FOR MORE INFORMATION

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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?

Iowa state courts apply the self-critical analysis privilege solely in the context of hospital or medical peer review panels. Iowa Code § 147.135. Iowa state courts have declined to expand the self-critical analysis privilege from the limited context of hospital or medical peer review panels. In *Wells Dairy, Inc. v. Am. Indust. Refrigeration, Inc.*, an explosion occurred at a factory, and the factory owner retained outside experts to investigate the cause of the explosion and recommendations for actions that would help avoid similar occurrences in the future. 690 N.W.2d 38, 40-41 (Iowa 2004). During subsequent litigation, opposing counsel requested the retained experts' report. *Id.* at 41. The Iowa Supreme Court held that the self-critical analysis privilege did not apply. Deciding this case in 2004, the Court reasoned that the self-critical analysis privilege was "relatively new," had "not gained much support from the federal courts," and had not yet been recognized by the Iowa Legislature. *Id.* at 49-50.

Similarly, Iowa federal courts have not explicitly recognized the self-critical analysis privilege. Iowa federal courts have noted that "[t]he self-critical analysis privilege has had an ambiguous existence, neither uniformly adopted nor rejected." *Holland v. Muscatine Gen. Hosp.*, 971 F. Supp. 385, 390 (S.D. Iowa 1997). As the Eighth Circuit explains, "courts have appeared reluctant to enforce even a qualified 'self-evaluation' privilege. They typically concede its possible application in some situations, but then proceed to find a reason why the documents in question do not fall within its scope." *In re Burlington N. Inc.*, 679 F.2d 762, 765 fn. 4 (8th Cir. 1982). In *LeClere v. Mutual Trust Life Ins. Co.*, the Northern District of Iowa declined to apply the self-critical analysis privilege. Deciding the case in 2000, the court explained that the Eighth Circuit had not recognized a self-critical analysis privilege, and the court stated that it did "not believe that the Eighth Circuit Court of Appeals will ultimately recognize such a privilege." No. C99-0061, 2000 WL 34027973 at *3 (N.D. Iowa June 14, 2000).

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?

There is no rule either explicitly permitting or prohibiting third-party litigation funding in Iowa. In 2013, the Iowa legislature proposed a bill that would have regulated at least some types of litigation funding. *See* H. Study B. 218, 85th Gen. Assemb., Reg. Sess. (Iowa 2013). However, the bill did not receive committee approval and, as a result, did not move to the floor for full debate. Based on the foregoing, Iowa is silent as to discovery of third-party litigation funding files.

In the federal context, Iowa federal courts require all parties to file Disclosure Statements at the outset of the case. *See* N.D. Iowa L.R. 7.1 (2021); S.D. Iowa L.R.

7.1 (2021). These Disclosure Statements require parties to disclose (1) "the names of all associations, firms, partnerships, corporations, and other artificial entities that either are related to the [party] as a parent, subsidiary, or otherwise, or have a direct or indirect pecuniary interest in the [party's] outcome in the case," and (2) "with respect to each such entity, a description of its connection to or interest in the litigation." *Id.* This requirement would arguably include the disclosure of third-party entities who fund a party's litigation. Therefore, discovery of the "identity" of third parties who fund litigation, and their "connection" to the case, is arguably mandated in Iowa federal courts. The extent to which parties may discover *additional* information regarding third-party litigation funding is not clear.

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

Iowa's state-law equivalent of a 30(b)(6) corporate representative deposition is Iowa Rule of Civil Procedure 1.707(5), which allows the party noticing the deposition to "name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested." In Iowa state court, depositions may only be taken in the state or within 100 miles from the nearest Iowa point unless the Court orders otherwise upon proper motion. Iowa R. Civ. Pro. 1.701(5). When a "deponent is a party or the officer, partner or managing agent of a party which is not a natural person, the deponent shall be required to submit to examination in the county where the action is pending." Iowa R. Civ. Pro. 1.701.

In federal court, Iowa's local rules do not speak to the location for 30(b)(6) depositions. The noticing party chooses the deposition location, but if the noticed location is unreasonable, inconvenient, or otherwise burdensome, the deponent may ask the court to grant a protective order under Rule 26(c)(2). *See e.g., New Medium Technologies LLC v. Barco N.V.*, 242 F.R.D. 460, 465 (N.D. Ill. 2007). The "general rule" is that "the deposition of a non-resident defendant should be conducted at the defendant's place of residence." *Id.* (citation and quotation marks omitted). Therefore, if a plaintiff's deposition notice purports to require a non-resident defendant to travel to Iowa, "this general rule places the burden on [the plaintiff] to justify taking the deposition in [Iowa]." *Id.* "When the parties are unable to agree, courts have broad discretion in selecting the place for a deposition." *Catipovic v. Turley*, No. C11-3074, 2013 WL 1718061 at *9 (N.D. Iowa Apr. 19, 2013). Iowa federal courts will consider a number of factors when deciding whether the deposition of a non-resident defendant should be taken in Iowa or at the defendant's location, including the burden on the parties and their counsel, and whether there are any legal procedures in the defendant's jurisdiction that may impede the deposition. *Id.*

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?

Benefits. The strategic benefit of admitting a driver was driving in the course of employment is to establish, early in the case, a unified, cooperative defense between the employer and the driver. An employer's and attorney's relationship with a driver may be irreparably harmed if the driver views the employer and attorney as "abandoning" the driver, particularly if the driver's conduct was in the "gray area" between operating within or outside the scope of employment.

Detriments. The detriment to admitting a driver was in the "course and scope" of employment for direct negligence claims is that, by doing so, Iowa's doctrine of *respondeat superior* will make the employer "liable for the negligence of an employee committed while the employee is acting in the scope of his employment." *Jones v. Blair*, 387 N.W.2d 349, 355 (Iowa 1986). An employee's actions are within the course and scope of employment "when the employer has the right to direct the means and manner of doing work, and has the right of control over the employee." *Id*. Stated another way: "A claim of vicarious liability under the doctrine

of *respondeat superior* rests on two elements: proof of an employer/employee relationship, and proof that the injury occurred within the scope of that employment." *Biddle v. Sartori Mem'l Hosp.*, 518 N.W.2d 795, 797 (Iowa 1994).

Admitting that a driver was in the "course of scope" of employment also creates the potential for accompanying claims of negligent hiring, retention, supervision or training. In order to successfully prove these theories, a claimant must establish:

1. [T]hat the employer knew, or in the exercise of ordinary care should have known, of its employee's unfitness at the time of [hiring/retention/engaging in wrongful or tortious conduct/training];

2. that through the negligent [hiring/retention/supervision/training] of the employee, the employee's incompetence, unfitness, or dangerous characteristics proximately caused the resulting injuries;

3. and that there is some employment or agency relationship between the tortfeasor and the defendant employer.

The Iowa Supreme Court has held that punitive damages may be recovered against an employer who recklessly hires or retains an employee. *See Briner v. Hyslop*, 337 N.W.2d 858, 867 (Iowa 1983).

Additionally, there are certain nuances to the defense of an employer and employee that must be considered even after admitting a driver was in the "course and scope" of employment. For example, "a defense personal to the agent, such as immunity, will not ordinarily extend to bar a claim against the principal for the agent's negligence unless the rationale for the immunity also applies to the principal." *Hook v. Trevino*, 839 N.W.2d 434, 441 (Iowa 2013).

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

Due to the COVID-19 pandemic, civil jury trials in Iowa were put on hold for most of 2020. Likely for this reason, this firm is not aware of any "nuclear" verdicts in Iowa in the past year.

In 2019, the most noteworthy verdict was a medical malpractice case in Polk County for $12,500,000. Medical malpractice cases have, in recent years, accounted for the largest verdicts in Iowa.

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

Iowa allows plaintiffs to recover expenses for "necessary" medical care. Iowa Code § 668.14.

If medical care is found to be "necessary," a plaintiff may still only recover those medical expenses that are "reasonable." *Pexa v. Auto Owners Ins. Co.*, 686 N.W.2d 150, 156 (Iowa 2004).

"[T]he plaintiff has the burden to prove the reasonable value of the services rendered. The reasonable value of medical services can be shown by evidence of the amount paid for such services or through the testimony of a qualified expert witness." *Id.*

In June 2020, Iowa passed a law that further addressed the evidence available to prove a plaintiff's recoverable medical expenses. *See* S.F. 2338 (2020). Effective July 1, 2020, the following provisions became law:

Iowa Code § 622.4 Medical expenses: Evidence offered to prove past medical expenses *shall be limited to evidence of the amounts actually paid to satisfy the bills that have been satisfied, regardless of the source of payment, and evidence of the amounts actually necessary to satisfy the bills that have been incurred but not yet satisfied.* Evidence of the amounts actually necessary to satisfy the bills that have been incurred shall not exceed the amount by which the bills could be satisfied by the claimant's health insurance, regardless of

whether such health insurance is used or will be used to satisfy the bills. This section does not impose upon any party an affirmative duty to seek a reduction in billed charges to which the party is not contractually entitled.

Iowa Code § 668.14A(1) Recoverable damages for medical expenses: In an action brought to recover damages for personal injury, the damages that may be recovered by a claimant for the reasonable and necessary cost or value of medical care rendered shall not exceed the sum of the amounts actually paid by or on behalf of the injured person to the health care providers who rendered treatment and any amounts actually necessary to satisfy the medical care charges that have been incurred but not yet satisfied.

(emphasis added). Under this statute, amounts billed may be discoverable, but plaintiffs may only recover the amounts actually paid. *See 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)

As discussed in Section VI, Iowa allows plaintiffs to recover expenses for "necessary" medical care, but only to the extent the medical expenses are "reasonable." Iowa Code 668.14; *Pexa*, 686 N.W.2d at 156. This item of damage is now capped at the amounts actually paid pursuant to Iowa's recent statute addressing this issue; however, this does not preclude defendants from arguing that an amount actually paid was not "reasonable."

Iowa case law requires defendants who wish to dispute the reasonableness of a paid medical charge to do so through expert testimony. *See Pexa*, 686 N.W.2d at 156 ("The reasonable value of medical services can be shown by evidence of the amount paid for such services *or through the testimony of a qualified expert witness*") (emphasis added). Based on this requirement, this author's strategy in situations where amounts paid are suspected to be "unreasonable" is to retain a local or regional expert with sufficient experience in the relevant medical billing field in that region to allow him or her to opine on the unreasonableness of the paid medical expenses at issue. This author is not aware of successful efforts to subpoena contracts between insurers and healthcare providers simply for the purpose of disputing the reasonableness of paid medical expenses in a personal injury action, and this would not seem to be a cost-effective approach in Iowa except for perhaps when addressing the most egregiously-unreasonable medical bills.

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

If the employee is injured in Iowa, Iowa likely has jurisdiction over a worker's compensation claim. For nonresident employers, if their "services are performed within [Iowa] by any employee" they are considered to be doing business in the state. Iowa Code § 85.3 (2021). This means the employer and employee are "subject to the jurisdiction of the workers' compensation commissioner" if "any and all personal injuries sustained by an employee aris[e] out of and in the course of employment." *Id.*

If the employee is injured *outside* the state, there are several scenarios where Iowa may still exercise jurisdiction over a worker's compensation claim. For a discussion of those scenarios, see Iowa Code section 85.71 (2021).

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

Iowa permits pre-suit depositions only for the limited purpose of perpetuating testimony, and only when the testimony will be used in an action "cognizable in some court of record in Iowa, but which cannot currently be brought." Iowa R. Civ. Pro. 1.722; *see also* Iowa R. Civ. Pro. 1.725. An application to perpetuate pre-suit testimony must be brought in the court where the prospective action may be filed. *Id.* Rule 1.722 can be used to "establish evidence by persons of advanced age who are familiar with the facts" and in circumstances

where, "unless their testimony is perpetuated[,] it will soon be impossible to prove such facts." *See City of Emmetsburg v. Cent. Iowa Tel. Co.*, 96 N.W.2d 445, 449 (Iowa 1959). An application under Rule 1.722 is "an ancillary or auxiliary proceeding to prevent a failure or delay of justice by preserving and registering testimony which would otherwise be lost before the matter to which it relates could be made ripe for judicial determination." Official Comment to Rule 1.722.

Courts have been reluctant to allow pre-suit depositions where the requirements of Rule 1.722 have not been strictly met. In a recent decision, the Iowa Court of Appeals found that a district court exceeded its authority by allowing a potential party to take testimony under Rule 1.722 when "the application filed . . . did not meet the requirements of the rules." *Van Hamm v. Keokuk Cty.*, No. 17-0310 2017 WL 4844309 at *3 (Iowa Ct. App. Oct. 25, 2017).

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

The question as to the length of time equipment must be preserved following an accident implicates the often-discussed "spoliation" doctrine. Iowa's spoliation doctrine applies only to sanction "the *intentional* destruction of evidence." *Hendricks v. Great Plains Supply Co.*, 609 N.W.2d 486, 491 (Iowa 2000) (emphasis added). When a vehicle is involved in an accident, it should be preserved as much as possible while still allowing for the vehicle to be moved from the accident scene so as to avoid further traffic dangers. For example, if a tanker is blocking a heavily-travelled interstate, spoliation concerns must give way to the need to move the tanker from the interstate to ensure the traveling public's safety. However, once the roadway is safely clear, and if it appears litigation may result from the accident, a qualified expert should be retained to obtain and preserve available electronic data from the vehicle.

The more difficult question is: how *long* must the vehicle be preserved/kept on "legal hold?" Transportation professionals cannot engage in their livelihood without their vehicles, and a company cannot be expected to indefinitely retire every vehicle involved in an automobile accident. The Iowa Supreme Court provided guidance on this issue in *Hendricks* when it held that a homeowner's insurance company did not engage in spoliation when it demolished the scene of a house fire approximately six months after the fire. *Id.* The following factors were relevant to the Court's determination that the insurance company did not engage in spoliation:

1. Most importantly for present purposes was the Court's statement that the insurance company "*was not required to preserve the fire scene indefinitely*," and six months was held to be sufficient time for the other parties to "conduct[] an additional investigation had they sought to do so." *Id.* (emphasis added). The Court hinted, without explicitly holding, that the standard courts will apply to determining whether evidence has been preserved for an appropriate length of time is whether parties were given a "reasonable opportunity" to inspect/obtain available evidence. *See id.*

2. The Court also noted that the insurance company had extensively documented the fire scene with photographs and had preserved certain key pieces of evidence, such as pipes, wires, and insulation, and that this evidence remained available to the other parties. *Id.*

Pursuant to the guidance from the Iowa Supreme Court in *Hendricks*, this author's general practice, upon notification of a significant accident with litigation potential, is to immediately retain an expert in trucking data extraction. This expert is then instructed to obtain and preserve all available electronic data from the truck and to photograph the equipment in as much detail as possible. Then, as soon as the other vehicles to the accident are identified, this author will provide written notice to the owners of those vehicles instructing them that if they or their agents intend to inspect our equipment, they will need to notify us of that intention

by a particular deadline (with that deadline calculated to safely fall under the definition of a "reasonable opportunity to inspect" based on the specific facts of each case). If that deadline passes with no indication that the other parties involved in the accident intend to inspect our equipment, we have by that point complied with the requirement to preserve available evidence and provide "reasonable opportunity" for other individuals to conduct their own inspections, and we can safely release the equipment for repairs and/or its regular commercial use

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

In Iowa, punitive damages are "awarded as punishment and as a deterrent to the wrongdoer and others." *Brokaw v. Winfield-Mt. Union Comm. School Dist.*, 788 N.W.2d 386, 395 (Iowa 2010). To recover punitive damages, the plaintiff must show "by a preponderance of clear, convincing, and satisfactory evidence, the conduct of the defendant from which the claim arose constituted willful and wanton disregard for the rights or safety of another." Iowa Code § 668A.1(a)-(b).

To receive an award of punitive damages, "a defendant's conduct must be more egregious than mere negligence." *Kinseth v. Weil-McLain*, 913 N.W.2d 55, 79 (Iowa 2018). The Iowa Supreme Court has "stated that in the context of section 668A.1, 'willful and wanton' means the actor has intentionally done an act of unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences." *Brokaw*, 788 N.W.2d at 396. A plaintiff is required to prove the wanton and willful conduct of the defendant by a preponderance of "clear, convincing, and satisfactory evidence." Iowa Code § 668A.1(a).

There is currently no cap on punitive damages in Iowa. However, the percentage of the punitive damage award that a plaintiff may personally recover depends on "[w]hether the conduct of the defendant was directed specifically at the claimant, or at the person from which the claimant's claim is derived." Iowa Code § 668A.1(1)(b). If the defendant's conduct is directed specifically at the claimant, the full amount of punitive damages awarded will be given directly to the claimant. *See* Iowa Code § 668A.1(2)(a). However, if not, no more than 25% of the awarded punitive damages will be given to the claimant, "with the remainder of the award to be ordered paid into a civil reparations trust fund administered by the state court administrator." Iowa Code § 668A.1(2)(b). Although this statute is not "cap" per se, it can be a useful negotiating tool when explaining to a plaintiff that their excitement over a potential punitive damages recovery should be tempered by the risk that the majority of any punitive damage award could go to the State of Iowa's civil reparations trust fund rather than to the plaintiff.

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

There is currently no state-wide mandate on Zoom trials. In some Iowa counties, effective February 1, 2021, videoconference trials have been mandated in all non-jury civil matters and a party must specifically object to the videoconference trial if they wish to appear in person.

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 the COVID-19 pandemic, civil jury trials in Iowa were put on hold for most of 2020. Likely for this reason, this firm is not aware of any noteworthy verdicts in Iowa premised on punitive damages in the past year.

In 2018, a Polk County jury awarded over $4,000,000 for a broken leg in a low speed car accident. There were punitive damages awarded because the defendant driver, who was also a law student, had been drinking prior to the accident.