FOR MORE INFORMATION

STOLL KEENON OGDEN PLLC
Lexington, Kentucky
www.skofirm.com

Palmer Gene Vance II
gene.vance@skofirm.com

HARLIN PARKER
Bowling Green, Kentucky
www.harlinparker.com

Marc A. Lovell
lovell@harlinparker.com

Justin L. Duncan
duncan@harlinparker.com

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KENTUCKY

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?

The self-critical analysis privilege is not available under Kentucky law. *University of Kentucky v. Courier-Journal & Louisville Times Co*., 830 S.W.2d 373, 378 (Ky. 1992) ("The University asks the Court to adopt a 'self-critical analysis' privilege which would exempt from disclosure self-evaluative documents. We refuse to judicially adopt such a 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?

No Kentucky appellate courts have directly touched on this issue; however, discovery of the files would likely be subject to Kentucky Rule of Civil Procedure 26.02(1), which limits discovery to "any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party."

Although applying the federal counterpart to Kentucky Rule of Civil Procedure 26.02(1), the United States District Court for the Western District of Kentucky in *Harper v. Everso*n, No. 3:15-CV-00575-JHM, 2016 U.S. Dist. LEXIS 197894, 2016 WL 8201785, at **17-18 (W.D. Ky. June 27, 2016) held that information regarding the third-party funding of the plaintiff's litigation was not relevant to the ERISA-related issues to be resolved at an upcoming preliminary injunction hearing.

As an aside, neither the Kentucky Court of Appeals nor the Supreme Court of Kentucky has addressed whether third-party litigation funding agreements violate Kentucky's champerty statute, which voids any contract or agreement to provide funding for another party's case in exchange for a share of the proceeds. Ky. Rev. Stat. § 372.060; *see Boling v. Prospect Funding Holdings, LLC,* 771 Fed. Appx. 562, 576 (6th Cir. 2019). However, in *Boling*, the Sixth Court predicted that the Supreme Court of Kentucky would hold that such agreements would violate Kentucky's champerty statute and are inconsistent with Kentucky's public policy. 771 Fed. Appx. at 582

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

Federal district courts sitting in Kentucky have developed a general tenet that Federal Rule of Civil Procedure 30(b)(6) depositions should be taken at the corporation's principal place of business. *See Schall v. Suzuki Motor of Am., Inc.,* No. 4:14CV-00074-JHM, 2017 U.S. Dist. LEXIS 192487, 2017 WL 5622498, at *11 (W.D. Ky. Nov. 21, 2017). The general tenet recognizes that the plaintiff voluntarily chose the forum, in contrast to the corporate defendant who is an involuntary participant

in the litigation. *Davis v. Hartford Life & Accident Ins. Co*., No. 3:14-CV-00507-TBR, 2016 U.S. Dist. LEXIS 90576, 2016 WL 3843478, at *3 (W.D. Ky. July 13, 2016). For this reason, the general tenet creates a presumption that there is "good cause" for a protective order, under Fed. R. Civ. P. 26(c)(1)(B), when a Rule 30(b)(6) deposition is noticed for a location other than the defendant's principal place of business. *Schall*, 2017 U.S. Dist. LEXIS at * 11. However, district courts in Kentucky recognize that this presumption of "good cause" can be rebutted by demonstrating "special circumstances." *See, e.g., id*.

Kentucky's counterpart to Rule 30(b)(6) of the Federal Rules of Civil Procedure, Kentucky Rule of Civil Procedure 30.02(6), does not provide any guidance as to the appropriate location for corporate representative depositions. Although Kentucky's appellate courts have not specifically addressed this issue, we predict a Kentucky court would adopt the rule and rationale articulated in the Federal cases cited above.

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?

Unlike most jurisdictions, in Kentucky, a company's admission of vicarious liability will not have the effect of preventing admission of unfavorable facts supporting direct claims against the trucking company, such as negligent entrustment, hiring, retention, supervision, or training. *MV Transp. Inc. v. Allgeier,* 433 S.W.3d 324, 337 (Ky. 2014). That is because the Kentucky Supreme Court has held that direct negligence claims are separate and distinct from claims of vicarious liability. *Id.* ("[A] plaintiff may assert and pursue in the same action a claim against an employer based under respondeat superior upon the agent's negligence, and a separate claim based upon the employer's own direct negligence in hiring, retention, supervision, or training.") In *Allgeier*, the court explained that "[t]he employer's admission to the existence of an agency relationship from which vicarious liability may arise does not supplant the claim that the employer's own negligence, independent of the negligence of the employee, may have caused or contributed to the injury." *Id.*

There are, however, some benefits of admitting vicarious liability. First, failing to admit vicarious liability could create a conflict between the driver and trucking company, requiring separate counsel for each due to their diverging interests.

Second, in cases where the plaintiff has not asserted any direct claims against the trucking company, the admission of vicarious liability eliminates the need for plaintiff to establish that the driver was acting within the course and scope of his employment at the time of the accident. Although the trucking company remains a party and is identified at trial, reducing the trucking company's involvement could place more attention on the driver and less on the trucking

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

Espino v. McCargo Fayette County, 15-CI-00009 ($97,796,617)

A member of the Guam National Guard, who was in Kentucky for training, was struck by an intoxicated driver as he stood in front of a bar. The collision left the guardsman with serious injuries including an amputated leg. The jury returned a verdict of $97,796,617, which included $62,000,000 in punitive damages.

Garmon v. Atlas Trucking, et al., Anderson County, 12-CI-00395 ($32,144,971)

An intoxicated (marijuana and pain medicines) dump truck driver lost control and crossed the centerline, striking the decedent head-on. The decedent was pinned in her car for seventy (70) minutes and died several days later. The plaintiff estate brought suit, seeking compensatory damages for the decedent's widower and two minor children, as well an imposition of punitive damages. The jury awarded $5,000,000 for the decedent's pain and suffering, $15,000,000 for the consortium interests of the widower and two children,

and $10,000,000 in punitive damages.

Henney v. Henderson, et al., Bourbon County, 09-CI-0325 ($8,802,329)

An overloaded dump truck ran a red light and crashed into the plaintiff's sedan. The plaintiff was gravely injured – his aorta was transected and there was proof he survived the collision and suffered for nearly a minute. A jury valued his pain and suffering at $3,000,000 and awarded his wife $4,800,000 for her consortium interest. The jury awarded an additional $1,000,000 to the estate, including $10,000 in punitive damages.

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

Kentucky has adopted the collateral source rule. *See Baptist Healthcare Systems v. Miller*, 177 S.W.3d 676 (Ky. 2005). Thus, at least in the personal injury context, total bills are admissible regardless of amount paid. *Id.* Amounts billed are therefore discoverable as they are directly relevant to calculating plaintiff's damages, including past and future medical expenses.

The relevance of amounts paid is not so evident and will depend on the nature of the claims and defenses asserted in the action. For example, while amounts paid may not be relevant in a traditional personal injury action, such information could be relevant to establishing a party's interest in a subrogation matter.

It is important to note that Kentucky's collateral source rule speaks to admissibility, not discoverability. *Id.* Thus, just because the amounts paid are not admissible at trial does not necessarily mean that the information is not relevant or that it could not lead to other information that could bear on the issues in the case. *See* Order, *Chrispen v. USA,* Case No. 7:16-cv-00132-ART-EBA (E.D. Ky. Jan. 25, 2017) (ruling that information regarding the amount paid to plaintiff to her for insurance or disability payments was relevant even through the collateral source rule would likely bar the admission of the information at trial). Accordingly, whether amounts paid are discoverable in a particular action will depend on the nature of the suit.

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)

While a party may be entitled to obtain in discovery amounts actually charged and accepted by a healthcare provider for procedures outside of a personal injury, the admissibility of this information will again depend on the nature of the lawsuit. As referenced above, Kentucky's collateral source rule precludes admission of this evidence for the purpose of offsetting or reducing the plaintiff's claimed damages. In *Miller*, the court noted "it is absurd to suggest that the tortfeasor should receive a benefit from a contractual arrangement between Medicare and the health care provider. Simply because Medicare contracted with [the plaintiff's] physician to provide care at a rate below usual fees does not relieve a tortfeasor from negligence or the duty to pay the reasonable value of [the plaintiff's] medical expenses." 177 S.W.3d at 683-84.

However, this information may be discoverable and admissible in other types of actions, including a dispute with the provider or lienholder over the reasonableness of the charges.

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 Kentucky while in the course and scope of his employment, and his employer has workers' compensation coverage in place, the Kentucky Workers' Compensation Act limits the liability of the employer to workers' compensation benefits. KRS 342.690. If an employee is injured by a third-party, the employee can either claim workers' compensation benefits or proceed at law by civil action against the third-

party to recover damages, but he cannot collect from both. KRS 342.700(1).

With regard to jurisdiction to civil actions, Kentucky courts take several factors into consideration, which vary case to case, including but not limited to, the amount in controversy, where the injury occurred, where the resident and/or non-resident defendants reside, and the non-resident defendant's contacts with Kentucky.

Pursuant to KRS 452.460(1), an action for an injury to a person or property of a plaintiff against a defendant residing in this state, must be brought in the county in which the defendant resides, or in which the injury is done. Pursuant to KRS 452.450, an action against a corporation which has an office or place of business in Kentucky, or a chief officer or agent residing in this state, must be brought in the county in which such office or place of business is situated or in which such officer or agent resides. KRS 452.450. If the suit against a corporation is based upon a contract, suit must be brought in one of the aforementioned counties, or in the county in which the contract was made or to be performed. Id. If the suit against the corporation is for a tort, suit must be brought in one the aforementioned counties, or the county in which the tort is committed. Id. Kentucky District Courts have exclusive jurisdiction in civil cases in which the amount in controversy does not exceed $5,000.00 (except for cases involving real property were jurisdiction is exclusively vested in the Circuit Court). KRS 24A.120. Kentucky Circuit Courts have jurisdiction of all civil cases in which the amount in controversy exceeds $5,000.00, and over issues not exclusively vested in some other court. KRS 23A.010.

Kentucky's "long-arm statute," KRS 454.210, governs the exercise of personal jurisdiction over non-resident individuals and entities. The long arm statute sets forth a laundry list of acts/omissions that would avail non-resident individuals and entities to the jurisdiction of Kentucky courts, including but not limited to the following: transacting business in Kentucky; contracting to supply services or goods in Kentucky; causing tortious injury by an act or omission in Kentucky; contracting to insure any person, property or risk located in Kentucky, having an interest in real property in Kentucky, causing injury in Kentucky by an act or omission, or by breach of a warranty, outside of Kentucky, if revenue is derived from the conduct and/or the defendant is engaging in a consistent course of conduct.

Additionally, due process requires the non-resident defendant to have minimum contacts with Kentucky such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). By requiring that individuals have "fair warning that a particular activity may subject them to the jurisdiction of a foreign sovereign," the Due Process Clause "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." Hinner v. Robey, 336 S.W.3d 891 (Ky. 2011).

When a Kentucky court seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, this "fair warning" requirement is satisfied if the defendant has "purposefully directed" his activities at residents of Kentucky, and the litigation results from alleged injuries that "arise out of or related to" those activities. Id. Further, it is well-settled principle that exercising personal jurisdiction does not turn on whether the defendant at any point physically entered Kentucky. Id

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

Pre-suit depositions are not expressly prohibited so long as the deponent agrees to participate. In the event the prospective deponent is not agreeable, a pre-suit deposition may be ordered by courts to perpetuate the testimony of a witness. CR 27.01. Pursuant to CR 27.01, the party wishing to take a pre-suit deposition must file a verified petition with the court showing that there is substantial reason to support an expectation that there will be an action, which has not yet been brought or caused to be brought; the subject matter of his interest in the matter; the identity of the person to be deposed; and the identity of expected adverse parties.

CR 27.01(1).

Assuming notice requirements under CR 27.01(2) are met with regard to the verified petition, and "the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken…" and the "depositions may then be taken in accordance with the Kentucky Rules of Civil Procedure governing depositions. CR 27.01(3). Further, the deposition testimony is admissible as evidence in Kentucky state and federal courts. CR 27.01(4).

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

No. However, the preservation of vehicles/tractor-trailers is a common request from opposing attorneys. Kentucky recognizes a general requirement to preserve evidence when litigation is pending or it is reasonable to assume an adverse party will seek discovery of the evidence. Tinsley v. Jackson, 771 S.W.2d 331 (Ky. 1989); Sandborn v. Commonwealth, 754 S.W.2d 534 (Ky. 1988). This would include vehicles/tractor-trailers. Except in cases of mere negligence or loss by accident, a party's non-production of relevant evidence can give rise to a missing evidence jury instruction that permits, but does not compel, the jury to draw a negative inference from the non-production if it finds the non-production to have occurred intentionally or in bad faith. *See, e.g.,* Johnson v. Commonwealth, 892 S.W.2d 559. Whether to provide the instruction is soundly within the trial court's discretion. University Medical Center, Inc. v. Beglin, 375 S.W.3d at 789-91 (Ky. 2011). Although the facts and circumstances vary from case to case, having the vehicle/tractor-trailer readily available can protect a company and its fleet, and can assist in the defense of the company and its driver in the event of litigation. Thus, a vehicle/tractor-trailer should be held so long as the threat of litigation from the accident is present. However, each company must weigh the risks and balance the possibility of spoliation with the economics of returning the equipment to service.

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

In order to justify a punitive damages award, there must first be a finding of failure to exercise reasonable care, and then a plaintiff must prove by clear and convincing evidence that this negligence was accompanied by wanton or reckless disregard for the lives, safety, or property of others." Nissan Motor Company, Ltd. v. Maddox, 486 S.W.3d 838 (Ky. 2015) *quoting* Gibson v. Fuel Transport, Inc., 410 S.W.3d 56, 59 (Ky. 2013). See also Phelps v. Louisville Water Co., 103 S.W.3d 46, 52 (Ky. 2003) (defining gross negligence as "a wanton or reckless disregard for the lives, safety or property of others.").

In 1988, the Kentucky legislature attempted to codify the punitive damages standard into Kentucky Revised Statute §411.184, which provided that a plaintiff shall recover punitive damages only upon proving, by clear and convincing evidence, that the defendant from whom such damages are sought, acted toward the plaintiff with oppression, fraud, or malice. KRS §411.184(2). The constitutionality of the definition of "malice," however, was challenged in Williams v. Wilson, 972 S.W.2d 260, 269 (Ky. 1998), and the following section was deleted: "Malice means either conduct which is specifically intended by the defendant to cause tangible or intangible injury to the plaintiff or conduct that is carried out by the defendant both with a flagrant indifference to the rights of the plaintiff and with a subjective awareness that such conduct will result in human death or bodily harm." KRS 411.184(1)(c).

In applying the gross negligence standard to motor vehicle accidents, Kentucky courts have traditionally required more than simply evidence of poor judgment. In all cases of driver error, intoxication has been a factor. See, e.g., Kinney v. Butcher, 131 S.W.3d 357 (Ky. App. 2004), Stewart v. Estate of Cooper, 102 S.W.3d 913 (Ky. 2003), and Shortridge v. Rice, 929 S.W.2d 194 (Ky. App. 1996). In Horn v. Hancock, 700 S.W.2d 419 (Ky. App. 1985), a simple violation of transportation regulations by a truck driver was found to be insufficient

to justify punitive damages. Id. at 421.

There are no limits or caps on how much may be awarded as punitive damages other than constitutional limitations that may apply under decisions of the United States Supreme Court.

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

Kentucky has not mandated Zoom trials. In response to the COVID-19 pandemic, the Kentucky Supreme Court has issued statewide Administrative Orders, the latest of which postpones all civil jury trials through April 1, 2021. It is anticipated that the Administrative Order postponing jury trials will be extended beyond April 1, 2021. Nonetheless, some courts may utilize Zoom technology to conduct bench trials in less complex cases should the parties be agreeable to same.

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?

The vast majority of Kentucky cases in which punitive damages have been awarded are not related to commercial transportation. However, below are summaries of notable cases in which punitive damages have been awarded in both transportation and other cases.

Estate of Congleton, et al. v. Steel Tech., Inc., Gallatin County, 02-CI-172

On August 6, 2003, a Gallatin County Circuit Court jury returned a significant verdict in a case involving a tractor-trailer accident, which resulted in the death of Melissa Congleton, a young mother. The driver of the tractor-trailer was hauling a large steel coil using a flatbed trailer. The steel coil weighed 37,000 pounds and was secured using 3 chains, though the FMCSA required at least 5 chains given the weight of the cargo. An unidentified car stopped in the path of the tractor-trailer, causing the driver to brake suddenly. Two of the chains securing the steel coil broke. The steel coil fell through the side of the flatbed trailer, directly in the path of an oncoming pickup truck in the next lane. The pickup truck struck the steel coil and bounced off the side of the road, where it struck a stone wall before coming to stop. Melissa Congleton died at the scene from the impact. At trial, plaintiffs' counsel focused on the violent death of a young mother due to the reprehensible conduct of defendant company and its driver, and the company/driver's violations under the FMCSA and subsequent fines related to same. At the close of defendant's case, the trial court decided that the evidence supported a jury instruction as to punitive damages. The jury returned a verdict on punitive damages in the amount of $1,000,000.00, which was appealed on constitutional grounds. The Kentucky Supreme Court ultimately upheld the punitive damages award.

Coleman v. BTM Excavating, Calloway County, 12-CI-457

Robert Coleman was traveling east on KY 121 during the morning hours, when the morning sun was described as blinding. There was also proof from phone records that Coleman may have been on his cell phone. In addition, Coleman was not wearing his prescribed eyeglasses, which was a restriction on his operator's license. At the same time, Edward Harcourt was driving a dump truck for BTM Excavating. The truck was overloaded as Harcourt turned onto KY 121 from an inferior drive. Shortly thereafter, Coleman rear-ended the dump truck at 55-65 miles per hour, without hitting his brakes or swerving to avoid the accident. As a result, Coleman sustained a traumatic brain injury and various other skull and spinal injuries, with almost $800,000.00 in medicals. The jury determined that Coleman was 90% at fault, with the remaining 10% shared equally between BTM and Harcourt. As far as damages were concerned, the jury awarded Coleman his medicals, plus $417,600.00 for impairment, and $200,000.00 in pain and suffering. The jury also awarded $25,000.00 in punitive damages. The raw verdict totaled $1,441,292.00. Coleman took $156,629.00, accounting for 10% of $1,416,292.00, plus $25,000.00 in punitive damages, and then less $10,000 more for PIP.

Espino, et al. v. Margo, et al., Fayette County, 15-CI-00009

In 2017, a Fayette County jury awarded $62 million in punitive damages to plaintiffs in a private motor vehicle accident case. In 2014, plaintiff Noel Espino, who was a Captain in the Kentucky National Guard, was standing on a sidewalk outside of a bar when an SUV driven by defendant Jarad Margo backed over him, which resulted in the amputation of plaintiff's left leg and several other serious injuries. The SUV also crashed through the front of the bar. It was discovered that Defendant Jarad Margo had switched seats with his wife so that he could parallel park their vehicle just prior to the accident. However, Defendant Jarad Margo was intoxicated at the time of the accident. Defendant Margo was convicted of assault, driving under the influence, leaving the scene of an accident, and criminal mischief. Defendant Margo was sentenced to 10 years in prison At the civil trial, plaintiff's counsel focused on plaintiff's military service and the idyllic lifestyle plaintiff and his family lived prior to the accident. In addition to medical expenses and damages for loss of consortium, the jury awarded plaintiffs $62 million in punitive damages.

Yung, et al. v. Grant Thorton LLP, Kenton County, 07-CI-2647; 2017-SC-151-DG

Although it was not transportation or vehicle related, in 2018, the Supreme Court of Kentucky affirmed a landmark award of $80 million in punitive damages to a group of plaintiffs in a case against Grant Thorton LLP, one of the largest accounting networks in the world. The plaintiffs participated in a tax shelter marketed by Grant Thorton LLP that would purportedly allow funds held in plaintiffs' Cayman Island-based companies to be distributed in the U.S. without federal tax liability. After the IRS disallowed the tax shelter and settled with plaintiffs, the plaintiffs sued Grant Thorton LLP in Kenton Circuit Court. The Kenton Circuit Court found Grant Thorton LLP liable for fraud and gross negligence in the marketing and sale of the tax shelter. A judgment was rendered against Grant Thorton LLP for the $900,000.00 engagement fee paid by plaintiffs to Grant Thorton LLP with interest; approximately $19 million in taxes, interest, and penalties paid to the IRS by plaintiffs; and $80 million in punitive damages. Grant Thorton LLP appealed the trial court's judgment to the Kentucky Court of Appeals where the punitive damages award was reduced to $20 million. The Supreme Court of Kentucky ultimately reinstated the $80 million punitive damages award, finding that an award of that magnitude passed constitutional muster under federal due process guidelines.