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TEXAS

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 generally inapplicable in Texas. "Only privileges grounded in the Texas Constitution, statutes, the Texas Rules of Evidence, or other rules established pursuant to statute are recognized in Texas." *In re Fisher & Paykel Appliances, Inc.* 420 S.W.3d 842, 848 (Tex. App—Dallas, 2014, no pet.), citing *Abbott v. GameTech Int'l, Inc.*, 03-06-00257-CV, 2009 Tex. App. LEXIS 4554, 2009 WL 1708815, at *6 (Tex. App.—Austin June 17, 2009, pet. denied) (citing Tex. Evid. R. 501). With that said, the work-product protections of Tex. R. Civ. P. 192.5 may extend to self-critical analyses if such was prepared in anticipation of litigation. *See In re Weeks Marine, Inc.*, 31 S.W.3d 389, 391 (Tex. App.—San Antonio, 2000, pet. denied).

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?

There is no specific rule in place to date requiring disclosure of litigation funding sources, much less their files, in Texas. Federal district courts in the state have weighed in on the issue. In *United States ex rel. Fisher v. Ocwen Loan Servicing, LLC*, 2016 U.S. Dist. LEXIS 32967, the Eastern District Court held that the litigation funding documents were protected by the work product doctrine. (E.D. Tex. 2016). Two bills were introduced in the 2019 Texas legislative session to require the disclosure of third-party litigation funding agreements (HB 2096 and SB 1567), neither made it out of committee. No similar bills have been introduced in the 2021 legislative session to date.

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

With regard to depositions of corporations, governments agencies and other organizations, there is no set rule regarding who must travel for the deposition. The Federal Rules do not identify the proper place for a Rule 30(b)(6) deposition. The Texas Lawyer's Creed states that an attorney "will not arbitrarily schedule a deposition . . . until a good faith effort has been made to schedule it by agreement." The noticing party may generally select the deposition location, but this selection is subject to the court's ability to grant a protective order under Rule 26(c)(2).

Accordingly, courts have broad discretion in determining the deposition location. Courts will analyze the potential convenience and hardship to the parties as they pertain to the locations at issue. Depositions of plaintiff organizations are normally in the judicial district where the action was brought because the plaintiff has consented to participation in the district in which it filed the lawsuit. 8A Charles Alan Wright, Arthur Miller, Mary Kay Kane & Richard L.

Marcus, *Federal Practice & Procedure* § 2112 (2012). A foreign corporation should be deposed in the district in which it has its principal place of business, unless justice requires modification of the location, similar to nonresident defendants. 8A Charles Alan Wright, Arthur Miller, Mary Kay Kane & Richard L. Marcus, *Federal Practice & Procedure* § 2112, at 84–85 (rev. 1994)).

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?

Generally, claims for vicarious liability and claims for direct negligence are "mutually exclusive modes of recovery." *Rosell v. Cent. W. Motor Stages, Inc.*, 89 S.W.3d 643, 654 (Tex. App.—Dallas 2002, pet. denied) (citing Arrington's *Estate v. Fields*, 578 S.W.2d 173, 178 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.)). If a plaintiff does not allege gross negligence, and a defendant-employer admits vicarious liability, "the competence or incompetence of the [employee] and the care which was exercised in his employment are immaterial issues." *Arrington's Estate*, 578 S.W.2d at 178. In such a situation, a defendant-employer's liability for ordinary negligence is established as a matter of law under the doctrine of respondeat superior. *Rosell*, 89 S.W.3d at 654. However, if a plaintiff alleges ordinary negligence against a defendant-driver and gross negligence against a defendant-employer for negligent entrustment, then the negligent entrustment claim becomes "an independent and separate ground of recovery against the owner for exemplary damages." *Id*.

This rule also has implications at trial. As for the liability questions that are submitted to a jury, it has been held that there is no necessity for including a defendant-employer in any ordinary negligence liability questions if the employer has stipulated that the defendant-driver was acting within the course and scope of their employment. *Id*. at 656. However, in cases where a plaintiff has brought claims of gross negligence against a defendant-employer, a separate question on the employer's independent negligence is proper to obtain the factual negligence determination needed to support such a claim. *Id*. In regard to jury questions on apportionment under Texas Civil Practice and Remedies Code § 33.003, courts have held that it is "proper to compare only the negligence of those directly involved in the incident." *Id*. (citing *Loom Craft Carpet Mills, Inc. v. Gorrell*, 823 S.W.2d 431, 432 (Tex. App.—Texarkana 1992, no writ). The Fifth Court of Appeals has opined that, "while the statute on its face requires all defendants to be included in the apportionment question, it would not be proper for an employer to be included along with the driver if its only responsibility was that of respondeat superior." *Id*. at 657. Therefore, once an employer stipulates that the driver was acting within the course and scope of their employment, the negligence of the driver is "passed on" to the employer, eliminating the need for the employer to be included in any apportionment question. *See Id*.

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

a. *Gregory v. Chohan,* No. 05-18-00167-CV,2020 Tex. App. LEXIS 9303, 2020 WL 7022378 (Tex. App.—Dallas, Nov. 30, 2020, no pet.)

In *Chohan*, there was a multi-vehicle accident that occurred after Gregory jackknifed a tractor-trailer on an icy road.. Id. at *1-2. When the truck came to a stop, the cab was partially on the left shoulder with the trailer at an angle, blocking all of the left lane and half of the right lane of the highway. Id. at 2. Gregory abandoned the truck without activating its emergency flashers or setting out any reflective triangles or flares. Id. Soon thereafter, a number of tractor-trailers and passenger vehicles crashed into or around the abandoned truck. Id. at 3. As a result, four people died and others were injured. Id. at 1-2. Plaintiff sued Gregory for negligence and, after judgment in plaintiff's favor, the lower court awarded almost $17 million in economic and non-economic damages. Id. at 5-8.

On appeal, defendant asserted*, inter alia*, that the evidence was legally and factually insufficient to prove Gregory was negligent. *Id*. at 8. After reviewing evidence presented at the lower court which addressed Gregory's actions both before and after the crash, the lower court affirmed the trial court's judgment. *Id*. at

64.

b. *FTS Int'l. Servs., LLC v. Patterson*, No. 12-19-00040-CV, 2020 Tex. App. LEXIS 6851,2020 WL5047913 (Tex. App.—Tyler, Aug. 26, 2020, no pet.)

In *FTS*, Mr. Patterson was driving when the driver of a semi-truck drifted into Patterson's lane and collided with his vehicle. Id. at *1. Patterson subsequently sued the driver's employer, FTS International Services, for medical expenses and lost earning capacity based on the direct negligence theory of liability. Id. at 4-5. The lower court found in favor of Mr. Patterson and entered a judgement against the driver and FTS awarding Patterson roughly $33,394,642. *Id*. at 6.

On appeal, FTS contended that the Texas Supreme Court had never expressly adopted direct negligence theories of liability where the employer is liable, not for vicarious liability for its employees negligence, but for the employer's own independent negligence on such theories as negligent hiring, training, supervision, and retention. *Id*. at 11. The court agreed and held that the Texas Supreme Court has not ruled definitively on these theories of liability. *Id*. at 9. Nonetheless, the court stated that the Texas Supreme Court, while not expressly adopting these theories of liability, does recognize that lower Texas courts have a broad consensus in applying these direct negligence claims as viable theories of liability. *Id*. at 11-12. In affirming the lower court's decision regarding FTS's liability, the court concluded that to impose liability on an employer under a theory of negligent hiring or retention, a plaintiff must show the, "employer's failure to investigate, screen, or supervise its employees proximately caused the injuries incurred by the plaintiff. *Id*. at 9-10. However, despite agreeing with the lower court that FTS was liable for Plaintiff's injuries, the court of appeals overturned the lower court and held that the damages were excessive and ordered a remand for a new trial on all issues. *Id*. at 89.

c. *Eddie McPherson, Karen Pearson v. Jefferson Trucking, LLC, Timothy Wayne Jefferson, Eric Wayne Jefferson*; Upshur County, Texas; November 2018; Settlement reached prior to briefing on appeal

Plaintiffs' 21-year-old son, a house painter, was killed apparently instantly when he drove his van into the side of Defendants' tractor trailer. The tractor trailer was perpendicular across the roadway so as to back into a driveway and reportedly did not have lights on. Plaintiffs alleged negligence, negligent training, and gross negligence. The driver refused to answer questions, citing potential self-incrimination. The jury awarded $260 million, apparently all compensatory, assigned 65% negligence to the driver of the tractor trailer, 20% to the tractor trailer company as employer of the driver, 10% on Timothy Jefferson, also as employer, and 5% on the deceased. The verdict was reduced to reflect 5% contributory negligence.

d. *Lauro Lozano, Jr. (driver) and Irene Lozano v. JNM Express, Anca Transport, Inc., Omega Freight Logistics, LLC, Jorge Marin, Silvia Marin*; Hidalgo County, Texas; May 2019; Currently on appeal with Corpus Christi Court of Appeals (submitted December 30, 2020)

Plaintiff 46-year-old truck driver returned home for 34 hours rest, but was ordered back on the road after only 3 hours instead. He was injured in single-vehicle accident after falling asleep at the wheel. Injuries included fractured pelvis, four ribs, fibula, and tibia; a patellar tendon tear, a Lisfranc dislocation of his foot; and a mesenteric hematoma (abdomen). Plaintiff testified that the trucking company representative directed him to alter his logbook.

e. Allen Norris (58 driver), Delores Norris (spouse), Fabian Williams (47 driver) v. UPS and Byron Bisor; Jefferson County, Texas; August 2019; Currently on appeal to Beaumont Court of Appeals

(briefing completed; not submitted)

This rear-end accident of an allegedly overloaded tractor-trailer into a pickup truck and then an SUV occurred in Louisiana. Defendants fought (and are appealing) venue. Upon trial to the bench due to the apparent late payment of a jury fee, the court awarded $19.2 million to Allen Norris, $1.1 million to his wife, and $6.8 million to Williams, all as compensatory rather than punitive damages. The injuries included back and neck injuries for both plaintiffs; head injuries including a subdural hematoma; and other miscellaneous injuries.

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)

Courts of Appeals in Texas have been split on the discoverability of medical providers' pricing information. Several years ago, the Supreme Court decided the case In Re North Cypress which permitted the discovery of pricing information in the context of hospital lien disputes. Courts of appeals have been split on whether the reasoning in that opinion extends to personal injury suits. The Texas Supreme Court is currently considering the case of *In Re K&L Auto Crushers, LLC and Thomas Gothard Jr*. This case is expected to resolve the issue of discoverability of procedure pricing for purposes of rebutting inflated claimed medical expenses.

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

Texas has District Courts and County Courts. The courts generally have concurrent jurisdiction over personal injury cases with damages less than $200,000. For cases with alleged damages over $200,000, jurisdiction will be in District Court.

Texas's Forum Non Conveniens statute, Tex. Civ. Prac. & Rem. Code § 71.051 lists 6 factors that courts consider when deciding whether to dismiss a claim based on Forum Non Conveniens:

(1) an alternate forum exists in which the claim or action may be tried;

(2) the alternate forum provides an adequate remedy;

(3) maintenance of the claim or action in the courts of this state would work a substantial injustice to the moving party;
(4) the alternate forum, as a result of the submission of the parties or otherwise, can exercise jurisdiction over all the defendants properly joined to the plaintiff's claim;
(5) the balance of the private interests of the parties and the public interest of the state predominate in favor of the claim or action being brought in an alternate forum, which shall include consideration of the extent to which an injury or death resulted from acts or omissions that occurred in this state; and
(6) the stay or dismissal would not result in unreasonable duplication or proliferation of litigation.

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

Pre-suit depositions in Texas are governed by Rule 202. A pre-suit deposition can take place under two circumstances: (1) to obtain testimony for use in an anticipated suit; or (2) to investigate a potential suit. However, pre-suit depositions are not intended for routine use, and a plaintiff must also show, and the court must find, that: (1) the deposition is intended to prevent the failure or delay of justice in an anticipated suit; or (2) the likely benefits of allowing a deposition to investigate a potential claim outweigh the burden or expense of the deposition.

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

There is no specific rule or law addressing the length of a hold. Generally, vehicles or tractor-trailers involved in an accident should be preserved on a litigation hold for the duration of the lawsuit or until obtaining the written consent of the parties to release the vehicle. However, if good cause to release the vehicle exists, a party may move for an order allowing the party to release the hold. Otherwise, the party runs the risk of a potential spoliation claim. If the condition of a vehicle cannot be preserved as it existed immediately following an accident, steps should be taken to document the vehicle's condition and any changes or modifications that are made. Failure to adequately document the vehicle's condition may also result in a spoliation claim.

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

With few statutory exceptions, exemplary damages can only be awarded where a plaintiff proves by clear and convincing evidence that the harm complained of results from fraud, malice, or gross negligence. Further, exemplary damages require a unanimous jury verdict with respect to both liability and the amount of exemplary damages. Exemplary damages are capped at the greater of: (1) two times the amount of economic damages, plus an amount equal to any noneconomic damages up to $750,000; or (2) $200,000.

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

Texas has not mandated Zoom trials at a statewide level. The last guidance from the Texas Supreme Court allows for Courts to proceed with any civil proceedings via Zoom, without the parties' consent. These Zoom trials have been proceeding fairly often in larger counties such as Bexar with mixed reviews from the attorneys involved.

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 general, Texas limits the amount of exemplary damages awarded to an amount equal to the greater of: two times the amount of economic damages plus an amount equal to any noneconomic damages found by the jury not to exceed $750,000; or $200,000. Tex. Civ. Prac. & Rem. Code § 41.008. Such damages may only be awarded if the Plaintiff proves by clear and convincing evidence that the harm resulted from fraud, malice, or gross negligence. Tex. Civ. Prac. & Rem. Code § 41.003. To prove gross negligence, and hence the need for punitive damages, the Plaintiff must meet the objective and subjective standards: "viewed from the actor's standpoint the act or omission complained of must involve an extreme degree of risk, considering the probability and magnitude of…harm." *Medina v. Zuniga*, 593 S.W.3d 238 (Tex. 2019). And, "the actor must have actual, subjective awareness of the risk involved, but nevertheless proceed in conscious indifference to the rights, safety, or welfare of others." *Id., citing Lee Lewis Constr. Inc. v. Harrison*, 70 S.W.3d 778, 785 (Tex. 2001). With that in mind, the circumstances of the accident are relevant, as are any drug tests, the status of a driver's commercial driver's license, and his past driving history, among other items. Notably though, Texas has a "high bar" when it comes to gross negligence claims. *See Escobedo v. Appleton*, 2020 U.S. Dist. LEXIS 113610 at 19-21 (W.D. Tex. 2020).

Nevertheless, there are parts of the State where gross negligence claims are less likely to be disposed of at the summary judgment stage, and very large results ensue. Take *FTS Int'l Servs., LLC v. Patterson*, No. 12-19-00040-CV, 2020 Tex. App. LEXIS 6851 (Tex. App. Aug. 26, 2020) for example. In that case, the Plaintiff received a verdict in excess of $33 million that included punitive damages which actually had to be reduced due to Texas' cap on exemplary damages. To show punitive damages against both company and driver, the Plaintiff introduced evidence of untruthfulness on the driver's application, the failure of the company to investigate that untruthfulness sooner, past incidents of unsafe driving by the driver while with the company, training issues, and the use dangerous drugs at the time of the accident. *Id.* at 83-85. While the Court held that the damages in the case were ultimately excessive, it held that the jury could reasonably have found that both the company and driver were grossly negligent based on the evidence. *Id.*