ALABAMA

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1. **Provide an update on current black box technology and simulations in your State and the legal issues surrounding these advancements.**

   Alabama does not have any statutory scheme to protect the privacy of data recorded by black boxes or require disclosure of the presence of a black box at the time a vehicle is purchased. Data from black boxes has been cited by the Supreme Court of Alabama as "telling" evidence. *Norfolk Southern Ry. Co. v. Johnson*, 75 So. 3d 624, 645 (Ala. 2011) ("Additionally—and telling—is the fact that the data retrieved from the train's black box also indicates that the train was within the speed limit and that the horn was being sounded as the train approached the crossing.").

2. **Besides black box data, what other sources of technological evidence can be used in evaluating accidents and describe the legal issues in your State involving the use of such evidence?**

   Of course, other types of onboard equipment may be used in litigation, including DriveCam or other recording devices. We have found cell phone and other hand-held device data to be particularly useful in cases involving the alleged use of such devices while driving. A skilled expert should be engaged to download and analyze the data. Objections are often raised alleging relevance and privacy concerns, but we have found judges to be amenable to allowing downloads, but limiting counsel's access to the download to the particular date/time at issue. This often involves cooperation between defense and plaintiff experts. Counsel should also check with local municipalities and ALDOT to determine if there are traffic cameras in the area of an accident. This should be done quickly because many cameras have limited recording capability. Unfortunately, some of these cameras are "live view" only and have no recording capability.

3. **Describe the legal issues in your State involving the handling of post-accident claims with an emphasis on preservation / spoliation of evidence, claims documents, dealing with law enforcement early, and social media.**

A. Preservation/Spoliation

Preserving potential evidence is vital after an accident, particularly if the accident is severe and the parties should know it will likely lead to litigation. Spoliation is the destruction or failure to "preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *Oil Equip. Co. v. Modern Welding Co.*, 661 Fed.Appx. 646, 652 (11th Cir. 2016). Under Alabama law, courts consider five factors when determining whether the failure to preserve evidence warrants severe sanctions such as dismissal: "(1) the importance of the evidence destroyed; (2) the culpability of the offending party; (3) fundamental fairness; (4) alternative sources of the information obtainable from the evidence destroyed; and (5) the possible effectiveness of other sanctions less severe than dismissal." *Story v. RAJ Properties, Inc.*, 909 So. 2d 797, 802-803 (Ala. 2005) (citation omitted).

In the claims process, it is important to properly assess the likelihood of litigation and identify any pieces of evidence that could potentially be lost so as to avoid spoliation sanctions. When in doubt, err on the side of caution and preserve critical evidence. Also, be mindful of litigation hold letters. *See Barry v. Big M Transportation, Inc.*, Case No. 1:16-cv-00167-JEO, 2017 WL 3980549, at *6 ("The subject collision was certainly severe . . . . In addition, Big M received a preservation letter from the Barrys' counsel on April 27, 2015, three days *before* Big M completed the sale of the truck to Mack . . . Under these circumstances, Big M's failure to preserve the truck's ECM data amounts to spoliation, as it was reasonably foreseeable, if not a near certainty, that the accident would lead to litigation."). *Barry* involved the preservation of black box data, and the defendant there usually preserved such data but failed to do so in the particular case. Policies for the preservation of evidence should be implemented and <u>enforced</u>.

B. Claims Documents

Claim file materials are protected by the traditional work product doctrine if the materials were "prepared in anticipation of litigation." *Ex parte Nationwide Mut. Fire Ins. Co.*, 898 So. 2d 720, 723 (Ala. 2004). Whether materials are prepared in anticipation of litigation ultimately depends on the adjuster's own experience and information regarding the prospective litigation at the time the materials are compiled. *See ex parte Flowers*, 991 So. 2d 218 (Ala. 2008). However, "[t]he fact that a defendant anticipates the contingency of litigation resulting from an accident or event does not automatically qualify an 'in house' report as work product." *Ex parte State Farm Mut. Auto Ins. Co.*, 761 So. 2d 1000, 1003 (Ala. 2000). Where an "insurer has a separate and independent contractual duty to investigate a claim, the insurer must satisfy the requirements of Rule 26(b)(3), Ala. R. Civ. P., by showing more than simply when a document was prepared. The insurer claiming a work-product privilege must show why each document was prepared and how it was used." *Id* at 1004 (Lyons, J., concurring). Alabama law does not, however, require that anticipation of litigation be the sole purpose of the creation of the report for it to be protected as work product. Note that even if claim materials are entitled to work product protection, they may be discoverable if the party seeking them makes the required showing of substantial need and unavailability to obtain the

substantial equivalent by other means. *See* Ala. R. Civ. P. 26(b)(4). Also, note that Alabama only recognizes the self-critical analysis privilege for medical peer review documents. *See* Ala. Code. § 22-21-8. Therefore, claims documents that involve self-critical analysis will not be shielded from discovery for that purpose.

C. Law Enforcement

We have found that the difficulty or ease of dealing with law enforcement depends largely on the particular individual you are dealing with. Defense counsel should make contact with law enforcement early on and, if possible, at the scene of the accident. Use of local counsel is best in these situations. Also, be mindful that it can be helpful to speak with law enforcement before sending a subpoena. We have found that doing so may result in obtaining additional information, such as personal notes and cell phone photos, which may be overlooked by a clerical person.

D. Social Media

Social Media can make or break a case. Identification of witnesses, potential parties, bystanders, etc. should be done as soon as possible, and the social media of those individuals should be monitored and saved on a routine basis. Often, social media accounts are scrubbed as soon as plaintiff's counsel becomes involved and deleted data may not be retrievable. Litigants should be aware, though, that social media typically constitutes hearsay and it must be demonstrated that an exception to the hearsay rule, such as a statement against interest, applies. *See Horwitz v. Kirby*, 197 So. 3d 943, 962 (Ala. 2015).

4. Describe the legal considerations in your State when defending an action involving truck drivers who may be considered Independent Contractors, Borrowed Servants or Additional Insureds.

A. Independent Contractors

Under Alabama law, a company is not liable under the doctrine of respondeat superior if the trucker is an independent contractor. *See Williams v. Tennessee River Pulp & Paper Co.*, 442 So. 2d 20 (Ala. 1983) (paper company not liable for logger's failure to properly maintain truck for hauling lumber where logger was an independent contractor). Whether one is an independent contractor or employee depends on whether the alleged employer had the right to control the manner of the alleged employee's performance. *Id.* Furthermore, "[c]ontrol is not established if the asserted [employer] retains the right to supervise the asserted [employee] merely to determine if the [employee] performs in conformity with the contract." *Id.* (quotation omitted). Alabama courts have looked to the Restatement (Second) of Agency regarding whether one is an employee. *See id.* Also, a key factor is whether the truck driver owns his truck and equipment or whether the alleged employer provided the equipment. *See Wright v. McKenzie*, 647 F. Supp. 2d 1293, 1301-02 (M.D. Ala. 2009).

B. Borrowed Servants

Alabama recognizes the doctrine of borrowed servants. "Under Alabama law, the borrowed servant doctrine recognizes that an employee may be in the general service of and paid by his employer . . . and nevertheless be transferred for a particular work assignment to a third-party employer . . . . Accordingly, the third-party employer that borrowed the employee accepts liability for the employee's work on that particular assignment, and the general employer is not liable." *Proctor v. Fluor Enterprises, Inc.*, 494 F.3d 1337, 1344 (11th Cir. 2007). Furthermore, "[t]he ultimate test in determining whether an employee has become a loaned servant is a determination of whose work the employee was doing and under whose control he was doing it . . . . It is the reserved right of control, rather than the actual exercise of control, that furnishes the true test of the relationship*." United States Fid. & Guar. Co. v. Russo Corp*., 628 So. 2d 486, 489 (Ala. 1993). The court will examine if the special employer had the right to control the specific act giving rise to the cause of action. *See Eastman v. R. Warehousing & Port Servs., Inc.,* 141 So. 3d 77, 84 (Ala. 2013) ("The crucial question to be determined in this case is *which employer had the right to control the particular act giving rise to Bentley's death.*"). As with independent contractor and employment issues, Alabama courts look to the Restatement of Agency in analyzing borrowed servant issues. *See id.*

C. Additional Insureds

Whether an employee or truck driver may be an additional insured subject to a duty to defend and indemnify depends on the policy language itself. *See Sentry Ins. Co. v. Pacific Indem. Co.*, 345 So. 2d 283, 285-288 (Ala. 1977). Typical rules of insurance contract construction will apply to determine whether the truck driver is an additional insured of its employer, customer, or other party involved that has insurance in place. At the outset of the case it is important to review any relevant insurance policies to determine which, if any, may cover the truck driver and what duties are owed to additional insureds under the policy.

5. What is the legal standard in your state for allowing expert testimony on mild traumatic brain injury (mTBI) claims and in what instances have you had success striking experts or claims?

Admissibility of expert testimony generally is governed by Rule 702 of the Alabama Rules of Evidence. Rule 702 provides:

> (a) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.
>
> (b) In addition to the requirements in section (a), expert testimony based on a scientific theory, principle, methodology, or procedure is admissible only if:
> (1) The testimony is based on sufficient facts or data;

(2) The testimony is the product of reliable principles and methods; and
(3) The witness has applied the principles and methods reliably to the facts of the case.

Ala. R. Evid. 702.

There do not appear to be any reported cases involving the admission of expert testimony related to mild traumatic brain injury claims in Alabama. At the trial court level, the admissibility of such evidence will depend largely on the trial judge.

6. Is a positive post-accident toxicology result admissible in a civil action in your State?

Post-accident toxicology results are admissible in civil actions in Alabama. *See Aycock v. Martinez*, 432 So. 2d 1274 (Ala. 1983) (trial court did not err in admitting evidence of toxicology report showing that plaintiff's decedent's blood alcohol content exceeded the legal limit after the accident). However, litigants should be aware that, "[u]nder Alabama law, a party offering laboratory test results into evidence has the burden of establishing a chain of custody without breaks in order to lay a sufficient predicate for admission of [the] evidence." *Swanstrom v. Teledyne Continental Motors, Inc.*, 43 So. 3d 564, 576 (Ala. 2009). Also, be sure to understand the specific test at issue and the results of that test. Many "positive" test results are not admissible on the issue of impairment.

7. What are some considerations for federally-mandated testing when drivers are Independent Contractors, Borrowed Servants, or Additional Insureds?

As referenced above, the determination of whether one is an independent contractor, employee, or borrowed servant depends on the exercise of control over the manner of the truck driver's work. Merely requiring a driver to complete federally-mandated testing or other requirements likely does not impact whether the company is actually controlling the manner of performance. Borrowed servants will only be considered such where the alleged special employer controlled performance of the specific act giving rise to the claim; mere failure to have the proper federal certifications is not likely to give rise to a claim in and of itself. Therefore, it is unlikely that merely requiring such truck drivers to be properly certified amounts to "controlling" the manner of performance.

On the other hand, companies should be wary of contracting with truck drivers who do not have the proper certifications. For negligent hiring/supervision claims, "a plaintiff must demonstrate that the employer knew, or in the exercise of ordinary care should have known, that its employee was incompetent." *Wright v. McKenzie*, 647 F. Supp. 2d 1293, 1297 (M.D. Ala. 2009). While a comprehensive background check is probably not required, a company planning to hire an independent truck driver should at least make sure he has the proper certifications, insurance, and a commercial driver's license to insulate them from negligent hiring claims. Notably, in *Wright*, the plaintiff sued a number of parties, including a timber company that had contracted with a trucking company that allegedly employed an incompetent driver. The court granted summary judgment in favor of the timber company where there was no evidence the timber

company knew, or should have known, of traffic citations and other negative marks on the driver's record. *Id.* at 1297-99.

8. Is there a mandatory ADR requirement in your State and are any local jurisdictions mandating cases to binding or non-binding arbitration?

There is not a mandatory requirement for ADR in Alabama, but many courts will order mediation if the parties do not otherwise agree to mediate.

9. Can corporate deposition testimony be used in support of a motion for summary judgment or other dispositive motion?

Rule 32(a)(2) of the Alabama Rules of Civil Procedure provides that at "trial or upon the hearing of a motion or an interlocutory proceeding . . . . The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b) (6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose." The language of the Rule itself provides that a corporate deposition may be used against the corporation at the dispositive motion/summary judgment stage. Alabama law generally allows for the use of deposition testimony to support or oppose summary judgment motions. *See* Ala. R. Civ. P. 56(e) ("The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits."); *Richter v. Central Bank of Alabama, N.A.*, 451 So. 2d 239, 242 (Ala. 1984) ("Summary judgment is granted in Alabama only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.").

10. What are the rules in your State for contribution claims and does the doctrine of joint and several liability apply?

Alabama law recognizes the doctrine of joint-and-several liability. *See Matkin v. Smith*, 643 So. 2d 949, 951 (Ala. 1994). Alabama law also does not allow for contribution claims against a joint tortfeasor. *Sherman Concrete Pipe Machinery, Inc. v. Gadsden Concrete & Pipe Co., Inc.*, 335 So. 2d 125, 126-27 (Ala. 1976) (" The general rule in Alabama . . . prohibits one of several joint tortfeasors from enforcing contribution from the others who participated in the wrong. This is because of the maxim that no man can make his own misconduct the ground for an action in his own favor.").

11. What are the most dangerous/plaintiff-friendly venues in your State?

Juries in the middle and western counties of Alabama are typically considered to be liberal, with some counties (for example, Bullock, Lowndes and Wilcox) earning the reputation of being extremely liberal. The counties containing the larger municipalities, Jefferson (Birmingham) Montgomery and Mobile, are generally considered moderate, but

there is always a chance of getting a jury that leans heavily one way or the other. The northern counties have a reputation of being fairly conservative.

12. Is there a cap on punitive damages in your State?

Alabama's punitive damages caps are set forth in Ala. Code § 6-11-21. Generally, the cap is three times the amount of compensatory damages or $500,000, whichever is greater. However, if the case involves physical injury, the cap increases to three times the amount of compensatory damages or $ 1,500,000, whichever is greater. Alabama also provides an additional cap for small businesses (those having net worth of $2,000,000 or less) of $50,000 or 10 percent of the business' net worth, whichever is greater.

One critical exception for these caps is in wrongful death cases. Ala. Code § 6-11-29 provides that the caps in § 6-11-21 do not "pertain or affect any civil actions for wrongful death." Alabama law is unique in that it treats damages for wrongful death as punitive. *Cain v. Mortgage Realty Co., Inc.*, 723 So. 2d 631, 633 (Ala. 1998) ("In wrongful-death cases, however, all damages are punitive damages.").

13. Admissible evidence regarding medical damages – can the plaintiff seek to recover the amount charged or the amount paid?

Alabama has abrogated the collateral source doctrine, and a defendant may introduce evidence regarding the payment of medical expenses by a third party or the obligation of payment by a third party of such expenses. Ala. Code § 12-21-45. However, under the statute, the plaintiff may also introduce evidence that he is obligated to repay any expenses previously paid by a third party. The plaintiff is not limited solely to those expenses actually paid by a third party, and the determination of the proper effect of such payments on plaintiff's recovery is typically reserved for the jury. *See Crocker v. Grammar*, 87 So. 3d 1190, 1193 (Ala. Civ. App. 2011)("Section 12–21–45 does not dictate any particular outcome, but, rather, it allows a jury to make its own informed decision as to the effect of third-party payments of medical and hospital expenses on a plaintiff's recovery . . . . In some cases, a jury might adopt the underlying philosophy behind the collateral-source rule that it is unfair for a tortious wrongdoer to receive the benefit of third-party payments . . . while in other cases a jury may decide that it is the plaintiff who would receive an undue windfall if the damages were not reduced to account for the compensation the plaintiff had already received in the form of third-party payments.")(citations and quotations omitted).