FOR MORE INFORMATION

FRANDEN, FARRIS, QUILLIN, GOODNIGHT & ROBERTS
Tulsa, Oklahoma
www.tulsalawyer.com

Joseph R. Farris
jfarris@tulsalawyer.com

Jason Goodnight
jgoodnight@tulsalawyer.com

Jeremy Ward
jward@tulsalawyer.com

ALFA International
The Global Legal Network
Local Relationships Worldwide

OKLAHOMA

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?

Oklahoma law does not recognize the self-critical analysis privilege. *Lindley v. Life Investors Ins. Co. of America*, 267 F.R.D. 382, 387 (N.D. Okla. 2010). No state or federal court has been willing to adopt the privilege. The discovery of evidence pursuant to self-critical analysis is generally permitted, unless some other recognized form of privilege applies. The admissibility of such evidence in trial, however, is still subject to restrictions in the Evidence Code; namely, 12 O.S. § 2407, which states that evidence of subsequent remedial measures is inadmissible to prove negligence or culpability.

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?

Oklahoma has passed laws putting oversight of the practice of third party litigation funding under the state Department of Consumer Credit. The statute, Okla. Stat. § 14A-3-801(6), is part of the state's Consumer Credit Code. First, the law requires litigation funders to obtain a license from the state's Department of Consumer Credit prior to engaging in the business. The Oklahoma statute defines "consumer litigation funder" as a person who enters into a "consumer litigation funding agreement," which is defined as an agreement "under which money is provided to or on behalf of a consumer by a consumer litigation funder for a purpose other than prosecuting the consumer's legal claim" and "the repayment of the money is in accordance with a litigation funding transaction, the terms of which are included as part of the consumer litigation funding agreement." Other than establishing that the practice fits within the broader scope of consumer credit regulatory oversight, the Oklahoma statute is similar in many respects to the other laws that preceded it. It provides the consumer with the right to cancel within five days of receiving funds and specifies what must be in the litigation funding agreement.

However, Oklahoma, like most other jurisdictions, has not currently promulgated a rule, by statute or case law, allowing discovery of third party litigation finance files.

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

12 O.S. § 3230(B) governs where a witness or party is required to attend the taking of a deposition. Witnesses may only be obligated to attend a deposition in their county of residence, a county adjoining the county of their residence, or the county where they are located when the subpoena is served. A party may additionally be

deposed in the county where the action is pending. As such, the general rule is that the attorney travels for depositions. However, it is commonly accepted practice for counsel to confer, whenever possible, regarding any noticed deposition and work to facilitate the location that is most convenient for everyone involved.

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?

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 non-vicarious 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. Please describe any noteworthy nuclear verdicts in your State?

Within the past six years, there have not been any noteworthy nuclear verdicts pertaining to the transportation sector.

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

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)

This sort of information is generally considered irrelevant in the scope of a personal injury case, and there has not been great success in obtaining these sorts of records in the course of litigation.

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

The primary considerations for jurisdictional determination when an employee is injured are 1) where the employer is located, and 2) where the employment contract was formed. However, an employee who is injured in Oklahoma has the right to file for Worker's Compensation benefits in Oklahoma pursuant to the Oklahoma Administrative Worker's Compensation Act. 85A O.S. § 3. However, if an employee makes a claim for injury in another jurisdiction, they are precluded from any right of action in Oklahoma, absent a determination that there has been a change in circumstance that creates a good cause to bring an claim in Oklahoma; provided, however, that the employee may not receive duplicate benefits to those received in a foreign jurisdiction. *Id.*

As a practical matter, many out of state employees will seek to avoid submitting their claim in Oklahoma. The state is near the bottom in terms of the maximum benefits it offers, so depending on the jurisdiction where the employer or employment contract was based, employees may think themselves better off in a different jurisdiction.

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

12 O.S. §3227(A) governs the procedure for taking pre-suit depositions. The language is as follows:

> "1. PETITION. A person who desires to perpetuate his own testimony or that of another person regarding any matter that may be cognizable in any court may file a verified petition in the district court in the county of the residence of any expected adverse party for such perpetuation of testimony. The petition shall be entitled in the name of the petitioner and shall show:

a. That the petitioner or his personal representative, heirs, beneficiaries, successors or assigns may be a party to an action cognizable in a court but is presently unable to bring it or cause it to be brought.

b. The subject matter of the expected action and his interest therein, and a copy, attached to the petition, of any written instrument the validity or construction of which may be called in question or which is connected with the subject matter of the requested deposition.

c. The facts which he desires to establish by the proposed testimony and his reasons for desiring to perpetuate it.

d. The names or, if the names are unknown, a description of the persons he expects will be adverse parties and their addresses so far as known.

e. The names and addresses of the persons to be examined and the substance of the testimony which he expects to elicit from each.

The petition shall request an order authorizing the petitioner to take the depositions of the persons named in the petition to be examined for the purpose of perpetuating their testimony.

2. NOTICE AND SERVICE. The petitioner shall thereafter serve a notice upon each person named or described in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least twenty (20) days before the date of hearing, the notice shall be served either within or without the state in the manner provided for personal service of summons. If such service cannot, with due diligence, be made upon any expected adverse party named or described in the petition, the court may enter such order as is just for service by publication or otherwise, and shall appoint, for persons not served by personal service, an attorney who shall represent them and, if they are not otherwise represented, shall cross-examine the deponent. If any expected adverse party is a minor or incompetent the court shall appoint a guardian ad litem for any such minor or incompetent not legally represented.

3. ORDER AND EXAMINATION. If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall enter an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and how the depositions shall be taken. The depositions may then be taken in accordance with the Oklahoma Discovery Code, Section 3224 et seq. of this title. The court may enter orders of the character provided for by Sections 3234 and 3235 of this title. For the purpose of applying the Oklahoma Discovery Code to depositions for perpetuating testimony, each reference to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

4. USE OF DEPOSITION. If a deposition to perpetuate testimony is taken under the Oklahoma Discovery Code, it may be used in any action involving the same subject matter subsequently brought in a court of this state, in accordance with the provisions of subsection A of Section 3232 of this title."

In practice, these statutory requirements are accomplished by the filing of a miscellaneous action requesting the Court order the party in question to appear for deposition. However, the issuance of said Order is in the discretion of the Court, and not all judges are willing to grant permission to conduct these types of depositions.

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

Oklahoma has no specific rules regarding how long a vehicle/tractor-trailer must be held prior to release. 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. 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.

As a matter of practice, we generally advise clients to place holds on any vehicles/tractor-trailers involved in accidents as a matter of course. We also prefer to move quickly to work with opposing counsel to arrange inspections early in the litigation or pre-litigation process to minimize the time our vehicles are held.

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

In order to prove punitive or exemplary damages, a Plaintiff has the burden to prove that the Defendant acted in reckless disregard to the rights of others, and/or acted intentionally and with malice towards others. Plaintiff has the burden of proving this by clear and convincing evidence, which is "highly probably and free from serious doubt." Oklahoma Uniform Jury Instructions § 5.6. If a jury finds that the Plaintiff has satisfied this burden, a separate stage will take place, whereby the jury will be tasked with deciding what the damages should be. A jury may consider evidence of the following factors:

1. The seriousness of the hazard to the public arising from Defendant's misconduct;

2. The profitability of the misconduct to Defendant;

3. How long the conduct lasted and whether it is likely to continue;

4. Whether there were attempts to conceal the misconduct;

5. How aware Defendant was of the conduct and its consequences and how aware Defendant was of the hazard and of its excessiveness;

6. The attitude and conduct of Defendant upon finding out about the misconduct/hazard;

7. The financial condition of Defendant; and

8. (If the defendant is a corporation or other entity) The number and level of employees involved in causing or concealing the misconduct.

There is currently no cap on punitive damages. 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).

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

Oklahoma has generally declined to mandate Zoom trials during the course of the Covid-19 pandemic. Rather, jury terms have been cancelled and cases continued until such time as courts can safely reopen to the public. Hearings have been conducted by Zoom, BlueJeans, and other similar platforms.

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?

There have not been any noteworthy verdicts in Oklahoma premised on punitive damages with regards to the transportation sector. However, there have been some recent cases with considerable punitive damage awards. In March 2020, *Hetronic International, Inc. v. Hetronic Germany GmbH; Hydronic-Steuersysteme GmbH; Arbitron Austria GmbH; and Albert Fuchs,* United States District Court for the Western District of Oklahoma Case No. CIV-14-650-F, concluded an 11-day jury trial with a verdict of $101,947,103.00, as well as a punitive damages award of $10,721,664.00.

Plaintiff alleged that Defendants had violated an exclusivity contract, whereby Defendants would purchase parts for the assembly and distribution of radio remote control parts solely from the Plaintiff, instead secretly procuring parts from other manufacturers and marketing them under Plaintiff's trademark. Additionally, Plaintiff claimed that Defendants conspired to compete against Plaintiff and solicit Plaintiff's employees to assist them in the competition. An appeal is pending before the Tenth Circuit.