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# OHIO

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?

Ohio does not recognize the "self-critical analysis" or "self-evaluating" privilege in civil litigation. Geggie v. Cooper Tire & Rubber Co., 3d Dist. Hancock No. 5-05-01, 2005-Ohio-4750, ¶ 30; see State ex rel. Celebrezze v. Cecos Internatl., Inc., 66 Ohio App.3d 262, 265-266, 583 N.E.2d 1118 (12th Dist. 1990); Johnson v. Bay W. Paper Corp., No. C-1-04-91, 2005 U.S. Dist. LEXIS 60822, at *4 (S.D. Ohio Oct. 21, 2005).

The Sixth Circuit has also not explicitly adopted the privilege. United States ex rel. Sanders v. Allison Engine Co., 196 F.R.D. 310, 314 (S.D. Ohio 2000). The Northern District of Ohio has applied the privileged in the past. Hickman v. Whirlpool Corp., 186 F.R.D. 362, 363 (N.D. Ohio 1999). The Southern District of Ohio is less clear as it has doubted the privilege even though it analyzed it and ultimately found it did not apply to the facts of the case. United States ex rel. Sanders, 196 F.R.D. at 314-15. However, the Southern District of Ohio has indicated the privilege will not apply to "routine reviews done in the normal course of business." Id. at 313.

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?

This issue has not been litigated in state court in Ohio. However, to be generally discoverable, the documents sought must not be privileged and must be relevant and proportional to the needs of the case. Civ.R. 26(B)(1).

The Northern District of Ohio has held that "[a]bsent extraordinary circumstances, the Court will not allow discovery into 3PCL financing." In re Natl. Prescription Opiate Litigation, No. 1:17-MD-2804, 2018 U.S. Dist. LEXIS 84819, at *46 (N.D.Ohio May 7, 2018). It is not clear what "extraordinary circumstances" would permit the discoverability of such files. However, the Court ordered in-camera submissions relating to financing terms and affidavits from counsel and the funders to certify that there were no conflicts of interest or control by the funders.

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

Although not settled by the Ohio Supreme Court, a leading Ohio Court of Common Pleas case specifically holds that "the depositions of corporate officers or agents should be taken at the corporation's principal place of business. . . ." Insulation Unlimited v. Two J's Properties, Ltd., 95 Ohio Misc.2d 18, 25, 705 N.E.2d 754 (C.P. 1997).

In Ohio Federal Courts, the presumption is that "the deposition of a corporation by its agents and officers should ordinarily be taken at its principal of business" Scooter Store, Inc. v. Spinlife.com, LLC, No. 2:10-cv-18, 2011 U.S. Dist. LEXIS 57283, at *7 (S.D. Ohio May 25, 2011) (citing 8A Charles Alan Wright, Arthur R. Miller, Richard L. Markus, Federal Practice & Procedure § 2112 at 73 (2d ed. 1994)). However, that presumption may be overcome by weighing "whether counsel for all parties are located [in the forum district], whether the corporation is a large one whose employees often engage in travel, whether the costs of travel are oppressive, and whether the nature of the claim and the relationship of the parties are such that an appropriate adjustment of the equities favors a deposition site in the forum district." Terrell v. Uniscribe Professional Servs., No. 1:04 CV 1288, 2005 U.S. Dist. LEXIS 55071, at *4-5 (N.D. Ohio Sep. 16, 2005); Paradise Farms v. Chiquita Frupac, No. 1:02cv714, 2009 U.S. Dist. LEXIS 146454, at *5-7 (S.D. Ohio Dec. 1, 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?

Ohio permits direct negligence claims regardless of whether vicarious liability for an employee's negligent actions has been admitted. See Clark v. Stewart, 126 Ohio St. 263, 263, 185 N.E. 71 (1933). But see Nichols v. Coast Distrib. Sys., 86 Ohio App.3d 612, 619, 621 N.E.2d 738 (9th Dist. 1993) (following Clark even though it found no fault with the defendant-employer's arguments that the direct negligence claim should have been dismissed because the employer admitted that the employee was in the course and scope of his employment when the accident occurred). Therefore, whether a defendant admits that its driver was in the course and scope of employment does not change whether the direct negligence claims against the motor carrier will continue. Accordingly, there is no benefit to admitting that a driver was in the course and scope of his/her employment when the accident occurred.

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

On October 27, 2014, two plaintiffs received a $42.4 million jury verdict in the Cuyahoga County Court of Common Pleas for injuries suffered because of an accident where they were passengers in a vehicle. They alleged that the defendants dump truck operator and the dump truck company negligently operated the dump truck. The plaintiffs suffered facial fractures, lost sight in their right eyes, and had brain injuries that cognitive deficits. One plaintiff was in the hospital for six weeks.

On March 7, 2016, a plaintiff received a $27,018,940 jury verdict in the Cuyahoga County Court of Common Pleas for injuries suffered as a passenger in a bus. The accident occurred when the bus struck a commercial motor vehicle around 1:30 A.M. at night. The plaintiff suffered an amputated leg below the knee, multiple fractures in his other leg and spleen, and internal lacerations and bleeding. The plaintiff was in the hospital for 5.5 months.

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

The Ohio Supreme Court has held, and reaffirmed, that "R.C. 2317.421 makes. . . bills prima facie evidence of the reasonable value of charges for medical services." *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362, 857 N.E.2d 1195, ¶ 9; *Jaques v. Manton*, 125 Ohio St.3d 342, 2010-Ohio-1838, 928 N.E.2d 434, ¶ 11 (holding that *Robinson* applies regardless of the collateral-source rule because that evidence is still inadmissible); *Moretz v. Muakkassa*, 137 Ohio St.3d 171, 2013-Ohio-4656, 998 N.E.2d 479, ¶ 92 (holding that expert testimony is not necessary for the admission of evidence of write-offs from medical bills). So, not only is the amount paid of medical bills discoverable, it is also admissible evidence.

Other than requesting this in discovery from the plaintiff, one of the ways to obtain discovery on this issue is to request medical records and bills from the plaintiff's treating provider. Another way is to subpoena or file suit against the plaintiff's health insurer to obtain explanation of benefit forms which show the amount constituting the write-offs for the applicable medical bills.

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 stated above, the Ohio Supreme Court held in *Robinson v. Bates*, 112 Ohio St.3d 17, 2006–Ohio–6362, 857 N.E.2d 1195, that both the original medical bill and the amount accepted as full payment are admissible to prove the reasonableness and necessity of charges rendered for medical and hospital care. Because different insurance arrangements exist, the fairest approach is to make the defendant liable for the reasonable value of plaintiff's medical treatment. Due to the realities of today's insurance and reimbursement system, that determination is not necessarily the amount of the original bill or the amount paid. Instead, the reasonable value of medical services is a matter for the jury to determine from all relevant evidence. The jury may decide that the reasonable value of medical care is the amount originally billed, the amount the medical provider accepted as payment, or some amount in between.

The Ohio Supreme Court revisited the issue of admissibility of paid and billed medicals after the passage of R.C. 2315.20. The Ohio Supreme Court affirmed in *Jacques v. Manton* that R.C. 2315.20 does not prohibit evidence of write-offs. Id. at 345. More recently, in *Moretz*, the Ohio Supreme Court reaffirmed its holdings in *Robinson* and *Jacques* that evidence of write-offs, reflected in medical bills and statements, is prima facie evidence of the reasonable value of medical services. *Moretz v. Muakkassa*, 2013–Ohio–4656, 137 Ohio St. 3d 171, 192, 998 N.E.2d 479, 497. *Moretz* also clarified that expert testimony is not necessary as a foundation for admitting evidence of such write-offs for that purpose. *Id.*

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

Ohio's workers compensation statute helps determine which jurisdiction applies when an employee is injured in Ohio. To qualify for workers' compensation, an employee must suffer an injury "in the course of, and arising out of," his/her employment. R.C. 4123.01(C). The phrase "in the course of employment" limits compensable injuries to those sustained by an employee while performing a required duty in the employer's service. *See Fisher v. Mayfield*, 49 Ohio St.3d 275, 551 N.E.2d 1271 (1990). "'Arising out of' requires a causal connection between the injury and the employment." *Bowden v. Cleveland Hts.-Univ. Hts. Schools*, Cuyahoga App. No. 89414, 2007-Ohio-6804, at ¶ 11. The injury is compensable if it is one that occurs while the employee engages in an activity that is consistent with the contract for hire and logically related to the employer's business. *Parenti v. Goodyear Tire & Rubber Co.*, 66 Ohio App. 3d 826, 586 N.E.2d 1121 (1990); *West v. Lukjan Metals Prods., Inc.*, 2009-Ohio-5761.

Ohio has jurisdiction over injuries an employee that arises within the territorial boundaries of Ohio. Additionally, "employees hired to work specifically in Ohio must be reported for workers' compensation insurance under the Ohio fund, regardless of where the contracts of hire were entered. Ohio Admin. Code 4123-17-23(D) Furthermore, when the employment relationship is engrained at a place of employment in Ohio with employment activities both within and outside the borders of Ohio, the law provides the authority to exert jurisdiction over out-of-state injuries. However, it is not enough that an employee working outside the state's boundaries is "supervised" from an office located in Ohio. An out-of-state employee could receive work instructions from, send reports to, and be paid from an employer's facility in Ohio, but still not be an Ohio employee for workers' compensation purposes. The employment must involve activities both

within and outside the borders of Ohio for the employee to be an Ohio employee for workers' compensation purposes.

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

Ohio does not allow pre-suit depositions. In the seminal case of *Poulos v. Parker Sweeper Co.*, 44 Ohio St.3d 124, 541 N.E.2d 1031 (1989), the Ohio Supreme Court held that pretrial discovery under R.C. 2317.48 is (1) "limited solely to interrogatories specifically concerning the facts necessary to the complaint or answer and are to be submitted only to the potentially adverse party contemplated by the lawsuit" and (2) the "person claiming to have a cause of action . . . must in his statutory action set forth the necessity and the grounds for the action and the facts sought and deemed necessary to state a cause of action." (Emphasis added).

Following the Supreme Court's interpretation of R.C. 2317.48 in *Poulos*, Ohio Civ. R. 34(D) was promulgated. This rule expanded the concept of pre-suit discovery codified in R.C. 2317.48. However, Ohio Civ. R. 34(d) only expanded discovery in a limited nature to include, among other things, "the inspection and copying of documents." Additionally, Ohio Civ. R. 30(A) explicitly states that that **"[a]fter commencement of the action**, any party may take the testimony of any person, including a party, by deposition upon oral examination . . ." (Emphasis added). Therefore, depositions can be utilized as a means of discovery only after the start of the lawsuit.

Since there is no legal authority for pre-suit depositions through statute or subpoenas, parties could nevertheless agree to such discovery. Both parties would have to agree to the nature and circumstances surrounding the deposition. Consequentially, if the parties fail to come to an agreement, then the pre-suit deposition would not occur with no legal authority to uphold it.

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

How long a vehicle must be held prior to release depends on the facts surrounding the circumstance. The trucking company needs to take an affirmative step in order to put the tractor-trailer back on the road. A practice point suggestion would be to notify the adverse party to provide them with a reasonable opportunity to inspect the truck. It must give adequate notice to that party for the desire to put truck back on the road. Ask what is the "reasonable time" needed to inspect the truck in order to actually get the truck inspected to know what they wish to preserve.

Additionally, if the adverse party sends a letter, i.e. a spoliation letter, to the trucking company stating what must be preserved, then the trucking company must preserve such items. This letter puts a motor carrier on notice of an impending claim and the need to retain all potentially critical evidence. If the trucking company fails to preserve important evidence related to the claim, a cause of action for spoliation of evidence can be brought. The court could tell the jury that it can assume that the documents would be negative toward the trucking company, which can be harmful for a trucking company's defense. Spoliation of evidence can also lead to losing in court, punitive damages, monetary sanctions, and criminal charges.

For example, in *Baker v. Swift Transp. Co. of Arizona, LLC*, No. 2:17-cv-909, 2018 U.S. Dist. LEXIS 75961, (S.D. Ohio May 4, 2018), plaintiff's punitive damages request survived dismissal because the Court could plausibly infer that the defendant maliciously spoliated evidence. Plaintiff alleged that defendant intentionally destroyed documents and data relevant to this case, including the semi-tractor trailer's original owner's manual; the semi-tractor trailer's maintenance records; Stocker's hours-of-service records; Stocker's historical driver performance data; videos and images from a LytxDriveCam or similar driver monitoring device; videos and images of Stocker or the semi-tractor trailer's cabin; videos and images of the

road in front of the semi-tractor trailer before the collision; and Swift's communications with Stocker. *Id.* at 6. Defendant destroyed these documents and data, despite receiving letters of preservation and subsequent emails and telephone calls indicating that litigation was probable. *Id.* Therefore, the court denied the defendant's motion to dismiss to the extent that it was tied to spoliation of evidence.

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

Pursuant to R.C. 2315.21(D)(4), the standard for punitive damages in any tort action is on the plaintiff to prove with clear and convincing evidence, that the plaintiff is entitled to recover punitive or exemplary damages. Under Ohio law, a court may award punitive damages in a tort action only upon a finding of actual malice or aggravated or egregious fraud on the part of the defendant. R.C. 2315.21. Because R.C. 2315.21 does not define malice, Ohio courts apply the definition of actual malice set forth in *Preston v. Murty*, 32 Ohio St.3d 334, 512 N.E.2d 1174, syllabus (1987).

In *Preston*, the Ohio Supreme Court defined malice as "(1) that state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge, or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm." *Preston*, 32 Ohio St.3d at 334, 512 N.E.2d 1174, syllabus. Because punitive damages are assessed as punishment and not for purposes of compensation, it is necessary that defendants' conduct was "conscious, deliberate or intentional" and that defendants "possess[ed] knowledge of the harm that might be caused by [their] behavior." *Id.* at 1176. *See also Freudeman v. Landing of Canton*, 5:09–cv–00175, 2010 WL 2196460, at *3 (N.D. Ohio May 31, 2010). An award of punitive damages is not justified in a tort action unless there are "aggravated circumstances apart from or surrounding the injury or the actions of the party causing the injury." *Pelkowski v. Nussbaumer*, No. CA–8928, 1993 WL 50723, at *3 (Ohio App. 5th Dist. Feb. 8, 1993) (quoting *Troyer v. Horvath*, 13 Ohio App.3d 155, 157, 468 N.E.2d 351 (1983). Such aggravated circumstances include intoxication and deliberate actions to flee the scene or evade responsibility.

Additionally, to impose punitive damages on an employer, a plaintiff must show either "(1) the employer's actions directly demonstrated malice, aggravated or egregious fraud, oppression, or insult or (2) where the employer authorized, participated in, or ratified such actions by its employee." *Boyd v. Smith*, No. 2:12-CV-814, 2014 WL 1050080, at *8 (S.D. Ohio Mar. 14, 2014) (citing *Estate of Beavers v. Knapp*, 175 Ohio App.3d 758, 779, 889 N.E.2d 181 (2008)).

Furthermore, punitive damages in Ohio are limited. R.C. 2315.21(D)(1) limits the amount of punitive damages that can be awarded in civil lawsuits. Punitive damages cannot exceed twice the amount of compensatory damages awarded to the plaintiff from the defendant. However, if the defendant is a small employer of individual, the punitive damages cannot exceed the lesser of twice the amount of compensatory damages awarded or 10% of the defendant's net worth up to a maximum of $350,000. *Id.*

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

No. Ohio did not and does not mandate Zoom trials. The 88 county courts in Ohio, as well as the 12 district Court of Appeals, and federal courts are operating under amended operations. Each court has issued their own orders outlining its accommodations for COVID-19. Many courts postponed civil jury trails and limited grand jury sessions. For example, the Franklin County Court of Common Pleas suspended jury trials until January 29, 2021. The use of video conference and teleconference were encouraged for non-trial proceedings such as arraignments, pre-trial status conferences, mediations, probation, and specialized dockets appointments.

If necessary, in-person court proceedings would be limited to the number of people which permitted the observing of social distancing requirements and other health safety protocols. Based upon recommendations from the Supreme Court Responsible Restart Ohio, any individual entering the courthouse is required to wear a protective mask, covering the nose and mouth.

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?

COVID-19 has impacted civil litigation by delaying courts dockets and closing courts. Thus, there has not been a recent Ohio case premised on punitive damages with regards to trucking transportation. However, in prior years, courts have evaluated punitive damages claims and provided noteworthy analysis. For example, in *Parker v. Miller*, No. 2:16-CV-1143, 2017 WL 3642372 (S.D. Ohio Aug. 24, 2017), the court allowed the request for punitive damages to withstand defendant's motion to dismiss. This case involved a tractor-trailer crashing into a state patrol car at nearly 70 mph while plaintiff was seated inside. *Id.* at 1. The state patrol car had its emergency lights on and road flares. *Id.* The complaint alleged that the driver of the trailer had enough time to see the police car blocking the right lane, or to stop and change lanes, but instead applied the brakes only two seconds before impact, crashing into the back of the car and causing severe injuries to the plaintiff. *Id.* The Court stated that a reasonable factfinder could find a conscious disregard for plaintiff's safety on these facts. *Id.* at 2.

Additionally, a year later in *Parker v. Miller*, 2018 WL 374981, S.D. Ohio, Eastern Division (August 7, 2018), the court found that the facts could support a finding of malice on the part of the employers in hiring and retaining the driver as well as authorizing and ratifying his conduct. *Id.* at 11. The complaint alleges that the employers hired the driver having a poor safety record, he faced numerous crashes and violations, and the employers did not provide training or discipline. The court found that plaintiff sufficiently alleged that the employers exhibited a conscious disregard of an almost certain risk of substantial harm. *Id.* at 11-12.