

SOUTH CAROLINA

Duke Highfield, Esquire
Victoria L. Anderson, Esquire
YOUNG CLEMENT RIVERS, LLP
25 Calhoun Street, Suite 400
Charleston, SC 29401
Phone: (843) 577.5456
Fax: (843) 579.1330
E-Mail: dhighfield@ycrlaw.com
E-Mail: tanderson@ycrlaw.com

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

In South Carolina, the forum county or venue is a particularly important factor with regard to case valuation, as it can have a rather dramatic impact on a verdict. The following venues in South Carolina are considered to be very liberal and/or plaintiff-oriented: Allendale, Hampton, Jasper, Orangeburg, and Williamsburg Counties. The following venues are also liberal, but to a somewhat lesser degree: Bamberg, Barnwell, Chesterfield, Clarendon, Colleton, Darlington, Dillon, Fairfield, Lee, and Marion Counties.

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

McKissick v. Brian Todd Jarrell, individually, and as employee/agent of Jarrell Enterprises, and Ricky Lee Jarrell, individually and as owner/agent of Jarrell Enterprises, et al. Charleston County Court of Common Pleas, September 20, 2017

The jury awarded the Plaintiff \$7,750,000.00, including \$3,000,000.00 in punitive damages against driver Brian Jarrell, in a case involving allegations that the intoxicated driver of the Defendant caused a fatal motorcycle accident. The decedent was on his way home from work when Defendant Brian Jarrell, driving a vehicle owned by Jarrell Enterprises, collided with the motorcycle, left the scene, and was later apprehended by police at a license checkpoint, while still under the influence of alcohol.

Cross, et al v. XPO Express, Inc., et al. United States District Court; May 11, 2018

The Jury rendered a \$19 million dollar verdict against the Defendants. In this action, a Canadian national and his family were killed in a fiery auto collision in South Carolina. The decedents, stopped for construction traffic ahead of them, were struck from the rear by a tractor trailer driving at approximately 70 mph. All three occupants of the vehicle, were killed in the collision. The plaintiffs filed claims for wrongful death and motor vehicle negligence, as well as a claim against the defendant driver's employer. The plaintiffs sought damages for wrongful death, as well as pre-death pain and suffering. The jury returned a finding for the plaintiffs and awarded \$19 million in damages, including \$5 million for each of the three plaintiff members of the family, as well as another \$2 million for the father and son, for pre-death pain and suffering.

Of note, is that the Plaintiffs asked the jury for a verdict nearly four times the amount awarded. Additionally, no punitive damages were awarded.

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

Accident animations and/or computer-generated evidence is admissible if “screened carefully and admitted cautiously.” computer-generated video animation is admissible as demonstrative evidence when the proponent shows that the animation is (1) authentic under Rule 901, SCRE; (2) relevant under Rules 401 and 402, SCRE; (3) a fair and accurate representation of the evidence to which it relates, and (4) its probative value substantially outweighs the danger of unfair prejudice, confusing the issues, or misleading the jury under Rule 403, SCRE. *Clark v. Cantrell*, 339 S.C. 369, 384, 529 S.E.2d 528, 536 (2000), internal citations omitted.

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 been no significant decisions and trends over the past two years in South Carolina as it relates to retention or spoliation of in-cab videos or the admissibility of in-cab videos. As it relates to retention and spoliation, South Carolina does not have any unique rules with regard to in-cab videos and does not recognize an independent tort for the negligent spoliation of evidence. *Cole Vision Corp. v. Hobbs*, 394 S.C. 144, 154, 714 S.E.2d 537, 542 (2011). It does, however, remain a viable mechanism for the party claiming that spoliation of evidence has occurred. Courts in South Carolina have granted various forms of relief as a result of spoliation, including striking a pleading and giving an adverse inference jury instruction.

A party bringing a motion for sanctions based on spoliation bears the burden of establishing three independent elements before the court may determine which sanction, if any, is appropriate. These elements are:

- (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed;
- (2) that the records were destroyed with a culpable state of mind; and
- (3) that the destroyed evidence was relevant to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.

Id. (internal citations omitted).

There is no specific requirement with regard to spoliation of electronic data; however the elements above must be considered. In our experience, preservation of such materials, if any, is generally preferred and better protects the interests of the driver and/or carrier.

In-cab videos will generally be admissible absent a ruling from the trial court that the video is more prejudicial than probative pursuant to Rule 403 SCRPC or Rule 403 FRCP.

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.

South Carolina does not have any unique laws and/or regulations regarding telematics data. The analysis with regard to retention and potential spoliation is outlined in the response to Question 4 *supra*. As it relates to notification of any third party vendors as it relates to spoliation/retention, South Carolina courts have stated that "documents are considered to be under a party's control when that party has the right, authority, or practical ability to obtain the documents from a non-party," *Waters v. Lake City Police Ofc.*, No. 4:15-CV-4143-RBH-TER, 2018 WL 650461, at *3 (D.S.C. Jan. 31, 2018), citing, *Goodman v. Praxair Servs., Inc.*, 632 F.Supp.2d 494, 515 (D. Md. 2009)(citation and internal quotation marks omitted). Accordingly, if a non-party is control of telematics data which the party has the "right, authority, or practical ability to obtain," the party must make an effort to obtain the documents, or if unable to obtain, be able to document and/or provide to the court reasonable efforts made to obtain the same. South Carolina courts have not ruled on limits for upstream liability for spoliation.

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

Yes, absent a finding by the court that the admission of the post-accident toxicology result is more prejudicial than probative (Rule 403 SCRPC and FRCP).

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

In general, unless protected by the attorney-client and/or work product privileges, possibly yes. South Carolina does not recognize any self-critical privilege. Where a post-accident investigation (inclusive of preventability determinations) is done or created in the ordinary course of business it is very likely a South Carolina court would order that it be disclosed pursuant to proper discovery requests.

South Carolina does not recognize a specific exemption from discovery for pre-suit investigation; rather, a party must assert attorney-client privilege or privilege under the work-product doctrine with regard to any materials it seeks to preserve in confidence. The essential elements giving rise to the [attorney-client] privilege [are]:“(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.” *State v. Doster*, 276 S.C. 647, 651, 284 S.E.2d 218, 219-20 (1981) (internal citations omitted). The attorney work product doctrine protects from discovery documents prepared in anticipation of litigation, unless a substantial need can be shown by the requesting party. *See* Rule 26(b)(3), SCRPC; *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947). Generally, in determining whether a document has been prepared “in anticipation of litigation,” most courts look to whether or not the document was prepared because of the prospect of litigation. *Tobaccoville USA, Inc. v. McMaster*, 387 S.C. 287, 294, 692 S.E.2d 526, 530 (2010) (internal citation omitted). The analysis then turns on whether the plaintiff/claimant is able to prove that he has a substantial need for the work product privileged

materials *and* that he cannot obtain substantially similar materials via alternative means. Written or recorded statements and photographs taken during accident investigation are also discoverable unless such fall under the category of privilege as discussed above.

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

South Carolina has enacted legislation to authorized automated truck platooning by exempting “the operator of any nonleading commercial motor vehicle subject to Federal Motor Carrier Safety Regulations and traveling in a series of commercial vehicles using cooperative adaptive cruise control or any other automated driving technology” from FTC rules and state law which prohibits vehicles from following too closely on the roadway. S.C. Code Ann. §56-5-1930. Currently, this exemption applies only to commercial motor vehicles.

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.

South Carolina does not have a specific requirement regarding the usage of hands free devices for commercial drivers; while there is a ban on the use of a wireless electronic communications to compose, send, or read a text-based communication, that restriction does not apply to someone using a hands-free wireless electronic communication device. S.C. Code Ann. § 56-5-3890.

Drivers subject to the FMCSA must comply with those applicable requirements for the usage of hands free devices.

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

Golden Rule arguments are generally prohibited. “It is improper for counsel to make a closing argument to the jury ... calculated to arouse passion or prejudice.” *Gathers v. Harris Teeter Supermarket, Inc.*, 282 S.C. 220, 231, 317 S.E.2d 748, 755 (Ct. App. 1984). Attorneys must “tailor their remarks “so as not to appeal to the personal biases of the jury” or “arouse the jurors' passions or prejudices.” *Von Dohlen v. State*, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004). Arguments must be confined to reasonable inferences drawn from the admissible evidence,” and asking a jury to take into account “harm to nonparties” caused by a defendant’s product or conduct is prohibited. See *Branham v. Ford Motor Co.*, 390 S.C. 203, 234, 701 S.E.2d 5, 22 (2010)

While more motions *in limine* have been made with regard to Reptile style arguments in recent years, there has been limited treatment from the courts, and no direct prohibition of Reptile arguments.

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

The advantages or disadvantages of federal court versus state court in South Carolina will vary greatly depending on the unique facts of individual cases. From a general standpoint, South Carolina's state courts are largely plaintiff-friendly and, barring unusual circumstances, courts will typically allow cases to go to a jury rather than resolve by way of motions practice. It is rare for summary judgment to be granted in a state court case. Federal court juries are drawn from a wider area, which can sometimes help to offset the plaintiff-oriented leanings of a liberal venue. In addition, most federal courts will often consider issues by way of written motions practice, rather than oral hearings, and make rulings based on the same. Stricter adherence to scheduling orders in federal court may also assist with more timely resolution of cases.

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

The Uniform Act Regulating Traffic on Highways expressly excludes the use of a citation given for traffic violations for failure to wear a safety belt or use the child passenger restraint system as evidence in any trial of any civil action. S.C. Code Ann. §§ 56-5-6540(C), 56-5-6460. With respect to citations for other traffic violations, it is not clear whether such citations are admissible in subsequent civil litigation. It appears, however, that South Carolina courts are inclined to exclude citations in subsequent civil litigation and would prohibit citations from being admitted as either substantive or impeachment evidence. *See Samuel v. Mouzon*, 282 S.C. 616, 320 S.E.2d 482 (Ct. App. 1984) (citing *Hannah v. Ike Topper Structural Steel Co.*, 120 Ohio App. 44, 201 N.E.2d 63 (1963) (a traffic ticket and attached form authorizing entry of guilty plea, waiver of trial and payment of fine cannot be used in a subsequent automobile collision as proof of conviction or prior inconsistent statement for impeachment)).

By statute, a conviction, guilty plea, forfeiture of bond, or a plea of no contest for a traffic violation covered by the Uniform Act Regulating Traffic on Highways is not admissible in any civil action. S.C. Code Ann. § 56-5-6160; S.C. Code Ann. § 56-5-6220. Nevertheless, South Carolina courts have directly held that evidence of a guilty plea or conviction of a traffic offense *is* admissible for impeachment purposes and hinted that they may even be admissible as substantive evidence. *Addyman v. Specialties of Greenville, Inc.*, 273 S.C. 342, 257 S.E.2d 149 (1979); *see also Doe v. Doe*, 346 S.C. 145, 148, 551 S.E.2d 257, 258 (2001) (“[O]nce a person has been criminally convicted he is bound by that adjudication in a subsequent civil proceeding based on the same facts underlying the criminal conviction. . . .”); *Green v. Boney*, 233 S.C. 49, 103 S.E.2d 732 (1958) (holding that generally the fact that a defendant has entered a guilty plea can be received into evidence as an admission or for impeachment purposes in a subsequent civil case). Nevertheless, South Carolina courts have repeatedly affirmed that forfeiture of a bond or a plea of no contest are not admissible for any purpose. *Samuel v. Mouzon*, 282 S.C. 616, 621, 320 S.E.2d 482, 485 (Ct. App. 1984) (“[A] person has forfeited bond cannot be received into evidence either as an admission or for impeachment purposes in a subsequent civil case. . . .”); *Kibler v. State*, 267 S.C. 250, 227 S.E.2d 199 (1976) (“[A] plea of nolo cannot be used as an admission against a defendant in civil litigation.”); *In re Anderson*, 255 S.C. 56, 177 S.E.2d 130 (1970) (plea of nolo contendere is not an admission of guilt except in case in which it is entered).

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 South Carolina, a plaintiff in a personal injury action seeking damages for the cost of medical services is entitled to recover the reasonable value of those medical services, not necessarily the amount paid. *Haselden v. Davis*, 353 S.C. 481, 484, 579 S.E.2d 293, 295 (2003) (citing 22 Am. Jur. 2d *Damages*, § 198 (1988)). Thus, a plaintiff can present to the jury the total medical bills incurred, regardless of payment, Medicare reduction, and like factors. *Id.*; *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 595-96, 686 S.E.2d 176, 189 (2009) (holding the trial court did not err in permitting the jury to evaluate the value of the plaintiff's medical care in assessing damages despite the fact that the plaintiff received the medical care for free).

Offsets are generally not available under South Carolina law. Under the collateral source rule, a plaintiff's damages may not be reduced by benefits received from some source like unemployment compensation or first party insurance. HUBBARD & FELIX, SOUTH CAROLINA LAW OF TORTS 560 (3d ed. 1990); *Citizens & S. Nat'l Bank of S.C. v. Gregory*, 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995) ("compensation received by an injured party from a source wholly independent of the wrongdoer will not reduce the amount of damages owed by the wrongdoer.").

The collateral source rule also applies to Medicaid and Medicare payments "such that the amount a plaintiff is billed by her medical provider may be recoverable as compensatory damages, despite the fact that the Plaintiff's Medicaid may have paid a lower amount." *Haselden*, 353 S.C. at 483, 579 S.E.2d at 294, n.3 (recognizing that, although several courts in other jurisdictions find that allowing a plaintiff to claim the billed amount, as opposed to the paid amount, would result in a windfall, South Carolina courts do not find the amount paid to be dispositive).

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

Generally there are no caps on damages. Two exceptions are for governmental entities entitled to the protections of the South Carolina Tort Claims Act, which allow for limited actual damages but not punitive damages, exemplary damages, or prejudgment interest (S.C. Code Ann. § 15-78-120. *et seq.*, currently set at \$300,000 per person or \$600,000 per occurrence); for charities under S.C. Code Ann. § 33-56-180(A) which limits recovery against charitable organizations to the same limit as those imposed by the Tort Claims Act.

In addition, there are limitations applicable to punitive damages sought under South Carolina law. A defendant may request a bifurcated trial on the issue. Punitive damage awards are capped to the greater of either three times the amount of compensatory damages or \$500,000. In certain situations, where the defendant's actions could subject the defendant to conviction for a felony and such actions were the proximate cause of the plaintiff's damages or where the wrongful conduct was motivated primarily by unreasonable financial gain and known, or approved by, a person responsible for making policy decisions on behalf of the defendant, the cap can be increased to four times the compensatory damages or \$2 million, whichever is greater. Finally, there is no cap on a punitive damages award where the defendant acted with an intent to harm; was convicted of a felony for the same conduct which caused the plaintiff's

damages; or acted, or failed to act, while under the influence of alcohol, drugs, or other substances which impaired the defendant's judgment. S.C. Code Ann. § 15-32-530 (C).