FOR MORE INFORMATION

NILAN JOHNSON LEWIS PA
Minneapolis, Minnesota
www.nilanjohnson.com

Sheila T. Kerwin
skerwin@nilanjohnson.com

Leah Kippola-Friske
lkippola-friske@nilanjohnson.com

Chelsea E. Vilchis
cvilchis@nilanjohnson.com

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MINNESOTA

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 sparingly recognized in Minnesota courts. Courts in Minnesota have refused to accept the self-critical analysis in the context of a federal question case. Capellupo v. FMC Corp., No. CIV. 4-85-1239, 1988 WL 41398, at *1 (D. Minn. May 3, 1988). The issue in this Title VII case was whether documentation outlining affirmative action plans, goals, and objectives were discoverable. The court ruled that keeping the documentation from the Plaintiff would deprive them of relevant, admissible evidence. In Capellupo, the court also recognized a reluctance by courts in this jurisdiction to accept the privilege at all. Id. at *4. Additionally, they have struck down the use of the privilege in a case arising in district court under diversity of citizenship jurisdiction. Konrady v. Oesterling, 149 F.R.D. 592 (D. Minn. 1993). The documentation in question was connected to an Institution Review Board organized pursuant to federal statute to monitor the testing of a new medical device. This information did not fall under the public policy behind the self-critical analysis privilege to continue to improve patient care under self-review. Id. at 595–96. Additionally, the Konrady court noted the judicial hostility to evidentiary privileges. Id.

In Stabnow v. Consolidated Freightways Corp. of Delaware, the court recognized the elements necessary to utilize the self-critical analysis privilege. No. CIV. 99-641MJDRLE, 2000 WL 1336645, at *4 (D. Minn. Aug. 15, 2000).

> [F]irst, the information must result from a self-critical analysis undertaken by the party seeking protection, second, the public must have a strong interest in preserving the free flow of the type of information sought . . . the information must be of the type whose flow would be curtailed if discovery were allowed" and, in any event, "no document will be accorded a privilege unless it was prepared with the expectation that it would be kept confidential, and has in fact been kept confidential.

Id. at *5 (citing Spencer Savings Bank v. Excell Mortgage Corp., 960 F.Supp. 835, 836 n. 2 (D.N.J.1997) (internal quotations omitted). The court in the Stabnow case did not find the materials attempting to be protected to actually be self-critical and in the interest of public policy. Id. Additionally, the court questioned whether the self-critical analysis privilege was even still in existence in Minnesota but left that issue open. Id. at *6. Following the Stabnow decision, Minnesota courts have yet to address its use.

However, in the healthcare context, Minn. Stat. § 145.64 protects "data and information acquired by a review organization, in the exercise of its duties and functions" and is not subject to subpoena or discovery. The statute serves the

same public policy context to allow review organizations to be candid in improving healthcare and encourages the medical profession to police its own activities. This is similar to the self-critical analysis privilege, but it is codified specifically for medical field.

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?

The Minnesota Supreme Court recently approved 3rd Party Litigation Funding in June 2020 reversing the 120-year prohibition against champerty. See Maslowski v. Prospect Funding Partners LLC, 944 N.W.2d 235 (Minn. 2020). Because of the recency of the approval of 3rd Party Litigation Funding, the courts have not directly addressed the discovery of 3rd Party Litigation Funding.

Although the court in Maslowski abolished the prohibition against champerty, it did not take away all of the court's authority to review such agreements, stating that the "district courts may still scrutinize litigation financing agreements to determine whether equity allows their enforcement." Id. at 241; see e.g., Osprey, Inc. v. Cabana Ltd. P'ship, 340 S.C. 367, 532 S.E.2d 269, 278 (2000) ("Our abolition of champerty as a defense does not mean that all such agreements are enforceable as written."). "Parties . . . retain the common law defense of unconscionability." Id.; see Abernethy v. Halk, 139 Minn. 252, 166 N.W. 218, 220 (Minn.1918) (observing that a court "may decline to enforce an unconscionable contract"). Courts should continue to carefully review uncounseled agreements, particularly between parties of unequal bargaining power or agreements involving an unsophisticated party. Id. "Courts and attorneys should likewise be careful to ensure that litigation financiers do not attempt to control the course of the underlying litigation, similar to the "intermeddling" that we described in our early champerty precedent." Id.; see Huber v. Johnson, 68 Minn. 74, 70 N.W. 806, 808 (Minn. 1897) (stating that "it is difficult to conceive of any stipulation more against public policy" than a contract term requiring the litigation financier's permission to settle the underlying litigation). This language seems to indicate that there may be circumstances where the courts may need to review 3rd party litigation funding agreements and opens the door to discovery on these issues.

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

Witness depositions under Rule 30(b)(6) generally take place at the corporation's principal place of business. See Dwelly v. Yamaha Motor Corp., 215 F.R.D. 537, 541 (D. Minn. 2003); accord 8A Charles Allen Wright et al., Federal Practice and Procedure § 2112 (3d ed. 2010). This presumption is subject to change when justice requires. Id. Minnesota courts are almost certain to follow this presumption when the corporation being deposed is a defendant. See

Webb v. Ethicon Endo-Surgery, Inc., No. CIV. 13-1947 JRT/JJG, 2014 WL 7685527, at *4 (D. Minn. Aug. 8, 2014), aff'd, No. CIV. 13-1947 JRT/JJK, 2015 WL 317215 (D. Minn. Jan. 26, 2015) (citing New Medium Techs. LLC v. Barco N.V., 242 F.R.D. 460, 466 (N.D. Ill. 2007).

However, the district court holds great discretion in determining the location of a deposition. Thompson v. Sun Oil Co., 523 F.2d 647, 648 (8th Cir. 1975); see also Carlson Wagonlit Travel, Inc. v. Invensys PLC, No. CIV. 01-2337(JRTFLN), 2003 WL 21010961, at *2 (D. Minn. Mar. 8, 2003). When making this determination, courts consider: (1) location of counsel for both parties, (2) size of corporation and regularity of executive travel, (3) resolution of discovery disputes by forum court, (4) nature of the claim and relationship between parties, and (5) expense. Webb, 2014 WL 7685527, at *4 (citing Nat'l Cmty. Reinvestment Coal v. NovaStar Fin., Inc., 604 F. Supp. 2d 26, 31–32 (D.D.C. 2009).

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?

Under the "well-established principle" of respondeat superior, "an employer is vicariously liable for the torts of an employee committed within the course and scope of employment." Schneider v. Buckman, 433 N.W.2d 98, 101 (Minn. 1988). Such liability stems not from any fault of the employer, but from a public policy determination that liability for acts committed within the scope of employment should be allocated to the employer as a cost of engaging in that business. See Lange v. National Biscuit Co., 297 Minn. 399, 403, 211 N.W.2d 783, 785 (Minn. 1973). Foreseeability or knowledge is often not required on the part of the employer, or at least not as foreseeability applies in other legal contexts, because contrary to liability based on negligence, liability based on respondeat superior stems from public policy rather than from any fault of the employer. See Lange, 297 Minn. at 403, 211 N.W.2d at 785. "If [the courts] were to predicate liability in respondeat superior cases upon a showing that the employer should have reasonably anticipated the employee's specific misconduct, this distinction would be lost. Fahrendorff ex rel. Fahrendorff v. N. Homes, Inc., 597 N.W.2d 905, 912 (Minn. 1999). The requirement in Minnesota to prove employer liability in a negligence claim requires the employee to be acting in the furtherance of their employer's interest requiring both the existence of a duty and its exercise. Marston v. Minneapolis Clinic of Psychiatry & Neurology, Ltd., 329 N.W.2d 306, 310 (Minn. 1982).

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

In January 2017, a jury awarded over $28.7 million to a teenage passenger rendered a quadriplegic after her car was hit by an Ely School District bus. Plaintiff's counsel argued that both drivers were at fault. The teen driver of the passenger vehicle had been texting up until the time of the collision according to phone records, and the bus driver was apparently speeding. The jury found the teen driver was 90% negligent, and the bus driver was 10% negligent.

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

In discovery of the amounts actually billed or paid, the courts take into consideration both the work-product doctrine and the attorney-client privilege. Generally, billing records are not protected under these privileges because they do not typically contain opinions, conclusions, legal theories, or mental impressions of counsel, and therefore, the billing records are generally not protected. City Pages v. State, 655 N.W.2d 839, 843 (Minn. Ct. App. 2003). Parties asserting the privilege have the burden to show the narrative within billing records that fall under the attorney-client privilege or the work-product doctrine. 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)

Under Minn. Stat. § 548.251, the court allows for a motion after damages have been determined to reduce the damages by amounts from collateral sources, which include reductions in medical costs negotiated by an insurance company. This statute has been primarily applied in the personal injury context, however, is open to application in other areas.

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

Under Minn. Stat. § 176.041, subd. 4, Minnesota workers' compensation benefits apply if the employee: (1) regularly performs or is hired to perform the primary duties of employment outside of Minnesota; (2) is injured in the state of Minnesota while working for the same employer; and (3) chooses to forego any workers' compensation claim in another state. Minnesota Department of Labor and Industry, Extraterritorial

Jurisdiction: A Summary, November 2017, https://www.dli.mn.gov/sites/default/files/pdf/infosheet_extraterr_juris.pdf (last visited Feb. 15, 2021).

"Employment relation test," under which jurisdiction is present where employment relationship is centered, is appropriate to define scope of workers' compensation coverage for traveling or transitory workers. Vaughn v. Nelson Bros. Const., 520 N.W.2d 395 (Minn. 1994). Although the quantity of time a worker spends in a single locale may be a factor in determination of situs of employment relation, it should not be controlling. Id.

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

Under Minn. R. Civ. P. 30.01, depositions may only be taken after service of the summons

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

Minnesota does not have any legal considerations regarding how long a vehicle/tractor-trailer must be held prior to release.

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

In Minnesota, punitive damages are allowed "only upon clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights and safety of others." Minn. Stat. § 549.20(1)(a). See also Burks v. Abbott Laboratories, 639 F. Supp. 2d 1006 (D. Minn. 2009). Under the "deliberate disregard standard for punitive damages, the court must determine whether evidence is sufficient to allow a jury to conclude that it is highly probably that the defendant acted with deliberate disregard for the rights or safety of others. Morrow v. Air Methods, Inc., 884 F. Supp. 1353 (D. Minn. 1995). Minnesota does not have any cap on damages.

Under Minnesota law, punitive damages cannot be sought in the initial complaint. Minn. Stat. § 549.20(1)(a). Therefore, prior to seeking punitive damages, a party must move to amend the pleadings to include the damages, and "if the court finds prima facie evidence in support of the motion, the court shall grant the moving party permission to amend the pleadings. Minn. Stat. § 549.191. A plaintiff seeking punitive damages does not need to demonstrate an entitlement to punitive damages but instead an entitlement to allege such damages. See Popp Telecom, Inc. v. Am. Sharecom, Inc., 361 F.3d 482, 491 (8th Cir. 2004) (emphasis added). In this context, "'prima facie' does not refer to a quantum of evidence." Freeland v. Fin. Recovery Servs., Inc., 790 F. Supp. 2d 991, 994 (D. Minn. 2011). Instead "prima facie evidence is that evidence which, if unrebutted, would support a judgment in that party's favor." Id. (citing Olson v. Snap Prod., Inc., 29 F. Supp. 2d 1027, 1034 (D. Minn. 1998) (internal quotations omitted). The court is not concerned with credibility determinations at this stage and does not consider any challenges to the evidence presented to support it. Id.

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

State courts in Minnesota have not mandated Zoom trials. However, Minnesota's U.S. District Court held its first virtual civil jury trial to determine damages in a case on January 25, 2021 and lasted four days. There have yet to be any appeals. Motion hearings, settlement conferences with the court, and other pretrial hearings are routinely held over Zoom in both state and federal courts in Minnesota.

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?

A Minnesota woman was awarded $8 million in compensatory damages and an additional $8 million in punitive damages after she was a patient at a Minnesota drug treatment center and was allegedly raped repeatedly by the facility's top administrator. Chris Serres, Judge awards $16M to woman sexually assaulted

by top administrator at Minnesota treatment center, AP News (July 3, 2018), https://apnews.com/article/6f2bb20815bb444da5313d7d80769349 (last visited Feb. 18, 2021). In the ruling, the Ramsey County District Court judge stated the woman was entitled to such a large award due to the lasting trauma and distress of being assaulted both sexually and emotionally by a person who was supposed to be caring for her. Id.

In 2019, a jury awarded a Minnesota cop $585,000 including $300,000 in punitive damages. Louis Matsakis, Minnesota Cop Awarded $585K After Colleagues Snooped on Her DMV Data, Wired (June 21, 2019), https://www.wired.com/story/minnesota-police-dmv-database-abuse/ (last visited Feb. 18, 2021). The Plaintiff, Amy Krekelberg, received a notice in 2013 notifying her that an employee abused his access to the government driver's license database and looked through the information of thousands of people, including Krekelberg. Id. She learned her personal information had been accessed over 1,000 times despite the fact that she was never under investigation and was actually in law enforcement. Id. Krekelberg sued the city of Minneapolis and two individuals, who looked up her personal information after she allegedly rejected their romantic advances. Id. The verdict shows the value that people hold in their privacy being protected. Id.