

NEBRASKA

- 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 largely undeveloped in Nebraska. See *Carlson v. Freightliner LLC*, 226 F.R.D. 343 (D. Neb. 2004) (the privilege "remains largely undefined and has not generally been recognized). While Nebraska's Federal District Court recognizes that the privilege exists, Nebraska state courts have yet to encounter an issue involving the self-critical analysis privilege. However, the District Court in *Carlson* found that the privilege did not apply to "routine internal corporate reviews of matters related to business operations, recalls, and safety concerns." *Carlson*, 226 F.R.D. at 365. If a state court were to face an issue with the self-critical analysis privilege, it is likely that the court would turn to *Carlson* for some guidance. We will not know how successful the privilege will be in Nebraska without further development.

- 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?**

Currently Nebraska does not have any specific discovery rules concerning Third Party Litigation Funding Files. Discovery of third-party funding is likely subject to the general rules of discovery under NEB. CT. R. DISC. S 6-326. Under these rules, third party litigation funding arrangements are often kept out of the public eye and are hidden from parties and judges involved in litigation under basic relevance considerations. However, Ben Sasse, a Nebraska senator, has pushed for the implementation of the Litigation Funding Transparency Act. This would require third party litigation funding arrangements to be disclosed in federal litigation. Nebraska's rules and regulations pertaining to discovery of such files may change if the Act passes and the state decides to implement laws similar to the Act's discovery requirement.

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

Nebraska's rules do not explicitly identify who must travel to a Rule 30(b)(6) witness deposition. However, according to NEB. REV. STAT. § 25-1227(1), a witness "shall not be obliged to attend a deposition outside the county of their residence or outside the county where subpoena is served." If a witness lives outside of the county, then it is settled that the attorney is required to travel, at least to that county, to take a Rule 30(b)(6) witness deposition. If the witness does not live outside of the county, then the question on who travels

to the deposition largely depends on coordination and agreement of the parties.

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?

It is well-settled in Nebraska that when an employee negligently commits an act which caused the injury while in the course and scope of his employment, the doctrine of *respondeat superior* holds the employer liable for the damages caused by the employee. *Pullen v. Novak*, 99 N.W.2d 16, 25–26 (1959). By admitting that the driver was in the course and scope of employment for a direct negligence claim, an employer is essentially opening itself up to defending against liability caused by its employee, but may also risk being open to additional claims. If no admission takes place, then the burden falls on the person bringing suit to show that the employee was acting within the scope of his or her employment to recover damages. *Ballard v. Union P. R. Co.*, 781 N.W.2d 47 (2010) (employer not liable for acts of employee because the employees acted on their own impulses and there was no evidence that employer knew or should have known employee had dangerous propensities). Admission benefits the employee-by shifting his or her liability to the employer and dismissing claims asserted against him or her.

Admitting “course and scope of employment” may be effective in preventing direct claims against an employer for negligent hiring, negligent entrustment, etc. By admitting such, an employer can seek to limit the scope of Plaintiff’s claims to those solely based on *respondeat superior* by arguing that the direct claims against an employer are no longer at issue based on the employer’s admission. While Federal courts have addressed this argument, the Supreme Court of Nebraska has not yet directly addressed the issue. *See McHaffie v. Bunch*, 891 S.W.2d 822 (Mo. 1995).

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

We are not aware of any noteworthy nuclear verdicts in Nebraska.

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

Nebraska’s rules currently do not include specific legal considerations concerning discovery of the amounts actually billed or paid. Under NEB. CT. R. DISC. § 6-326, the general scope of discovery covers information that is “reasonably calculated to lead to the discovery of admissible evidence.” Additionally, by statute, Nebraska holds that the measure of damages for medical expenses in personal injury cases is the private party rate. *See NEB. REV. STAT. § 52-401*. The billed amount is both admissible and recoverable, with the amount actually paid only admissible to show that medical expenses are fair and reasonable. *See N.J.2d Civ. § 4.01*, see also *Parnell v. Madonna Rehab. Hosp.*, 258 Neb. 125, 602 N.W.2d 461 (1999).

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).

Nebraska does not have a statute pertaining to recovery of the amounts actually charged and accepted by a healthcare provider for certain procedures outside of the personal injury context. While we are not aware of any Nebraska authority on this issue, we are of the opinion that a court would likely apply the same rules governing personal injury procedures to other matters outside of a personal injury.

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

The Nebraska Workers' Compensation Act is the employee's exclusive remedy against an employer for an injury arising out of and in the course of employment. *Millard v. Hyplains Dressed Beef*, 237 Neb. 907, 468 N.W.2d 124 (1991). Nebraska's Compensation Act applies if the injury occurred in Nebraska, the employment was principally located in Nebraska, the employer was performing business in Nebraska, or the hiring contract was executed in Nebraska. NEB. REV. STAT. § 48-115. Nebraska's Workers' Compensation Court has jurisdiction over claims that fall within its compensation act. NEB. REV. STAT. § 48-152.

In some instances, Nebraska's Long-Arm Statute may catch an out-of-state defendant if there are sufficient minimum contacts for Nebraska's Workers' Compensation Court to exercise personal jurisdiction over the matter. *Underwriters Captive Risk Assurance Co., Inc. v. E.M. Pizza, Inc.*, 923 N.W.2d 789 (2019). However, if another state would be better positioned to apply workers' compensation laws, then Nebraska may decline to exercise jurisdiction over the case. *Id.* (minimum contacts were established, but because it would be more reasonable to allow California to apply their own state workers' compensation laws, Nebraska declined jurisdiction).

Another jurisdictional concern arises when there is a third-party claim at issue. However, it has been determined that Nebraska's compensation court does not have authority over these cases. *Gimple v. Student Transp. of Am.*, 915 N.W.2d 606 (2018); *Miller v. M.F.S. York/Stormor*, 595 N.W.2d 878 (1999).

Thus, common jurisdictional considerations that arise when an employee is injured in Nebraska include: (1) whether the employee's suit falls under Nebraska's Workers' Compensation Act; (2) if there are sufficient minimum contacts to subject an out-of-state defendant to Nebraska compensation laws or, alternatively, if it would be better suited to decline jurisdiction; and (3) whether the dispute involves a third-party claim or suits against third parties.

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

As a practical matter, pre-suit depositions are not commonly conducted in Nebraska. However, pursuant to NEB. CT. R. DISC. § 6-327, a petitioner may request a pre-trial deposition if he or she desires to perpetuate his or her own testimony or the testimony of another person regarding any matter that may be cognizable in any Nebraska state court. To properly request a pre-suit deposition the petitioner or the petitioner's attorney must file a petition in the district of where the expected adverse party resides. The petitioner must include several things, including: (1) a showing that petitioner anticipates being a party to an action but is currently unable to bring the suit forward now; (2) subject matter of the expected action; (3) facts that the deposition would establish; (4) names and/or description of the adverse party and other persons expected to be involved in the anticipated suit. NEB. CT. R. DISC. § 6-327(1)(i)-(v). While this is an option to petitioner's who meet the statute's requirements, it is rare for a pre-suit deposition request to occur.

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

Nebraska does not have any statutory regulations or other rules that govern the amount of time an impounded unit may be held by law enforcement before it must be released. Typically, law enforcement agencies recognize that there are loads that must be delivered and storage fees that accumulate, and in response, generally try to get equipment released in a timely fashion. Many times, the attorney on the case will stay in touch with the investigating officer to stay up to date on the possible release date and to communicate that the vehicle/tractor-trailer needs to be released as soon as possible.

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

Nebraska does not permit punitive damages. Under Nebraska law, "punitive, vindictive, or exemplary damages contravene NEB. CONST. ART. VII, § 5, and thus are not allowed in this jurisdiction." *O'Brien v. Cessna Aircraft Co.*, 298 Neb. 109, 139, 903 N.W.2d 432, 458 (2017); *Miller v. Kingsley, Sr.*, 194 Neb. 123, 124, 230 N.W.2d 472, 474 (1975). Notably, there remains some ambiguity in Nebraska's denial of punitive damages as NEB. CONST. ART. VII, § 5 also provides that "[a]ll fines, penalties . . . shall be appropriated exclusively to the use and support of the common schools." See *Abel v. Conover*, 170 Neb. 926, 104 N.W.2d 684 (1960). The *Abel* court, while finding that penalties paid for the benefit of a private person were unconstitutional, stated that punitive damages are available in Nebraska if such damages are paid into the school fund. As a practical matter, Nebraska courts have not awarded punitive damages despite this language.

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

There are no mandates requiring Zoom trials in Nebraska. From the outset of the pandemic, judges have had discretion on how to conduct proceedings in their court and each county has issued their own orders concerning trials and court operations. For example, Lancaster County originally issued an order that in-person civil jury trials were able to resume in August, 2020 after trials had been continuously pushed back. However, in November, 2020, the County continued all civil jury trials and pretrial conferences until on or after January 4, 2021. As of February 19, 2021, Lancaster County has not held a civil jury for the calendar year 2021. In another example, the Seventh Judicial District issued an order that in-person proceedings, such as trials, would continue with additional safety measures. The results of not mandating Zoom trials are not readily apparent at this time, but significant delays in civil trials are likely to occur in the future.

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?

Nebraska has not had any noteworthy verdicts premised on punitive damage, largely because the state does not permit punitive damages. *O'Brien v. Cessna Aircraft Co.*, 298 Neb. 109, 139, 903 N.W.2d 432, 458 (2017); *Miller v. Kingsley, Sr.*, 194 Neb. 123, 124, 230 N.W.2d 472, 474 (1975).