

OREGON

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?

There is no current statute or case law in Oregon that recognizes the self-critical analysis privilege. Companies and practitioners should be aware that materials that might otherwise fall under a self-critical analysis privilege are discoverable in Oregon, and may be admissible in court so long as foundation and relevance are properly established.

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?

Oregon law does not prohibit discovery of 3rd Party Litigation Funding files, nor does it have any statutes that regulate 3rd Party Litigation Funding. Accordingly, there are several considerations that the parties and practitioners must take into account when 3rd Party Litigation is involved, including the discoverability of 3rd party files and the potential waiver of the attorney-client privilege with regard to disclosures to third parties.

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

Whether the witness or the attorney travels for a deposition, including a deposition under Oregon's version of Rule 30(b)(6), depends upon whether the deponent is the plaintiff, the defendant, or a non-party. In general, Oregon courts follow the rule that the plaintiff can be deposed in the place where the action was filed or where the plaintiff has its place of business, whichever is most convenient for the defendant.

The defendant and non-parties, on the other hand, can be deposed wherever the defendant or non-party lives or has a business, whichever is most convenient for the parties and the witnesses. Nonresident plaintiffs are normally required to appear in Oregon for deposition at their own expense, while nonresident defendants are normally not required to appear in Oregon for deposition at their own expense.

Despite these general rules, a party may seek a protective order, for good cause shown, changing the location of the deposition or allocating the expense of travel.

4. What are the benefits and detriments in your State by admitting a driver was in the "course and scope" of employment for direct negligence claims?

Under Oregon law, admitting a driver was acting in the "course and scope" of his employment will ordinarily make the motor carrier vicariously liable for the negligent acts of the employee. *Stanfield v. Laccoarce*, 284 Or 651, 655 (1978). Thus, a plaintiff can establish liability without having to prove the distinct elements of a direct negligence claim against the motor carrier for negligent hiring,

supervision, retention, or entrustment. Each case must be decided upon its own facts to determine whether the employee was acting within the “course and scope” of employment. *Heide v. T.C.I. Inc.*, 264 Or 535, 540 (1973). Thus, it is often prudent to not admit course and scope until discovery has sufficiently progressed. However, a party must have an objectively reasonable basis to deny “course and scope.” If they do not, they open themselves up to potential attorney fee exposure. ORS 20.105(1).

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

In May 2019, an Oregon federal court jury awarded a \$26.5 million verdict in the case of *Allison et al. v. Smoot Enterprises Inc. et al.*, which involved a fatal head-on collision between plaintiffs’ vehicle and a semi-truck in Eastern Oregon. The jury found that the drivers of the two companies had been racing, speeding, and preventing passing for 100 miles prior to the head-on crash that killed the decedent and injured her husband. The jury awarded Matthew Allison \$600,000 in economic damages and \$7 million in noneconomic damages, and the Estate of Sara Allison \$2.38 million in economic damages and \$10 million in noneconomic damages. The jury also awarded \$1.5 million in punitive damages against Smoot Enterprises and \$5 million in punitive damages against Horizon Transport. Last year, the case resolved through voluntary mediation program offered by the U.S. 9th Circuit Court of Appeals with the verdict intact.

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

A defendant will want to obtain discovery of amounts actually billed and paid in order to evaluate and request an appropriate post-verdict deduction of the jury award under Oregon’s collateral source rule. Under Oregon’s statutory collateral source rule, the trial court may deduct from a jury award certain benefits received from collateral sources, including medical expenses later written off by a medical provider, under an agreement with an insurer. Oregon Revised Statute (ORS) 31.580(1); *White v. Jubitz*, 219 Or. App. 62, 73-74, 182 P.3d 215 (2008), *aff’d*, 347 Or. 212, 219 P.2d 566 (2009).

However, the rule precludes deduction of certain sources of collateral benefits, including benefits which the plaintiff is required to repay, some insurance benefits, and retirement, disability and Social Security benefits. ORS 31.580(1). Additionally, medical expenses billed and later written off by a medical provider under an agreement with Medicare are not subject to post-verdict deduction under the Social Security exception to the collateral source rule. *White v. Jubitz*, 247 Or. 212, 230, 219 P.2d 566 (2009).

Although qualifying collateral benefits can be deducted from the amount of damages, they are still inadmissible as evidence during trial. Instead, evidence of the benefits must be submitted to the court by affidavit after the verdict. ORS 31.580(2). As such, discovery of amounts billed and paid should be obtained.

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)

Neither the Oregon legislature nor appellate courts have considered efforts to require healthcare providers to disclose amounts that they are contractually obligated to accept for certain procedures. Typically, the only area where defendants see these amounts is in the Personal Injury Protection (PIP) file.

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

The Oregon Rules of Civil Procedure (ORCP) set forth the circumstances under which an Oregon court may exercise specific, or “conduct-related,” personal jurisdiction over a nonresident defendant. ORCP 4. One of those circumstances is an action claiming injury to a person within or without state arising out of an act or omission within this state by the defendant. ORCP 4 C. Another circumstance is an action claiming injury to a person within this state arising out of an act or omission outside this state by the defendant, provided that at the time of the injury, either: (1) solicitation or service activities were carried on within this state by or on behalf of the defendant; or (2) products, materials, or things distributed, processed, serviced, or manufactured by the defendant were used or consumed within this state in the ordinary course of trade. ORCP 4 D. If one or both of the provisions are true, an Oregon court may exercise personal jurisdiction over an employer even if the act or omission occurred outside this state. Finally, under the catchall provision, Oregon’s jurisdiction extends to the extent permitted by federal Due Process. ORCP 4 L; *State ex rel. Circus Circus Reno, Inc. v. Pope*, 317 Or. 151, 153-54, 854 P.2d 461 (1991).

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

Oregon civil rules permit pre-suit depositions in limited circumstances to perpetuate testimony when a party is presently unable to bring suit. A party seeking to perpetuate testimony must petition the court, and make a showing that the petitioner (or their personal representative, heirs, beneficiaries, successors, or assigns) are likely to be a party to an action and are presently unable to bring such an action or defend it. ORCP 37 A(1). Additionally, the petitioner may seek to perpetuate testimony upon a showing that the petitioner has an interest in property about which a controversy may arise that would be the subject of an action.

The petition must also designate the subject matter of the expected action, the facts which the petitioner seeks to establish by the proposed testimony (and reasons for perpetuating the same), and the names of the expected adverse parties and proposed witnesses. The petitioner must then serve notice and a copy of the petition upon expected adverse parties in the manner provided for service of a summons. ORCP 37 A(2).

The court, upon being satisfied that perpetuation testimony may prevent a failure or delay of justice, will make an order designating the persons to depose and specifying the subject matter of the examination. ORCP 37 A(3).

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

Oregon does not have any specific law or regulations mandating 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?

There are no statutory limits on punitive damages in Oregon. Punitive damages are recoverable in Oregon where a defendant is proven by clear and convincing evidence to have “acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others.” ORS 31.730.

Oregon Courts and the United States Supreme Court have held large awards of punitive damages to be unconstitutional when the amount of punitive damages awarded greatly exceeds the amount of economic and non-economic damages awarded. Oregon courts have used the excessiveness review used by the federal Supreme Court. The Oregon Court of Appeals held that a \$22.5 million award of punitive damages was unconstitutional under the due process clause when the jury only awarded \$500,000 in compensatory damages. See *Bocci v. Key-Pharmaceuticals, Inc.*, 189 Or. App. 349, 76 P.3d 669 (2003). The court held that

an award of 7 times as many punitive damages as compensatory damages would be constitutional and reduced the verdict to \$3.5 million in punitive damages and \$500,000 in compensatory damages. *Id.* However, in 2015 the Oregon Court of Appeals reduced an award of \$125 million in punitive damages to \$25 million even though the jury had awarded only \$168,514 in compensatory damages. *See Schwarz v. Philip-Morris-USA, Inc.*, 272 Or. App. 268, 355 P.2d 931 (2015). The court probably allowed a large punitive damage award because the conduct of Philip Morris was especially outrageous.

However, the Oregon Constitution prohibits state court judges from reviewing jury decisions for any factual findings. Article VII (Amended) 3. A review for excessiveness of a punitive damages award must inherently review the factual basis. It's possible that in the future, the Oregon Supreme Court will determine that no punitive damages can be constitutional because the federal Supreme Court requires an excessiveness review of punitive damages while the Oregon State Constitution does not allow for excessiveness review.

Seventy percent of the punitive damages awarded must be paid to the State of Oregon. See ORS 31.735 (2015). This is because punitive damages are not awarded to compensate the injured party but rather to punish the at fault party.

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

Oregon has not mandated Zoom trials.

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?

In December 2019, an Oregon district court jury awarded \$9.65 million, including \$4 million in punitive damages, to two bicyclists who were struck by an 18-wheeler while traveling westbound on Interstate 84 in *Moutal et al. v. Exel, Inc.*, Case No. 3:17-cv-01444. The collision resulted in one of the cyclists nearly losing his leg and the other with injuries. The plaintiffs presented evidence that the truck had crossed the fog line into the shoulder at an area where the road curved left, was traveling four miles over the speed limit, and failed to provide care after the crash. The case settled with the verdict intact.