

OKLAHOMA

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1. Provide an update on current black box technology and simulations in your State and the legal issues surrounding these advancements.

Oklahoma does not have any special rules governing the use of ECM/black box technology in accident investigation and litigation. Oklahoma does not generally have any specialized requirements in terms of carrying black box technology onboard vehicles above what is federally mandated. Some private entities may offer reconstruction simulations on a contractual basis. The admissibility of the results from simulations and data downloaded from black boxes is the standard relevance/probative value test.

2. Besides black box data, what other sources of technological evidence can be used in evaluating accidents and describe the legal issues in your State involving the use of such evidence.

Any other available source of technological evidence (airbag modules, for example) can be used in evaluating accidents, and such evidence is generally admissible if it can be appropriately sponsored, is determined to be relevant, and carries greater probative value to the case than it does prejudice to the party against whom it is being offered.

3. Describe the legal issues in your State involving the handling of post-accident claims with an emphasis on preservation / spoliation of evidence, claims documents, dealing with law enforcement early and social media?

Oklahoma's traditional spoliation rule is that a litigant who is on notice that document or information in its possession are relevant to litigation or potential litigation, or are reasonably calculated to lead to the discovery of admissible evidence has a duty preserve such evidence. *Barnett v. Simmons*, 197 P.3d 12, 2008 OK 100. Additionally, Oklahoma courts do not distinguish between electronic data and other evidence for purposes of spoliation. If a party does not own or control the evidence, he still has an obligation to give the opposing party notice of access to the evidence or of the possible destruction of the evidence if litigation is anticipated. As such, sending preservation letters to opposing parties early, even in advance of litigation, as well as advising clients to preserve any relevant evidence in anticipation of demands by opposing parties, is highly recommended.

Oklahoma Highway Patrol seems to have recently adopted a policy restricting access to certain accident-related items by civil litigants, such as ECM data recording modules. OHP has communicated that DPS requires litigants to seek a court order to gain access to such evidence for examination and independent testing during pre-litigation. Oklahoma state courts have been mixed in their response to attempts to subpoena access to such evidence in pre-litigation, with some jurisdictions refusing to issue subpoenas on behalf of defendants until they are actually sued.

4. Describe the legal considerations in your State when defending an action involving truck drivers who may be considered Independent Contractors, Borrowed Servants or Additional Insureds?

Many of our interstate trucking clients rely upon independent contractors as part of their business. As a matter of practice, independent truckers will lease their tractor to the trucking company, who will then lease it back to the driver. This allows the trucking company to apply their DOT number to the vehicle so that it is covered by their federally mandated insurance policies. When defending a negligence action involving either an employed or independently contracted driver, we generally advise our clients to stipulate to liability for the driver's actions under the theory of *respondeat superior*. In 1997 in the case of *Jordan v. Cates*, the Oklahoma Supreme Court held that even though Oklahoma generally recognizes causes of action for negligent hiring and retention against an alleged tortfeasor's employer, such causes of action are made "unnecessary and superfluous" when vicarious liability for the employee's actions are admitted and stipulated to by the employer under the doctrine of *respondeat superior*. *Jordan v. Cates*, 1997 OK 9, ¶¶ 15-16, 935 P.2d 289, 293. Therefore, claims for negligent hiring and retention are only available "in a nonvicarious liability case or in a case where vicarious liability has not been established." *Id.* ¶ 15.

Two years later in *N.H. v. Presbyterian Church (U.S.A.)*, the Oklahoma Supreme Court again reaffirmed negligent hiring, supervision, and retention claims against an employer were only "available if vicarious liability is not established." *N.H. v. Presbyterian Church (U.S.A.)*, 1999 OK 88, ¶ 20, 998 P.2d 592, 600. Negligent entrustment claims are also precluded under *Jordan* and *N.H.* because this claim is also superfluous and unnecessary once an employer admits to vicarious liability for its employee's actions. *Simpson v. Kaya*, No. CIV-10-1093-D, 2012 WL 3518037, *3 (W.D. Okla. Aug. 15, 2012). Moreover, these alternative theories of imputed liability against an alleged tortfeasor's employer are precluded even if a plaintiff requests punitive damages, as Plaintiffs have done here, because as the Oklahoma Supreme Court explained since "vicarious liability can include liability for punitive damages, the theory of negligent hiring and retention imposes no further liability on employer." *Jordan*, ¶ 16, 935 P.2d at 293.

As the court in *Johnny v. Bornowski* succinctly explained: "Under Oklahoma law, once an employer admits vicarious liability for its employee's actions, no further negligence associated with the particular incident may be maintained against the employer. Because vicarious liability can include punitive damages, where a claim for punitive damages is

made against the employer based on negligence claims asserted directly against it that are associated with its employee, only the conduct of the employee shall be available to the jury for evaluation of Plaintiff's claim. To do otherwise would be unnecessary and superfluous. ***There has been no deviation from this established legal position by Oklahoma courts.***" *Johnny v. Bornowski*, No. 10-04008-CV-FJG, 2012 WL 13723, *2 (W.D. Mo. Jan. 4, 2012) (emphasis added) (interpreting Oklahoma law). By stipulating to liability under *respondeat superior*, other more damaging theories of liability are cut off, and any punitive damages may still be covered by the employer's insurance policy. We **do not**, however, admit that the driver is an employee instead of an independent contractor where those fact apply.

5. What is the legal standard in your state for allowing expert testimony on mild traumatic brain injury (mTBI) claims and in what instances have you had success striking experts or claims?

The legal standard for allowing expert testimony on mild traumatic brain injury (mTBI) in Oklahoma is the federal Daubert standard, where the testimony is "relevant to the task at hand" and that it rests "on a reliable foundation." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 584-587. The testimony can be deemed to qualify as scientific knowledge if it is the result of scientific methodology. Challenges to expert testimony and claims are most successful in cases where there is no physical evidence of a mTBI or when the expert has not conducted a full review of the patient or all of their medical records prior to forming an opinion.

6. Is a positive post-accident toxicology result admissible in a civil action in your State?

Yes. Assuming there were no deviations from the testing protocol, or issues of chain of custody with regards to the evidence, a positive post-accident toxicology result would likely be admissible. 12 O.S. § 2401.

7. What are some considerations for federally-mandated testing when drivers are Independent Contractors, Borrowed Servants, or Additional Insureds?

See generally the answer to #4. Additionally, 49 CFR § 382, which governs testing of drivers for controlled substances and alcohol, applies to "service agents and to every person and to all employers of such persons who operate a commercial motor vehicle in commerce in any State[.]" including an "employer who employs only himself or herself as a driver[.]" 49 C.F.R. §382.103(a). Additionally, employers who utilize independent contractors are still required to investigate and maintain a DOT file as required by 49 C.F.R. §391.23, and independent contractors are still required to submit to testing pursuant to § 382.211.

In general, carriers who employ independent contractors or other types of non-employee drivers are advised to observe the same standards of care that they would apply to an employee driver.

8. Is there a mandatory ADR requirement in your State and are any local jurisdictions mandating cases to binding or non-binding arbitration?

There is no mandatory ADR statute in Oklahoma law. Many state court jurisdictions require non-binding mediation as part of the scheduling order in a case as a matter of course, but no court subjects parties to arbitration.

9. Can corporate deposition testimony be used in support of a motion for summary judgment or other dispositive motion?

Yes. Any deposition testimony, or any evidence that meets the standards for admissibility, can be used in support of a motion for summary judgment or any other dispositive motion. Additionally, there is currently a split in federal jurisdictions regarding whether the testimony of a corporate representative is binding upon the corporation, or whether it creates a rebuttable presumption of binding the corporation. Corporate clients are advised to appoint individuals for deposition who are familiar with the facts sought in the deposition, and can identify questions that are outside the scope of their role within the corporation, or outside the scope of the deposition notice.

10. What are the rules in your State for contribution claims and does the doctrine of joint and several liability apply?

The Oklahoma Legislature abolished joint and several liability for fault-based actions in 2011. 23 O.S. § 15 makes the liability for damages caused by two or more persons “several only and a joint tortfeasor shall be liable only for the amount of damages allocated to that tortfeasor.” This amended version of the statute also eliminated joint and several liability for the grossly negligent or willful.

This rule has effectively eliminated statutory contribution amongst tortfeasors under 12 O.S. § 832. Pursuant to that statute, contribution can exist only to the extent a tortfeasor pays more than its *pro rata* share of the common liability. For purposes of the statute, *pro rata* means “proportionate, as based on one’s degree of fault.” Under the several liability standard of 23 O.S. § 15, a tortfeasor cannot be compelled to pay more than its share of the damages, because their liability is limited to their assessed percentage of fault. As such, contribution claims are functionally moot in negligence cases in Oklahoma.

However, joint & several liability can still apply in tort actions not involving negligence, e.g. battery, intentional infliction of emotional distress, trespass, conversion, etc.

11. What are the most dangerous/plaintiff-friendly venues in your State?

As a general rule, the counties of Eastern/Southern Oklahoma tend to be more plaintiff-friendly, especially the more rural counties. Tulsa County and Oklahoma County have more plaintiff-friendly judges, but more moderate juries. Creek County has historically been a difficult county to defend in, but has recently become more moderate. McCurtain

and Haskell counties stand out as difficult to defend in. The rural counties become overwhelmingly plaintiff-friendly if the injured party is a local.

12. Is there a cap on punitive damages in your State?

No. On April 23, 2019, the Oklahoma Supreme Court struck down 23 O.S. § 61.2(B)-(F), holding that it was an impermissible special law in violation of Article 5, Section 46 of the Oklahoma Constitution because it singled out for different treatment less than the entire class of similarly situated persons who may sue to recover for bodily injury. *Beason v. I. E. Miller Services, Inc.*, 2019 OK 28 (2019).

13. Admissible evidence regarding medical damages – can the plaintiff seek to recover the amount charged or the amount paid?

Title 12, Section 3009.1(A) of the Oklahoma Statutes provides, “the actual amounts paid for any doctor bills, hospital bills, ambulance service bills, drug bills and similar bills for expenses incurred in the treatment of the party shall be the amounts admissible at trial, not the amounts billed for expenses incurred in the treatment of the party.” (emphases added). For this provision to apply, the defendant must provide, “in addition to evidence of payment, a signed statement acknowledged by the medical provider or an authorized representative that the provider, in consideration of the patient’s efforts to collect the funds to pay the provider, will accept the amount paid as full payment of the obligations . . .” 12 O.S. § 3009.1(A).

The caveat to this rule is if the medical provider has filed a lien in the case for an amount in excess of the amount paid. In that instance, the bills in excess of the amount paid, but not more than the amount of the lien, shall be admissible. *Id.*

If no payment has been made, “the Medicare reimbursement rates in effect when the personal injury occurred shall be admissible if, in addition to evidence of nonpayment, a signed statement acknowledged by the medical provider or an authorized representative that the provider, in consideration of the patient’s efforts to collect the funds to pay the provider, will accept payment at the Medicare reimbursement rate less cost of recovery as provided in Medicare regulations as full payment of the obligation is also admitted.” *Id.* However, “if a medical provider has filed a lien in the case for an amount in excess of the Medicare rate, then bills in excess of the amount of the Medicare rate but not more than the amount of the lien shall be admissible.” *Id.*