ARKANSAS

Jerry J. Sallings
WRIGHT, LINDSEY & JENNINGS LLP
200 W. Capitol Ave., Suite 2300
Little Rock, AR 72201
Phone: (501) 371-0808
Fax: (501) 376-9442
E-Mail: jsallings@wlj.com
www.wlj.com/

1. Provide an update current black box technology and simulations in your State and the legal issues surrounding these advancements.

Technology in Arkansas is on par with the rest of the country. As to legal issues, Arkansas statute requires that the owner of the vehicle must give permission to download the data before it may be downloaded. Also in a 2015 criminal case the Arkansas Court of Appeals affirmed a conviction for negligent homicide, saying that there was sufficient evident to support the verdict. *Sizemore v. State*, 2015 Ark. App. 728, at 9, 478 S.W.3d 281, 286. The case stemmed from a car crash, and the court observed that an Arkansas State trooper testified about the vehicle's "black box" information, which "indicated that the vehicle's speed had increased to seventy-five miles per hour before rolling over[.]" *Id.* at 8, 478 S.W.3d at 285.

2. Besides black box data, what other sources of technological evidence can be used in evaluating accidents and describe the legal issues in your State involving the use of such evidence.

Arkansas courts generally allow most technological evidence, such as GPS data and accident simulations. For example, an accident reconstruction expert can use computer simulations to recreate an accident. This sort of evidence is admissible as long as the program used is appropriate within the scientific community and the inputted data survives *Daubert* scrutiny. *See* Question 5 below.

3. Describe the legal issues in your State involving the handling of post-accident claims with an emphasis on preservation / spoliation of evidence, claims documents, dealing with law enforcement early and social media?

I. Arkansas and the Eighth Circuit have different standards for what warrants a spoliation of evidence instruction. In Arkansas, the requesting party must identify relevant evidence, that is in possession of a party in whose interest it is produce it, and the party must fail to produce the evidence without a satisfactory explanation. *Source Logistics, Inc. v. Certain Underwriters at Lloyd's of London Subscribing to Policy No. NA041790U*, 2010

Ark. App. 239, at 4–6, 374 S.W.3d 232, 235–36 (citing Arkansas Model Instructions 106A—Adverse Inference). Arkansas also recognizes spoliation when a party intentionally destroys evidence. *Tomlin v. Wal-Mart Stores, Inc.*, 81 Ark. App. 198, 206–07, 100 S.W.3d 57, 62–63 (2003); Arkansas Model Instruction 106—Effect of Intentional Destruction or Suppression of Evidence. And trial courts are not required to make a finding of bad faith by the spoliator prior to giving the instruction. *Bunn Builders, Inc. v. Womack*, 2011 Ark. 231, at 11, 2011 WL 2062393. The Eight Circuit, though, does require bad faith. In diversity cases, a district court must make two findings: "(1) there must be a finding of intentional destruction indicating a desire to suppress the truth, and (2) there must be a finding of prejudice to the opposing party." *Burris v. Gulf Underwriters Ins. Co.*, 787 F.3d 875, 879 (8th Cir. 2015); *Stevenson v. Union Pacific R.R. Co.*, 354 F.3d 739, 747 (8th Cir. 2004).

II. As to claims documents, Arkansas federal courts will look hard into claims documents to determine the applicability of the work-product doctrine. *Sims v. State Farm Mutual Automobile Insurance Company*, 2014 WL 12650652, at *6–7 (E.D. Ark. Apr. 30, 2014). Even though litigation is likely post-accident, there is no work product immunity for documents prepared during the regular course of business.

4. Describe the legal considerations in your State when defending an action involving truck drivers who may be considered Independent Contractors, Borrowed Servants or Additional Insureds?

I. In Arkansas, a company is not liable for an independent contractor's negligence. But when an employer "goes beyond certain limits in directing, supervising, or controlling the performance of the work, the relationship changes to that of employer-employee, and the employer is liable for the employee's torts. *Draper v. ConAgra Foods, Inc.*, 92 Ark. App. 220, 229, 212 S.W.3d 61, 67 (2005). Arkansas uses a multi-factor test to determine if one is an independent contractor, and the right of the employer to control the other party's work is the key factor. *Arkansas Transit Homes, Inc. v. Aetna Life & Cas.*, 341 Ark. 317, 322, 16 S.W.3d 545, 548 (2000).

II. Arkansas recognizes the borrowed servant doctrine. *See St. Joseph's Regional Health Center v. Munos*, 326 Ark. 605, 612, 934 S.W.2d 192, 195 (1996). It is also referred to as a loaned employee. The central issue in these cases is "whether the general or specific employer had the right of control and thus was the employee's master . . . ." *Watland v. Walton*, 410 F.2d 1, 3–4 (8th Cir. 1969) (Arkansas law). Courts in Arkansas must consider the negligent act in question when deciding that question. *Munos,* 326 Ark. at 613, 934 S.W.2d at 196.

III. Whether an employee may be an additional insured subject to a duty to defend and indemnify depends on the insurance policy's language. *See, e.g.*, *Producers Rice*

Mill, Inc. v. Rice Hull Specialty Products, Inc., 2017 Ark. App. 219, at 9, 519 S.W.3d 354, 359.

5. What is the legal standard in your state for allowing expert testimony on mild traumatic brain injury (mTBI) claims and in what instances have you had success striking experts or claims?

Arkansas Rule of Evidence 702 says that if "scientific, technical, or other specialized knowledge will assist the trier of facts to understand the evidence . . . a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise." The standard is, therefore, the same no matter the topic the expert testifies about. Arkansas also uses *Daubert* in interpreting Rule 702. *Farm Bureau Mut. Ins. Co. of Arkansas, Inc. v. Foote*, 341 Ark. 105, 117, 14 S.W.3d 512, 520 (2000). Under that standard, trial courts "must make a preliminary assessment of whether the reasoning or methodology underlying expert testimony is valid and whether the reasoning and methodology used by the expert has been properly applied to the facts in the case." *Coca-Cola Bottling Co. of Memphis, Tennessee v. Gill*, 352 Ark. 240, 262, 100 S.W.3d 715, 729 (2003). This law would determine whether an expert could testify about mild traumatic brain injury claims.

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

Positive post-accident toxicology results are only admissible in civil actions if the plaintiff produces other corresponding evidence that the defendant was impaired at the time of the accident. *City of Little Rock v. Cameron*, 320 Ark. 444, 447, 897 S.W.2d 562, 564 (1995); *see also Wade v. Grace*, 321 Ark. 482, 488–89, 902 S.W.2d 785, 789–90 (1995).

7. What are some considerations for federally-mandated testing when drivers are Independent Contractors, Borrowed Servants, or Additional Insureds?

As noted in Question 4 above, an employer's right to control is determinative when courts consider whether a driver was an independent contractor or an employee. But requiring proper licensing by independent contractors does not equal control over the working process. *See, e.g.*, *Henderson v. Tyson Foods, Inc.*, 2015 Ark. App. 542, at 9, 473 S.W.3d 52, 58. So requiring a driver to complete federally-mandated testing would likely not result in an employer-employee finding. Employers should still hire competent drivers that have completed the proper testing, because failing to do would call into question the driver's character and could lead to a negligent hiring claim. *Cf. Russell v. Northeast Texas Land and Timber*, 2009 Ark. App. 828, at 3–4, 372 S.W.3d 816, 818 (holding that a timber broker is not liable for logging driver's negligence when there was no showing that the broker was aware of the truck's unsafe condition).

8. Is there a mandatory ADR requirement in your State and are any local jurisdictions mandating cases to binding or non-binding arbitration?

There are no mandatory ADR requirements in Arkansas. But courts are "vested with the authority to order any civil" case before it to mediation. Ark. Code Ann. § 16-7-202(b).

9. Can corporate deposition testimony be used in support of a motion for summary judgment or other dispositive motion?

Yes. Arkansas Rule of Civil Procedure 56(c)(2) says that judgement "shall be rendered if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law . . . ." This includes all deposition testimony.

10. What are the rules in your State for contribution claims and does the doctrine of joint and several liability apply?

I. In Arkansas, the right to contribution is a derivative claim. *Martin Farm Enterprises, Inc. v. Hayes*, 320 Ark. 205, 208, 895 S.W.2d 535, 537 (1995). These claims exist when one tortfeasor has discharged the common liability or paid more than his share of the underlying liability. Contribution may be raised through a cross-claim, a third-party action by the lone defendant, or a separate action.

II. No. For incidents occurring on or after March 25, 2003, the liability of joint tortfeasors will generally be several rather than joint. Subject to two exceptions, in any action for personal injury, medical injury, property damage, or wrongful death, each defendant shall only be liable for an amount of damages in direct proportion to that defendant's percentage of fault. Ark. Code Ann. § 16-55-201.

11. What are the most dangerous/plaintiff-friendly venues in your State?

Noting that every case is different and that juries can be unpredictable to the point that extreme verdicts can be returned in any case, there has been a higher incidence of plaintiff friendly verdicts returned in the following counties in Arkansas: Phillips, Lee, and Monroe.

12. Is there a cap on punitive damages in your State?

No. *See Bayer CropScience LP v. Schafer*, 2011 Ark. 518, at 13, 385 S.W.3d 822, 831 (holding that the statutory cap on punitive damages is unconstitutional under the Arkansas Constitution).

13. Admissible evidence regarding medical damages – can the plaintiff seek to recover the amount charged or the amount paid?

The law in Arkansas permits a claimant to introduce and "blackboard" medical costs that have been billed, regardless of whether or not plaintiff has paid them or will ever have to pay them. The Arkansas legislature passed the Civil Justice Reform Act of 2003. It included a provision that would permit plaintiffs to recover only those medical costs that had actually been paid. *See* Ark. Code Ann. § 16-55-212(b). But in 2009 the Arkansas Supreme Court found this provision of the Civil Justice Reform act to be unconstitutional. *Thomas v. Rockwell Automation, Inc*., 2009 Ark. 241, at 11, 308 S.W.3d 135, 142 (2009).