FOR MORE INFORMATION

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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 self-critical analysis privilege which has been developed under federal common law has not been addressed in the Washington State appellate courts. If presented, we expect that the State court judges would adopt the analysis of the Ninth Circuit Court of Appeals. Opinions from that court indicate that the Ninth Circuit had not recognized "this novel privilege". *Union Pacific Railroad Company v. Mower*, 219 F.3d 1069 (9th Cir. 2000*); Lewis v. Wells Fargo & Co*., 266 F.R.D. 433, 439. Although the federal cases address the discoverability of self-critical analysis reports, it is questionable whether such reports would be admissible at trial.

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?

Third Party Litigation Funding, also known as Pre-Settlement Funding, is permitted in Washington State. We have identified no Washington case law discussing this issue. We expect that these files would 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.

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

The Washington rule does not address the required location of a 30(b)(6) deposition. These are generally held at an agreed location or by court order if parties cannot agree. If an out-of-state corporate representative is required to travel to the State of Washington for a deposition, the court may order terms such as payment of expenses for the witness to attend.

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?

By admitting a driver was in the "course and scope" of employment, the attorney has no conflict of interest in defending both the company and the driver. Otherwise, either the employer or the driver must secure other counsel. True scope of employment defenses in Washington are extremely rare and would require evidence of outrageous or significantly illegal conduct by the driver (i.e., not a simple misdemeanor offence) that is not connected to the course and scope of the driver's employment. Moreover, it is seldom successful as an affirmative defense.

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

We have not been able to identify any "nuclear verdicts" during the last several years. Part of the reason seems to be that the COVID-19 pandemic has drastically limited the number of cases that have been tried to verdict since March 2020 in this state. Also, many of the high value verdicts from the last few years were personal injury cases, in which the plaintiff suffered severe life-altering injuries resulting in long-term, sometimes life-long, medical care that would seem to justify the verdicts' high dollar value.

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

The test for admissibility of bills is whether or not the charges were reasonable and that the service was necessary. Discovery is permitted to determine the amounts billed and paid. This information can then be reviewed by a defense expert to determine if the charges were reasonable, and that expert may testify at trial, if the judge finds he or she is qualified and that the testimony will assist the jury. Washington has only one appellate case, which affirmed a trial court's ruling excluding evidence of the amount paid, since there was no expert opinion provided.

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)**

We are generally able to obtain the amounts actually charged and accepted by a healthcare provider for certain procedures when seeking billing information under a release of medical Information authorization from the patient. We can obtain such information through a HIPAA compliant subpoena pursuant to current state law; however, that is a lengthy and time-consuming process. Although billing information is discoverable and admissible in a personal injury case, it is probably not admissible as evidence of third-party payers is not admissible in court in this state.

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

There are several considerations in determining which jurisdiction applies when an employee is injured: whether the activity or pursuit which caused the injury was within the "course and scope" of employment, the physical location where the injury occurred (i.e., at work or on the employer's property), whether the employee is a W-2 employee or an independent contractor who may fall within the "course and scope" of regular employment with the employer, and whether the employer is self-insured or enrolled in Washington State's Department of Labor and Industries Workers' Compensation program.

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

Per Washington State Superior Court Rules, a pre-suit deposition is designated a "perpetuation of testimony." The person desiring to perpetuate their own or another's testimony may file a verified petition in the proper jurisdiction of any expected adverse party. The verified petition must contain all the usual information required of any such petition and shall request an order to perpetuate the testimony.

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

No, there are no laws or regulations requiring a trucking company to hold a vehicle/tractor-trailer for a certain amount of time. However, to avoid allegation of spoliation or evidence tampering, we recommended that after a serious accident, a vehicle/tractor-trailer be held 30-45 days–or perhaps longer–to give the parties an opportunity to retain appropriate experts and to record physical and digital evidence related to the vehicle. We recommend that early communications through local counsel be started with opposing counsel and that they be promptly offered an opportunity to perform a non-destructive investigation on the truck. Once such communication has occurred and related investigations have been conducted, the truck may be repaired and returned to service, if appropriate.

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

There are no punitive damages in the State of Washington except by statute, such as insurance related claims *(Fluke Corp. v. Hartford Acc. & Indem. Co*., 34 P.3d 809 (2001)), employee gender discrimination claims (*Erickson v. Biogen, Inc*., 20 Id.Verd.Stlmnt.Rpts. 74, 2019 WL 9359902 (W.D.Wash.)) and malicious harassment lawsuits.

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

No, While the state of Washington has not mandated Zoom trials in courts statewide, nearly all courts within the state have mandated that trials be conducted using some form of remote access. The major populated counties have mandated use of Zoom for trial. However, not all courts are using Zoom for all types of cases: jury trials may be postponed, some bench trials appear to be going forward for some cases but not for others depending upon the judge or circumstances inherent in fully trying the case, civil cases are more likely to be postponed or limited to a Zoom trial than are criminal cases.

We are aware of only one Washington state case that has been heard on appeal involving issues of a remote trial, but it was not held over Zoom. The Appellant argued that the trial Court erred in allowing a completely remote trial by phone for one party but apparently not for the other. However, the appeal was decided on other grounds and the issue of fairness of conducting a remote trial was not decided. *Vatne v. Vatne*, 2017 WL 2021420 (Wash.App. Div. 1).

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?**

Punitive damages have been held to be unsound in principle and contrary to public policy. Since 1891, in an unbroken line of cases, it has been the law of this state that punitive damages are not allowed unless expressly authorized by the legislature. *Spokane Truck & Dray Co. v. Hoefer*, 2 Wash. 45, 25 P. 1072; *Maki v. Aluminum Bldg. Prods.*, 73 Wash.2d 23, 436 P.2d 186 (1968) (punitive damages are contrary to public policy*); Fluke Corp. v. Hartford Acc. & Indem Co*., 34 P.3d 809 (2001) (insurance policy's plain language unambiguous grant of liability coverage for malicious prosecution was not against public policy). Examples of the narrow exceptions have been made by the legislature include: RCW 19.86.090 *700 (consumer protection act); 19.52.030 (usury); and 64.12.030 (trespass to trees, shrubs and timber).