

WEST 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?**

West Virginia does not appear to recognize the self-critical analysis privilege.

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?**

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.

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

While various unpublished orders have been entered regarding this issue, there has not been a published opinion defining the travel regime. Typically, the expert witness travels because attorneys taking depositions generally prefer to host them at their own offices and total costs are less. However, remote video depositions have become much more common recently due to COVID-19 concerns.

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?**

A plaintiff can maintain a negligent hiring/supervision/training claim where the employer admits scope and course of employment. *See, e.g., McCormick v. W. Virginia Dep't of Pub. Safety*, 503 S.E.2d 502, 507 (W.Va. 1998). Also, 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 general rule governing the vicarious liability of employers in West Virginia

is an employer is ordinarily not liable for the negligent acts of an independent contractor. *Rogers v. Boyers*, 170 S.E. 905 (W.Va. 1933). The exceptions to this general rule include where the work to be done is unlawful or intrinsically dangerous. *Pasquale v. Ohio Power Co.*, 418 S.E.2d 738 (W.Va. 1992). Additionally, an employer may be liable where it exercises direct control or supervision over the contractor or hires an incompetent contractor. *Id.* Some special categories of employers may have special duties imposed by law. *Carrico v. W.Va. R.R. Co.*, 14 S.E. 12 (1891). To constitute an inherently dangerous activity sufficient to place a nondelegable duty upon the one ordering the work, the work must be dangerous in and of itself and not dangerous simply because of the negligent performance of the work, and that danger must be naturally apprehended by the parties when they contract. *King v. Lens Creek Ltd.*, 483 S.E.2d 265 (W.Va. 1996). In the selection of an independent contractor, the employer is charged with the duty of exercising reasonable care to secure a person of skill and prudence. *Dunbar Tire & Rubber Co. v. Crissey*, 114 S.E. 804 (W.Va. 1922).

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

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.

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

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.*

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)

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

West Virginia Code § 56-3-33 provides that the West Virginia courts have personal jurisdiction over non-residents when a non-resident, or their duly authorized agent, causes tortious injury by an act or omission in the state. Further, the non-resident must have such minimum contacts with West Virginia that the exercise of personal jurisdiction does not offend traditional notions of fair play and substantial justice. Courts have been very reluctant to allow such, absent good cause.

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

Rule 27 of the West Virginia Rules of Civil Procedure governs pre-suit deposition. That rule sets forth a process by which a petition can be filed in order to seek leave of court to take a deposition of either the petitioner or another person in order to “prevent a failure or delay of justice.” West Virginia trial Courts have

been hesitant in allowing such absent good cause.

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

This analysis would be driven by guidance from the Supreme Court of Appeals of West Virginia with regard to spoliation of evidence which could subject the client to an adverse jury instruction at trial or a cause of action for intentional spoliation, should the client not retain the unit, repair the unit involved, or place it back in service. This could turn a claim with no liability into potential damages and an adverse decision when a defense on the merits would have yielded a defense verdict.

While there is some authority that allows repair work to be performed, the better course of action is always to maintain such evidence in the same state until after the applicable statute of limitations has run. In the alternative, notification of an opportunity to inspect to a potential adverse party may assist in defending a spoliation claim.

However, given the unsettled state of the law in West Virginia, the completely safe choice would be to not repair or place back in service the truck/trailer unit until after either the statute of limitations has expired or any potential claim has been brought and the appropriate steps taken to produce for inspection the vehicle with consent of the adverse party. Conversely, a business decision may lead to the repair and placement of the unit back in service with the known possible ramifications of a spoliation claim.

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

Punitive damages are limited to acts of actual malice or a conscious, reckless and outrageous indifference to the health, safety and welfare of others, must be proven by clear and convincing evidence, and are capped at no more than four (4) times compensatory damages or Five Hundred Thousand Dollars (\$500,000.00), whichever is greater. W.Va. Code § 55-7-29.

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

Most state court trials in West Virginia are currently via remote electronic means only. A few courts have convened trials in larger venues, but some judges are cautious regarding potential prejudice and have only entered such orders in limited circumstances. Antidotally, there, have been some technological issues and learning curves, but the parties have made it work. There do not appear to be any pending appeals which can be identified relating to issues unique to remote trials.

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?

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.