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# WASHINGTON

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

There appears to be split authority regarding the self-critical analysis privilege. Washington has not yet addressed this issue, nor the issue of the discoverability or admissibility of internal accident reports. The privilege seeks to "protect the opinions and recommendations of corporate employees engaged in the process of critical self-evaluation of the company's policies for the purpose of improving health and safety." *In re Block Island Fishing, Inc.*, 323 F. Supp. 3d 158 (D. Mass. 2018). Jurisdictions that recognize the self-critical analysis privilege do so because it encourages thorough and candid self-evaluation and compliance with the law. *Id.* at 160 (citations omitted). Proponents of the privilege believe that it encourages candid self-criticism and the possible discoverability of the information may remove the incentive to critically self-evaluate. Most jurisdictions, however, have rejected this privilege.

Generally, information gathered and recorded for purposes of litigation is inadmissible as a business record. *Owens v. City of Seattle*, 49 Wn.2d 187, 299 P.2d 560 (1956); *See also*, 2 McCormick On Evid. § 288 (8th ed.). If the purpose of the business is to compile and record information for use in court, a report may be admissible. *State v. Ecklund*, 30 Wn.App. 313, 633 P.2d 933 (Div. 2 1981). Information gathered by an insurer may fall into this category – but may be objectionable on the basis that it was not furnished by someone with a duty to provide the business with accurate information. 5C Wash. Prac., Evidence Law and Practice § 803.39. Often, the *reason* why the report was created is of critical importance. *Doehne v. EmpRes Healthcare Management, LLC*, 190 Wn. App. 274, 360 P.3d 34 (Div. 2 2015).

Washington has two leading cases relating to this subject. In *Harris v. Drake*, defendant Drake rear-ended plaintiff Harris. Plaintiff filed a PIP claim with his insurer, United Services Automobile Associates (USAA). USAA required the plaintiff to undergo an independent medical examination according to the terms of his PIP coverage. USAA retained Dr. Bede to perform the exam. Dr. Bede ultimately opined that plaintiff's impingement syndrome was not related to the automobile accident with defendant. Prior to trial, plaintiff filed a motion *in limine* to exclude the testimony of Dr. Bede. Plaintiff claimed the doctor's reports were the work product of his insurance company. The Supreme Court of Washington held that the PIP insurer's IME is properly considered work product protected and thus not subject to discovery. *Harris v. Drake*, 152 Wn.2d 480, 99 P.3d 872 (2004).

The *Harris* Court cited *Heidebrink v. Moriwaki*. In *Heidebrink*, the defendant/insured gave a recorded statement to his insurer following an automobile accident. Plaintiff brought suit for injuries and sought to obtain a copy of the defendant/insured's recorded statement. The insurance company refused to turn it over, claiming the recorded statement was prepared in anticipation of a possible lawsuit against the

insured and was therefore work product. (citing *Fireman's Fund Ins. Co. v. McAlpine,* 120 R.I. 744, 391 A.2d 84 (1978) (where a Rhode Island court reasoned that the seeds of prospective litigation are sown when the insured reports a claim to the insurance company, and the prudent party begins to prepare his or her case at that time).*Heidebrink v. Moriwaki*, 104 Wn.2d 392, 396, 706 P.2d 212 (1985). The court ultimately agreed with the insurance company and stated that when the insurance company takes its insured's statement of how the accident happened, the insured reasonably expects that this statement to his own insurer will be kept confidential.

Whether material was prepared in the anticipation of litigation, and thus qualifies as work product, requires examination of the specific parties and their expectations. *Id*. at 400.

Internal accident reports *may* not be discoverable. Arguably, once a claim is made, the seeds of prospective litigation are sown. An insurance company prepares internal accident reports as a way to evaluate claims, the value of claims, and potentially prepare for a possible lawsuit.

## 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?

Third party litigation funding, also known as Pre-Settlement Funding, is likely permitted in Washington State. We have identified no Washington case law discussing this issue. Washington Civil Rule 26(b)(1) requires discovery to be reasonably calculated to lead to the discovery of admissible evidence. Third party litigation funding in some sense seems both irrelevant in many instances, but also unlikely to be reasonably calculated to lead to the discovery of admissible evidence. It likely also does not fall under insurance agreement disclosures. CR 26(b)(1)(C)(2).

However, it is possible that these files may be subject to subpoena and disclosure under Washington rules of discovery as no privilege applies between a person seeking such funding and the funding company.

## 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?

Settlement of claims for minors are governed by SPR 98.16W and RCW Chapter 11.88. The rules were created to adequately protect the rights of minors and ensure that a settlement is reasonable under the circumstances. The settlement of a claim of an unemancipated minor requires court approval. SPR 98.16W(a). A petition will have to be filed on behalf of the "affected person" to secure court approval. SPR 98.16W(b)(1)-(4). Upon filing the petition for settlement, the court shall then appoint a settlement guardian ad litem to assist in determining the adequacy of the proposed settlement. SPR 98.16W(c). Under certain circumstances, the court may dispense with the appointment of the settlement guardian ad litem. SPR 98.16W(c)(2). The guardian ad litem must meet certain qualifications and issue a report. SPR98.16W(d)-(e). A hearing will be subsequently held relating to the fairness of the settlement. SPR 98.16W(f).

The statute of limitations for personal injury actions *in general* is three years. RCW 4.16.080. For minors, the statute is tolled until the minor reaches the age of majority (18). RCW 4.16.190(1).

## 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?

If vicarious liability is admitted, it precludes any direct claims (such as negligent hiring, supervision, retention, etc.). *LaPlant v. Snohomish County*, 162 Wn.App. 476, 271 P.3d 254 (Div. 1 2011). Such causes of action may only be brought if an employee was acting *outside* the scope of their employment. *Anderson v. Soap Lake School District*, 191 Wn.2d 343, 423 P.3d 197 (2018). However, this does not preclude a separate and distinct claim for negligence based on a special relationship or an independent duty. *Harris v. Federal Way Public Schools*, 21 Wn.App.2d 144, 505 P.3d 140 (Div. 1 2022). There is no real disadvantage to admitting vicarious liability as a plaintiff would still be required to prove all elements of the initial negligence claim, for instance.

The advantage, however, is limiting plaintiff's additional claims of negligent hiring, retention, and supervision. It would also likely limit a plaintiff from inquiring into a defendant's safety procedures and practices.

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

The term "spoliation" is typically associated with the bad faith destruction of evidence. *Carroll v. Akebono Brake Corporation*, 22 Wn.App.2d 845, 514 P.3d 720 (Div. 1 2022). A party will not be responsible for spoliation if there was an innocent loss or destruction of evidence or a party had no duty to preserve the evidence in the first place. *Tavai v. Walmart Stores, Inc.*, 176 Wn.App. 122, 307 P.3d 811 (Div. 2 2013). An innocent loss, therefore, does not raise an inference that the party believed they had a weak case or unfavorable information. 2 McCormick On Evid. § 265 (8th ed.). The duty to preserve arises when a party has notice of the potential for claims where the evidence would be relevant or important. *Pier 67 Inc. v. King County*, 89 Wn.2d 379, 573 P.2d 2 (1977). Once a duty is established, the court will ask whether the destruction was in bad faith or if an innocent explanation exists. *Carroll*, 22 Wn.App.2d. The court will evaluate (1) the potential important or relevance of the missing evidence; and (2) the culpability or fault of the adverse party. *Cook v. Tarbert Logging, Inc.*, 190 Wn.App. 448, 360 P.3d 855 (Div. 3 2015). Destruction of evidence in bad faith allows an inference that such evidence would have been unfavorable to the destroyer. *Tavai*, 176 Wn.App. However, the negative inference is not, by itself, substantive evidence – it will not establish an essential fact not otherwise proved. *Walker v. Herke*, 20 Wn. 2d 239, 147 P.2d 255 (1944).

Generally, Washington views spoilation as an evidentiary matter. To remedy spoliation, "we may apply a rebuttable presumption that shifts the burden of proof to a party who destroys or alters important evidence." *Ardesson v. Atlantic Richfield Co.*, 127 Wn. App. 1010, 2005 WL 950708 (Div. 2 2005); *see also, Henderson v. Tyrrell*, 80 Wn.App. 592, 910 P.2d 522 (Div. 3 1996). However, the court may also view it as a violation of civil discovery requirements. *J.K. by Wolf v. Bellevue School District No. 405*, 20 Wn.App.2d 291, 500 P.3d 138 (Div. 1 2021). In rare instances, destruction/tampering with evidence is a gross misdemeanor. RCW 9A.72.140. While some states allow a tort action for damages for spoliation, Washington has not recognized any such cause of action. The court may also exclude any of the spoliating party's evidence, including exclusion of other evidence not related to the spoiled evidence, enter summary judgment on a specific issue, or even dismiss certain claims or defenses entirely. *Unigard Sec. Ins. Co. v. Lakewood Engineering & Mftg. Corp.*, 982 F.2d 363, 1993 A.M.C. 1506, 24 Fed. R. Serv. 3d 353 (9th Cir. 1992).

The trial court has considerable discretion in deciding which consequence should be imposed on a party for spoliation and will not be reversed except for an abuse of discretion. However, the court should choose the least severe sanction to be applied when destruction of evidence occurs. *Tietjen v. Department of Labor and Industries,* 13 Wn. App. 86, 534 P.2d 151 (Div. 2 1975).

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

Medical lien information is discoverable in Washington. As for medical expenses actually paid, it may also be discoverable under Washington Civil Rule 26. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action…It is not a ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. CR 26(b)(1).

Amounts paid are inadmissible in Washington courts, but a defendant may challenge the reasonableness of the medical expenses by presenting testimony that the charges were unreasonable. *Hayes v. Wieber Enterprises, Inc.*, 105 Wn.App. 611, 20, P.3d 496 (Div. 3 2001). Challenges and expert testimony on "reasonable costs" based on Medicare reimbursement rates and other health care information has been rejected and excluded. *See Beltran-Serrano v. City of Tacoma*, 10 Wn. App.2d 1002, 2019 WL 3938570 (Div. 2 2019) (Not reported in Pac. Rptr.).

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

Such information would likely be discoverable under Washington Civil Rule 26. As stated above, a party may obtain discovery on any matter, not privileged, which is relevant to the subject matter involved in the pending action. Information contained in EDRs are likely to be highly relevant and useful in motor vehicle cases.

Washington courts have not explicitly addressed the admissibility of event data recorders or "black boxes". The only in-depth case relating to EDR's is *Cook v. Tarbert Logging, Inc.*, 190 Wn.App. 448, 360 P.3d 885 (2015). In *Cook*, Plaintiff's pickup truck collided with a Tarbert Logging truck. The Plaintiff was injured in the collision and his truck was totaled. At some point in the future, Plaintiff also sued Stevens County for the roads "primitive" condition. The County requested examination of the vehicle, along with the Airbag Control Monitor (a type of event data recorder). By the time the examination was requested, the truck had been parted out and sold. The County accused Plaintiff of spoliation and filed a motion to exclude Plaintiff's expert from offering opinion testimony about Plaintiff's speed before and at the time of the collision. The Court of Appeals assumed the reliability of the black box, stating:

> "As explained by the experts who testified at trial, the airbag icon that lights up on the dashboard during a vehicle's operation indicates that the ACM is working, streaming data about the key aspects of the vehicle's operation that inform whether to trigger the explosion that will deploy airbags. Among operating information continually being streamed through an ACM are the vehicle's speed, the engine's speed, the percent throttle, the brake switch circuit status, and the driver's seat belt status. An ACM is programmed with an algorithm that determines within milliseconds whether the operating information collectively signals a crash, in which case airbags will be deployed. After deployment, the ACM retains information that was streaming through it for up to five seconds "before algorithm enable." Clerk's Papers (CP) at 14. If the vehicle is one for which software and hardware for reading retained data are available to the public, then according to experts in the trial below, the data is 'very useful' in determining precrash speed. Report of Proceedings (RP) (Aug. 27, 2013) at 1207." *Id*.

The evidence is likely obtained through the normal course of discovery, and it is likely admissible.

## 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?

Washington does not allow for punitive damages unless expressly authorized by statute. Punitive damages are allowable under the following:

- The Uniform Trade Secrets Act. RCW 19.108.030 – 19.108.040; *See also*, *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 738 P.2d 665 (1987)
- Discrimination statutes. *Miles v. F.E.R.M. Enterprises, Inc.*, 29 Wn.App. 61, 627 P.2d 564 (Div. 3 1981)
- Violation of civil rights. *Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 935 P.2d 555 (1997)
- Insurance Fair Conduct Act (IFCA). RCW Chapter 48.30.

Therefore, punitive damages are not available against a motor carrier or broker. However, if the tort arises from conduct that occurred even in part in another jurisdiction where punitive damages are allowable, it may be possible to recover. *Tabingo v. American Triumph LLC*, 188 Wn.2d 41, 391 P.3d 434 (2017); *see also*, *Singh v. Edwards Lifesciences Corp.*, 151 Wn.App. 137, 210 P.3d 337 (Div. 1 2009) (court applied California law permitting the award of punitive damages for injury suffered in California caused by a defective medical product); Additionally, to the extent that a claim arises under federal law, punitive damages may be recoverable. *Hiatt v. Walker Chevrolet Co.*, 120 Wn. 2d 57, 64, 837 P.2d 618 (1992).

## 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?

On March 15, 2023, the Spokane County Superior Court awarded plaintiff, in *Meseret Shiferaw v. Nationwide Affinity Insurance Co.*, Spokane County Superior Court Case No. 19-2-03579-32 $47,000,000.00 in punitive damages against defendant Nationwide Insurance for acting in bad faith. Because of the freshness of this decision, further details are unknown at this time. However, this is considered an exceptionally large award for the plaintiff and against an insurance company arising out of a simple auto accident.

Another recent punitive damages verdict is *Long, et al. v. Pharmacia, LLC, F/K/A Monsanto Company*, King County Superior Court Case No. 18-2-00001-7 SEA from 2021. A group of students, parents, and occupants of the Sky Valley Education Center were allegedly exposed to toxic chemicals called polychlorinated biphenyls (PCBs) which led to a myriad of very serious neurological and other diseases. The jury returned a verdict for plaintiffs and each of the eight plaintiffs were awarded five million dollars in punitive damages. Recovery on all claimed totaled over 62 million. Punitive damages were allowed as Monsanto was headquartered in Missouri, which allows for punitive damages. The plaintiffs contended the defendant manufacturer designed and supplied a product that was not reasonably safe for its intended use and did not provide adequate warnings regarding the product, warranting both compensatory and punitive damages. This verdict is not currently on appeal.

## 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?

We have not been able to locate any Washington case law on this issue.

## 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?

Washington courts have not yet addressed this issue. Broker exposure or liability for motor carrier negligence may be linked to how much control over the motor carriers actions the broker/shipper had via principles of vicarious liability. RCW 8.86.090. Additionally, a broker may face liability or exposure through the negligent hiring and retention of unqualified carriers. *Evans v. Tacoma School District No. 10*, 195 Wn. App. 25, 380 P.3d 553 (Div. 2 2016).

There have been more recent cases from California and Oregon which have held that that such a relationship did exist. Therefore, it may be possible that Washington follows this trend in the future.

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

Washington's comparative negligence rule is outlined in Chapter 4.22 RCW. The statute provides that any contributory fault chargeable to the claimant in an action based on fault diminishes proportionally the amount awarded as compensatory damages for an injury attributable to the claimant's fault. Therefore, if a plaintiff is found to be 50% at fault, he will only collect 50% of the damages awarded to him. Fault includes acts or omissions, "including misuse of a product, that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability on a product liability claim." The term also includes "breach of warranty, unreasonable assumption of rick, and unreasonable failure to avoid an injury or to mitigate damages." RCW 4.22.015.

In determining whether a person was contributorily negligent, the inquiry is whether that person exercised the care for his or her own safety that a reasonable person would have used under the then-existing facts or circumstances. *Dunnington v. Virginia Mason Medical Center*, 187 Wn. 2d 629, 389 P.3d 498 (2017).

An exception to contributory negligence is joint and several liability. If a plaintiff is found to be fault free, the at fault parties are acting in concert, or one at fault party is acting as the agent of another at fault party, joint and several liability will apply. RCW 4.22.070. In these cases, a plaintiff may collect an entire judgment from one at fault party, even if there are several at fault parties.

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

The statute of limitations for personal injury and wrongful death is three years. RCW 4.16.080. While the statute does not specifically state that wrongful death is limited to three years, the Washington State Supreme Court has held that the time limit is governed by the statute which governs "any other injury to the person or rights of another not hereinafter enumerated." RCWA 4.16.080(2); *Atchison v. Great Western Malting Co.*, 161 Wn. 2d 372, 166 P.3d 662 (2007); *Beal for Martinez v. City of Seattle*, 134 Wn. 2d 769, 776, 954 P.2d 237 (1998).

## 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?

A wrongful death action may be brought by the decedent's "personal representative". RCW 4.20.010. If the decedent had a will, the personal representative may been named in the document. If there was no will, a court can appoint one. The personal representative of the decedent has the authority to file, negotiate, and settle a wrongful death claim.

In cases where the wrongful death lawsuit involves a child, RCW 4.24.010 allows a parent or legal guardian to file a claim for the death of a child only if the child had no surviving spouse, domestic partner, or children. If the child was under the age of 18, a parent or legal guardian may file a wrongful death action if they regularly contributed to the child's support. If the child was over the age of 18, the parent or legal guardian must have had "significant involvement" in the life of the adult child. Significant involvement includes: giving or receiving emotional, psychological, or financial support, at or reasonably near the time of death, or at or reasonably near the time of the incident causing death.

RCW 4.20.020 grants the right of recovery to a "spouse, state registered domestic partner, child or children, including stepchildren, of the person whose death shall have been so caused." *If* there is no spouse, state registered domestic partner, or child, then the parents or siblings are the beneficiaries. *Id*. Stepchildren may also recover even if the stepparent later divorces. *Leren v. Kaiser Gypsum Company, Inc.*, 9 Wn. App. 2d 55, 442 P.3d 273 (Div. 1 2019).

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

No. While Washington traffic laws impose an affirmative duty to use a seatbelt, evidence of failure to use a seatbelt is inadmissible in a civil action. RCW 46.61.688; *See also*, *Clark v. Payne*, 61 Wn.App. 189, 194, 810 P.2d 931 (Div. 2 1991) (failure to wear seatbelt inadmissible as evidence of contributory negligence); *Patterson v. Horton*, 84 Wn. App. 531, 540-41, 929 P.2d 1125 (Div. 2 1997).

## 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.

Though Washington requires all individuals who drive a motor vehicle, for instance, to be insured - a plaintiff who is not at fault may still recover damages if they are uninsured themselves. Washington is not a "no pay no play" state and therefore still allows recovery. However, recovery may still be limited on other theories such as comparative fault.

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

If a case is filed in Washington State, Washington law will presumptively apply. *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 100-01, 864 P.2d 937 (1994). If a conflict of law issue arises the court will (1) identify an "actual" conflict of substantive law, (2) if there is an actual conflict of substantive law, apply the most significant relationship test to determine which state's substantive law applies to the case, or, if there is no actual conflict, apply the presumptive law of the forum, (3) then, if applicable, apply the chosen substantive law's statute(s). *Woodward v. Taylor*, 184 Wn.2d 911, 366 P.3d 432 (2016).

An actual conflict of law exists where the result of an issue is different under the laws of the interested states. *Seizer v. Sessions*, 132 Wn.2d 642, 648, 940 P.2d 261 (1997). Differences between two states' statutes of limitations is not considered a basis for an actual conflict. *Rice v. Dow Chem. Co.*, 124 Wn.2d 205, 210, 875 P.2d 1213 (1994). If there is an actual conflict, the court will apply a two part "most significant relationship test" to determine which state's substantive law applies. The first part of the test evaluates the contacts each interested jurisdiction has with the parties and the occurrence under the factors of the Restatement (Second) of Conflict of Laws §145. *Woodward*, 184 Wn.2d at 917. The second part of the test requires the court to evaluate the interests and policies of the potentially concerned jurisdictions by applying the factors set forth in Restatement (Second) of

Conflict of Laws §6. *Id*. In *Woodward v. Taylor*, Taylor was driving a car with Woodard and two other passengers through Idaho as they were returning to Washington from a trip to Nevada. During the drive, the roadway was slick with ice and snow. Taylor set the cruise control to 82 mph – above the legal speed limit of 75 mph. Subsequently, Taylor lost control of the car, resulting in a rollover accident. Woodward was asleep in the rear passenger seat and suffered significant injuries. Woodward filed a negligence suit against Taylor in King County Superior Court (Washington) and Taylor moved to dismiss on the pleadings, arguing that Woodward's claim was time barred under Idaho's two-year statute of limitations for personal injury actions. The trial court held that Idaho substantive law applied to the case and thus the two year statute of limitations also applied. Woodward appealed.

The Washington State Supreme Court found that no actual conflict of law existed between Washington and Idaho negligence law because both states applied the same standard of care. *Id*. Similarly, the court also found that no actual conflict existed between Washington and Idaho maximum speed limit laws because both states prohibit driving above the state's maximum speed limit and driving too fast when confronted with hazardous road conditions. Finally, the court found no actual conflict existed between Washington and Idaho even when the states' comparative fault laws differed because the *result* under either state's laws would have been the same, as a jury likely would have found defendant liable to the Plaintiff.