehicle/tractor trailer would be relevant. *Id*. Since the statute was enacted in 2019, only one court has cited the new statute. Before the statute was enacted, some courts in Virginia and in the Fourth Circuit had examined the time evidence must be held prior to release. For

example, in *Silvestri v. General Motors Corp.*, the Fourth Circuit affirmed the trial court's dismissal of a plaintiff's claim because the plaintiff disposed of the vehicle in question three months after the incident occurred without affording the defendant, General Motors, the opportunity to examine the vehicle despite knowing that litigation was likely. 271 F.3d 583 (4th Cir. 2001).

Pursuant to Virginia's spoliation statute, a trial court finding that spoliation has occurred may impose sanctions. *See* Va. Code § 8.01-379.2:1(B). If the trial court finds that the spoliation prejudiced the other party, the court has wide discretion to sanction the spoliating party so long as the sanction is "no greater than necessary to cure the prejudice." *Id*. If the trial court finds that the spoliating party acted recklessly or intentionally with regard to the destruction of evidence, the trial court may "(a) presume that the evidence was unfavorable to the party, (b) instruct the jury that it may or shall presume that the evidence was unfavorable to the party, or (c) dismiss the action or enter a default judgment." *Id*.

It is notable that the Virginia law relates only to parties and potential litigants. Virginia does not recognize an independent tort for negligent or intentional spoliation of evidence. *See Austin v. Consolidation Coal Co.*, 256 Va. 78, 82, 501 S.E.2d 161, 163 (1998).

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

In Virginia, a claim for punitive damages in a personal injury lawsuit "must be supported by factual allegations sufficient to establish that the defendant's conduct was willful or wanton." *See Woods v. Mendez*, 265 Va. 68, 76-77, 574 S.E.2d 263, 268 (2003). The Supreme Court of Virginia defines willful and wanton conduct as "action undertaken in conscious disregard of another's rights, or with reckless indifference to consequences with the defendant aware, from his knowledge of existing circumstances and conditions, that his conduct probably would cause injury to another." *Id*. In addition to common law punitive damages, the Virginia Code deems a defendant's conduct sufficiently "willful and wanton" to justify an award of punitive damages, if the jury so decides, if the defendant's blood alcohol content at the time of the accident was 0.15 or greater. *See* Va. Code Ann. § 8.01-44.5. Pursuant to the Code of Virginia, punitive damages are capped at $350,000.00. *See* Va. Code Ann. § 8.01-38.1.

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

No, there have been no mandated zoom trials in Virginia. During the state's "judicial emergency" period mandated by the Supreme Court of Virginia in response to the COVID-19 pandemic, the Supreme Court of Virginia halted jury trials until each judicial circuit developed a plan for holding safe jury trials. Similarly, federal courts in Virginia have chosen not to order any trials to be held via zoom or other video conferencing platform. All federal and state courts in Virginia have regularly held telephonic and video conference motions hearings throughout the pandemic.

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?

In Virginia, compensatory damages must be awarded in order for a jury to also award punitive damages. *Syed v. ZH Techs., Inc*., 280 Va. 58, 694 S.E.2d 625 (2010). Virginia also allows for the bifurcation of trials so that punitive damages are tried second and only if the jury comes back with a compensatory damages verdict for the plaintiff. Bifurcation is often requested and rarely granted.

As previously mentioned, in order for punitive damages to be awarded in Virginia, the plaintiff must prove that the defendant's conduct was so willful and wanton to evidence a conscious disregard for the rights of others. The Supreme Court of Virginia has consistently held that punitive damages are disfavored and are

reserved for only the most egregious conduct. For example, in *Coalson v. Canchola*, the Supreme Court held that the trial court erred in remitting the jury's punitive damage award from $100,000 to $50,000 where the defendant driver was found to have double the legal limit of alcohol in his blood stream and he was having a conversation on his cell phone at the time of the accident. 287 Va. 242. 754 S.E.2d 525 (2014). In *Doe v. Isaacs*, the Supreme Court of Virginia overturned a verdict of $350,000 in punitive damages against a John Doe driver where the John Doe driver rear ended the plaintiff's vehicle while likely intoxicated because the court reasoned that the defendant's conduct was gross negligence, not willful and wanton conduct. 265 Va . 531, 579 S.E.2d 174 (2003). *See also Puent v. Dickens*, 245 Va. 217, 427 S.E.2d 340 (1993) (three drinks of whiskey within one hour of driving a motor vehicle was not sufficient evidence to prove willful and wanton conduct). *But see Webb v. Rivers*, 256 Va . 460, 507 S.E.2d 360 (Va, 1998) (where defendant driver was driving over 90 miles per hour and his BAC was measured at .21, sufficient evidence existed for punitive damages claim to proceed to jury).

There are not currently any cases on appeal to the Supreme Court of Virginia involving an award of punitive damages.