STATE LAW SUMMARY
Overview of the State of Oklahoma

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Overview of the State of Oklahoma
Court System
A. Trial Courts
The state district court system in Oklahoma is made up of courts in each of Oklahoma's 77 counties. The two largest jurisdictions are Oklahoma County (which includes Oklahoma City) and Tulsa County (which includes Tulsa). In Oklahoma, the initial filing is called a petition rather than a complaint, but the rules of civil procedure are modeled after the Federal Rules. When filing a petition in state court, a plaintiff is required to state whether the amount in controversy exceeds $75,000. If it does, such a general statement regarding damages is sufficient. If, however, the amount in controversy does not exceed $75,000, a plaintiff must specify the amount of damages sought.
Cases involving claimed damages that do not exceed $6,000 fall under the Small Claims Procedure Act. These cases are still filed in district court, but they have their own set of rules, apart from the normal rules of civil procedure. The Small Claims Procedure Act is codified at 12 O.S. §1751 et. seq.

State courts do issue scheduling orders with mediation deadlines. However, both the Dispute Resolution Act and the District Court Mediation Act state that the process involves an agreement of the parties to mediate. 12 O.S. §§1804 and 1823.

Jury trials involve 12 jurors. If neither party requests a jury trial, a bench trial can be had. Oklahoma remains a fairly conservative jurisdiction. Southeastern Oklahoma is generally considered the most plaintiff-friendly area of the state. Tulsa County is extremely conservative. Unreasonably high verdicts are uncommon and generally involve cases with egregious liability facts and/or serious injuries/damages.

Oklahoma provides an excellent on-line resource for Oklahoma legal research and searching of case files for cases filed throughout the state. The web site is called OSCN (the Oklahoma State Courts Network). It is found at www.oscn.net. The site provides free access to all Oklahoma cases, statutes and jury instructions, among other things. There are downloadable versions of the Oklahoma Uniform Jury Instructions (OUJI) for use in cases. Oklahoma courts prefer to use these OUJI, and many of the below sections contain citations to them.

B. Appellate Courts

Appeals of civil actions are filed in the Oklahoma Supreme Court. The statutes governing appeal and error are set forth beginning at 12 O.S. §951. The rules governing appeals are the Oklahoma Supreme Court Rules. Though the appeal is filed in the Oklahoma Supreme Court, there is an intermediate appellate court called the Oklahoma Court of Civil Appeals that will initially decide the appeal of most judgments and appealable orders. A review of an opinion of the Court of Civil Appeals in the Oklahoma Supreme Court on certiorari is a matter of sound judicial discretion and will be granted only when there are special and important reasons and a majority of the justices direct that certiorari be granted. Okla.Sup.Ct.R. 1.178. There are nine justices on the Oklahoma Supreme Court.

The rules regarding the posting of a supersedeas bond are set forth at 12 O.S. §990.4. Generally, the amount of the bond is an amount equal to the judgment, including costs and interest, where the bond is guaranteed by a surety. If the bond is not guaranteed by a surety, the party must post twice the amount of the judgment. 12 O.S. §990.4(B)(1)(a).

Postjudgement interest is addressed at 12 O.S. §727 et seq. The rates for each calendar year are set forth in the statute, and are based on the prime interest rate plus two percentage points.

Procedural

A. Venue
According to 12 O.S. §141, the venue of actions resulting from the use or operation of motor vehicles is proper in any county where service can be obtained on one of the defendants, or in any county where the damages or a part thereof were sustained.

B. Statute of Limitations
Statutes of limitation are codified at 12 O.S. §95. The statute of limitations for a negligence action is two years. The statute of limitations is five years for contract actions (including bad faith actions).

C. Time for Filing An Answer
The time limits for responsive pleadings are set forth in 12 O.S. §2012. A defendant shall serve an answer within 20 days after service of the summons and petition.

D. Dismissal Re-Filing of Suit
The rules relating to dismissal of actions are contained in 12 O.S. §§683 and 684.. A plaintiff may dismiss an action, without an order of the court, by filing a notice of dismissal at any time before pretrial. After the pretrial conference, an action may only be dismissed by agreement of the parties or by the court. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice.

If a case is dismissed without prejudice, or it fails otherwise than on the merits, it can be refilled within one year of the dismissal, even if the time limit for commencing the action has expired before the new action is filed. 12 O.S. §100.

Liability
A. Negligence
Oklahoma negligence law is detailed in Chapter 9 of the Oklahoma Uniform Jury Instructions. That law includes the following basic principles.
A plaintiff must prove each of the following three elements in a negligence action:
First, that he/she has sustained injury;
Second, that the defendant was negligent; and
Third, that such negligence was a direct cause of the injury.
Negligence is the failure to exercise ordinary care to avoid injury to another’s person or property. Ordinary care is the care which a reasonably careful person would use under the same or similar circumstances.
Oklahoma follows a modified comparative negligence scheme. If a plaintiff is more than 50 percent at fault, that plaintiff is barred from recovery. 23 O.S. §13 Any negligence on the part of the plaintiff that is less than 50 percent results in a reduction in Plaintiff’s award equal to the percentage of negligence attributed to the plaintiff.

B. Negligence Defenses
Like the standards for negligence, the defenses to a negligence action are set forth in Chapter 9 of the Oklahoma Uniform Jury Instructions. The primary defense to a negligence action is contributory/comparative negligence, which is discussed above.

Assumption of the risk is an available defense. A defendant must show that 1) the plaintiff knew of the risk and appreciated the degree of danger, 2) the plaintiff had the opportunity to avoid the risk, 3) the plaintiff acted voluntarily, and 4) the plaintiff’s action was the direct cause of his/her injury. OUJI 9.14.
There is a jury instruction for “unavoidable accident.” It is defined as an accident that occurs without negligence on the part of either party. OUJI 10.9. The Oklahoma Uniform Jury Instructions state that, while Oklahoma has recognized the sudden emergency doctrine, no jury instruction need be given. The basic negligence instructions cover this topic by stating that the standard of care required of a party depends on the circumstances. See OUJI 10.10.

C. Gross Negligence, Recklessness, Willful and Wanton Conduct
These terms are applicable to punitive damages, and will be discussed in that section.

D. Negligent Hiring and Retention
There is no special jury instruction on this topic. The standard falls under general negligence principles. Oklahoma Courts have cited the Restatement of Agency (Second), §213(b) for the proposition that if an employer does not exercise the care which a prudent person would ordinarily use in hiring, training or retaining an employee, and if the work being performed by that person poses a serious risk of harm, there is a special duty of investigation. A plaintiff must show either actual knowledge of unfitness or circumstances sufficient to place a reasonably prudent person on notice of the individual’s unfitness if the employee is not performing work which constitutes a serious risk of great harm. Jackson v. Remington Park, Inc. 874 P.2d 814 (Okla. App. 1994).

E. Negligent Entrustment
An owner or provider of a vehicle has a duty to use ordinary care to avoid lending it to another person whom he knows, or reasonably should know, is intoxicated/careless/reckless/incompetent to drive. OUJI §10.16. Oklahoma also has a statute which states that the owner of a motor vehicle who knowingly permits such motor vehicle to be operated by a person who is not qualified to operate a motor vehicle (i.e. unlicensed) shall be civilly liable for any unlawful act committed by the operator. 47 O.S. 6-307.

F. Dram Shop
A bar owner (or other commercial vendor that sells liquor for on-the-premises consumption) has a duty to use ordinary care not to serve alcohol to a person that the bar owner (or other commercial vendor) knows or reasonably should know from the circumstances is already intoxicated. OUJI 10.14.

G. Joint and Several Liability
Pursuant to tort reform legislation that became effective November 1, 2011, liability for damages caused by two or more persons is several only. A joint tortfeasor is liable only for the amount of damages allocated to that tortfeasor. 23 O.S. §15

H. Wrongful Death and/or Survival Actions
The law governing situations where the death of one is caused by the wrongful act of another is set forth in 12 O.S. §§1053 – 1055. The action may be brought by the personal representative, or, where no personal representative has been appointed, by the widow or next of kin. The recoverable damages are discussed below.

I. Vicarious Liability
An employer is vicariously liable for the acts and/or omissions of its employee when that employee is found to have been acting within the scope of his employment and/or authority at the time of the occurrence. Beard v. Richards, 820 P.2d 812 (Okla. 1991); Jackson v. Remington Park, Inc. 874 P.2d 814 (Okla. App. 1994).
To proceed under respondeat superior, a plaintiff is not required to name the truck driver as a defendant. The plaintiff may proceed only against the trucking company, even though the only basis for liability against the trucking company is respondeat superior. However, if the plaintiff does sue the driver and then by an affirmative act, releases the driver/servant, and that release effectively bars any further action against the driver/servant, the vicariouslyliable master is likewise released. This rule is referred to as the “Release Rule.” The dismissal without prejudice of a driver would not preclude the prosecution of an action against the trucking company, because the dismissal does not bar future action against the driver. Martin v. Mid-Cal Express, 2003 OK CIV APP 106, 83 P.3d 898.

In order to hold an employer liable for the intentional tort of its employee, a plaintiff must show, first, that the relation of master and servant existed at the time, and, second, that the tortious act was committed within the scope of authority. Thompson v. Madison Machinery Company, Inc., 684 P.2d 565 (Okla. 1984)). See 23 O.S. § 103

The jury instructions governing agency are contained in Chapters 6 and 7 of the Oklahoma Uniform Jury Instructions.

J. Exclusivity of Workers’ Compensation
Workers’ Compensation is the exclusive remedy for an employee against his/her employer and/or co-employees. 85 O.S. § 11-302. There is an exception to this exclusivity in the event of an intentional tort. An intentional tort shall exist only when the employee is injured as a result of willful, deliberate, specific intent of the employer to cause such injury. The issue of whether the act is an intentional tort is a question of law for the court. 85 O.S. § 11-302(B).

Damages
A. Statutory Caps on Damages
Tort reform that became effective in November, 2011 placed cap on non-economic damages. This legislation is codified at 23 O.S §61.2. The amount of compensation that the trier of fact may award a plaintiff for non-economic loss may not exceed $350,000, regardless of the number of parties sued or the number of actions brought. The cap can be lifted if the the judge and jury find, by clear and convincing evidence, that the defendant’s acts or failures to act were: 1) in reckless disregard for the rights of others, 2) grossly negligence, 3) fraudulent, or 4) intentional or with malice.

B. Compensatory Damages for Bodily Injury
The recoverable damages in a personal injury case are set forth in Oklahoma Jury Instruction 4.1. In fixing the amount to award a plaintiff, a jury may consider the following elements:

A. Plaintiff’s physical pain and suffering, past and future;
B. Plaintiff’s mental pain and suffering, past and future;
C. Plaintiff’s age;
D. Plaintiff’s physical condition immediately before and after the accident;
E. The nature and extent of Plaintiff’s injuries;
F. Whether the injuries are permanent;
G. Thy physical impairment;
H. The disfigurement;
I. Loss of earnings/time;
J. Impairment of earning capacity;
K. The reasonable expenses of the necessary medical care, treatment and services, past and future.

Any of the elements that are not supported by evidence should be removed from consideration by the court.

C. Collateral Source
Tort reform that became effective in November, 2011 established that the amount paid for medical expenses is the amount admissible as damages, not the amount billed. 12 O.S. §3009.1.

D. Pre-Judgment/Post judgment Interest
Oklahoma law regarding Prejudgment and Postjudgment interest is codified at 12 O.S. §727.1. In a personal injury action, prejudgment does not begin to accrue until 24 months after the action was commenced. The statutory interest rates are set forth at the end of §727.1.

E. Damages for Emotional Distress
The standards for intentional infliction of emotional distress are set forth in Oklahoma Uniform Jury Instruction 20.1. An action for intentional infliction of emotional distress will lie only where there is extreme and outrageous conduct coupled with severe emotional distress. Restatement (Second) of Torts §46 (1977); Chandler v. Denton, 741 P.2d 855 (Okla. 1987). The right to recover is not dependent on physical injury. Chandler v. Denton, supra at 867. The extreme and outrageous character of a Defendant’s conduct is in itself important evidence that the distress episodes took place. Restatement (Second) of Torts § 46, Comment “K”. Severe emotional distress may be shown either by physical manifestations of the distress or by subjective testimony. Chandler v. Denton, supra at 867.

Negligent infliction of emotional distress is not an independent tort, but is in effect a tort of negligence. Lockhart v. Loosen, 943 P.2d 1074. Recovery for negligent infliction of emotional distress caused by willful, actionable tort is recoverable even absent physical injury, if it is the natural probable consequence of the tortious act. Cleveland v. Dyn-A-Mite Pest Control, Inc. 2007 OK CIV APP 95, 57 P.3d 119. Oklahoma now recognizes a claim for negligent infliction of emotional distress of a bystander only if the plaintiff was directly and physically involved in the accident, suffered damage from actually viewing the injury to another rather than learning about the accident later, and a familial or other close personal relationship existed between the plaintiff and the party who suffered the injury giving rise to the mental anguish. Kraszewski v. Baptist Medical Center of Oklahoma, Inc., 916 P.2d 241 (Okla. 1996).

F. Wrongful Death and/or Survival Action Damages
The damages recoverable in a wrongful death action are 1) medical and burial expenses, 2) loss of consortium and grief of the surviving spouse, 3) the mental pain and anguish suffered by the decedent, 4) the pecuniary loss to the survivors, and 5) the
grief and loss of companionship of the children and parents of the decedent. 12 O.S. 1053(B).

Section 1055 provides the damages recoverable for the death of an unmarried, unemancipated minor child. These include medical and burial expenses, loss of anticipated services and support, loss of companionship and love of the child, destruction of the parent-child relationship and loss of monies expended by parents or guardian in support, maintenance and education of the child. 12 O.S. 1055.

G. Punitive Damages
Oklahoma has adopted a multi-tiered system for assessing punitive damages. Actions for breach of duty or obligation (other than contract) may include claims of punitive damages for sake of example and for punishment based upon the following criteria: the seriousness of the hazard to the public arising from defendant’s misconduct; the profitability of the misconduct to the defendant; the duration of the misconduct and any concealment of it; the degree of the defendant’s awareness of the hazard and its excessiveness; the attitude and conduct of the defendant upon discovery of misconduct or hazard; in cases involving corporations or other entities, the number and level of employees involved in causing or concealing the misconduct; and the financial condition of the defendant. 23 O.S. § 9.1(A).

Category I require the jury to find by clear and convincing evidence of conduct amounting to reckless disregard for the rights of others, or that an insurer has recklessly disregarded its duty to deal fairly and act in good faith with its insured. Exemplary damages in Category I may not exceed either $100,000.00 or the amount of actual damages awarded, whichever is greater.

Category II involves the jury finding by clear and convincing evidence that a defendant acted intentionally and with malice towards others, or that an insurer intentionally and with malice breached its duty to deal fairly and act in good faith with its insured. Damages in Category II may not exceed the greater of $500,000.00, twice the amount of actual damages awarded, or the increased financial benefit derived by the defendant or insurer as a direct result of the conduct causing the injury to the plaintiff and other persons.

This category permits the trial court to reduce any award for punitive damages by the amount which the court finds the defendant or insurer has previously paid as a result of other punitive damage verdicts in the State of Oklahoma for the same conduct.

Category III is used when the jury finds by clear and convincing evidence that a defendant acted intentionally and with malice towards others or an insurer intentionally and with malice breached its duty to deal fairly and act in good faith with its insured, coupled with a finding by the Court on the record, out of the presence of the jury, that there is evidence beyond a reasonable doubt that the defendant or insurer acted intentionally and with malice and engaged in life-threatening conduct to humans. If such a finding is made, the jury can assess exemplary damages in any amount it deems appropriate. 23 O.S. § 9.1(B), (C) and (D).
H. Diminution in Value of Damaged Vehicle
When the personal property that has been damaged is susceptible of repair at a reasonable cost, the proper measure of damages is the cost of repairs made plus the diminution in value of the personal property. *Brennan v. Aston, Jr.*, 84 P.3d 99 (Okla. 2003). Oklahoma Uniform Jury Instructions, Civil 2d, 4.14. The diminution in value is the value of the property prior to the damage minus the value of the property after the property has been repaired. *Brennan v. Aston, Jr.* supra.

I. Loss of Use of Motor Vehicle
While the property is being repaired, a party can also recover the value of the loss of use of the property. This value can be determined by the cost of renting property to use during the time the repair is being made or the loss of business caused by the loss of the use of the property. *Marland Refinery Co. v. Duffy*, 220 P. 846 (Okla. 1923).

Evidentiary Issues
A. Preventability Determination
Oklahoma does not have specific case law on this issue.

B. Traffic Citation from Accident
Whether or not a citation was issued is generally not admissible in a negligence case. What is admissible, however, is when a party that received a citation makes an admission of guilt to the citation. If the citation is not going to be contested, it should be paid with the explicit provisions that it is being paid not as an admission of guilt, but rather under a plea of *nolo contendere* (no contest). 12 O.S. § 2410(A)(2). There is a box on the citation that should be checked to indicate this plea.

A driver’s credibility may be attacked or impeached by presenting evidence that he or she has been convicted of a crime within the past ten years if the crime was punishable by imprisonment in excess of one (1) year or more, or if the crime involved dishonesty or false statement, regardless of punishment. If a conviction is being appealed, that appeal does not bar the introduction of the criminal conviction for impeachment purposes. However, evidence of the appeal may also be admitted. Of course, the admission of evidence of conviction of crime may not be allowed if the probative value is outweighed by the unfairly prejudicial effect to the accused. 12 O.S. § 2609.

C. Failure to Wear a Seat Belt
Evidence of the use or nonuse of seatbelts will be admissible in a civil action except for minors under the age of 16. 47 O.S. 11-1112. In *Fields v. Volkswagen of Am., Inc.*, the Oklahoma Supreme Court held that evidence of failure to use seat belts was not admissible to establish a defense of “contributory negligence” in products liability cases. 555 P.2d 48, 62 [Okla. 1976]. In 1987, the Oklahoma Legislature, in connection with adoption of an act that requires mandatory use of seat belts, enacted a statute that precludes introduction of evidence concerning “use or nonuse” of seat belts in any civil lawsuit. Okla. Stat. tit. 47 §§ 12-420. In *Bishop v. Takata Corp.*, 12 P. 3d 459 (Okla. 2000). The Oklahoma Supreme Court determined that the seat belt exclusionary statute did not prohibit use or nonuse evidence in a lawsuit alleging a defect in a seat belt system.

D. Failure of Motorcyclist to Wear a Helmet
No Oklahoma cases have decided whether the use of helmets can be evidence of contributory negligence.

E. Evidence of Alcohol or Drug Intoxication
Intoxication of a defendant at the time of an automobile collision may be shown as tending to prove negligence. *Nail v. State*, 33 Okla. Crim. 100, 109 (Okla. Crim. App. 1925). Any evidence having the tendency to prove intoxication, can be submitted to the jury. The remoteness in time or the strength of the evidence goes to weight rather than to admissibility. Id.

F. Testimony of Investigating Police Officer
Investigating police officers may not state his opinion as to which of the parties was at fault in causing the accident or his opinion concerning what acts of the parties contributed to the accident. *Gabus v. Harvey*, 678 P.2d 253 (Okla. 1984)

G. Expert Testimony
Oklahoma has adopted the standards set forth in *Daubert v. Merrell-Dow Pharmaceuticals* and its progeny for the admissibility of expert testimony. In fact, pursuant to Oklahoma’s latest tort reform act, 12 O.S. § 2702, 2703 was amended to incorporate the *Daubert* and *Kuhmo* standards of Rule 702 of the Federal Rules of Evidence. Additionally, the proponent of expert testimony may not illicit testimony from the expert regarding facts or data upon which the expert has based her opinion or inference that would otherwise be inadmissible unless the court finds that the probative value of the testimonies substantially outweighs its prejudicial effect. However, in an automobile accident negligence case, an expert witness may not state his opinion as to which of the parties was at fault in causing the accident or his opinion concerning what acts of the parties contributed to the accident. *Gabus v. Harvey*, 678 P.2d 253 (Okla. 1984)

H. Collateral Source
The collateral source rule traditionally applies in the context of common law tort actions to determine the amount of compensatory damages which will compensate the injured party for all detriment proximately caused. 23 O.S. §61. The general rule applied to determine the proper amount which will compensate for the injured party's "whole loss" in a common law tort action is as follows: total or partial compensation for an injury received by the injured party from a collateral source wholly independent of the wrongdoer will not operate to lessen the damages recoverable from the person causing the injury. Further, it is well settled that damages recoverable for a wrong are not diminished by the fact that the party injured has been wholly or partly indemnified for his loss by insurance effected by him and to the procurement of which the wrongdoer did not contribute. The same has been held true of compensation received by an employee from a benefit fund maintained by the employer. Pursuant to these authorities, the Supreme Court of Oklahoma has determined that under the damages statute the receipt of compensation by the injured party from a collateral source wholly independent of the wrongdoer would not operate to lessen the damages recoverable from the person causing the injury. *Worsham v. Nix*, 2006 OK 67 (Okla. 2006)

I. Recorded Statements
Any person who has given a recorded or written statement is entitled to a copy of that statement upon request. 12 O.S. § 3226(B)(2). However, efforts to discover the contents of claims files are vigorously resisted by the defense bar, although there is no
clear precedent in this state. The Oklahoma Supreme Court does permit the discovery of claims files and claims manuals in bad faith litigation. Karzenkiewicz v. Jackson, 904 P.2d 66 (Okla. 1994).

The crucial issue to the Court is whether the material sought to be discovered is prepared "in anticipation of litigation." In order to determine whether the material is prepared in anticipation of litigation, a Court will determine whether the document was secured in the regular course of the duties performed by the individual as an employee of the insurance company (the ordinary course of work). Hall v. Goodwin, 775 P.2d 291 (Okla. 1989). In other words, is such a document typically prepared by the insurance company prior to the notice of a lawsuit? On the other hand, during the course of a particular representation, an attorney may draw from various mental impressions consisting of conclusions, legal theories, and opinions, evaluations, its strength and weakness, and inferences drawn from interviews of witnesses. The sum total of these impressions, when reduced to writing, is the attorney's work product. Only the distilled product which is communicated to the client, or any communication received by the client from counsel which is intermixed with work product, is discoverable. Ordinary work product consists of factual information garnished by counsel acting in a professional capacity in anticipation of litigation. This includes facts gathered from parties and witnesses, and materials discovered through investigation of counsel and/or his agents. Although ordinary work product is cloaked with a qualified immunity, it may be discovered upon a showing of the inability to secure the substantial equivalent of the materials without undue hardship. Ellison v. Gray, 702 P.2d 360 (Okla. 1985).

J. Prior Convictions

Admissibility of prior convictions is based on the Oklahoma Rules of Evidence. Evidence of a voluntary and knowing guilty plea to a traffic violation, whether criminal or non-criminal, is admissible in a civil action as an admission against interest, by the implication of the conduct prohibited by the ordinance.

Impeachment of a witness by evidence of a conviction of a crime is determined through a balancing test. The balancing test, applicable only in determining the admissibility of prior convictions under Section 2609(A)(2) is whether 'the probative value of admitting this evidence outweighs its prejudicial effect to the detriment of the defendant.' So long as the questions are within the boundaries of Section 2609 and are "asked in good faith and in an appropriate manner, they are not prejudicial." Johnson v. State, 662 P.2d 687, 690 (Okl. Cr. 1983). We do, however, offer the following guidelines to trial courts in conducting the balancing test required under Section 2609(A)(2):

(1) The impeachment value of the prior crime.
(2) The point in time of the conviction and the witness' subsequent history.
(3) The similarity between the past crime and the charged crime.
(4) The importance of the defendant's testimony.

K. Driving History
Past history of traffic offense convictions as substantive evidence to establish a pattern of negligent driving, attempting to imply that the defendant driver was also driving negligently at the time of the accident giving rise to the civil trial, is not admissible.

Oklahoma’s Rules of Evidence were modeled after the Federal Rules. Therefore, prior traffic convictions cannot be used to show action in conformity therewith on a particular occasion. Fed.R.Civ.P. 404 and 608. This is the same rule where a driver is given a traffic citation for an accident that results in a civil suit and trial. That is assuming of course the driver did not enter a guilty plea.

L. Fatigue
Oklahoma does not have any case law on this issue.

M. Spoliation
Spoliation occurs when evidence relevant to prospective civil litigation is destroyed, adversely affecting the ability of a litigant to prove his or her claim. Patel v. OMH Med. Ctr. Inc., 987 P.2d 1185 (Okla. 1999), cert. denied, 528 U.S. 1188 (2000). Oklahoma courts have recognized the existence of an adverse presumption that follows destruction or spoliation of evidence. Beverly v. Wal-Mart Stores, Inc., 3 P.2d 163, 165 (Okla. App. 1999). This presumption varies in weight with the nature of the conduct complained of and the importance of the evidence. Id. Therefore, it is important for companies to have a document retention policy and institute litigation holds whenever necessary.

When an expert employed by a party or his attorney conducts an examination reasonably foreseeably destructive without notice to opposing counsel, and such examination results in either negligent or intentional destruction of evidence, thereby rendering it impossible for an opposing party to obtain a fair trial, a court is required to take appropriate action, either to dismiss the suit altogether or to ameliorate the ill-gotten advantage. Barker v. Bledsoe, 85 F.R.D. 545 (W.D. Okla. 1979).

Settlement
A. Offer of Judgment
1. When Can It Be Made?

There are two types of offers of judgment in Oklahoma. The first type is governed by 12 O.S. § 1101, and the second type is governed by 12 O.S. § 1101.1. An offer made under 12 O.S. § 1101 may be made at any time before trial. An offer made under 12 O.S. § 1101.1 may be made at any time more than 10 days prior to trial. Wise and Woolery, 904 P.2d 151 (Okla. App. 1995). See also, Barfield v. Barfield, 742 P.2d 1107 (Okla. 1987).

2. Effect of an Offer of Judgment?

The effect of an offer of judgment depends on whether it falls under 12 O.S. § 1101 or 12 O.S. § 1101.1. According to 12 O.S. § 1101, if the plaintiff accepts the offer within five days, the offer and acceptance shall be noted in the journal, and judgment shall be rendered accordingly. If the offer is not accepted, and if
the plaintiff fails to obtain judgment for more than was offered by the defendant, the plaintiff shall pay the defendant’s costs from the time of the offer. Thus, this section shifts costs only, not attorney fees.

The second statute, 12 O.S. § 1101.1, has the potential to shift attorney fees. The first thing that should be noted is that the provisions of 12 O.S. § 1101.1 apply only where the plaintiff demands in a pleading or in trial proceedings more than $100,000.00, or where the defendant makes an offer of judgment for more than $100,000.00. Any offer of judgment may precede the demand. Thus, even if a defendant’s offer is less than $100,000.00, the provisions of this section will apply if plaintiff demands $100,000.00 or more in a pleading or at trial.

An offer of judgment shall be deemed to include any costs or attorney fees otherwise recoverable unless it expressly provides otherwise. Each plaintiff to whom an offer of judgment is made shall within ten days file either a written acceptance or rejection of such offer, or a counter-offer of judgment. In the event the plaintiff rejects the offer of judgment and a judgment awarded to plaintiff is less than the final offer of judgment, then the defendant filing that offer of judgment shall be entitled to recover reasonable litigation costs and reasonable attorney fees incurred by that defendant from the date of the filing of the final offer of judgment until the date of the verdict. Likewise, in the event a defendant rejects a counter-offer of judgment made by the plaintiff, and the judgment awarded to the plaintiff is greater than the final counter-offer of judgment, the plaintiff shall be entitled to recover reasonable litigation costs and reasonable attorney fees incurred by the plaintiff from the date of filing of the final counter-offer of judgment until the date of the verdict. Evidence of offers of judgment or counter-offers of judgment is not admissible for any reason other than to enforce the settlement agreement or to determine attorney fees and litigation costs.

B. Liens

1. **Who is Entitled to Assert a Lien? Who has subrogation rights?**

A hospital and a physician are statutorily authorized to assert liens in personal injury cases. Title 42 O. S. §§ 43 and 46. In cases where the plaintiff was in the course and scope of his or her employment, the employer/insurance carrier will have a workers’ compensation subrogation interest. The employer/insurance carrier’s subrogation rights are governed by 85 O.S. § 348.

2. **When is a Lien Enforceable Against a Defendant?**

Written notice containing specific information must be filed in the Office of the County Clerk is the county in which the health care provider is located, and must be filed on the mechanic’s and materialmen’s docket before any monies are paid to the injured person. This notice of lien must also be mailed to the injured person and their legal representative, all persons or entities alleged to be liable to the injured party, and to any insurance carriers of any persons or entities alleged to be liable. The lien may be enforced by civil action so long as it is brought
within one (1) year after the health care provider is aware of a final judgment, settlement or compromise. *Kratz v. Kratz*, 905 P.2d 753 (Okla. 1995).

A hospital or physician's lien against uninsured motorist benefits in the State of Oklahoma is unenforceable. 85 O.S. § 44. Similarly, an employer/employees' compensation carrier may not subrogate against uninsured motorist benefits or medical payments benefits. 85 O.S. § 44. Also, the employer/carrier may not subrogate for any death benefits paid. 12 O.S. §§ 1101 and 1101.1.

C. Minor Settlement
Of special note is the statute in Oklahoma which requires court approval of any settlement involving claims brought on behalf of a minor. Oklahoma statutes require that any money recovered on behalf of a person less than eighteen (18) years of age in excess of $1,000.00 must be deposited in a federally insured banking, credit union or savings and loan institution and is supervised by the court. The settlement itself must also be approved by a court, and is commonly referred to as a "friendly suit". 12 O.S. § 83.

D. Negotiating Directly With Attorneys
Claims handlers are permitted to negotiate with attorneys.

E. Confidentiality Agreements
A confidentiality provision can be included in a settlement agreement, and is enforceable.

F. Releases
If the plaintiff does sue the driver and then by an affirmative act, releases the driver/servant, and that release effectively bars any further action against the driver/servant, the vicariously-liable master is likewise released. This rule is referred to as the "Release Rule." The dismissal without prejudice of a driver would not preclude the prosecution of an action against the trucking company, because the dismissal does not bar future action against the driver. *Martin v. Mid-Cal Express*, 2003 OK CIV APP 106, 83 P.3d 898.

G. Voidable Releases
A release in Oklahoma is nothing more than a contract. And in Oklahoma, where a contract is entered into on the basis of a misrepresentation which goes to the contract's inducement, as a notion distinct from its nature, the tainted agreement is rendered voidable. Fraud in the inducement is defined as a "misrepresentation as to the terms, quality or other aspects of a contractual relation, venture or other transaction that leads a person to agree to enter into the transaction with a false impression or understanding of the risks, duties or obligations she has undertaken." A contract voidable for fraud in the inducement creates a valid contractual relationship, which subsists in contemplation of law until the parties are relieved of their obligation by a decree of rescission. The interests of an innocent third party are often protected where a contract is

A misrepresentation which would relieve an insurer of liability to its insured or to the insured's designated beneficiary had it been made in an application for insurance not mandated by law 26 does not relieve the insurer of liability to an innocent third party
whose protection is mandated by Oklahoma's compulsory insurance law. *Harkrider v. Posey*, 2000 OK 94, 13 (Okla. 2000)

**Transportation Law**

A. State DOT Regulatory Requirements


B. State Speed Limits


C. Overview of State CDL Requirements

There are three classes of CDL in Oklahoma. The requirements for each are set by statute at 47 O.S. 6-101 et. seq. Mediation/ADR Mediation is not mandatory. Any case can be referred to court ordered mediation via Oklahoma District Court Mediation Act.

**Insurance Issues**

A. State Minimum Limits of Financial Responsibility

Oklahoma's compulsory liability limits are $25,000 / $50,000 / $25,000. 47 O.S. 7-324

B. Uninsured Motorist Coverage

1. **Is it Available, Can it Be Limited?**

   Uninsured/underinsured motorist coverage, if obtained by the company, will afford coverage for the employee. The employee may bring suit against the uninsured motorist carrier of his employer. 36 O.S. § 3636. Oklahoma law has a general rule requiring an auto liability policy to include uninsured motorist coverage unless the insured specifically rejects it in writing. *Merrill v. Northern Ins. Co. of New York*, 747 F. Supp. 1415 (W.D. Okla. 1990); 36 O.S. §§ 3636 and 3637; 47 O.S. § 161(C)(6). Oklahoma law exempts “motor carriers” from this rule. However, the definition of “motor carrier” does not include a private carrier carrying its own goods. Thus, if a company is a private carrier, carrying only its own goods, it must opt out of UM coverage in writing. A signature of a single representative of the company is sufficient.

2. **Effect of Workers’ Compensation Benefits on Availability of Coverage.**

   Even though an employee may be receiving workers’ compensation benefits, he may still make a claim against his own uninsured/underinsured motorist and/or his employer’s uninsured/underinsured motorist coverage. Additionally, the subrogation rights of a workers’ compensation carrier do not apply to uninsured
motorist benefits, regardless of who paid the premium. Wise v. Woolery, supra at 152.

C. No Fault Insurance
Oklahoma is not a no-fault insurance state.

D. Disclosure of Limits and Layers of Coverage
Upon receiving a request for production, a party is required to produce any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. 12 O.S. 3226(B)(1)(b).

E. Unfair Claims Practices
Oklahoma has an Unfair Claims Settlement Practices Act that is codified at 36 O.S. 1250.1 through 1250.16. Section 1250.5 sets forth the acts which constitute and unfair claim settlement practice. Section 1250.4 provided that a violation of the Act will subject the insurer to discipline, including a civil penalty between $100 and $5,000.

F. Bad Faith Claims
Bad faith actions fall under the breach of contract statute of limitations, which is five years. 12 O.S. 95(1). An insurance company has a duty to deal fairly and act in good faith with its insureds. OUJI 22.1. The elements a plaintiff must prove to establish a first party bad faith claim for failure to pay an insured's claim are set forth in OUJI 22.2. Essentially, a plaintiff must prove that an insurer unreasonably failed to pay all or part of a plaintiff's claim.

Oklahoma also recognizes a bad faith action against a liability insurer for 1) denying coverage to the insured, 2) failing to defend the insured, or 3) refusing to settle a claim against the insured within the policy limits. The elements for these claims are set forth in OUJI 22.3. Essentially, a plaintiff must prove that the insurer's actions were unreasonable.

The compensatory damages recoverable in a bad faith action are listed in OUJI 22.4. They are: 1) financial losses, 2) embarrassment and loss of reputation, and 3) mental pain and suffering. Punitive damages are also available if a plaintiff proves that the insurer acted with reckless disregard, intent or malice. OUJI 22.5 – 22.7.

G. Coverage – Duty of Insured
Oklahoma does not have a statute addressing the duty of the insured.

H. Fellow Employee Exclusions
While there is no case law on this issue, an Oklahoma court has ruled in regard to a geographical exclusion clause, that freedom of contract principles control as to any vehicle coverage in excess of that required by statute. Equity Mutual Insurance Co. v. Spring Valley Wholesale Nursery, Inc., 747 P.2d 947, 953 (Okla. 1987).