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IDAHO

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?

Idaho does not recognize a self-critical analysis privilege *per se*. *See e.g.*, *Anstine v. Dbh Props.*, 2012 Ida. Dist. LEXIS 16. To protect internal reports, Idaho courts apply a work product privilege analysis consistent with Idaho Rule of Civil Procedure ("I.R.C.P.") 26(b). I.R.C.P. 26(b)(3)(A) protects "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, insurer, or agent)." The work product privilege will not shield a report that merely documents what happened, to whom, and when, what was said and by whom, and what was observed near the time of the incident. *Anstine*, 2012 Ida. Dist. LEXIS 16 at *14.

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?

Idaho does not have a statute or case law addressing the discovery of third party litigation funding. Therefore, the general scope of discovery rule would apply to answer this question:

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense, including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

I.R.C.P. 26(b)(1)(A).

Other courts that have addressed this issue articulate the following principles:

Courts across the country that have addressed the issue have held that litigation funding information is generally irrelevant to proving the claims and defenses in a case. . . Nonetheless, there is no bright-line prohibition on such discovery. Discovery into litigation funding is appropriate when there is a sufficient factual showing of "something untoward" occurring in the case; for example, discovery will be ordered where there is a sufficient showing that a non-party is making ultimate litigation or settlement decisions, the interests of plaintiffs or the class are sacrificed or not being protected, or conflicts of interest exist.

V5 Techs. v. Switch, Ltd., 334 F.R.D. 306, 311–12 (D. Nev. 2019), *aff'd sub nom. V5 Techs., LLC v. Switch, LTD.*, No. 2:17-CV-2349-KJD-NJK, 2020 WL 1042515 (D. Nev. Mar. 3, 2020). An Idaho court presented with this question would likely weigh

similar considerations in determining whether discovery was warranted in a specific case.

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

Generally, in a case pending in Idaho courts, the attorneys travel to the witness for a Rule 30(b)(6) deposition. The subpoena power of Idaho courts is generally limited to within Idaho. Logistically, it is easier for attorneys to travel and it puts less burden on witness. Since the COVID pandemic, most depositions have taken place via tele conference (e.g., Zoom) alleviating the need for anyone to travel.

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?**

Admitting a driver acted within the course and scope of employment invokes the traditional concepts of respondeat superior thereby exposing the employer to liability. However, if the employer admits a collision occurred within the course and scope of employment, a plaintiff cannot pursue independent negligence theories like of negligent entrustment and negligent hiring or training. Wise v. Fiberglass Sys., 110 Idaho 740, 743-44, 718 P.2d 1178 (1986). Following admission that the accident occurred with the course and scope of employment, the jury should only hear evidence of "the one contested issue – whether the collision was caused by [the employee's] negligence." Wise, 110 Idaho at 743.

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

The scope of research to answer this question was limited to jury verdicts (not settlements or bench trial judgments) exceeding $10,000,000.

Larson v. Hapco Farms, 00 Idaho Verd. Stlmnts. 3-1: Plaintiff, an Idaho potato grower, and Defendant, a New York produce broker, had cooperated in the establishment of a repacking facility in Atlanta for the purpose of repacking Idaho potatoes into bags at the facility. Plaintiff allegedly was informed by certain individuals at the facility that Defendant was having non-Idaho potatoes packed in bags carrying the Idaho Potato name. Plaintiff set up videotape surveillance to confirm the accusation, and the evidence was then taken to the Idaho Potato Commission. The Commission hired an accounting firm, Deloitte & Touche, to investigate. This firm concluded there had been mislabeling, but made no determination as to who was responsible. The Commission upon completion of its investigation fined Plaintiff $10,000 for not promptly reporting the violations, and fined Defendant $200,000 for its involvement. Defendant paid the fine and relinquished its license to use the Idaho Potato name, but did not admit guilt. Plaintiff and Defendant entered into a settlement agreement at this time that they would not publicize the events surrounding this investigation, and that they would not make disparaging remarks against each other. These events transpired during the summer of 1996. In the spring of 1997, Defendant filed a lawsuit against the Deloitte & Touche. A public relations agency was also hired, which contacted reporters with the Idaho Falls Post Register, The New York Times, and The Wall Street Journal. Allegations were made that Plaintiff and the Commission, along with the accounting firm, had conspired to fabricate evidence and point the finger of blame at Defendant. Plaintiff filed suit for defamation and breach of the settlement agreement. Defendant counter-sued under the same theories.

After a three-week federal trial in 2000, the jury returned a $11.2 million verdict in favor of Plaintiff. The jury found that Plaintiff had been defamed by statements made by Defendant, and that Defendant knew that the defamatory statements were false, or were made in reckless disregard of their truth or falsity. The jury also found that Defendant had breached the agreement to not publicize issues relating to the investigation, and to avoid disparaging remarks. On Defendant's counter-claim, the jury found that Plaintiff had not defamed Defendant, and had not breached the settlement agreement. The jury awarded General Presumed Damages

of $11.2 million in favor of Plaintiff.

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

Idaho does not, by statute, follow the collateral source rule. I.C. § 6-1606 ("In any action for personal injury or property damage, a judgment may be entered for the claimant only for damages which exceed amounts received by the claimant from collateral sources as compensation for the personal injury or property damage, whether from private, group or governmental sources, and whether contributory or noncontributory."). The statute expressly allows the tortfeasor to introduce evidence of "payment by collateral sources… after the finder of fact has rendered an award." I.C. § 6-1606. Consistent with the broad scope of I.R.C.P. 26, a party may seek discovery regarding medical payments billed and/or paid.

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)

Consistent with Section 6 above, parties may obtain evidence as to "Medicare write-offs" and what a health care provider accepted as payment vis-à-vis the amount billed. Though a write off is "technically not a collateral source it is the type of windfall that I.C. section 6-1606 was designed to prevent." *Eldridge v. West*, 166 Idaho 303, 314, 458 P.3d 172 (2020) (quotes removed). Thus, a party may conduct discovery regarding write-offs as a court must reduce a judgment to account for such write-offs. *See Eldridge*, 166 Idaho at 314.

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

Idaho applies the "most significant relation test" as set forth in the Restatement (Second) of Conflict of Laws § 145 in determining the applicable law. In a tort case the following considerations must be taken into account:

(a) the place where the injury occurred,

(b) the place where the conduct causing the injury occurred,

(c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and

(d) the place where the relationship, if any, between the parties is centered.

Seubert Excavators, Inc. v. Anderson Logging Co., 126 Idaho 648, 651, 889 P.2d 82, 85 (1995) (citing *Johnson v. Pischke*, 108 Idaho 397, 400, 700 P.2d 19, 22 (1985)). "Of these contacts, the most important in guiding this Court's past decisions in tort cases has been the place where the injury occurred." *Id.* (citing *Barringer v. State*, 111 Idaho 794, 727 P.2d 1222 (1986)).

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

Idaho does not recognize pre-suit depositions by private parties. I.R.C.P. 30 governs depositions. A civil proceeding and the civil rules only apply after the filing of a complaint, petition or application with the Court. I.R.C.P. 3(b).

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

Idaho law does not require a period of retention for vehicles or tractor-trailers involved in an accident. In the event of an accident, involved parties must remain on the scene of the accident "until [they have] fulfilled the requirements of law." I.C. § 49-1301(1); *see also* I.C. § 18-8007(1) (requirements of drivers involved in accidents to exchange information and render assistance to injured party). Both local and state police may conduct investigations and require the presence of the vehicle during the investigation. *See* I.C. § 49-1301(5).

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

While Idaho law does not permit a litigant to initially make a claim for punitive damages, upon pre-trial motion, and following a hearing, a litigant may be granted leave to amend the pleadings to include a prayer for punitive damages. I.C. § 6-1604. That statute requires the plaintiff to establish "a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages." *Pierce v. McMullen*, 328 P.2d 445 (Idaho 2014). The decision whether to allow a plaintiff to amend a complaint to allege punitive damages rests in the sound discretion of the trial court. *Vendelin v. Costco Wholesale Corp*., 95 P.3d 34 (Idaho 2004).

Whether to allow a claim of punitive damages is a substantive question controlled by Idaho law. *See Windsor v. Guarantee Trust Life Ins. Co*., 684 F. Supp. 630, 633 (D. Idaho 1988). Ultimately, an award of punitive damages requires a bad act and a bad state of mind. *See Todd v. Sullivan Const. LLC*, 191 P.3d 196, 201 (Idaho 2008). The defendant must (1) act in a manner that was an extreme deviation from reasonable standards of conduct with an understanding of – or disregard for – the likely consequences, and must (2) act with an extremely harmful state of mind, described variously as with malice, oppression, fraud, or outrageousness. *See Myers v. Workmen's Auto Ins. Co.*, 95 P.3d 977, 983 (Idaho 2004); *see also* I.C. § 6-1604.

Since plaintiffs are only required to demonstrate a "reasonable likelihood" of establishing their entitlement to punitive damages, on motions to amend to assert a claim for punitive damages under Idaho Code § 6-1604(2), courts apply the same standard they would apply in resolving an FRCP 50 motion at the close of plaintiffs' case. *See Bryant v. Colonial Sur. Co*., 2016 WL 707339, *3 (D. Idaho 2016). That is, evidence is viewed in the light most favorable to plaintiffs, with the benefit of all legitimate inferences without assessing credibility. *See id.* (citing *E.E.O.C. v. Go Daddy Software, Inc.*, 581 F.3d 951, 961 (9th Cir. 2009)).

A principal is liable for punitive damages based on the acts of its agent only in circumstances in which the principal participated, or in which the principal authorized or ratified the agent's conduct. *Openshaw v. Oregon Auto. Ins. Co*., 94 Idaho 335, 487 P.2d 929 (1971); *Boise Dodge, Inc. v. Clark*, 92 Idaho 902, 453 P.2d 551 (1969); *Curtis v. Siebrand Bros. Circus & Carnival Co.*, 68 Idaho 285, 194 P.2d 281 (1948).

Punitive damages are capped at "the greater of two hundred fifty thousand dollars ($250,000) or an amount which is three (3) times the compensatory damages contained in such judgment." I.C. § 6-1604(3).

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

Idaho has not mandated Zoom 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?

T3 Enterprises, Inc. et al. v. Safeguard Business Systems, Inc. et al., 17 Id. Verd. Stlmnt. Rpts. 83: Business/franchise dispute. Ada County jury returned a $6,034,056 verdict in favor of Plaintiff, finding that Defendant violated Plaintiff's franchise rights and tried to cover up its inappropriate conduct. The verdict included $4,400,000 in punitive damages, which was based on conduct by Defendant's corporate counsel, who concealed from Plaintiffs that the company-owned distributors were selling to the distributors' protected customers.

Ferdinand v. TIG Ins. Co. et al., 03 Idaho Verd. Stlmnts. 2-4: Insurance bad faith case (refusal to pay UIM claim). Ada County jury returned $250,000 verdict in favor of Plaintiff. After second phase of trial (re: evidence of Defendants' financial condition and additional closing arguments), jury returned $8.5 million in punitive damages.

(Presumably, in both these cases, the punitive damages awarded were reduced to $250,000. *See* I.C. § 6-1604 ("If a case is tried to a jury, the jury shall not be informed of [the cap on punitive damages].")).