

KENTUCKY

Palmer Gene Vance II
Samuel T. Reinhardt
STOLL KEENON OGDEN PLLC
300 West Vine Street
Suite 2100
Lexington, KY 40507
Tel: (859) 231-3000
Fax: (859) 253-1093
E-Mail: gene.vance@skofirm.com
E-Mail: sam.reinhardt@skofirm.com

Marc A. Lovell
Amanda M. Sowell
Justin L. Duncan
HARLIN PARKER
519 E. 10th Street
Bowling Green, KY 42101
Tel: (270) 842-5611
Fax: (270) 842-2607
E-Mail: lovell@harlinparker.com
E-Mail: sowell@harlinparker.com
E-Mail: duncan@harlinparker.com

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

Counties in Appalachian eastern Kentucky are generally considered plaintiff-friendly venues that corporations and insurance companies seek to avoid. This area is comprised of the following counties: Bell, Breathitt, Clay, Estill, Floyd, Harlan, Jackson, Johnson, Knott, Knox, Laurel, Lee, Leslie, Letcher, Lincoln, Magoffin, Martin, McCreary, Menifee, Morgan, Owsley, Perry, Pike, Powell, Pulaski, Rockcastle, Wayne, Whitley, and Wolfe. From 1998 to 2016, there have been at least sixty-three (63) verdicts exceeding \$1 million by juries in these counties, including a \$270 million award in Knott County in a case involving personal injuries sustained in a gas explosion.

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

Hagan v. B&B Trucking, Jefferson County, 12-691:

Danny Halzerig, a driver for B&B Trucking, lost control of his tractor trailer as he navigated a famous curve on northbound I-65 in downtown Louisville, Kentucky. His truck began to slide and it collided with a concrete barrier. That impact caused the truck to jackknife over the barrier and into the southbound lanes of I-65, blocking three or four lanes of travel. That same morning, Laura Hagan was traveling southbound on I-65 and collided with Halzerig's truck. Hagan did not slow down prior to the collision as she did not see Halzerig's truck until the

impact. The collision resulted in significant front-end damage to her vehicle. Hagan suffered four broken ribs, a cervical strain, a bruised lung and chest wall bruising. She later underwent a surgery to have a Medtronic pain pump inserted to manage her pain.

Hagan sued Hazelrig for negligent operation of the vehicle, and asserted a claim of negligent hiring and training against B&B Trucking, seeking \$139,388 for past medicals, \$200,000 for future medicals, and \$850,000 for pain and suffering.

In developing her case, Hagan relied on the investigating officer who blamed Hazelrig for the wreck and concluded Hagan had no time to avoid the collision. Hagan also presented testimony from an accident reconstructionist/conspicuity expert who noted among other things that (1) Hazelrig was driving too fast and (2) the area was poorly lit and Hagan had only a very limited time to react.

Conversely, the defendants argued that the accident was unavoidable and was a function of a dangerous curve in adverse weather. The defense also blamed Hagan for not wearing corrective lenses as mandated by her license.

The case was tried for a week. The jury returned a verdict assessing 87% of the fault to the defendants. The raw verdict totaled \$461,743, which equaled \$401,725 after apportionment.

Spencer v. Central Transport, Jefferson County, 14-3490:

This case involved a disputed red light collision in downtown Louisville on a rainy morning in March 2012. As George Spencer entered the intersection at Broadway and 10th Street, he crashed into the rear of a Central Transport tractor-trailer driven by Travis Arnold. There were no independent witnesses to the collision. Spencer suffered eight broken ribs and a punctured lung in the collision, and was hospitalized for six days. He sought \$62,250 for past medical expenses and \$250,000 for pain and suffering.

Spencer filed suit against Central Transport and alleged Arnold ran the light. Spencer was certain that he had the green light. But, Spencer argued that regardless of the light, Arnold was to blame because he was distracted, using a cell phone, in a hurry, and driving too fast in an attempt to beat the light as it changed from yellow to red.

Central Transport denied fault relying on the testimony of its driver that he, and not Spencer, had the green light. Accident reconstructionist Vince Sayre testified that Arnold's version of events was consistent with the physical evidence. Central Transport also questioned Spencer's certainty that he had a green light as Spencer misremembered other important facts such as where the accident occurred and where he struck Arnold's truck.

The jury deliberated for an hour before returning a defense verdict, finding that Arnold was not at fault, and Spencer was not awarded anything.

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

It depends. The admissibility of accident animations and/or computer generated visual evidence ("CGVE") are analyzed the same as diagrams drawn by hand or photographically created images. *Gosser v. Commonwealth*, 31 S.W.3d 897, 903 (Ky. 2000). That is, computer-

generated diagrams have to be relevant, are subject to exclusion if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury; are subject to the trial court's discretion over the mode and order of the presentation of evidence, and have to be authenticated by testimony of a witness that he or she has personal knowledge of the diagram's subject matter and the diagram is accurate. *Id.*

If the CGVE is merely illustrative of a witness's testimony, its admission normally does not depend on testimony as to how the diagram was prepared, e.g., how the data was gathered or inputted into the computer. *Id.* However, where the CGVE purports to contain exact measurements, to be drawn to scale, etc., then testimony as to how the data was obtained and inputted into the computer would be relevant and could be necessary to the admission of the diagram. *Id.*

4. Significant decisions or trends in Kentucky in the past two (2) years regarding (a) retention and spoliation of in-cab videos and (b) admissibility of in-cab videos.

There are no reported Kentucky cases specifically addressing the issue of retention and spoliation of in-cab videos. However, the general rule in Kentucky is that a party has a duty to preserve relevant information when that party has notice that the evidence is relevant to litigation or should have known that the evidence may be relevant to future litigation. *Univ. Med. Ctr., Inc. v. Beglin*, 375 S.W.3d 783, 789-91 (Ky. 2011). Except in cases of mere negligence or loss by accident, a party's non-production of relevant evidence can give rise to a jury instruction that permits, but does not compel, the jury to draw a negative inference from the non-production if it finds the non-production to have occurred intentionally or in bad faith. *See, e.g., Johnson v. Commonwealth*, 892 S.W.2d 559. Whether to provide the instruction is soundly within the trial court's discretion. *Beglin*, 375 S.W.3d at 789-91.

Assuming a proper foundation is laid, in-cab videos are admissible if relevant and probative of an issue in the case. *Fields v. Commonwealth*, 12 S.W.3d 275, 279 (Ky. 2000). However, if the video has an audio component and the latter is used to prove the truth of its contents, the audio is subject to the hearsay rule. *Id.*

5. Kentucky laws and regulations regarding the retention of telematics data and the obligation of third-party vendors to preserve evidence.

There are no Kentucky laws specifically addressing the retention of telematics data. However, a party has a duty to preserve telematics data when that party has notice that the data is relevant to litigation or should have known that the data may be relevant to future litigation. *Beglin*, 375 S.W.3d at 789-91.

Though Kentucky appellate courts have not discussed the issue, it is likely the duty to preserve evidence extends to third-party vendors. Rule 34.01 of the Kentucky Rules of Civil Procedure requires that a party to litigation produce documents "which are in the possession, custody or control of the party upon whom the request is served." Ky. R. Civ. P. 34.01. A party has control over discoverable information within the meaning of CR 34.01 if the party has a legal right to obtain the documents on demand. *Southern Fin. Life Ins. Co. v. Combs*, 413 S.W.3d

921, 978-28 (Ky. 2013). Accordingly, assuming the agreement between the party and its third-party agent allows for the party to access the documents upon demand, the party will likely be deemed to have “control” over the documents and may then issue its litigation hold notice to the third-party.

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

No. Kentucky appellate courts have directly touched on the issue; however, admissibility of the toxicology result would likely be subject to Kentucky Rule of Evidence 403. Nearly identical to its counterpart in the Federal Rule of Evidence, Kentucky Rule of Evidence 403 provides, “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.” KRE 403. Considering the prejudice inherent in a positive drug-test, the moving party would need to connect the positive test with the alleged negligence and/or improper conduct. A positive drug or alcohol test could also be relevant to the issue of punitive damages or a party’s credibility as to their memory of the accident.

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

It depends on the underlying purpose or motivation of the investigation. For example, if the investigation is being conducted in anticipation of litigation, it will be shielded from discovery under the work-product doctrine. *Duffy v. Wilson*, 289 S.W.3d 555, 559 (Ky. 2009). If, on the other hand, the investigation is being conducted in the ordinary course of business, it is discoverable by the adverse party. *Id.*

The Kentucky Supreme Court has acknowledged that “prudent parties anticipate litigation and begin preparation prior to the time suit is formally commenced.” *Duffy*, 289 S.W.3d at 559. The test for whether a particular document constitutes work product is “whether, in light of the nature of the document and the factual situation of the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.” *Id.* In *Duffy*, Kentucky’s highest court held that documents prepared by an insurance investigator constituted work product because they were prepared in anticipation of litigation. *Id.*

Accordingly, a document need not be created by a party’s attorney to constitute work product. *Id.* Generally, the work product doctrine extends to any representative of the client, if the work they were doing was in “anticipation of litigation.” *Transit Authority of River City (TARC) v. Vinson*, 703 S.W.2d 482, 485, 489 (Ky. App. 1985) (“The policy of protecting counsel’s work product prior to litigation applies with equal force to the work product of the party’s other representatives.”). For example, in *TARC*, the court held that the work product doctrine can extend to private investigators. *Id.*

Kentucky also recognizes an insurer-insured privilege when the insurance policy requires cooperation with respect to potential litigation as a condition of coverage. *Asbury v. Beerbower*, 589 S.W.2d 316 (Ky. 1979). This privilege protects a statement given by the insured to a

representative of the insurer from discovery. *Id.* For example, in *Asbury*, the plaintiff sought to discover a statement the defendant had given to her insurance adjuster before suit was filed or defense counsel retained. *Id.* The *Asbury* Court held the statement to the insurer fell within the scope of the attorney-client privilege even though no attorney was involved. *Id.*

As noted, not all investigatory materials are protected by the work product doctrine. *Id.* Work product that does not reflect the mental impressions of the investigator and is primarily factual, “receives a qualified protection which is overcome if the opposing party shows substantial need of the material and inability to obtain it elsewhere without undue hardship.” *Id.*

In Kentucky, to obtain the disclosure of documents deemed work product, the requesting party must show that “it has a substantial need for, and is unable to obtain the substantial equivalent of” the material. *TARC*, 703 S.W.2d at 486. In *TARC*, the Kentucky Court of Appeals held that the photographs and reports were factual in nature and did not contain the mental impressions or legal opinions of the investigation. *Id.* at 485. Therefore, the materials received a qualified protection that could be overcome by the requesting party’s showing of substantial need and inability to obtain the material elsewhere without undue hardship. *Id.* Because it was impossible to obtain a substantial equivalent to the materials, the court ordered its disclosure. *Id.*

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

KRS 281.764, which was enacted in July 2018, addresses the operation of platooning as it relates to motor carriers. Platooning is permitted in Kentucky; however, a motor carrier must follow certain rules in order to operate a platoon, which include the following:

- (1) The motor carrier wishing to operate a platoon must provide notice to the Department of Vehicle Regulation and the Kentucky State Police, including a plan for the platoon operations;
- (2) Only CMV’s are eligible to operate in a platoon;
- (3) Only an appropriately endorsed driver with a valid CDL may drive a CMV;
- (4) A CMV operating in a platoon is not permitted to draw another motor vehicle into the platoon; and
- (5) Each CMV operating in a platoon must display a marking warning to other vehicles and law enforcement that the CMV may be part of a platoon,

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.

No such laws currently exist in Kentucky which would preclude a commercial driver from using a hands-free device to have a conversation via a cell phone. Kentucky does prohibit writing, sending, and reading text messages on a cellular phone while driving. KRS 189.292(2). The prohibition does not apply to the use of a cell phone’s GPS and navigation systems, reading and entering telephone numbers to make a phone call, writing text messages to report illegal activity, summon medical help or law enforcement, prevent injury to a person or property, or to

operators of emergency or public safety vehicles when such use is “an essential function of the operator’s official duties”. KRS 189.292(3).

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

There is no Kentucky case law on Reptile Theory. Accordingly, there is no case law on the application of the rules of evidence to the theory. However, litigators should file preventive motions in limine, based on Rules 401, 403 and 404, if they anticipate the use of the Reptile Theory. Attorneys should explain the similarities between the Reptile Theory and the prohibited “Golden Rule” to show the trial court that use of the Reptile Theory must be prohibited. *See Stanley v. Ellegood*, 382 S.W.2d 572, 575 (Ky. 1964) (“Golden Rule” arguments are improper).

Kentucky prohibits pervasive use of “Golden Rule” arguments. The “Golden Rule” argument is defined as an argument that “calls upon the jury to put itself in the place of the injured plaintiff and to award damages based upon what the jurors would consider themselves entitled to.” *May v. Francis*, 433 S.W.2d 363 (Ky. 1968). The seminal case of *Stanley v. Ellegood*, 382 S.W.2d 572, 575 (Ky. 1964), held that “Golden Rule” arguments are improper.

Whether a “Golden Rule” argument prejudices a jury depends on the “unique facts” of each trial. *Id.* “An isolated instance of improper argument, for example, will seldom be found prejudicial. But when it is repeated and reiterated in colorful variety by an accomplished orator its deadly effect cannot be ignored.” *Id.* (citation omitted).

Applying these principles, Kentucky appellate courts have made it plain that to establish prejudice, the offending argument must be clearly improper and persistent. While the Reptile Theory should be barred because it is irrelevant under Rule 401 and prohibited because it elicits character evidence on a person’s careflessness under Rule 404, Kentucky trial courts are more likely to exclude the Reptile Theory under Rule 403 because of its inherent prejudicial nature. While “Golden Rule” arguments are improper, they become reversible error only if they are deemed prejudicial. *Stanley v. Ellegood*, 382 S.W.2d at 575. *See also Rockwell Int’l Corp. v. Wilhite*, 143 S.W.3d 604, 631 (Ky. Ct. App. 2003) (“Even if an argument is improper, however, the question remains whether the probability of real prejudice is sufficient to warrant a reversal.”). By explaining to the trial judge that use of the Reptile Theory is as prejudicial as persistent use of the “Golden Rule” – a more familiar prohibited argument – attorneys should have a good chance of successfully preventing use of the Reptile Theory on Rule 403 grounds. *See also Brooks v. Caterpillar Glob. Mining Am., LLC*, No. 4:14CV-00022-JHM, 2017 WL 3401476, at *8 (W.D. Ky. Aug. 8, 2017)(granted Motion in Limine precluding “Golden Rule” arguments by Plaintiff’s counsel; however, Plaintiff’s counsel offered no arguments in objection to the motion.

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

Kentucky Federal Court: Generally, Kentucky Federal Court procedures tend to be more structured from a scheduling standpoint. Further, Federal Court procedure is stricter than

Kentucky state Court procedure. Discovery disputes generally require attorneys to first try to resolve the matter among themselves and then contact the magistrate judge for informal proceedings prior to filing any motions. In some instances, plaintiff attorneys are not as well-versed in Federal procedure, which can be advantageous to defense counsel. Generally, Kentucky Federal Courts do not require in-person appearances for hearings, which makes the time and cost associated with travel less of an issue. The Federal Court system utilizes an electronic filing system. A jury pool is made up of individuals from a wider geographical area covering the entire Federal District. From the pool, a jury of at least 6, and no more than 12 individuals are selected in civil cases. Unless the parties stipulate otherwise, the verdict must be unanimous and must be returned by a jury of at least 6 members.

Kentucky State Court: Kentucky State Courts tend to be less structured than Kentucky's Federal Courts. Kentucky state Courts also require in-person appearances for hearings. There are no specific requirements which must be met for discovery disputes prior to filing a motion. Further, plaintiff attorneys generally tend to be more comfortable in state Court. Kentucky state Courts utilize an electronic filing system. The jury pool in state Court is made up of individuals residing in the county of filing. From the pool, a jury of 12 individuals is selected in circuit civil cases – (3/4) agreement required for verdict.

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

Generally, a citation resulting from a motor vehicle accident, itself, would not be admissible in a subsequent civil litigation, to prove action in conformity therewith. However, evidence of the citation would be admissible for impeachment purposes. Further, KRE 404(b) would allow evidence of the citation to be admissible if it was offered for another purpose, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Pursuant, to KRE 404(b)(2) evidence of the citation could be admissible if it was so inextricably intertwined with other evidence that was essential to the case, that separating the two could not be accomplished without a serious adverse impact on the party seeking to admit the evidence. Thus, the determination related to whether or not the evidence of the citation was admissible would be left to the judge in the civil litigation.

Generally, a guilty plea to a citation constitutes an admission against interest and constitutes competent evidence in a civil case involving the same occurrence; however, the guilty plea is not conclusive and may be explained. *Johnson v. Tucker*, 383 S.W.2d 325 (1964), See also *Race v. Chappell*, 202 S.W. 626 (1947).

A guilty verdict would be addressed the same as a citation, discussed above. A nolo contendere plea is generally not admissible against the defendant who made the plea. KRE 410. However, a nolo contendere plea is admissible in a civil proceeding wherein another statement made during the course of the same plea has already been introduced and, in fairness, the statement should be considered contemporaneously with it. *Id.*

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?

In Kentucky, the amount of the medicals billed—as opposed to medicals paid—is recoverable and offsets are not available. *Baptist Healthcare Systems, Inc. v. Miller*, 177 S.W.3d 676, 682-683 (Ky. 2005) (holding, “[i]t is improper to reduce a plaintiff’s damages by payments for medical treatment under a health insurance policy if the premiums were paid by the plaintiff or a third party other than the tortfeasor. The collateral source rule, as this rule is commonly known, allows the plaintiff to (1) seek recovery for the reasonable value of medical services for an injury, and (2) seek recovery for the reasonable value of medical services without consideration of insurance payments made to the injured party. The collateral source rule has long been followed in Kentucky. Medicare benefits are governed by the collateral source rule and are treated the same as other types of medical insurance.”).

There is no basis for post-verdict reductions or offsets for medical bills incurred as the result of an accident.

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

There are no statutory caps in Kentucky dealing with the amount of damages that may be awarded.