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NORTH CAROLINA

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?

We are not aware of any explicit recognition of the "self-critical analysis privilege" by North Carolina Courts. In 2005, the United States District Court for the Eastern District of North Carolina specifically addressed this privilege and found that Courts within the Fourth Circuit have been mixed in their application of the privilege. *McDougal-Wilson v. Goodyear Tire & Rubber Co.*, 232 F.R.D. 246, 250 (E.D.N.C. 2005). The Court found that "Courts in this Circuit have made clear that this particular privilege is "of recent origin and one that is narrowly applied even in those jurisdictions where it is recognized." *Id*. There, the Court declined to apply the privilege to affirmative action plans. *Id*. This ruling is consistent with other North Carolina federal court opinions in finding the application of the self-critical analysis privilege questionable at best. *See Warren v. Legg Mason Wood Walker, Inc.*, 896 F. Supp. 540, 543 (E.D.N.C. 1995). We believe these rulings would be informative to North Carolina state courts if specifically faced with the application of this privilege.

As a result, we expect that information that may fall within this privilege would be more likely to find protection under North Carolina's rules related to material prepared in anticipation of litigation and/or North Carolina Rule of Evidence 407 (protecting evidence of subsequent remedial measures from admission into evidence). *See Hall v. Cumberland Cty. Hosp. Sys., Inc.*, 121 N.C. App. 425, 431, 466 S.E.2d 317, 320 (1996) (where self-critical analysis privilege was asserted by counsel, but protection was analyzed under anticipation of litigation, attorney-client privilege and work product).

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?

In 2008, the North Carolina Court of Appeals in *Odell v. Legal Bucks, LLC*, found that the third-party funding agreement there was unenforceable because the agreement was an advance that was usurious and that the terms violated the North Carolina Consumer Finance Act. 192 N.C. App. 298, 301, 665 S.E.2d 767, 770 (2008). Likewise, a North Carolina Federal Bankruptcy court examined the *Odell* decision and also refused to enforce a similar agreement after finding that it violated public policy. *In re DesignLine Corp.*, 565 B.R. 341, 348 (Bankr. W.D.N.C. 2017). Neither of these Courts found that 3rd party funding agreements were unenforceable as a whole, but rather engaged in a fact specific inquiry of the lender's

involvement in the litigation.

Further complicating a third party lender's willingness to become involved in North Carolina cases is this state's continued adherence to the doctrine of contributory negligence. Here, a plaintiff whose negligence contributes to the cause of an accident is barred from all recovery, even if that negligence is as small as one percent (assuming the defendant did not have the last clear chance to avoid the accident). This doctrine increases the risk involved for a potential lender.

Accordingly, third party funding arrangements in North Carolina are rare. We are not aware of any specific rules related to discovery of these agreements in this state.

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

North Carolina Rule of Civil Procedure 30(b)(1) provides generally that a resident of North Carolina can only be compelled to attend a deposition in the county where he/she resides or transacts business in person. A nonresident likewise can only be compelled to attend a deposition in the county where he/she resides, or within 50 miles of the place of service. A Plaintiff may also be compelled to attend a deposition in the county where he/she filed the action.

In practice, it is most common for the 30(b)(6) designee to appear at a location convenient to him/her and for the noticing attorney to travel to that location to take the deposition. Of course, with the recent transition to more remote video depositions, it is likely that more of these depositions will take place remotely going forward.

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?

As in most states, in North Carolina an employer is vicariously liable for the negligence of its employees/agents committed in the course and scope of their employment pursuant to the doctrine of respondeat superior. Direct claims against the employer for negligent hiring, retention, training and supervision may also be asserted in certain circumstances if drivers are deemed to be in the course and scope of their employment when involved in an accident. However, applicable North Carolina law provides that admission of agency will render such direct claims moot and prejudicial unless a punitive damages claim is stated. As such, agency is regularly admitted to avoid such direct claims, as they will not only increase exposure, but also expand the scope of discovery to allow Plaintiff's counsel to access many of the organization's operational documents.

By statute ownership of a vehicle is prima facie evidence of an agency relationship with the driver of said vehicle. N.C. Gen. Stat. § 20-71.1. North Carolina appellate court opinions analyzing this statute have held that the statute alone, even in the face of undisputed evidence that the driver was on a purely personal mission, is sufficient to submit the issue of whether the driver was an agent of the owner to the jury. That said, if the evidence shows the trip was purely personal in nature and unauthorized by the owner, the defendant is entitled to an instruction indicating that it is the jury's duty to answer the agency issue "no" if they find the facts to be as the owner contends. *See Belmany v. Overton*, 270 N.C. 400, 154 S.E.2d 538 (1967).

In contrast, a company "is not liable for the independent contractor's negligence unless the employer retains the right to control the manner in which the contractor performs his work, or the independent contractor is engaged in an ultrahazardous or inherently dangerous activity." *Woodson v. Rowland*, 329 N.C. 330, 350, 407 S.E.2d 222, 234 (1991). The analysis for truck drivers follows this common law test. *See* N.C.

Gen. Stat. § 97-19.1.

Ultimately, in North Carolina, a driver operating a company owned or dispatched vehicle will usually be found to be in the course and scope of employment. The greatest practical benefit of admitting that the driver was within the course and scope at the outset of litigation is that it often renders direct claims against the company moot, which limits the scope of discovery. Again, though, if punitive damages claims are asserted, the benefit of limiting discovery and dismissal of the underlying direct claims is no longer available.

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

In 2018, a jury awarded a total of $17 million in compensatory damages in a case involving a tractor-trailer collision that resulted in one death and the alleged mild traumatic brain injury of another. In a bifurcated trial, $13 million was awarded for the wrongful death claim and $4 million was awarded for the TBI claim. Reportedly, the two plaintiffs were towing a disabled tractor to their employer's shop when the defendant collided with them in a tractor-trailer. Contributory negligence was at issue, but ultimately was unsuccessful.

In 2015, a verdict was returned against a commercial busing company totaling $18 million. A 58 year old decedent was traveling in a charter bus with a group of students to a college visit. While on the way, the bus ran off the road and overturned in a ditch. A wrongful death action was brought by the decedent's estate in Durham County, a notably liberal venue, alleging negligence against the driver of the bus as well as direct negligence by the bus company. The case was tried on March 26, 2015 before Judge Allen Baddour. The $18 million dollar verdict consisted of only compensatory damages.

More recently, in January 2019 a substantial $7 million dollar verdict was awarded to a police officer who was stuck by a Greyhound bus while he was investigating another accident. The bus dragged his car nearly 200 feet. The officer suffered head, back, neck, and rib injuries. The case was tried in the U.S. District Court for the Eastern District of North Carolina before Judge Louise Flanagan.

Of note, outside the transportation context, in 2018 a jury sitting in the U.S. District Court for the Middle District of North Carolina returned a verdict of nearly $38 million dollars in an asbestos related wrongful death action.

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

Pursuant to Rule 414 of the North Carolina Rules of Evidence, a party may only introduce evidence of the actual amount of medical expenses that have been paid or are necessary to satisfy outstanding bills, rather than the amount billed. This rule opens the door to discovery of amounts actually paid or outstanding through interrogatories and/or requests for production of medical bills, lien statements and/or insurance explanations of benefits. Because the amounts actually paid are often much lower than the amount billed, Plaintiffs' attorneys in North Carolina have increasingly begun to abandon their medical expense claims in an effort to prevent discovery of amounts paid. However, North Carolina courts have not yet clearly ruled on this issue.

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)

After Rule 414, discussed above, was incorporated into the North Carolina Rules of Evidence, attorneys in North Carolina made efforts to depose billing clerks for providers where a Plaintiff had an outstanding balance. This was done in an effort to determine how much the provider would accept to resolve the Plaintiff's outstanding bill, thus reducing the admissible damages from the full outstanding balance to an

assumed lesser acceptable amount. However, such tactics have been met with mixed results.

Often, providers testified that, prior to resolution of the matter, they are not allowed to accept any reduction of the outstanding bill to satisfy the amount owed. Rather, it is only after the matter has resolved that they will negotiate. This testimony results in the full outstanding balance often remaining admissible. Accordingly, we have seen increasingly fewer of these depositions and discovery tactics employed.

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

If an employee is injured in North Carolina, the North Carolina Industrial Commission will have jurisdiction over the claim under the North Carolina Workers' Compensation Act, provided that the employer has three or more employees and/or purchased workers' compensation insurance. NCGS § 97-19.1 specifically addresses tractor-trailer drivers and provides in essence that workers' compensation coverage will be found for owner-operators if operating under the company's USDOT number, even if deemed an independent contractor under the common law and even if the company employs less than three operators.

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

Rule 27 of the North Carolina Rules of Civil Procedure sets out the procedure for seeking a pre-suit deposition. This rule allows for the preservation of testimony which may not be available in the future. Rule 27, comment. However, the rule does not allow the taking of such a deposition to obtain information to prepare a Complaint. Rule 27, Comment to 1975 amendment. *See In re Lewis*, 11 N.C. App. 541, 181 S.E.2d 806. Instead, the current rule only allows for pre-suit depositions to be taken when "the perpetuation of the testimony may prevent a failure or delay of justice". This mirrors the language of the Federal Rule.

A party does not have a right to take a pre-suit deposition under Rule 27, but must petition the Court for leave to conduct the deposition. *See* Rule 27(a)(1). A grant of such a petition is not immediately appealable. *Williams v. Blount*, 14 N.C. App. 139, 140, 187 S.E.2d 464, 465 (1972). However, North Carolina commentators have asserted that denial of such a petition should be immediately appealable "since the unavailability of material testimony at a later date would constitute the denial of a substantial right." G. Gray Wilson, *North Carolina Civil Procedure Vol. 1*, 27-3 (3rd Edition 2007).

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

North Carolina Appellate Courts have held that "a party's intentional destruction of evidence in its control before it is made available to the adverse party can give rise to an inference that the evidence destroyed would injure its (the party who destroyed the evidence) case." *Holloway v. Tyson Foods, Inc.*, 193 N.C. App. 542, 547, 668 S.E.2d 72, 75 (2008). "If, however, the evidence withheld or destroyed was equally accessible to both parties or there was a fair, frank, and satisfactory explanation for the nonproduction of the evidence, the principle is inapplicable and no inference arises." *Id*.

"The obligation to preserve evidence even arises prior to the filing of a complaint where a party is on notice that litigation is likely to be commenced, and the spoliator must do ... what is reasonable under the circumstances," *McLain v. Taco Bell Corp.*, 137 N.C. App. 179, 187, 527 S.E.2d 712, 718 (2000) (internal citations omitted). "When the evidence indicates that a party is aware of circumstances that are likely to give rise to future litigation and yet destroys potentially relevant records without particularized inquiry, a

factfinder may reasonably infer that the party probably did so because the records would harm its case." *Id*.

Based on the applicable law, we evaluate the potential for litigation on a case-by-case basis when determining how long to hold a vehicle. Assuming a claim is anticipated, we ensure that we fully document the evidence at the earliest possible opportunity so nothing is not lost. Depending on the severity of the accident, and how the claimants have communicated, if at all, during the investigation, we may contact the claimant directly to advise we intend to release the vehicle and allow the opportunity to inspect. If contacting the claimant is not advisable, we may put the insurer on notice of our intent to release the vehicle after a reasonable amount of time holding the same, which again is case dependent. Ultimately, the evaluation is based upon what a judge may deem reasonable if the request for an adverse inference instruction arises at a future trial. Please note, though, that special care must be taken in cases that may be removed to federal court, as our federal courts apply a different rule that affords the judge more significant penalties for spoliation, up to and including the striking of defenses and pleadings.

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

North Carolina General Statute ("NCGS") § 1D-15 provides that punitive damages can only be awarded if a claimant proves compensatory damages as well as the presence of at least one of the following aggravating factors: fraud, malice, or willful or wanton conduct. The aggravating factor must be proven by clear and convincing evidence. Further, punitive damages cannot be awarded solely on the basis of vicarious liability.

Willful and wanton conduct is defined as the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm. It means more than gross negligence.

NCGS 1D-1 provides that the purpose of punitive damages is to "punish a defendant for egregiously wrongful acts and to deter the defendant and others from committing similar wrongful acts." Based on this, in order to recover punitive damages from a corporation, plaintiff must prove the officers, directors, or managers of the corporation participated in or condoned the conduct constituting the aggravating factor giving rise to punitive damages. Likewise, punitive damages cannot be recovered against a driver if the driver died as a result of the accident.

NCGS § 1D-25 limits punitive damages to "three times the amount of compensatory damages or two hundred fifty thousand dollars ($250,000), whichever is greater." However, this cap does not apply for cases involving a defendant operating a vehicle while under the influence. North Carolina appellate courts have interpreted this cap to apply to limit the Plaintiff's total award, rather than serve as a cap on damages for each defendant. *GE Betz, Inc. v. Conrad*, 231 N.C. App. 214, 240, 752 S.E.2d 634, 653 (2013), writ denied, review denied, 367 N.C. 786, 766 S.E.2d 837 (2014).

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

The Chief Justice of the North Carolina Supreme Court has authorized Courts to conduct remote proceedings. A party may object to conducting a proceeding remotely; however, there must be good cause shown for such objection. If the Court determines that good cause for objection to the remote proceeding has not been shown, the proceeding can move forward remotely over the party's objection. We are not aware of any civil jury trial having been held remotely in North Carolina. However, Courts have routinely conducted motion hearings via WebEx. Many North Carolina Courts have also moved to resume in person hearings and trials with mixed results.

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?

Due to North Carolina's law placing a cap on punitive damages, as discussed above, significant verdicts premised solely on punitive damages do not occur in this State. There must be a significant compensatory damages award to support a large punitive damages finding. We are not aware of any such recent cases in the transportation context.