

MISSISSIPPI

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1. Identify the venues/areas in your State that are considered dangerous or liberal.

There are a number of liberal venues in Mississippi. Most of the counties bordering the Mississippi River are considered liberal. This trend extends to the adjacent counties. Also, other significant liberal counties are Hinds, Holmes, Smith, Panola, Marshall and Noxubee.

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

January 6, 2017

Birdsong v. Flying W Trucking, Cause No. 13-6 was tried in the Circuit Court of Rankin County, Mississippi. Plaintiff operating a pickup truck on the interstate, alleged a phantom vehicle braked suddenly which caused him to brake and was rear ended by a tractor trailer. Plaintiff alleged back injury with permanent disability and presented medical and vocational experts at trial. Liability defense was that the plaintiff and phantom vehicle had been traveling bumper to bumper and suddenly pulled in from of the tractor trailer and braked suddenly. The defense also diminished plaintiff's damages. The jury reached a defense verdict.

January 10, 2018

Boudreaux v. Goforth, Cause No. 15-172 was tried in the Circuit Court of Lamar County. Plaintiff was travelling to a family Thanksgiving gathering. The operator of a tractor trailer changed lanes and struck plaintiff's vehicle causing it to spin off the roadway. The trucking company admitted fault and defended on damages. Plaintiff did not seek medical treatment until four days after the accident. His neurosurgeon recommended L4-5 fusion surgery, which plaintiff did not have done as of the trial. Plaintiff also alleged he developed a "tremor." Plaintiff was unable to return to his job as a Direct TV installer and had done some light duty work. Plaintiff sought medical bills, lost wages, and non-economic damages. The trucking company defended on damages and had expert medical testimony that surgery was not needed. The jury returned a verdict of \$515,000, broken down as \$195,000 for past and future medicals, \$70,000 lost wages, \$200,000 pain and suffering and \$50,000 emotional distress.

September 14, 2018

Franklin v. Skymile Logistics, Cause No. 3:16-655 was tried in the United States District Court for the Southern District of Mississippi in Jackson, Mississippi. The case involved two separate collisions by three truck drivers. The driver of the defendant's truck was driving slowly on Interstate I-20 and was missing tail lights. Plaintiff was following in his truck and rear ended defendant's trailer because he did not realize defendant's vehicle was moving slowly. Both drivers partially pulled the rigs off the road. Plaintiff exited his truck and a third truck crashed into the rear of plaintiff's trailer then struck defendant's trailer. Plaintiff suffered a femur fracture and had hip replacement surgery. He also suffered a broken arm and numerous cuts. His medical bills were \$283,000. Plaintiff's theory was that defendant driver caused both collisions by travelling too slowly and not having tail lights. The jury returned a verdict of \$3,500,000.

September 28, 2018

McCon v. D&D Express Transportation, Cause No. 1:17-77 was tried in the United States District Court for the Southern District of Mississippi in Gulfport, Mississippi. Plaintiff was a passenger in a vehicle operated by Daryl Williams. They were travelling on I-10 and the vehicle began to run out of gas. The vehicle was slowing and Williams activated his emergency flashers. Defendant's tractor trailer was fully loaded and was behind Williams' vehicle at 70 mph and struck the vehicle. Plaintiff suffered multi-level disc injuries in his neck and low back. Plaintiff's medical bills were \$17,330 and he had lost wages of \$11,363. The jury awarded \$350,000 and found Williams and defendant's driver each 50% at fault.

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

Computer generated animations and accident reconstruction are admissible but are subject to strict evidentiary standards of relevancy and reliability. *Ethridge v. Harold Case & Co., Inc.*, 960 So. 2d 474 (Miss.Ct.App. 2006). Computer animation must be based upon scientific, identifiable and objective facts such as accurate physical measurements to be a fair and accurate representation. *Cox. v. State*, 849 So. 2d 1257 (Miss. 2003).

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.

No decision specific to spoliation or admissibility of in-cab videos was found. However, the court in *Grand Casino Biloxi v. Hallmark*, 823 So. 2d 1185 (Miss. 2002) determined the defendant casino had a duty to preserve a slot machine's computer data report along with surveillance video and the machine itself since the casino was aware of the subject jackpot dispute. The Court noted that had the computer data been preserved, the Gaming Commission could have examined the data to determine what code the machine entered at the time of the plaintiff's alleged win. Thus, while the holding in *Grand Casino Biloxi* is fairly fact-specific, the

Court upheld the duty to preserve electronic evidence where a party was aware of potential litigation that would concern the data.

Federal Courts in Mississippi have been more explicit about the duty to preserve electronic evidence, recognizing the *Zubulake* decisions as “setting the benchmarks for modern discovery and evidence-preservation issues.” *Kermode v. Univ. of Miss. Med. Ctr.*, 2011 U.S. Dist. LEXIS 71624 (S.D. Miss. 2011) (citing *Maggette v. BL Dev. Corp.*, 2009 U.S. Dist. LEXIS 116789 (N.D. Miss. 2009)). Specifically, the District Court for the Southern District of Mississippi considers *Zubulake* and its progeny persuasive as to the standards for preserving electronic evidence in the absence of binding Fifth Circuit precedent. *Kermode*, 2011 U.S. Dist. LEXIS at *10-11. In Mississippi, once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a “litigation hold” to ensure the preservation of relevant documents. *Zubulake IV*, 220 F.R.D. at 218.

A party may not be sanctioned under the Federal Rules of Civil Procedure for destroying electronically stored information if it was the result of routine, good faith operation. Electronically stored information is routinely destroyed in the normal course of business without regard to pending or ongoing litigation, such as email messages automatically deleted on a scheduled basis (i.e. “inaccessible backup tapes”). Suspension of disposition schedule for all documents might cripple large organizations. *Id.*

This line of reasoning would likely be applied to preservation of in-cab video or other onboard electronic evidence/video.

Admissibility of in-cab video would be subject to evaluation of whether the video was relevant, authenticated or overly prejudicial similar to consideration of other evidence.

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.

Mississippi has no specific regulatory or case law on retention of telematics data. It is anticipated that general retention duties and rules would apply.

There is a duty to preserve electronic evidence where a party is aware of potential litigation that would concern the data. *Grand Casino Biloxi v. Hallmark*, 823 So.2d 1185 (Miss. 2002).

In Mississippi, once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a “litigation hold” to ensure the preservation of relevant documents. *Zubulake IV*, 220 F.R.D. at 218.

This line of reasoning would be applied to preservation of telematics data. It would be prudent to place third party vendors on notice to preserve data.

The Mississippi Supreme Court has recognized the distinction between a first party and third party spoliator, but refused to allow a separate cause of action for a spoliation claim regardless of whether the spoliator was a first party or third party. *Dowdle Butane Gas Co. v. Moore*, 831 So. 2d 1124, 1127-28 (Miss. 2002).

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

A positive post-accident toxicology result may be admissible in a civil action if plaintiff can establish a predicate the driver was impaired and the testing and test results are proven to be reliable. *Jackson v. Daley*, 739 So.2d 1031 (Miss. 1999); *Edwards v. Ellis*, 478 So.2d 282 (Miss. 1985).

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

Discovery of post-accident investigation by opposing counsel depends on the circumstances of what the investigation consisted of and when and by whom it was conducted. As a general rule, if the investigation was done in the ordinary course of business, regardless of whether a claim or lawsuit had been made, then it is likely discoverable. If investigation was done at the request of counsel or after notice of a claim, then the investigation is likely not discoverable. *Haynes v. Anderson*, 597 So.2d 615 (Miss. 1992). The analysis under Mississippi law is whether the materials were prepared in the anticipation of litigation. *Dunn v. State Farm Fire & Cas. Co.*, 927 F.2d 869 (5th Cir. 1991). Retention of counsel by the potential plaintiff is not necessary to trigger the protection; however, once attorneys are hired, it is reasonable to anticipate litigation. The protection does not extend to routine reports or investigation that is done in every case. *Id.*

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

We are not aware of any Mississippi laws/statutes which regulate automated driving systems.

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.

There are no laws or court decisions which preclude a driver from using a hands free device. Mississippi law does make it unlawful to text while driving when using a handheld mobile device. Miss. Code Ann. § 63-33-1. The statute recognizes voice operated or hands-free devices.

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

Mississippi law prohibits golden rule arguments. *Danner v. Mid-State Paving Co.*, 173 So.2d 608 (Miss. 1965) (golden rule arguments are reversible error); *Forbes v. State*, 771 So.2d 942 (Miss. Ct. App. 2000) (finding it error to urge jurors to consider their verdict will be

reflective of the “conscience of the community.” The United States District Court for the Northern District of Mississippi in an unreported decision granted defendant’s motion *in limine* to prohibit plaintiff’s counsel from making golden rule arguments or any “reptile theory” arguments. Some Mississippi courts have shown a willingness to prohibit “reptile theory” questions and arguments.

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

Federal Courts are generally preferred over state courts in Mississippi except for a few venues including Rankin County, DeSoto County, and Harrison County. The federal judges’ rulings are typically more consistent than the state court counterparts. Federal judges are appointed whereas the State court judges are elected. Juries in federal courts are drawn from a number of counties, usually 10-15. Federal court juries are usually better educated and more conservative than most state court juries. A jury verdict in federal court must be unanimous while a verdict in state court only requires 9 of 12 vote.

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

Convictions in a criminal case is admissible in a civil suit growing out of the same offense. *Owens v. Kelly*, 191 So. 3d 738 (Miss.Ct.App. 2015). However, typically, convictions ten years prior to the incident are irrelevant. *Bowman v. CSX Transp., Inc.*, 931 So. 2d 644, 655 (Miss. Ct. App. 2006) (holding that testimony about accidents at the same crossing were properly excluded as irrelevant where they occurred ten years earlier); See also, M.R.E. 609 (limiting use of convictions ten years or older) and M.R.E. 402 (irrelevant evidence is not admissible). If a party is “convicted,” including a guilty plea, of a traffic citation, that conviction is admissible subject to time limitations.

The Mississippi Supreme Court has not issued an opinion on the admissibility of the mere issuance of a traffic citation or whether paying a traffic citation is a guilty plea which is an admissible conviction. The Mississippi Court of Appeals has stated, in dicta, that the payment of a fine arising out of a traffic citation is akin to a plea of *nolo contendere* and should not be admissible. *Owens v. Kelly*, 191 So. 3d 738, 744 N.5 (Miss. Ct. App. 2015); M.R.E. 410 (Nolo Contendre pleas are inadmissible). In the same case, however, the Court of Appeals affirmed the payment of a traffic citation to impeach the defendant’s testimony that she was driving carefully and responsibly at the time of the accident, but did not rule on whether the payment was admissible as substantive evidence.

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?

Mississippi recognizes the collateral source rule which provides that compensation received by a plaintiff from a collateral source, wholly independent of the wrongdoer, cannot be

used by a defendant in mitigation or reduction of damages. *Burr v. Mississippi Baptist Medical Center*, 909 So. 2d 721 (Miss. 2005). However, the rule is not absolute. “If evidence is introduced for a purpose other than to mitigate damages, the collateral source rule is not violated and the evidence may be admitted.” *Burr*, 909 So. 2d at 729.

Under current Mississippi law, a plaintiff may recover for expenses written off by healthcare providers. Mississippi courts have recognized this as a form of the collateral source rule. *Williams v. Manitowoc Cranes, LLC*, 216 U.S. Dist. LEXIS 3553 (S.D. Miss. January 12, 2016); *Wal-Mart Stores, Inc. v. Frierson*, 818 So. 2d 1135 (Miss. 2002); *Brandon HMA, Inc. v. Bradshaw*, 809 So. 2d 611 (Miss. 2001).

Mississippi allows the plaintiff to submit evidence of incurred medicals to the jury. *McCary v. Caperton*, 601 So. 2d 866 (Miss. 1992). Plaintiff can “board” the face amount of the bills regardless of adjustments/amount actually paid. Miss. Code Ann. Section 41-9-119 establishes a rebuttable presumption that the face amount of the bills are reasonable and necessary medical expenses incurred by plaintiff. A defendant is entitled to “rebut the necessity and reasonableness of the bills, and the ultimate question is for the jury to determine.” *Herring v. Poirrier*, 797 So. 2d 797, 809 (Miss. 2000). Defendants in Mississippi are increasingly retaining medical billing experts to audit the face amount of medical bills and testify that the face amounts are unreasonable and have no relation to the cost of the service performed nor to the expected payment.

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

Non-economic compensation damages are capped at \$1,000,000. Miss Code Ann. § 11-1-60(2)(b). Punitive damages are limited to 2% of a defendant’s net worth for a defendant with a net worth of \$50,000,000 or less. Percentages and amounts increase on a sliding scale as a defendant’s net worth exceeds \$50,000,000. Miss. Code Ann. § 11-1-65(3).