OKLAHOMA

Joseph R. Farris
FRANDEN, FARRIS, QUILLIN, GOODNIGHT + ROEBRTS
2 W. 2nd Street, Suite 900
Tulsa, OK 74105
Phone: (918) 583-7129
Fax: (918) 584-3814
E-Mail: jfarris@tulsalawyer.com

1. Identify the venues/areas in your State that are considered dangerous or liberal.

As a general rule the counties of eastern Oklahoma tend to be more liberal as contrasted with western Oklahoma. The two most populous counties, Oklahoma County and Tulsa County tend to be more conservative.

2. Identify any significant trucking verdicts in your State during 2017-2018, both favorable and unfavorable from the trucking company's perspective.

In *George Bowden and Melissa Bowden, as Parents of Jagger Bowden, a Minor and, Gunner Bowden, Deceased v. Livestock Nutrition Center, LLC*, the jury (12-0)[1] found in favor of the Defendant and against the Plaintiffs.

There, Plaintiffs alleged that on January 19, 2015, on SH-9 near Stigler, OK, Gunner Bowden was driving a pickup in which Jagger Bowden was a passenger. Plaintiffs claimed that Defendant crossed the center line and failed to yield the right of way to their sons' vehicle. The collision resulted in the death of Gunner Bowden and significant injuries (fractured nose; lacerations to head and face; fractured ribs; and, PTSD) to Jagger Bowden. *(No medical bills were introduced.)* Defendant alleged that Gunner Bowden crossed the centerline without warning or justification and struck its tractor-trailer. Defendant denied that its driver was negligent in any manner.

In *Eickstaedt v. Doug Butler Enterprises Inc., d/b/a Pallet Supply Co., and Robert Hargis*, Tulsa County Case No. CJ-2017-659, the jury found in favor of the Plaintiff, Estate of Priscilla Eickstaedt, and awarded damages in the amount of $2,500,000.00. The jury found in favor of the Plaintiff, Earl Eickstaedt, and awarded damages in the amount of $500,000.00. The jury found in favor of both Plaintiffs on the issue of punitive damages. *(The Parties settled the case while the jury was deliberating on the issue of punitive damages and the verdict was stricken as settled.)*

The case involved a collision between a pickup truck pulling a flatbed trailer driven by Priscilla Eickstaedt in which Earl was a passenger, and, a 1995 semi-tractor trailer driven by Robert Hargis, an employee of Defendant, Pallet Supply. The collision occurred in the east bound middle lane of SH-64, east of Tulsa, OK. Plaintiff alleged that Defendant suddenly moved from the right lane into the center lane, striking Plaintiff's vehicle, causing them to lose control

[1] This case was defended by ALFA lawyers Joseph Farris and Jeremy Ward.

and roll. Plaintiffs also alleged that Defendant's trailer had so many deficiencies (lighting and brakes) that it was taken out of service after the accident. Plaintiffs claimed that the Plaintiff company knew of the deficiencies, but allowed the vehicle to be driven. As a result of the collision, Plaintiff (77 years old) was admitted to the hospital for treatment of a large hematoma on his head. After his release, he sought chiropractic treatment for soft tissue type injuries. Plaintiff's wife, Priscilla (77 years old), died at the scene. *(Plaintiffs did not present any medical bills.)*

Defendant alleged that their driver began moving from the outside lane to the center lane after signaling and checking his mirrors. Defendant Plaintiff, Priscilla, approached from the inside lane, lost control of her vehicle when the trailer began to sway and caused the impact between the vehicles. Defendant also claimed that the vehicle had passed a DOT inspection just three weeks prior to the collision and that they had no notice of any deficiencies on the trailer. Plaintiffs claimed that the vehicle which passed the inspection had a different VIN number than the trailer involved in the accident.

In *Fox v. Mize*, the Oklahoma Supreme Court expanded an employer's liability for the acts of an employee. 2018 OK 75.

There, Plaintiff Fox and Defendant Mize were in a motor vehicle accident in Oklahoma. Mize turned left in front of oncoming traffic, killing Plaintiff who was on a motorcycle. Mize was driving a concrete truck owned by his employer, Van Eaton Ready Mix, Inc. The traffic collision report provided that Defendant made an improper left turn in front of oncoming traffic. Mize had a Class "A" commercial driver's license, and his employer stipulated that he was acting in the course and scope of his employment at the time of the collision. From the scene, Defendant was taken in for a blood test which established he was under the influence of a prescription narcotic banned by the Federal Motor Carrier Safety Regulations.

Plaintiff brought suit against Mize for negligence and negligence per se and sued Van Eaton for negligence and negligence per se under the theory of respondeat superior. Plaintiff also asserted direct negligence claims against Van Eaton for negligent hiring, training, and retention, and negligent entrustment. Van Eaton stipulated that Mize was acting in the course and scope of his employment at the time of the collision and sought dismissal of the Plaintiff's direct negligence claims, arguing that negligent hiring and negligent entrustment were unnecessary, superfluous, and contrary to public policy because Van Eaton had already admitted to being Mize's employer for purposes of vicarious liability. The district court dismissed the negligent hiring claim but allowed the negligent entrustment claim to proceed. Upon consideration, the Oklahoma Supreme Court concluded an employer's liability for negligently entrusting a vehicle to an unfit employee was a separate and distinct theory of liability from that of an employer's liability under the respondeat superior doctrine. An employer's stipulation that an accident occurred during the course and scope of employment does not, as a matter of law, bar a negligent entrustment claim.

3. Are accident animations and/or computer-generated evidence admissible in your State?

Computer animations are admissible. *Tull v. Federal Express Corp*., 2008 OK CIV APP 105, 107 P.3d 495 "a simulation is substantive evidence because it "utilizes one or more programs which, after inputting data, use scientific formulas to produce conclusions based on that data regarding issues material to the trial."

4. Identify any significant decisions or trends in your State in the past two (2) years regarding (a) retention and spoliation of in-cab videos and (b) admissibility of in-cab videos.

(a) There are no decisions in Oklahoma regarding retention and spoliation of in-cab videos. By all accounts, retention and spoliation of in-cab videos would follow tradition spoliation rules in Oklahoma, *i.e.*, a litigant who is on notice that documents or information in its possession are relevant to litigation or potential litigation, or are reasonably calculated to lead to the discovery of admissible evidence has a duty to preserve such evidence. *Barnett v. Simmons,* 197 P.3d 12, 2008 OK 100. Additionally, Oklahoma courts do not distinguish between electronic data and other evidence for purposes of spoliation. *Id*.

(b) There are no decisions in Oklahoma regarding admissibility of in-cab videos. Presumably the video would be admissible if properly identified and authenticated pursuant to the Oklahoma Rules of Evidence.

5. What is your State's applicable law and/or regulation regarding the retention of telematics data, including but not limited to, any identification of the time frames and/or scope for retention of telematics data and any requirement that third-party vendors be placed on notice of spoliation/retention letters.

There are no specific Oklahoma laws or regulations regarding the retention of telematics data. However, *Barnett v. Simmons,* 197 P.3d 12, 2008 OK 100 makes clear that "[t]he duty to preserve material evidence arises not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation . . .. If a party cannot fulfill this duty to preserve because he does not own or control the evidence, he still has an obligation to give the opposing party notice of access to the evidence or of the possible destruction of the evidence if the party anticipates litigation involving that evidence."

6. Is a positive post-accident toxicology result admissible in a civil action?

Yes. Assuming there were no issues with the testing protocol, a positive post-accident toxicology result would likely be admissible. 12 O.S. § 2401.

7. Is post-accident investigation discoverable by adverse counsel?

Generally, no. According to the Oklahoma Discovery Code, "a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for

another party or its representative, including the other party's attorney, consultant, surety, indemnitor, insure or agent." 12 O.S. 2014 §3226(B)(3)(a).

However, the Oklahoma Supreme Court has declined to find a claims file privileged or protected work product in its entirely when sought by a third party. *Scott v. Peterson*, 126 P.3d 1232, 1234-36 (2005) (insured failed to show that claims file must necessarily contain only items that were prepared in anticipation of litigation or for trial or contained only mental impressions, conclusions, opinions, or legal theories of attorney or other representative of party concerning litigation). Compare *Skinner v. John Deere Ins. Co.*, 2000 OK 18, 998 P.2d 1219, 1224 (holding insurance claim materials generated after filing of petition were not discoverable) with *Sims v. Travelers Ins. Co.*, 2000 OK CIV APP 145, 16 P.3d 468 (finding claim file privileged where first notice of claim was the lawsuit).

Whether an insurer's investigatory documents were prepared in anticipation of litigation depends upon the facts of each case. *Heffron v. District Court Oklahoma County*, 77 P.3d 1069, 1079 (2003) (Because "a central part of the business of insurance companies is to investigate claims, review them and decide whether or not to pay, documents prepared in the ordinary course of business by the insurer, its employees and agents in regard to such endeavors cannot automatically be deemed to have been generated in anticipation of litigation merely because litigation may be deemed a contingency.").

8. Describe any laws in your State which regulate automated driving systems (autonomous vehicles) or platooning.

None. Currently Senate Bill 365 proposes that state law will supersede a city and county ordinance that "prohibits, restricts or regulates the testing or operation of motor vehicles equipped with driving automation systems."

There are no Oklahoma laws on platooning.

9. Describe any laws or Court decisions in your State which would preclude a commercial driver from using a hands-free device to have a conversation over a cell phone.

None. The pertinent Oklahoma statute makes a specific exception for hands free devices. 47 O.S. § 47-11-901c provides, "A. It shall be unlawful for any person to operate a commercial motor vehicle or for a public transit driver to operate a motor vehicle on any street or highway within this state while: 1. Using a cellular telephone or electronic communication device to write, send, or read a text-based communication; or 2. Using a *hand-held mobile telephone* while operating a commercial motor vehicle. (emphasis added).

10. Identify any Court decisions in your State precluding Golden Rule and/or Reptile style arguments by Plaintiffs' counsel.

Juries cannot be asked to put themselves in the shoes of the parties or their families. A Golden Rule appeal "is universally recognized as improper because it encourages the jury to depart

from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence . . . ." *Blevins v. Cessna Aircraft Co.*, 728 F.2d 1576, 1580 (10th Cir. 1984). Opposing counsel must interpose a timely objection, because use of a Golden Rule argument may not be plain error. *Id.* ("Although the remarks of plaintiff's counsel were improper, defendant failed to make a timely objection. We conclude that the remarks do not amount to plain error requiring reversal in the absence of an objection, particularly because of the proper instructions given the jury on the law it should apply in determining liability and damages."). However, even where a timely objection is interposed, the use of a Golden Rule argument may not be so prejudicial as to require a new trial.

For example, in *Lance v. Smith,* 306 P.2d 298 (Okla. 1957), plaintiff's counsel requested the jury apply the Golden Rule. After an objection by the defense, the trial court admonished the jury that they would be controlled only by the evidence that came from the witness stand and nothing further. *Id*. at 302. On appeal, the Oklahoma Supreme Court agreed that the plaintiff's counsel's invocation of the Golden Rule was improper. However, the plaintiff's Golden Rule argument, "while not to be condoned," did not call for reversal of the verdict for the plaintiff, because it appeared to the court that "the jury was not influenced thereby and apparently followed directions of court not to consider such improper argument."

Likewise, in *Hudman v. State,* 89 Okla. Crim. 160, the prosecutor read an American Bar Journal article about the duties of jurors in his closing argument. The duties included in the article provided that as a juror, "I must apply the Golden Rule by putting myself impartially in the place of the plaintiff and of the defendant, remembering that although I am a juror today passing upon the rights of others, tomorrow I may be a litigant whose rights other jurors shall pass upon." *Id.* at 183. The Oklahoma Court of Criminal Appeals observed that reading such an article should be avoided, but there was no reversible error in allowing it. *Id.*

The Oklahoma Rules of Evidence governing the relevancy of evidence and its admissibility are nearly identical to their federal counterparts. *Compare* 12 O.S. §§ 2401 – 2403 *with* Fed. R. Civ. P. 401 – 403. Sections 2401 - 2403 may be used to preclude the use of Reptile Theory arguments at trial. For example, many plaintiffs' lawyers using the Reptile system will attempt to define the duty owed by the defendant as one "to avoid needlessly endangering the public." A motion in limine can be used to successfully foreclose the use of such arguments at trial.

First, the existence of a duty and its scope are legal questions to be decided by the judge. *Wofford v. Eastern State Hosp*., 795 P.2d 516, 519 (Okla. 1990). Therefore, questions to witnesses such as "Wouldn't you agree that Defendant had a duty to needlessly avoid endangering the public?" are irrelevant and improperly ask a witness to opine on a duty—a legal question which should be defined in the Court's instructions to the jury. Moreover, the duty in most cases is much narrower than the one argued for by plaintiff's counsel (e.g., the duty will be to act reasonably under the circumstances, not to do everything possible to ensure the safety of the public).

11. Compare and contrast the advantage and disadvantages of Federal Court versus State Court in your State.

The three federal courts in Oklahoma tend to be slightly more conservative than their state court counterparts. Federal judges are more willing to grant summary judgment. Overall, any general advantage or disadvantage is slight and depends more on the particular judge and jury makeup.

12. How does your State handle the admissibility of traffic citations (guilty plea, pleas of no contest, etc.) in subsequent civil litigation?

Whether or not a citation was issued is generally not admissible in a negligence case. Under Oklahoma law, evidence of a traffic citation is inadmissible in a civil proceeding unless the defendant has both voluntarily and knowingly pled guilty to the traffic citation. *Lee v. Knight*, 771 P.2d 1003, 1004 (Okla. 1989); *Walker v. Forrester*, 764 P.2d 1337 (Okla. 1988).

In *Walker*, the defendant received a traffic citation, which she subsequently paid. The defendant sought to exclude all mention of the fact she received and paid for the ticket. *Id*. at 1338. The court excluded the use of the citation. In justifying its decision, the court noted there was no evidence defendant pled guilty to the citation, and thus, it would only have been admissible if she voluntarily and knowingly entered a plea of guilty. *Id*. at 1338-39. Further, 12 O.S. §2410(A) shows that pleas of nolo contendere are inadmissible against the party which took the plea. Even if/when a conviction occurs, Oklahoma generally does not admit evidence of a minor offense in a civil action arising from the same issues. *O'Neal v. Joy Dependent School Dist.*, 820 P.2d 1334, 1336 (Okla. 1991).

13. Describe the laws in your State which regulate whether medical bills stemming from an accident are recoupable. In other words, can a plaintiff seek to recover the amount charged by the medical provider or the amount paid to the medical provider? Is there a basis for post-verdict reductions or offsets?

Title 12, Section 3009.1(A) of the Oklahoma Statutes provides, "the *actual amounts paid* for any doctor bills, hospital bills, ambulance service bills, drug bills and similar bills for expenses incurred in the treatment of the party shall be the amounts admissible at trial, *not the amounts billed* for expenses incurred in the treatment of the party." (emphases added). For this provision to apply, the defendant must provide, "in addition to evidence of payment, a signed statement acknowledged by the medical provider or an authorized representative that the provider, in consideration of the patient's efforts to collect the funds to pay the provider, will accept the amount paid as full payment of the obligations . . ." 12 O.S. § 3009.1(A).

The caveat to this rule is if the medical provider has filed a lien in the case for an amount in excess of the amount paid. In that instance, the bills in excess of the amount paid, but not more than the amount of the lien, shall be admissible. *Id.*

If no payment has been made, "the Medicare reimbursement rates in effect when the personal injury occurred shall be admissible if, in addition to evidence of nonpayment, a signed statement acknowledged by the medical provider or an authorized representative that the provider, in consideration of the patient's efforts to collect the funds to pay the provider, will accept payment at the Medicare reimbursement rate less cost of recovery as provided in

Medicare regulations as full payment of the obligation is also admitted." *Id.* However, "if a medical provider has filed a lien in the case for an amount in excess of the Medicare rate, then bills in excess of the amount of the Medicare rate but not more than the amount of the lien shall be admissible." *Id.*

14. Describe any statutory caps in your State dealing with damage awards.

23 O.S. § 61.2 places a $350,000 cap on non-economic damages. The exception is where the tort-feasor's actions are found to be in reckless disregard of the rights of others, grossly negligent, fraudulent or intentional or with malice (the punitive damages standard). The statute does not apply to wrongful death or Governmental Tort Claims Act claims.

Finally, in September of 2017, the United States Court of Appeals for the Tenth Circuit has held that a defendant must assert Oklahoma's statutory cap on non-economic damages as an affirmative defense. *Racher v. Westlake Nursing Home Ltd. P'ship*, 871 F.3d 1152 (10th Cir. 2017). This issue has not been ruled upon by the Oklahoma Supreme Court.