FOR MORE INFORMATION

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Virginia

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

Preventability determinations and internal accident reports are discoverable in Virginia if they were created in the ordinary course of business and before suit has been threatened. *See Virginia-Carolina Chem. Co., v. Knight*, 106 Va. 674, 679 (1907); *Robertson v. Commonwealth*, 181 Va. 520, 540 (1943). The test generally developed by courts to determine whether documents constitute work product is whether the primary purpose for generating the documents was the prospect of litigation. *See McCullough v. Standard Pressing Machines*, 39 Va. Cir. 191 (1996). Further, the majority of circuit courts in Virginia have held that involvement of counsel is a prerequisite to asserting privilege to these documents. *See Estabrook v. Conley*, 42 Va. Circ. 512 (1997); *Monterrozo v. Sandridge*, 98 Va. Cir. 372 (2019).

Virginia does not have any reported decisions as to whether preventability determinations are admissible at trial. The best argument to bar such determinations is that they constitute subsequent remedial measures under Va. Code Ann. §8.01-418.1. Internal accident reports will generally be admissible if created in the ordinary course of business. A Defendant may be successful in preventing portions of the report that address preventability or corrective actions on the grounds these determinations are subsequent remedial measures.

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 Serv. 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).

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?

Virginia requires court approval of minor settlements. See Va. Code Ann. §8.01-424. If the case is already in litigation, the parties need only file a petition requesting approval of the settlement in the Court where the matter is pending. If no case is pending, the petition may be filed in any Circuit Court in Virginia. Upon approval, the Court shall direct payment of the proceeds into the Court or general receiver of the Court; invested in a college savings trust account; to a duly qualified fiduciary (after due inquiry); to the minor or another person provided the settlement is $50,000 or less, and the minor/person is considered by the court competent to expend and administer the funds; or into an annuity secured by a bond issued by an insurance company or irrevocably guaranteed by an insurance company, provided that the insurance company is authorized to do business in Virginia and rated "A plus" (A+) or better by Best's Insurance Reports.

In Virginia, the two-year statute of limitations does not begin to run until the minor turns 18. *See* Va. Code Ann. §8.01-229.

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?

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.

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

Virginia has no specific rule that mandates that a vehicle/tractor trailer must be held for any period of time prior to release. Under 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*.

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 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).

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

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).

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

In Virginia, event data recorders generally may only be accessed by the motor vehicle owner or with the consent of the motor vehicle owner or the owner's agent or legal representative. *See* Va. Code Ann. §46.2-1088.6(B).

The following exceptions apply to this general rule: 1. The owner of the motor vehicle or the owner's agent or legal representative has a contract with a third-party subscription service that requires access to a recording device or recorded data in order to perform the contract, so long as the recorded data is only accessed and used in accordance with the contract; 2. A licensed new motor vehicle dealer, or a technician or mechanic at a motor vehicle repair or servicing facility requires access to recorded data in order to carry out his normal and ordinary diagnosing, servicing, and repair duties and such recorded data is used only to perform such duties; 3. The recorded data is accessed by an emergency response provider and is used only for the purpose of determining the need for or facilitating an emergency response. Such persons are authorized to receive data transmitted or communicated by any electronic system of a motor vehicle that constitutes an automatic crash notification system and utilizes or reports data provided by or recorded by recording devices installed on or attached to a motor vehicle to assist them in performing their duties as emergency response providers; 4. Upon authority of a court of competent jurisdiction; or 5. The recorded data is accessed by law enforcement in the course of an investigation where constitutionally permissible and in accordance with any applicable law regarding searches and seizures upon probable cause to believe that the recording device contains evidence relating to a violation of the laws of the Commonwealth or the United States. *Id*.

There do not appear to be any published cases regarding the authority of a court to obtain access to event data recorders.

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?

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.

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?

Most noteworthy punitive damages cases in Virginia over the past five years did not involve auto claims. Two reported cases involving auto claims are set out below.

In 2021, a Lynchburg, Virginia jury returned a verdict of one million dollars ($500,000 in compensatory damages, and $500,000 in punitive damages) as a result of injuries sustained due to a head-on collision. *See Perkins v. Brown*; 2021 Dolan Media Jury Verdicts LEXIS 401. Defendant was driving in the dark with his lights off with a BAC of 0.20% (two and half times the legal limit in Virginia). Defendant had three DUI convictions and his license was suspended at the time of the accident. Plaintiff's medical bills were approximately $22,000, and his claimed injury was a crushed urethra. The punitive damage award was reduced to the $350,000 cap.

In 2022, a Fairfax, Virginia jury awarded one million dollars in punitive damages as a result of a head on collision. *See Vera v. Algie*; 2022 Dolan Media Jury Verdicts LEXIS 462. Defendant lost control of his car and entered Plaintiff's lane of travel, and he had a BAC of 0.15%. The punitive damages claim was defended on the grounds that the blood alcohol level was below a 0.15 because the blood test was performed on blood serum and not whole blood and that the defendant's speed, rather than his intoxication, was what caused him to lose control of the car and was the sole proximate cause of the crash. Plaintiff's medical bills were $573,000, and she was also claiming $125,000 in lost wages. The total verdict was $4,200,000.

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. As examples, 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 do not appear to be any cases on appeal to the Supreme Court of Virginia involving an award of punitive damages.

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?

There is no definitive authority in Virginia as to whether an expert is permitted to testify regarding the content of FMCSRs and/or their applicability to a set of facts. In Virginia, in any civil proceeding, 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. *See* Va. Code Ann. §8.01-401.3(A). No expert or lay witness while testifying in a civil proceeding shall be prohibited from expressing an otherwise admissible opinion or conclusion as to any matter of fact solely because that fact is the ultimate issue or critical to the resolution of the case. However, in no event shall such witness be permitted to express any opinion which constitutes a conclusion of law. *See* Va. Code Ann. §8.01-401.3(B).

It is likely that Virginia courts would not permit an expert to testify regarding the contents of the FMCSRs and their applicability as it would constitute a conclusion of law and would also "violate the province of the jury." *See Tittsworth v. Robinson*, 252 Va. 151, 475 S.E.2d 271 (1996). In an analogous unpublished opinion from the Virginia Court of Appeals, the Court held that an expert designated to testify regarding the National Defense Authorization Act was properly excluded at trial because said testimony would be a conclusion of law.

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?

There is no definitive authority in Virginia as to whether a broker or shipper is engaged in an agency relationship with a motor carrier. The 4th Circuit for the Western District of Virginia did deny a defendant's motion to dismiss on this issue, but it appears that the reasoning for the denial was due to the plaintiff disputing the authenticity of the contract carrier agreement. *See Jones v. D'Souza*, 2007 U.S. Dist. LEXIS 66993 (W.D. VA. September 11, 2007). In fact, the Court included a footnote stating that if the agreement were authentic, "the court entertains substantial doubt as to whether the negligence claim is viable." *Id*.

It is likely that this issue would be decided on a case-by-case basis pursuant to Virginia's independent contractor analysis. As noted by the Court in *Jones*, the Supreme Court of Virginia has identified four factors to be considered in determining whether an individual or entity is an employee or an independent contractor: (1) selection and engagement; (2) payment of compensation; (3) power of dismissal; and (4) power of control. *See Hadeed v. Medic-24, Ltd.*, 237 Va. 277, 288, 377 S.E.2d 589, 594-95 (Va. 1989). The fourth factor, power of control, is determinative. *Id*. However, the employer need not actually exercise this control; the test is whether the employer has the power to exercise such control. *McDonald v. Hampton Training Sch. for Nurses*, 254 Va. 79, 81, 486 S.E.2d 299, 301 (Va. 1997).

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

Virginia follows the contributory negligence doctrine and does not allow comparative negligence. In Virginia, if the plaintiff is found to be a proximate cause of the accident, then she is not permitted to recover. With contributory negligence, commonly known as the 1% rule, the jury does not assess a percentage of liability on the plaintiff or any defendants. However, in practice, the jury will only return a defense verdict if the plaintiff's negligence was a significant cause of the accident.

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

The statute of limitations for a personal injury action involving a motor vehicle expires after two (2) years from the date of the accident. *See* Va. Code Ann. §8.01-243. As stated above, if the injured party is a minor, then the two-year statute of limitations does not begin to run until the minor turns 18. *See* Va. Code Ann. §8.01-229. A wrongful death claim must be brought within two years of the date of death. *See* Va. Code Ann. §8.01-244. The cause of action in tort actions accrues on the date of the accident/death.

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 Virginia, wrongful death claims must be brought by the personal representative of the estate. *See* Va. Code Ann. §8.01-50. If there is no executor, a friend, family member, or other interested party can come forward to ask to serve in this role. If no one comes forward within six months, the court may name an administrator. *See* Va. Code Ann. §64.2-454.

If the deceased person was an infant who was in the custody of a parent pursuant to an order of court or written agreement with the other parent, administration shall be granted first to the parent having custody; however, that parent may waive his right to qualify in favor of any other person designated by him. *See* Va. Code Ann. §8.01-50. If no such parent or his designee applies for administration within 30 days from the death of the infant, administration shall be granted as in other cases. *Id*.

Whenever a fetal death is caused by a wrongful act, the natural mother of the fetus may bring an action pursuant to this section against such tortfeasor. *Id*. If the natural mother dies, such action may be initiated or maintained by the administrator of the natural mother's estate, her guardian, or her personal representative qualified to bring such action. *Id.*

The personal representative may compromise any claim for damages, before or after an action is brought, with the approval of the court in which the action was brought, or if an action has not been brought, with the consent of any circuit court. *See* Va. Code Ann. §8.01-55.

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

In Virginia, failure to wear a seatbelt does not constitute negligence, cannot be considered in mitigation of damages of whatever nature, is not admissible in evidence, and may not be the subject of comment by counsel in any action arising out of the use of a motor vehicle. *See* Va. Code Ann. §46.2-1094(D).

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.

Virginia has no limitations on damages recoverable for plaintiffs who do not have insurance coverage on the vehicle they were operating at the time of the accident. Further, the presence or absence of automobile insurance is not admissible as evidence under Virginia's collateral source rule.

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

Virginia adheres to the doctrine of *lex loci delicti*, applying the substantive law of the place where the wrong occurred to a plaintiff's tort claim. *See Jones v. R.S. Jones & Assoc., Inc.*, 246 Va. 3, 5 (1993) and *Milton v. IIT*

Research Inst., 138 F.3d 519, 521 (4th Cir. 1998). While this analysis can be complicated in other settings, as it pertains to motor vehicle accidents, Virginia will apply the substantive law of the state where the accident occurred. Virginia will apply Virginia procedural law for any cases heard in Virginia.