FOR MORE INFORMATION

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UTAH

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?

In Utah, there are two major self-critical analysis privilege or self-review privileges. These privileges are specific to the medical industry (not the transportation industry, *per se*). However, it is important for a party in a personal injury suit to know about these privileges.

I. Care-Review

Utah Heath Code Title 26 Chapter 25, i.e. Utah's care-review statute, provides that "[a]ny person, health facility, or other organization" may provide certain information, as listed within the provision, without incurring liability. The statute states that the providing party may use this information for only two purposes: (1) study and advancing medical research, with the purpose of reducing the incidence of disease, morbidity, or mortality; and (2) the evaluation and improvement of hospital and health care rendered by hospitals, health facilities, or health care providers." Utah Code Ann. § 26-25-1(3); *United States ex rel. Polukoff v. St. Mark's Hosp.*, 2020 WL 291397 (D. Utah Jan. 21, 2020). When a person or entity complies with the statute, "[a]ll information . . . are privileged communications and are not subject to discovery, use, or receipt in evidence in any legal proceeding of any kind or character." Utah Code Ann. § 26-25-3; *See id*.

II. Peer-Review

Utah Code Ann. § 58-13-5, Utah's peer-review privilege statute, establishes a duty for licensed health care to furnish information requested by the division or a board. This statute only provides immunity for liability, it does not extend to discovery requests or evidentiary matters. *Belnap v. Howard*, 2019 UT 9, ¶ 19, 437 P.3d 355, 360; *See also, United States ex rel. Polukoff v. St. Mark's Hosp.*, 2020 WL 291397 (D. Utah Jan. 21, 2020) at footnote 1. We have found no such data or reports that provide facts or statistics of the success of the privileges in the State of Utah.

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?

In 2019, Rep. Ken Ivory sponsored H.B. 448, the Litigation Funding Transparency Act. H.B. 448 would have permitted a party to request written disclosure of a third-party funder in certain instances – primarily if a plaintiff files a claim against a state, government body, state agency, etc. However, H.B. 448 did not pass and is not a law in Utah.

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

Utah R. Civ. Pro. Rule 30(b)(6) establishes that a party names a corporation, a partnership, an association, or a governmental agency, the organization may designate one or more officers, managing agents or other persons to testify on its behalf. Therefore, a witness or the attorney may "travel" on behalf of the agency, if the agency names such person.

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?

An employer may be held directly liable for its own negligence in hiring or supervising. *Clover v. Snowbird Ski Resort*, 808 P.2d 1037, 1048 (Utah 1991). Additionally, Utah case law provides that an employer of a driver may have direct liability outside the scope of employment when "a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct...." Restatement (Second) of Torts § 315 (1965); *Lane v. Messer*, 731 P.2d 488, 492 (Utah 1986). For example, if the employer "knows or should know of the necessity and opportunity for exercising control." *Lane v. Messer,* 731 P.2d 488, 492 (Utah 1986). Whether an employee is acting within the scope of his employment at a particular time is normally a question for the fact finder unless there is only one reasonable conclusion that can be drawn from the evidence. *Lane v. Messer*, 731 P.2d 488, 490 (Utah 1986).

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

There are no known noteworthy nuclear verdicts in Utah.

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

Utah Rule of Civil Procedure Rule 26.2(b)(6) provides that a plaintiff must produce, along with their Rule 26 disclosures, "copies of all bills, statements, or receipts for medical care, prescriptions, or other out-of-pocket expenses incurred as a result of the injury."

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)

The public need for health care cost transparency is increasing. There is a strong public interest to know how much a hospital service will cost, prior to entering a hospital building. In recent years, lawmakers and courts started to address this ongoing concern. R. Fuentes and K. Alacantar, *Challenging Inflated Medical Expenses In Casualty Claims*, https://www.translaw.org/Documents/TLI/2018/Fuentes-Alcantar%20-%20Paper.pdf.

On the federal level, the Centers for Medicare & Medicaid Services (CMS) issued the Hospital Price Transparency order which requires hospitals to provide the public with standard charges about items and services. *See, Special Edition - Monitoring for Hospital Price Transparency*, CMS.gov, Dec. 18, 2020. In another arena, efforts for price transparency regarding health insurance costs is a major wave among states. For example, the Utah legislature passed the Heath Insurance Right to Shop Amendments which requires insurance provides to disclose the insurance prices.

In litigation, price transparency has taken on a new form. Specifically, uninsured parties are requesting hospital contracts between the hospital and insurance companies. This is rooted in the idea and practice that hospitals typically charge an insured patient's insurance companies far

less for a service than an uninsured patient. Thus, state courts are permitting disclosure of these contracts in discovery and/or used as evidence at trial. *See In re N. Cypress Med. Ctr. Operating Co., Ltd.*, 559 S.W.3d 128 (Tex. 2018); *Solorio v. Fresno Cmty. Hosp. & Med. Ctr.*, No. F073953, 2018 WL 3373411 (Cal. Ct. App. July 11, 2018), as modified on denial of reh'g (July 31, 2018).

In Utah, there are no known appellate cases that address this particular issue. An argument for these contracts could be successful under Utah Rules of Civil Procedure R. 26(b)(1), which provides a party may discover "any matter . . . which is relevant to the claim or defend of a party . . . ." Parties in other states were successful using their state's equivalent rule. *In re N. Cypress Med. Ctr. Operating Co., Ltd.*, 559 S.W.3d 128 (Tex. 2018).

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

If a claim is brought against a government entity-employer, the claim is subject to the Utah's Immunity Act, Utah Code sections 63G-7-501 and 502. This statute vests exclusive, original jurisdiction in the district courts and venue in the county in which the claim arose. *GeoMetWatch Corp. v. Utah State Univ. Research Found.*, 2018 UT 50, ¶ 1, 428 P.3d 1064, 1067.

General workplace claims are subject to the Workers' Compensation Act, Utah Code § 35–1–60, for jurisdiction assessment. District courts have no jurisdiction over cases that fall within the purview of the Workers' Compensation Act. *Sheppick v. Albertson's, Inc.*, 922 P.2d 769, 773 (Utah 1996).

There are only two instances in which a district court "may be a judicial common law remedy but not for a compensation award." *Sheppick v. Albertson's, Inc.*, 922 P.2d 769, 773–74 (Utah 1996). First, an employee injured by a willful or intentional tortious act of an employer or a fellow employee may sue in a district court for a common law remedy. *Id*. Second, if an employer fails to comply with the insurance requirements stated in Utah Code Ann. § 35–1–46. *Id*.

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

Utah Rule of Civil Procedure Rule 27(a) provides the relevant law for taking deposition prior to action or pending an appeal. The Rule states that, essentially, the movant must file a verified petition in the county where the adverse party resides and must show that they desire a deposition, but do not yet have a cognizable cause of action. *Id*. The movant must also show facts supporting their desire for a pre-suit deposition. *Id*.

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

The Utah Administrative Code does not provide any explicit regulations regarding vehicle/tractor-trailer release. However, Utah Administrative Code Rule R909-1 and Rule R909-2 regulate Safety Regulations for Motor Carriers and Size and Weight.

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

Utah case law regarding punitive damages requires a two-part inquiry:

> (i) whether punitives are appropriate at all, i.e., whether the evidence is sufficient to support a lawful jury finding of defendant's requisite mental state; and (ii) whether the amount of punitives is excessive or inadequate, appearing to have been given under

the influence of passion or prejudice.

See Utah R.Civ.P. 59(a)(5); See also, *Crookston v. Fire Ins. Exch*., 817 P.2d 789, 807 (Utah 1991), holding modified by *Westgate Resorts, Ltd. v. Consumer Prot. Grp., LLC,* Appellee, 2012 UT 55, 285 P.3d 1219.

I. First Inquiry: Whether punitive damages are appropriate at all.

Under the first inquiry, punitive damages are allowed only where there is "'wilful and malicious' conduct, ... or ... conduct which manifests a knowing and reckless indifference toward, and disregard of, the rights of others." *Crookston v. Fire Ins. Exch*., 817 P.2d 789, 807 (Utah 1991).

II. Second Inquiry: Whether the amount of punitive damages is excessive.

Regarding the second inquiry, the court considers whether the punitive amount punishes and deters future egregious conduct and are grounded on wholly different policies, not to compensate the awarding party. *Crookston v. Fire Ins. Exch*., 817 P.2d 789 (Utah 1991).

Utah courts assess seven factors when establishing the need for punitive damages: (i) the relative wealth of the defendant; (ii) the nature of the alleged misconduct; (iii) the facts and circumstances surrounding such conduct; (iv) the effect thereof on the lives of the plaintiff and others; (v) the probability of future recurrence of the misconduct; (vi) the relationship of the parties; and (vii) the amount of actual damages awarded. *Crookston v. Fire Ins. Exch*., 817 P.2d 789 (Utah 1991).

In addition to these seven factors, the Utah Supreme Court has suggested that punitive damages below $100,000, but have ratios of 3 to 1 or less, are generally not excessive. However, punitive damages above $100,000 with ratios that exceed 2 to 1 are generally excessive. If a court a trial court decides to reduce or enlarge an award of punitive damages, then the trial court must explain its decision to do so.

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

The Utah Supreme Court has consistently updated its requirements for remote trials in response to the COVID-19 global pandemic. In short, yes. Utah currently mandates remote some civil bench trials and small claims hearings. Most hearings are currently being conducted remotely, while some are now in-person depending on a court's risk level. The Utah Judicial Council established three levels of court operations (Red, Yellow, Green), based on safety recommendations established by the Centers for Disease Control and the Utah Department of Health. Updates regarding remote trial requirements are available at https://www.utcourts.gov/alerts/.

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 are no cases currently up on appeal. One noteworthy verdict is *State Farm Mutual Automobile Insurance Co. v. Campbell*, slip op. 01-1289, 538 U.S. ___ (2003). The case arose from a bad faith claim due to State Farm's initial refusal to settle a negligent dispute stemming from an automobile accident. The entire case lasted over two decades. The jury initially awarded $145 million in punitive damages to the plaintiff. However, the trial court granted summary judgment for State Farm, essentially revoking the entire punitive amount. The case was then appeal to the Utah Supreme Court. The Utah Supreme Court upheld the $145 million punitive damage award. State Farm then appealed the verdict to the United State Supreme Court. The United States Supreme held that the punitive award was unconstitutional. The Supreme Court established a bright rule that under the due process clause, punitive damages are limited to less than ten times the size of compensatory damages.