MISSOURI

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

St. Louis City is frequently described as a "judicial hell hole" by the American Tort Reform Association and it has received a lot of press recently for some truly staggering verdicts ($4.69 billion, $72 million, $70 million, and $55 million) in talcum powder cases.

Fortunately, these type of verdicts are not seen in the transportation context. While it is still considered very plaintiff friendly, in recent years things have improved slightly. Significant gentrification has increased the number of educated professionals living in the city limits. Nevertheless, the surrounding areas are considered more conservative so removing to federal court is always advisable when possible.

Another urban area known to be plaintiff friendly is Jackson County, which is located in Kansas City. While 7 and 8 figure verdicts are not unheard of there, like St. Louis, their reputation is largely driven by high-value class action verdicts.

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

Defense Verdict

Case: Deborah Jennings v. TMC Corporation
Court: U.S. District Court for Eastern District of Missouri
Judge: Stephen N. Limbaugh

Date: 10/19/2017
Facts: Plaintiff was a passenger in a vehicle that lost control on Interstate 55 and spun out into the path of a tractor-trailer. Plaintiff's theory was that icy conditions made the tractor-trailer's speed too fast for conditions. Relied on expert testimony saying that it takes longer to stop an empty tractor-trailer than to stop a full load because the extra weight can help prevent its wheels from locking into a skid.
Specials: $225,000 billed, $112,000 paid
Last Demand: $1,075,000
Last Offer: $25,000

$1.2 Million Plaintiff's Verdict

Case: Daniel S. Hinges v. A& O Transportations, Inc., FedEx Ground Package Systems Inc.
Court: Newtown County Circuit Court
Date: 6/16/2017
Total Verdict: $1,266,286 and 0 comparative fault found
Facts: Plaintiff alleged Defendant driver ran a stop sign and struck him while he was driving on northbound Missouri Route 59. Plaintiff noted as being "determined" to go back to work, testimony from his wife and boss demonstrated that he was trying to work through day-to-day pain
Specials: $99,000 prior medical, $15,480 lost wage
Last Demand: $1,000,000
Last Offer: $200,000

$6.3 Million Plaintiff's Verdict

Case: Roger Ross, Lorinda Ross v. Jeschke Ag Service LLC
Court: Jackson County *applying Kansas Law*
Judge: Kevin Harrell
Date: 1/23/17
Total Verdict: 65% Defendant, 35% Plaintiff; $3.9 million economic damages reduced to $2.535 under comparative fault; $2.4 million non-economic damages reduced to $250,000 under Kansas statutory cap; $750,000 in punitive damages awarded by judge.

-total $3,535,000 awarded to plaintiff after taking into account comparative fault

Facts: Tractor-trailer attempting to pass farm tractor on one-lane highway struck the farm tractor when it attempted to turn left. Prior to the crash, Shaw's trailer was overloaded with materials from Gavilon Fertilizer in St. Joseph, Ross alleged in the petition.

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

Yes.

The admissibility of a video depends on whether it is practical, instructive, and calculated to assist the jury in understanding the case. Nash v. Stanley Magic Door, Inc., 863 S.W.2d 677, 681 (Mo.App. E.D.1993).

"[V]ideotape evidence may be admitted for two purposes: (1) to re-create events at issue in litigation; and (2) to illustrate physical properties or scientific principles that form the foundation for an expert's opinion." *Black v. U-Haul Co. of Missouri*, 204 S.W.3d 260, 265 (Mo.App. E.D. 2006) *citing Grose v. Nissan North America, Inc.*, 50 S.W.3d 825, 830 (Mo.App. E.D.2001).

i. To Re-Create Events At Issue in Litigation

When the video is an attempt to re-enact the original event, the essential conditions in the video must be "substantially similar" to those existing at the time of the accident. *Grose*, 50 S.W.3d 831. Admissibility of a re-creation does not require perfect identity between the actual and the experimental conditions. *Nash*, 8363 S.W.2d at 681.

First, the court should be confident that the film does not create the impression of re-enacting the accident. *Beers v. Western Auto Supply Co*, 646 S.W.2d 812, 815 (Mo.App. W.D. 1982). **Second**, the court should determine, from viewing the film, that there is little potential for jury confusion regarding the purpose of the film. *Id.* **Third**, if the court admits the video, it should be confident that the instruction it provides to the jury clearly indicates that the purpose of the video is only to establish a foundation for the expert's opinion and not to re-create the events at issue. *Id.* at 816. **Fourth**, the court should consider the need for the video whether the average layperson would have difficulty understanding the expert testimony in the absence of the visual aid, or whether other, less prejudicial evidence could be used. *Id.*

In addition to these factors, the court should make a determination that the probative value of the video outweighs its prejudicial effect. *Olinger v. General Heating & Cooling Co*., 896 S.W.2d 43, 48 (Mo.App. W.D.1994).

ii. To Illustrate Physical Properties Or Scientific Principles That Form Foundation For An Expert's Opinion

In *Black*, the Court held that video of, "how a truck would handle and brake if the final supporting nut was placed in the loosest position on the left front spindle" was not admissible because it did not speak to the issue of, "whether the supporting nut, initially placed in a tightened position, but without the support of a cotter pin, would come loose under normal driving conditions."

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.

Missouri does not recognize spoliation as a basis for liability against any party or non-party. *Fisher v. Bauer Corp.*, 239 S.W.3d 693, 701–04 (Mo. Ct. App. E.D. 2007). If a party has intentionally spoliated evidence, indicating fraud and a desire to suppress the truth, that party is

subject to an adverse evidentiary inference." *Baugher v. Gates Rubber Co., Inc.*, 863 S.W.2d 905, 907 (Mo.App.1993) (citing *Brown v. Hamid*, 856 S.W.2d 51, 56–57 (Mo. banc 1993)).

Recent struggles with adverse evidentiary inference vs. adverse evidentiary instruction

Under the adverse evidentiary inference, "the victim of spoliation is entitled to an adverse inference, which holds the spoliator to admit that the missing evidence would have been unfavorable to its position." *Marmaduke v. CBL & Assocs. Mgmt., Inc.*, 521 S.W.3d 257, 270 (Mo. App. E.D. 2017). They are not, however, entitled to an adverse jury instruction. *Id.*

"An inference is a permissible deduction the trier of fact may make without an express instruction of the law by the court." *Hill v. SSM Health Care St. Louis*, 563 S.W.3d 757, 764 (Mo.App. E.D. 2018), reh'g and/or transfer denied (July 5, 2018), opinion adopted and reinstated after retransfer (Dec. 20, 2018) "

The Defendants in *Hill* tried to use this distinction to their advantage. In a wrongful death case involving a slip-and-fall outside of a hospital, the surveillance video from the area where the fall occurred went missing. Plaintiff's successfully obtained an adverse evidentiary inference at trial, but Defendants attempted to use Missouri's lack of "instruction" to their advantage. During close, Defense counsel argued, "[i]n the instructions, which are the law ... you will not find one word in here to say anything about spoliation, loss of evidence, and you should then render a verdict in favor of the Hills. Nothing about that." *Id.* Plaintiff's promptly objected, stating, "Well, Judge, I object to that. He knows we can't give an instruction on that. I think that's—I think that's improper." *Id.* The trial court overruled him.

On appeal, the Court of Appeals held that, even though it was couched solely in terms of the jury instructions, Defense counsel's closing argument confused the issue of law regarding the adverse evidentiary instruction and reversed. *Id.* The Court held that, under the adverse evidentiary inference, the Defendants, "should have been held to admit that the video would have shown Mr. Hill's fall was caused by the dangerous condition at issue." *Id.* As the Court of Appeals pointed out, however, it is unclear when this admissions is to be made to the jury.

The Missouri Supreme Court recently declined to hear an appeal from that case, so its remains to be seen what sort of admission is required. Right now, however, the adverse evidentiary inference can be unevenly applied across the state.

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 of retention of telematics data and any requirement that third party vendors be placed on notice of spoliation/retention letters

Missouri's regulations mirror the Federal Motor Carrier Safety Regulations and will allow all drivers using "ELD-like" devices that meet the automatic on-board recording devises (see 49 CFR 395.15) to continue to use such devices until December 2019. Duty status logs must be kept for a minimum of six (6) months along with "all supporting documents". Supporting documents include, "Bills of lading, itineraries, schedules, or equivalent documents that show the

starting and ending location for each trip; Dispatch records, trip records, or equivalent documents; Expense receipts (meals, lodging, fuel, etc.); Fleet management system communication records; Payroll records, settlement sheets, or equivalent documents showing payment to a driver."

There is no requirement that third party vendors be placed on notice of spoliation letters. If an opposing party, however, seeks to obtain documents only in the control of a third-party vendor – the party cannot avoid disclosing the identity of that vendor during discovery. Failing to do so can subject a party to discovery sanctions. *See Soybean Merch. Council v. AgBorn Genetics*, LLC, 534 S.W.3d 822 (Mo.App. W.D. 2017) (sanctioning soybean merchant for failure to produce responsive documents as ordered by the court, failure to provide adequate responses to discovery, and failure of merchant's general manager to answer certain deposition questions, where opposing parties were forced to obtain information from third parties that merchant could have and should have provided, and court had to order general manager to sit for a second deposition).

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

If it is probative to the cause of the underlying accident, yes. Although subsequent remedial measures is inadmissible in negligence actions to establish a defendant's antecedent negligence, "post-accident remedial measures can be admitted for certain limited purposes, such as proving ownership or control, showing feasibility of precautionary measures when controverted, and impeaching or rebutting witness testimony." *Dillman v. Missouri Highway & Transp. Comm'n*, 973 S.W.2d 510, 512 (Mo.App. E.D. 1998).

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

So long as it was prepared in anticipation of litigation, post-accident investigations are protected from discovery under the work product doctrine. The work product doctrine precludes discovery of the mental impressions, conclusions, opinions, or legal theories, both tangible and intangible, created or commissioned by counsel in preparation for possible litigation. *State ex rel. Malashock v. Jamison*, 502 S.W.3d 618, 620 (Mo. 2016)(citing Rule 56.01(b)(3).

The "mere likelihood of suit" however is "not sufficient to invoke the privilege." *Stauffer Chemical Co. v. Monsanto Company*, 623 F.Supp. 148, 152 (E.D.Mo.1985). "Materials prepared in the ordinary course of business do not fall within the work product exception." *Bd. of Registration for Healing Arts v. Spinden*, 798 S.W.2d 472, 478 (Mo.App. W.D. 1990).

Essentially, if it's produced for the purpose of complying with a federal regulation – then it is likely discoverable in the State of Missouri.

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

Missouri does not currently have any laws regulating automated driving systems. Legislation relating to automated motor vehicle operation was proposed in the Missouri House of

Representatives in January of 2018. See 99th General Assembly House Bill 2271. The proposed legislation, which would establish the Automated Vehicle Safety Advisory Committee has not been voted on by either chamber of the Missouri legislature and is not currently schedule for a vote in either chamber.

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.

Missouri 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. Missouri does prohibit commercial motor vehicle drivers from using a hand-held mobile telephone and from using a wireless communications device to send, read, or write a text message or electronic message. R.S. Mo. § 304.820.

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

Under Missouri law, golden rule arguments and other improper personalization are not permitted and may constitute reversible error. *See Merrit v. Wilkerson*, 360 S.W.2d 283, 287-88 (Mo.App. 1962); *see also Jones v. State*, 389 S.W.3d 253, 257 (Mo.App. E.D. 2012) ("improper personalization occurs when [a party] implies that a defendant poses a personal danger to the jurors or their families").

There are no known published decisions in Missouri which specifically appear to address other recent Reptile-style arguments by plaintiffs' counsel.

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

The primary difference between state court in Missouri and federal court is the relative lack of codified Rules of Evidence in state court. While there are a few statutes that set forth a few specific evidentiary principles on a few topics, Missouri does not have its own codified Rules of Evidence similar to the Federal Rules of Evidence. The admissibility or exclusion of evidence is generally a matter of common law deduced from judicial precedent from the state's appellate courts. While Missouri has recently adopted the *Daubert* and its progeny standard of admissibility for expert testimony, other Rules of Evidence remain uncodified. Similarly, Missouri does not have mandatory disclosure requirements like those set forth under F.R.C.P. Rule 26, although similar information can generally be obtained by interrogatories and requests for production during discovery.

A major difference between federal court and state court in Missouri is the nature and extent of disclosure required as to expert witnesses. Missouri's state court rules do not require the disclosure of the experts' opinions or the factual basis and grounds for same and there is no report requirement for retained experts similar to F.R.C.P. Rule 26(a)(2). Other than the general nature and subject matter of the testimony of a retained expert and his or her qualifications, all

discovery of an expert's opinions, the factual basis and grounds for same as well as the methodology and related/supportive materials must be elicited or obtained by deposition.

In addition, 12 jurors deliberate in civil cases and a verdict can be rendered by as few as 9 in civil cases; 6-8 jurors typically deliberate in federal court civil cases which require a unanimous verdict. Because jurors are chosen from larger geographic areas, some federal jury panels will look different that the cities and counties in which that federal court physically sits. Generally speaking, voir dire in civil cases is conducted by the lawyers in state court, while voir dire in federal court is typically far more limited and sometimes required to be submitted in advance and conducted by the court. Both state and federal courts are requiring deposition designations and objections to same to be submitted and ruled on in advance of trial, but most state court judges still tend to be looser with these policies and requirements than judges in the federal court.

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

Statements of opinion regarding causation, fault, or contributing actions made by law enforcement officers who investigate an accident are inadmissible. *Stucker v. Chitwood*, 841 S.W.2d 816, 821 (Mo. App. S.D. 1992). Accordingly "[I]t is improper to introduce evidence showing that the investigating officer did or did not issue a traffic citation to a driver." *Id.* at 820.

In civil proceedings, a witness can be impeached only by proof of a conviction. R.S. Mo. § 491.050. The word "conviction" as used in Section 491.050 "is generally used in its broad and comprehensive sense meaning that a judgment of final condemnation has been pronounced against the accused." *M.A.B. v. Nicely*, 909 S.W.2d 669, 671 (Mo. banc 1995) (citation omitted). When an imposition of sentence has been suspended, there is no conviction to be used for impeachment purposes in a civil case because the term does not include a plea or a finding of guilty. Therefore, a guilty plea with a suspended imposition of sentence (SIS) is not admissible in a civil case.

As explained by the Missouri Supreme Court in *Lewis v. Wahl*, 842 S.W.2d 82(Mo. 1992), Missouri supreme Court cases decided prior to the 1981 amendment of Section 491.050 "consistently held that the statute permitted evidence of any felony or misdemeanor conviction, including traffic convictions, to be proved on the question of witness credibility in a subsequent civil action. *Id.* (citing S*tate v. Morris,* 460 S.W.2d 624, 629 (Mo. 1970); *Hoover v. Denton,* 335 S.W.2d 46, 47 (Mo. 1960); *State v. Cox,* 333 S.W.2d 25, 30 (Mo. 1960); *Brown v. Anthony Mfg. Co.,* 311 S.W.2d 23, 28 (Mo. banc 1958); *State v. Johnson,* 293 S.W.2d 907, 911 (Mo. 1956); and *State v. Blitz,* 171 Mo. 530, 71 S.W. 1027, 1030 (1903).). There are numerous Missouri cases wherein the conviction for a traffic violation was determined to be admissible in a subsequent civil action. *See e.g. Commerford v. Kreitler*, 462 S.W.2d 726, (Mo. 1971) (holding that a conviction of a misdemeanor, including speeding, in a state court, may be proved on cross examination to affect the credibility of a witness; M*oe v. Blue springs Truck Lines, Inc.*, 426 S.W.2d 1, (Mo. 1968) (holding that in a tort case brought by plaintiff driver, it was prejudicial error for a trial court to refuse to admit in rebuttal the record of defendant truck driver's conviction for operating a motor vehicle in a careless and imprudent manner.).

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?

As part of the 2005 Missouri tort reform, Mo. Rev. Stat. § 490.715 was amended to include a new subsection 5 that addressed valuation of the medical expenses, including a provision that there was a rebuttable presumption that the "value" of medical treatment is "the dollar amount necessary to satisfy the financial obligation to the health care provider." Plaintiffs were not permitted to introduce evidence of medical expenses that exceeded the reasonable "value" of medical care and treatment. *See id.*

Missouri cases, however, significantly undermined this statutory tort reform, by allowing evidence of "sticker price" bills to get to the jury upon a very low showing of the "reasonableness" of the full-price bills, which can be made by affidavits or the testimony of the health care providers. *See Deck v. Teasley*, 322 S.W.3d 536 (Mo. banc 2010). The bar to rebut the presumption was so low in practice that the statutory reform failed to have the desired effect.

Revised section 490.715, which went into law on August 28, 2017, attempts to streamline the evidentiary requirements for recovery of medical bills by eliminating the presumption from the statute and replacing it with an "actual cost" standard. More specifically, Missouri law now defines the "actual cost of the medical care or treatment" as follows:

> [The] sum of money not to exceed the dollar amounts paid by or on behalf of a plaintiff or a patient whose care is at issue plus any remaining dollar amount necessary to satisfy the financial obligation for medical care or treatment by a health care provider after adjustment for any contractual discounts, price reduction, or write-off by any person or entity.

In short, Missouri has significantly altered the evidentiary standard for proving the value of medical treatment rendered to an injured party. The new law appears to be sufficiently clear that medical bills evidence will be the amount actually paid or owed, and not the originally billed amount, or any write-offs, discounts or adjustments to the bill as a result of contracts with insurers or government programs. Further, the new law eliminates the need for evidence establishing that the full amount billed or charged represents the true value of the medical treatment, and thus may lessen some of the burdens discussed above.

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

There are no statutory caps on damages in a personal injury lawsuit outside of the context of medical mal-practice claims for wrongful death.