

ARKANSAS

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1. What are the venues/areas in Arkansas that are considered dangerous or liberal?

While jury verdicts from any venue can be hard to predict and are dependent upon the facts and circumstances of each case, historical information suggests that juries in the following counsels are historically considered to be more plaintiff-friendly: Phillips, Lee, Crittenden, and Saline.

2. Identify any significant trucking verdicts in your State during 2017-2018, both favorable and unfavorable from the trucking company's perspective.

Browne v. PAM Transport, Inc., was a class action wage & hour case addressing the “sleeper berth” issue: what wages are due a driver who spends more than 8 hours in the sleeper berth during a 24-hour period. In contrast to rulings from several other states and in spite of regulations limiting hours when drivers may be “on duty”, the Arkansas federal district judge ruled that drivers who are on the road must be paid for all hours above 8 hours spent on sleep/rest breaks.

3. Are accident animations and/or computer-generated evidence admissible in your State?

Yes, this type of evidence is generally admissible in Arkansas. Such evidence that purports to *recreate* an accident faces relatively high authentication requirements. Though conditions in the recreation need not be “identical” to the those of the underlying accident, *Carr v. Suzuki Motor Co.*, 280 Ark. 1, 3-4 (1983), they still must be *substantially similar* to the conditions existing at the time of the accident. *See e.g., Carter v. Mo. P. R. Co.*, 284 Ark. 278, 280 (1984). By contrast, animations or other computer-generated evidence that merely demonstrate general scientific principles, face less rigorous evidentiary scrutiny. *Peterrie Transp. Services, Inc. v. Thurmond*, 79 Ark. App. 375 (2002).

4. Identify any significant decisions or trends in your State in the past two (2) years regarding (a) retention and spoliation of in-cab videos and (b) admissibility of in-cab videos.

There have not been any significant decisions or trends regarding the retention or admissibility of in-cab videos in the past two years.

In-cab videos are admissible evidence in Arkansas. Retention and spoliation of in-cab videos are treated the same as other types of evidence. In Arkansas, spoliation occurs when a party intentionally destroys, loses, or suppresses evidence with knowledge that it may be material to a claim. While the destruction of evidence must be intentional, Arkansas courts do not require that the spoliator act in bad faith or with the desire to suppress the truth in order to find that spoliation occurred. *See Bunn Builders, Inc. v. Womack*, 2011 Ark. 231, 10-11. Note, however, that federal courts in Arkansas apply a higher level of intent - a “desire to suppress the truth” – before they will permit a spoliation instruction. *Bunn Builders v. Womack*, 354 F.2d 739 (8th Cir. 2004)

5. What is your State’s applicable law and/or regulation regarding the retention of telematics data, including but not limited to, any identification of the time frames and/or scope for retention of telematics data and any requirement that third party vendors be placed on notice of spoliation/retention letters?

Arkansas does not have any laws that specifically apply to telematics data. The retention of telematics data would be treated the same as other types of evidence. Generally a party has a duty to retain evidence which would tend to prove or disprove any issue of liability or damages once litigation is reasonably foreseeable. In Arkansas, spoliation occurs when a party intentionally destroys, loses, or suppress evidence with knowledge that it may be material to a claim. While the destruction of evidence must be intentional, Arkansas courts do not require that the spoliator act in bad faith or with the desire to suppress the truth in order to find that spoliation occurred. *See Bunn Builders, Inc. v. Womack*, 2011 Ark. 231, 10-11.

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

Arkansas law holds that evidence of alcohol and/or controlled substances in a motor vehicle accident case is so prejudicial that such evidence will be excluded absent clear evidence of actual intoxication or impairment. *Wade v. Grace*, 321 Ark. 482, 488-89 (1995); *Simco v. Ellis*, 222 F.Supp.2d 1139, 1140-41 (W.D. Ark. 2000) (“positive” test result not sufficient; confirmatory toxicology supporting determination of actual impairment required), *aff’d*, 303 F.3d 929 (8th Cir. 2002). In *Brumley v. Keech*, the Arkansas Supreme Court was asked to reverse the exclusion by a trial court of evidence that a trucking company failed to comply with post-accident drug and alcohol testing set out in the FMCSRs. 2012 Ark. 263. The Supreme Court upheld the exclusion, reasoning that there was no indication that Keech had been drinking alcohol or using controlled substances prior to the accident or that he was, or appeared to be, under the influence at the time of the accident.

7. Is post-accident investigation discoverable by adverse counsel?

Pre-suit investigations, including post-accident investigations and accident reconstructions, are covered by the attorney work product doctrine. *Holt v. McCastlain*, 357 Ark. 455 (2004). Under Rule 26(b)(3) of the Arkansas Rules of Civil Procedure, these materials may be subject to discovery only upon the adverse party establishing that, “. . . he has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.” Even if the court does require disclosure of these materials, the court, “. . . shall protect against disclosure of the mental

impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning litigation.”

However, if a party ultimately uses a reconstructionist to testify, then that expert’s post-accident investigatory materials (as well as other investigation data the expert considered in developing opinions) will usually be deemed discoverable.

8. Describe any laws in your State which regulate automated driving systems (autonomous vehicles) or platooning.

Arkansas has not yet enacted legislation that would permit fully autonomous vehicles on its public roadways, but as of Spring 2019, its General Assembly was considering a bill to create a pilot autonomous vehicle program subject to approval by the Arkansas State Highway Commission.

9. Describe any laws or Court decisions in your State which would preclude a commercial driver from using a hands-free device to have a conversation over a cell phone.

Drivers in Arkansas who are 21 or older can legally talk on the phone while driving. Ark. Code Ann. § 27-51-1604. However, texting and the use of social media are always prohibited.

Drivers under the age of 18 may never use a cell phone while operating a motor vehicle, even if the device is hands-free. Drivers between the ages of 18 and 21 may use a cell phone while driving only if they use a hands-free device to do so.

10. Identify any Court decisions in your State precluding Golden Rule and/or Reptile style arguments by Plaintiffs’ counsel.

Arkansas defines the Golden Rule as an argument that suggests to jurors that they “place themselves in the position of a party or victim.” *King v. State*, 317 Ark. 293, 297 (1994). The basis for prohibiting these arguments is that they tend to “subvert the objectivity of the jury” and can be “seen as an attempt to dissuade the jurors from their duty to weigh the evidence and instead to view the case from the standpoint of a litigant or party.” *King*, 317 Ark. At 297. Arkansas courts are silent as to whether Golden Rule arguments regarding liability are impermissible the same as Golden Rule arguments regarding damages. However, several cases indicate that Arkansas courts would prohibit all Golden Rule arguments. *See e.g., Piercy v. Walmart Stores*, 311 Ark. 424 (1993).

11. Compare and contrast the advantage and disadvantages of Federal Court versus State Court in your State.

The advantages and disadvantages of handling a case in Federal Court versus an Arkansas Court vary depending on the details of each case. Some considerations that impact which is more favorable include the jury pool for each court, the evidence and discovery rules of each court, convenience to clients, and so on.

One advantage of Federal Court is that the jury must produce a unanimous verdict, whereas Arkansas courts only require nine out of twelve jurors to agree upon a verdict.

12. How does your State handle the admissibility of traffic citations (guilty plea, pleas of no contest, etc.) in subsequent civil litigation?

Generally, misdemeanor traffic citations are not admissible as evidence in a subsequent civil litigation under Ark. Code Ann. § 27-50-804 and § 27-50-805.

However Arkansas courts have long held that once a defendant enters a guilty plea in open court, it is proper to admit evidence relating to either a traffic citation conviction or even the mere issuance of that citation in a subsequent civil case. *Nixon v. Chapman*, 103 Ark. App. 222 (2008). Conversely, pleas of no contest are not admissible in subsequent civil litigation. A.R.E. 410.

13. Describe the laws in your State which regulate whether medical bills stemming from an accident are recoupable. In other words, can a plaintiff seek to recover the amount charged by the medical provider or the amount paid to the medical provider? Is there a basis for post-verdict reductions or offsets?

Arkansas courts recognize the collateral-source rule, which is a general rule providing that recoveries from collateral sources, such as amounts paid from medical insurance to a medical provider, do not redound to the benefit of the tortfeasor, even though double recovery from the same damage by the injured party may result. *Amos v. Stroud*, 252 Ark. 1100 (1972). For the collateral source rule to apply, the third-party payment must be wholly independent of the tortfeasor. Under this rule, evidence showing that the injured person received payments from such a source is inadmissible, unless it is relevant for some purpose other than mitigation or reduction of damages. Therefore, a plaintiff can seek to recover the amount charged by the medical provider or the amount paid to the medial provider. There is not a basis for post-verdict reductions or offsets.

14. Describe any statutory caps in your State dealing with damage awards.

At present, no damage caps exist. Over 15 years ago, the Arkansas state legislature enacted punitive damage caps, which were codified as Ark. Code Ann. § 16-55-208. The statute limited punitive damage awards to the greater of either: (a) \$250,000.00; or (b) three times the amount of compensatory damages awarded in the action, not to exceed \$1,000,000. However, in 2011 the Arkansas Supreme Court ruled in *Bayer Crop Science LP v. Schafer* that the statutory cap on punitive damages was unconstitutional. 2011 Ark. 518. Therefore, there is no longer an effective statutory cap dealing with damage awards in Arkansas.