FOR MORE INFORMATION

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West Virginia

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

Preventable and non-preventable reviews and decisions would be admissible in West Virginia so long as they were not prepared in anticipation of litigation. *See, e.g., State ex rel. State Farm Mut. Auto. Ins. Co. v. Bedell*, 719 S.E.2d 722, 740 (2011) (recognizing that "materials prepared 'in anticipation of litigation or for trial' are exempt from disclosure" under the work product doctrine (internal citation omitted)).

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?

Documents in an insured's claim file that were generated prior to litigation are generally discoverable. *State ex rel. Allstate Ins. Co. v. Gaughan*, 508 S.E.2d 75, 90 (W.Va. 1998). Conversely, a third-party litigation funding file is not discoverable as to records created during litigation. However, as an exception to that rule, West Virginia Code § 46A-6N-6 requires the disclosure of third- party litigation agreements in discovery without awaiting a discovery request. West Virginia Code §§ 46A-6N-1 through 46A-6N-9 specify certain terms which must be present in said contracts and other terms which are forbidden or capped, including but not limited to, a limit of eighteen percent (18%) annual interest and a prohibition on arbitration clauses.

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?

General practice for resolution of a claim by a minor involves a summary proceeding to obtain Court approval. Limitation of action for personal injury generally is 2 years – West Virginia Code § 55-2-12; however, West Virginia Code § 55-2-15 savings statute to persons under disability, including infants – under 18, which an action can be brought within like number of years after becoming full age or disability is removed but in no case after 20 years.

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?

There are no legal advantages to such admission. Such strategy has been used in an attempt to mitigate damages.

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

West Virginia recognizes both negligent and intentional spoliation of evidence in certain circumstances. Negligent spoliation of evidence is recognized as a cause of action in West Virginia only against third parties; however, a party to a suit that caused spoliation of evidence may be subject to Rule 37 sanctions or an adverse jury instruction. Syl. Pts. 2, 3 & 4, *Tracy v. Cottrell*, 524 S.E.2d 879 (1999). West Virginia also recognizes a cause of action of intentional spoliation against parties to a civil action. Syl. Pt. 9, *Id*. A party who reasonably anticipates litigation has an affirmative duty to preserve relevant evidence. *Id*.

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 West Virginia, "[w]here a person's health care provider agrees to reduce, discount or write off a portion of the person's medical bill, the collateral source rule permits the person to recover the entire reasonable value of the medical services necessarily required by the injury. The tortfeasor is not entitled to receive the benefit of the reduced, discounted or written-off amount." Syl. Pts. 5-7, Kenney v. Liston, 760 S.E.2d 434, 436-37 (W. Va. 2014). To the extent that this practice permits double recovery by the plaintiff, such a result has been expressly approved by the Supreme Court of Appeals of West Virginia. Id. In practical terms, however, any double recovery is often subject to a subrogation claim by the party's own insurer. A plaintiff can recover the full amount charged by medical providers regardless of whether the plaintiff actually paid the bills himself or herself or whether some or all of such bills were paid by insurance under the "collateral source rule." *Kenney v. Listen*, 760 S.E.2d 434 (W. Va. 2014). A plaintiff may also recover the value of services which were gratuitously provided or later written off by the medical provider. *Id*. A Court may reduce or off-set medical bills if it determines they are not "reasonable and necessary." *Id*.

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

In West Virginia, a party who reasonably anticipates litigation has an affirmative duty to preserve relative evidence. Hannah v. Heeter, 584 S.E.2d 560, 566–67 (W. Va. 2003) (quoting Tracey v. Cottrell ex rel. Cotrell, 524 S.E.2d 879 (W. Va. 1999). Intentional spoliation of evidence is recognized as a cause of action against parties to a civil action. Id.at 571. A party to a suit that causes spoliation of evidence may be subject to Rule 37 sanctions or an adverse jury instruction. See Syl. Pt. 2, Tracey v. Cottrell ex rel. Cotrell, 524 S.E.2d 879 (W. Va. 1999).

With respect to third parties, "there is no general duty to preserve evidence." Id. at 568 (quoting Smith v. Atkinson, 771 So.2d 429, 433 (Ala. 2000). However, intentional spoliation of evidence is recognized as a cause of action against third parties, and negligent spoliation of evidence is recognized as a cause of action against third parties having a special duty to preserve evidence. Id. at Syl. Pts. 5 and 9.

5What 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 West Virginia, according to West Virginia Code § 55-7-29(a), an award of punitive damages may occur in a civil action against a defendant if a plaintiff establishes by clear and convincing evidence that the damages suffered were the result of the conduct that was carried out by the defendant with actual malice toward the plaintiff or a conscious, reckless and outrageous indifference to the health, safety and welfare of others. . The amount of punitive damages that may be awarded in a civil action may not exceed four times the amount of

compensatory damages or $500,000, whichever is greater. W. Va. Code § 55-7-29(c). This code provision became effective on June 8, 2015, and the Supreme Court of Appeals of West Virginia has not had an opportunity to apply the statutory standard for punitive damages to a particular set of facts. The federal courts, on the other hand, have made a few determinations on the subject.

In Billings v. Lowe's Home Centers, LLC, the United States District Court for the Southern District of West Virginia held that the plaintiff did not establish the statutory standard by failing to train Mr. Underwood, a Lowe's employee, regarding the operation of a specific forklift that rolled over the plaintiff's foot. Billings v. Lowe's Home Centers, LLC, Civil Action No. 2:18-cv-00039, 2019 WL 1869936, at *7 (S.D. W. Va. April 24, 2019). Before making this decision, the District Court indicated that the West Virginia Supreme Court, before the enactment of

§ 55-7-29, provided guidance as to when punitive damages were available to a plaintiff. Id. at *5. In sum, punitive damages are "the exception, not the rule" and are reserved for "extreme and egregious bad conduct." Id. (quoting Perrine v. E.I. du Pont de Nemours & Co., 225 W. Va. 482, 576-7, 694 S.E.2d 815, 909-10 (2010)). In holding that Lowe's conduct did not meet the requisite standard, the District Court observed that Mr. Underwood did receive general forklift training in 2017 and that Lowe's did not encourage an untrained employee, such as Mr. Underwood, to operate the specific forklift in question. Id. at *6.

In Robertson v. Cincinnati Life Insurance Company, the District Court denied the defendant's motion for summary judgment on the issue of punitive damages and found that the plaintiff presented evidence that a reasonable jury could find that the defendant "actually knew" that the plaintiff's claim was proper as required to award punitive damages in a breach of contract claim. Robertson v. Cincinnati Life Insurance Company, Civil Action No.

3:16-cv-04242, 2019 WL 441184, at *9-10 (S.D. W. Va. Feb. 4, 2019). The District Court stated that it relied on testimony from an employee, Ms. Binzer, in which she admitted to receiving and reading affidavits that contradicted information the defendant relied on in the medical records to deny the plaintiff coverage yet had no reason to believe that the information contained in the affidavits were not true. Id. at *10. Overall, the District Court found that "a reasonable jury could undoubtedly conclude that it is absurd to think Ms. Binzer would make such a "smoking gun" statement, and that she was merely attempting to say that she did not have any strong reason to believe one piece of conflicting evidence over the other." Id.

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?

West Virginia has not had any noteworthy verdicts premised on punitive damages since 2005 when West Virginia Code § 55-7-29(c) was adopted, which caps punitive damages at the greater of $500,000 or four (4) times the amount of compensatory damages. Wal-Mart Stores East, L.P. v. Ankrom, 19-0666 (W. Va. 2020), discussed above, did not involve an award of punitive damages.

While there do not appear to be many noteworthy nuclear verdicts in West Virginia in the recent past, in

Wal-Mart Stores East, L.P. v. Ankrom, 19-0666 (W. Va. 2020), the Supreme Court of Appeals of West Virginia affirmed judgments of $5,076,600 against Wal-Mart and $11,845,400 against a shoplifter in a negligence action brought by a customer when she collided with a shoplifter in the store with store employees in pursuit. In Deitz v. Patton Trucking Co., Inc., 2:15-CV-0827 (S.D. W. Va. 2017), a jury awarded plaintiff $162,500,000 in a trucking accident.

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?

A trial court has discretion to admit accident evidence and an expert qualified in regulations may testify if such testimony will assist the trier of fact to understand the evidence or to determine a fact in 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?

The Supreme Court of Appeals of West Virginia has held that the fact that the name of the motor carrier, the International Commerce Commission certificate number, and various state regulatory permit numbers were "prominently displayed" on a leased tractor-trailer contributed to the existence of an employer-employee relationship between the owner/driver and motor carrier, despite a clause in the contract specifically stating that the relationship was that of an independent contractor, and that, therefore, negligence of the owner/driver could be imputed to the motor carrier. *Griffith v. George Transfer & Rigging, Inc.*, 201 S.E.2d 281 (W. Va. 1973).

The Supreme Court of Appeals of West Virginia does not appear to have ruled directly on the issue of broker liability for motor carrier negligence. However, in another context, the Court has held that a real estate broker who volunteers to secure an inspection of property may be held liable to the buyer for civil damages if the broker is negligent in the selection and retention of the third party, and if such negligence proximately causes harm to the buyer. *See Thompson v. McGinnis*, 465 S.E.2d 922 (1995) (cited in *King v. Lens Creek Ltd. Partnership*, 483 S.E.2d 265 (W. Va. 1996).

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

§55-7-13a. Modified comparative fault standard established.

(a) For purposes of this article, "comparative fault" means the degree to which the fault of a person was a proximate cause of an alleged personal injury or death or damage to property, expressed as a percentage. Fault shall be determined according to section thirteen-c of this article.

(b) In any action based on tort or any other legal theory seeking damages for personal injury, property damage, or wrongful death, recovery shall be predicated upon principles of comparative fault and the liability of each person, including plaintiffs, defendants and nonparties who proximately caused the damages, shall be allocated to each applicable person in direct proportion to that person's percentage of fault.

(c) The total of the percentages of comparative fault allocated by the trier of fact with respect to a particular incident or injury must equal either zero percent or one hundred percent.

55-7-13b. Definitions.

As used in this article:

"Compensatory damages" means damages awarded to compensate a plaintiff for economic and noneconomic loss.

"Defendant" means, for purposes of determining an obligation to pay damages to another under this chapter, any person against whom a claim is asserted including a counter-claim defendant, cross-claim defendant or third-party defendant.

"Fault" means an act or omission of a person, which is a proximate cause of injury or death to another person or persons, damage to property, or economic injury, including, but not limited to, negligence, malpractice, strict product liability, absolute liability, liability under section two, article four, chapter twenty-three of this code or assumption of the risk.

"Plaintiff" means, for purposes of determining a right to recover under this chapter, any person asserting a claim.

§ 55-7-13c. Liability to be several; amount of judgment; allocation of fault.

(a) In any action for damages, the liability of each defendant for compensatory damages shall be several only and may not be joint. Each defendant shall be liable only for the amount of compensatory damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against each defendant for his or her share of that amount. However, joint liability may be imposed on two or more defendants who consciously conspire and deliberately pursue a common plan or design to commit a tortious act or omission. Any person held jointly liable under this section shall have a right of contribution from other defendants that acted in concert.

(b) To determine the amount of judgment to be entered against each defendant, the court, with regard to each defendant, shall multiply the total amount of compensatory damages recoverable by the plaintiff by the percentage of each defendant's fault and, subject to subsection (d) of this section, that amount shall be the maximum recoverable against that defendant.

(c) Any fault chargeable to the plaintiff shall not bar recovery by the plaintiff unless the plaintiff's fault is greater than the combined fault of all other persons responsible for the total amount of damages, if any, to be awarded. If the plaintiff's fault is less than the combined fault of all other persons, the plaintiff's recovery shall be reduced in proportion to the plaintiff's degree of fault.

(d) Notwithstanding subsection (b) of this section, if a plaintiff through good faith efforts is unable to collect from a liable defendant, the plaintiff may, not later than one year after judgment becomes final through lapse of time for appeal or through exhaustion of appeal, whichever occurs later, move for reallocation of any uncollectible amount among the other parties found to be liable.

(1) Upon the filing of the motion, the court shall determine whether all or part of a defendant's proportionate share of the verdict is uncollectible from that defendant and shall reallocate the uncollectible amount among the other parties found to be liable, including a plaintiff at fault, according to their percentages at fault: Provided, That the court may not reallocate to any defendant an uncollectible amount greater than that defendant's percentage of fault multiplied by the uncollectible amount: Provided, however, that there shall be no reallocation against a defendant whose percentage of fault is equal to or less than the plaintiff's percentage of fault.

(2) If the motion is filed, the parties may conduct discovery on the issue of collectability prior to a hearing on the motion.

(e) A party whose liability is reallocated under subsection (d) of this section is nonetheless subject to contribution and to any continuing liability to the plaintiff on the judgment.

(f) This section does not affect, impair or abrogate any right of indemnity or contribution arising out of any contract or agreement or any right of indemnity otherwise provided by law.

(g) The fault allocated under this section to an immune defendant or a defendant whose liability is limited by law may not be allocated to any other defendant.

(h) Notwithstanding any other provision of this section to the contrary, a defendant that commits one or more of the followings acts or omissions shall be jointly and severally liable:

(1) A defendant whose conduct constitutes driving a vehicle under the influence of alcohol, a controlled substance, or any other drug or any combination thereof, as described in section two, article five, chapter seventeen-c of this code, which is a proximate cause of the damages suffered by the plaintiff;

(2) A defendant whose acts or omissions constitute criminal conduct which is a proximate cause of the damages suffered by the plaintiff; or

(3) A defendant whose conduct constitutes an illegal disposal of hazardous waste, as described in section three, article eighteen, chapter twenty-two of this code, which conduct is a proximate cause of the damages suffered by the plaintiff.

(i) This section does not apply to the following statutes:

(1) Article twelve-a, chapter twenty-nine of this code;

(2) Chapter forty-six of this code; and

(3) Article seven-b, chapter fifty-five of this code.

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

2 years generally — exceptions exist.

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?

Such is by statute. West Virginia Code § 55-7-6 states:

By whom action for wrongful death to be brought; amount and distribution of damages; period of limitation.

(a) Every such action shall be brought by and in the name of the personal representative of such deceased person who has been duly appointed in this state, or in any other state, territory or district of the United States, or in any foreign country, and the amount recovered in every such action shall be recovered by said personal representative and be distributed in accordance herewith. If the personal representative was duly appointed in another state, territory or district of the United States, or in any foreign country, such personal representative shall, at the time of filing of the complaint, post bond with a corporate surety thereon authorized to do business in this state, in the sum of $100, conditioned that such personal representative shall pay all costs adjudged against him or her and that he or she shall comply with the provisions of this section. The circuit court may increase or decrease the amount of said bond, for good cause.

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

West Virginia Code § 17C-15-49 provides that a violation of West Virginia's seat belt law is not admissible as evidence of negligence or contributory negligence or comparative negligence in any civil action or proceeding for damages, and shall not be admissible in mitigation of damages. Provided, that the court may, upon motion of the defendant, conduct an in-camera hearing to determine whether an injured party's failure to wear a safety belt was a proximate cause of the injuries complained of. Upon such a finding by the court, the court may then, in a jury trial, by special interrogatory to the jury, determine (1) that the injured party failed to wear a safety belt and (2) that the failure to wear the safety belt constituted a failure to mitigate damages. The trier of fact may reduce the injured party's recovery for medical damages by an amount not to exceed five percent thereof. In the

event the plaintiff stipulates to the reduction of five percent of medical damages, the court shall make the calculations and the issue of mitigation of damages for failure to wear a safety belt shall not be presented to the jury. In all cases, the actual computation of the dollar amount reduction shall be determined by the court.

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.

No.

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