KANSAS

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

By and large, Kansas is a conservative, rural state. Most jurisdictions are conservative and large, plaintiffs' verdicts are uncommon. Wyandotte County, which houses urban Kansas City, Kansas, is the most plaintiff-friendly jurisdiction in Kansas, and is the only venue that could fairly be characterized as liberal. Finney, Sedgwick, Shawnee, Douglas, Cherokee, and Crawford County are all moderate, and therefore, more liberal than the rest of the state.

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

On February 2, 2018, a jury in Cherokee County, Kansas returned a verdict in favor of Kara Hansen in the amount of $38,500,000. Ms. Hansen was stopped on U.S. Highway 69 waiting for oncoming traffic to pass in order to make a left turn. She was rear-ended by another driver and paralyzed.

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

Kansas courts have not analyzed the admissibility requirements for an accident animation or computer-generated recreation. Victoria Webster, *The Use of Computer-Generated Animations and Simulations at Trial*, 83 Def. Couns. J. 439 (2016). However, the Kansas Court of Appeals has affirmed the admission of a computer-generated accident animation in a criminal case. *State v. Lockett*, 2000 Kan. App. Unpub, LEXIS 542, *6 (2000). In *Lockett*, the animation was designated for demonstrative purposes and was used by the State to reflect its expert's opinion. *Id.*

As for federal courts, the Tenth Circuit has recognized that "[v]ideo animation adds a new and powerful evidentiary tool" that carries the danger of confusing "art with reality" for the jury. *Robinson v. Mo. Pac. R.R. Co.*, 16 F.3d 1083, 1088 (10th Cir. 1994). However, the Court affirmed the admission of video animation for a limited, illustrative purpose that was accompanied by a cautionary instruction and the opportunity for vigorous cross-examination. *Id.* at 1087-88.

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 recent decisions related to the specific issue of spoliation or admissibility of in-cab videos.

Regarding spoliation, broadly speaking, there is no common law duty to preserve evidence, and spoliation is not recognized as an independent tort under Kansas law. *Superior Boiler Works, Inc. v. Kimball*, 292 Kan. 885, 259 P.3d 676 (2011); *see also Koplin v. Rosel Well Perforators, Inc.*, 241 Kan. 206, 734 P.2d 1177 (1987).

K.S.A. 60-237(e) specifically addresses the remedies available for a party's failure to preserve electronically stored information. The statute provides:
If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

> (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
> (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation, may:
>
> > (A) presume that the lost information was unfavorable for the party;
> > (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
> > (C) dismiss the action or enter a default judgment.

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?

The specific issue of telematics has not been addressed by Kansas courts, nor is it specifically addressed in the Kansas regulations. However, the same spoliation rules that govern electronic evidence would apply to such data if it was in the defendant trucking company's possession or could accessed thereby.

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

Post-accident toxicology results are admissible in civil actions if the following foundation requirements are met: (1) the blood sample is taken under appropriate conditions to guard against contamination; (2) the sample properly marked and conveyed to the laboratory, (3) the chemical testing is properly conducted by competent personnel, and (4) the test results are relevant and material to the issues presented in the litigation. *Wiles v. Am. Fam. Life Assurance Co. of Columbus*, 302 Kan. 66, 74, 350 P.3d 1071 (2015).

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

If counsel has been retained, any investigation into an accident is protected under attorney-client privilege. But if counsel has not been retained when the investigation occurs, the insurer or client's post-accident investigation is discoverable. There is no claim file privilege in Kansas. "The liability insurance carrier functions in an independent role. Statements obtained by it from its insured do not come into the category of communications of a client to his lawyer, none of the essentials of the professional lawyer-client relationship being present." *Alseike v. Miller*, 412 P.2d 1007, 1017 (Kan. 1966); s*ee also Heany v. Nibbelink*, 23 Kan.App.2d 583 (1997).

Nor are such materials protected under the work product doctrine. Rather, Kansas courts have determined that initial investigations of a potential claim, made by an insurance company, is done in the ordinary course of business and not "in anticipation of litigation." *Henry Enterprises., Inc. v. Smith*, 225 Kan. 615 (1979).

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

Although the Kansas Senate Transportation Committee held multiple meetings discussing the need for legislation addressing automated driving systems in 2018, to date, Kansas has not enacted any laws specifically address automated driving systems or platooning.

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.

Kansas does not have any laws that would preclude a commercial driver from using a hands-free device to have a conversation over a cell phone. Kansas does prohibit the use of a wireless communications device to write, send or read a written communication. See K.S.A. § 8-15,111.

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

Kansas has a long-standing rule against "Golden Rule" arguments. *See Walters v. Hitchcock*, 237 Kan. 31, 33, 697 P.2d 847 (1985). Golden rule arguments are not permitted because they encourage the jury to depart from neutrality and to decide the case on the improper basis of personal interest and bias. *State v. McHenry*, 276 Kan. 513, 523, 78 P.3d 403 (2003), disapproved on other grounds by *State v. Gunby*, 282 Kan. 39, 144 P.3d 647 (2006).

While there are no published opinions that broadly preclude Reptile style arguments, courts have issued Orders *in limine* precluding the argument. *See Perez v. Ramos*, 2018 Kan. App. Unpub. LEXIS 825, *26, 429 P.3d 254, 2018 WL 5305614.

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

Inasmuch as Kansas generally has Rules of Civil Procedure and Rules of Evidence that are codified and follow the Federal Rules of Civil Procedure and the Federal Rules of Evidence fairly closely, there are only limited differences and thus limited advantages and disadvantages. The primary difference between state court and federal court in Kansas are the way experts are treated and the absence of any mandatory disclosure procedures like those found in F.R.C.P. Rule 26. The disclosure of experts in state court does not require a party to provide a written report of a retained expert, but it does require the opinions of the retained expert to be disclosed together with a statement of the facts upon which the expert relies and a summary of the grounds for the experts' opinions and conclusions. A report by the expert is one possible format for compliance with this disclosure requirement, but the substantive information can also be provided by counsel although neither is required unless ordered by the court or requested by way of interrogatory during discovery; there is nothing similar to Rule 26(a)(2). Kansas state courts do not have a procedure similar to that of required initial disclosures required under F.R.C.P. Rule 26(a)(1) although the same information can be obtained from opposing parties by way of interrogatories and request for production.

The standards for admissibility of expert testimony have generally become the same in both state court in Kansas as well as federal court with K.S.A. §60-456(b) and K.S.A. §60-458 generally following F.R.E. Rules 702 and 703, respectively. There are some differences with respect to the admissibility of hearsay because of the manner in which hearsay is defined. A further difference between the two which may be an advantage in one case and a disadvantage in another is that a verdict in a civil case can be rendered in state court with a minimum of 10 jurors in agreement while a verdict in federal court must be unanimous. Typically, juries in Kansas which ultimately deliberate to a verdict are comprised of 12 jurors absent agreement of the parties while juries in federal court are typically comprised of 6-8 jurors at the time of deliberation and require a unanimous verdict of at least 6 in civil cases. Because jurors are chosen from larger geographic areas, some federal jury panels will look different than the cities and counties in which that federal court physically sits.

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

Generally speaking, police accident reports are not admissible under Kansas law to the extent they contain conclusions of the officer preparing the report. In a number of cases Kansas appellate courts have held that police officer's opinions and conclusions as to "contributing factors" to an automobile accident noted on his accident report, as distinguished from his reported observation as to physical conditions, are inadmissible in evidence. *Lollis v. Superior Sales Co., Inc.,* 580 P.2d 423 (Kan. 1978); *see Morlan v. Smith*, 380 P.2d 312 (Kan. 1963) (an officer's statement that "no improper driving indicated" was a pure conclusion of the investigating officer concerning the very question of negligence, which only the jury was allowed to decide); *see*

McGrath v. Mance, 400 P.2d 1013 (Kan. 1965) (officer's notation that plaintiff was guilty of "inattention" and an "improper start from parked position" was nothing more than his opinion regarding a question which was for the jury to decide). As Kansas Courts have consistently held that an officer's conclusions are not admissible, it appears relatively clear that evidence of the issuance or non-issuance of a traffic citation is similarly inadmissible.

There is a key difference in Kansas between a guilty plea versus a plea of nolo contendere and a verdict of guilty or finding of guilt. A plea of "guilty" is admissible in a subsequent civil case arising from the same incident because it is considered an admission against interest. K.S.A. § 60-460(g). Not so with a plea of nolo contendere. In *Patrons Mut. Ins. Asso. V. Harmon*, 240 Kan. 707 (1987), the Kansas Supreme Court explained that "[w]hen relevant, the plea of guilty to that charge may be admitted into evidence in a subsequent civil action as an admission of the act charged." *Id.* at 711. However, "[a] plea of nolo contendere or a finding of guilt in a criminal action is not an admission of the act charged and is limited to the case where the plea of nolo contendere or the finding of guilt is entered and cannot, therefore, be used as evidence as an admission in a subsequent civil case." *Id.* at 711-12.

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?

Under Kansas law, the plaintiff may present the amount billed by the medical providers and the defendant may present the amount accepted by the medical providers in full satisfaction of the amount billed. It is then left to the finder of fact to determine reasonable value of the medical care and expenses for the treatment of the plaintiff's injuries. In *Martinez v. Milburn Enterprises, Inc.*, 290 Kan. 572, 574, 233 P.3d 205, 208 (2010), the Kansas Supreme Court considered the issue of "whether in a case involving private health insurance the collateral source rule applies to bar evidence of (1) the amount originally billed for medical treatment or (2) the reduced amount accepted by the medical provider in full satisfaction of the amount billed, regardless of the source of payment." *Id.* at 208. The court held that evidence of (1) the original amount billed and (2) the amount accepted by the hospital in full satisfaction of the amount billed was admissible. *Id.* at 229. "However, evidence of the source of any actual payments is inadmissible under the collateral source rule." *Id.* "The finder of fact is permitted to determine from these and other facts, the reasonable value of the medical services provided." *Id.*

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

Under Kansas law, the amount recoverable for non-economic loss in personal injury actions is capped. K.S.A. § 19a02 provides that in any personal injury action, the total amount recoverable by each party from all defendants for all claims for non-economic loss shall not exceed a sum total of:

(1) $250,000 for causes of action accruing on or after July 1, 1988, and before July 1, 2014;

(2) $300,000 for causes of action accruing on or after July 1, 2014, and before July 1, 2018;
(3) $325,000 for causes of action accruing on or after July 1, 2018, and before July 1, 2022; or
(4) $350,000 for causes of action accruing on or after July 1, 2022.

Additionally, in wrongful death actions, non-pecuniary losses are capped at $250,000. K.S.A. § 60-1903a.