FOR MORE INFORMATION

WRIGHT, LINDSEY & JENNINGS LLP
Little Rock, Arkansas
www.wjlj.com

Jerry Sallings Esq,
jsallings@wlj.com

Antwan Phillips, Esq.
aphillips@wlj.com

ALFA International
The Global Legal Network
Local Relationships Worldwide

ARKANSAS

1. What are the legal considerations in your State governing the admissibility or preventability in utilizing the self-critical analysis privilege and how successful have those efforts been?

Arkansas does not recognize a self-critical analysis privilege outside of either statutory or regulatory enactments, such as Quality Assurance privileges. There are no Arkansas statutes or regulations that protect the "preventability" determinations made by trucking companies. There are no appellate court opinions addressing discoverability or admissibility of "preventability" determinations. There has been success in trial courts in defeating the admissibility, and sometimes discoverability, of "preventability" conclusions and discussions by trucking companies, depending upon the judge. However, arguments to exclude are usually based upon case law from other jurisdictions such as *Villalba v. Consolidated Freightways, Corporations of Delaware,* 2000 WL 1154073 (N.D. Ill.); *Cameron v. Werner Enterprises, Inc.,* 2016 WL 3030181 (S.D. Miss. May 25, 2016); and 49 U.S.C. § 504(f); *Sajda v. Brewton,* 265 F.R.D. 334 (N.D. Ind. 2009).

2. Does your State permit discovery of 3rd Party Litigation Funding files and, if so, what are the rules and regulations governing 3rd Party Litigation Funding?

None known at this time. In 2015, Arkansas enacted a consumer litigation lending statute. Ark. Code. Ann. 4-57-109. It caps the maximum rate of interest in a consumer lawsuit lending transaction at 17%. *Id.* Because of this cap, Consumer Lawsuit Lenders have not been a presence in Arkansas and there has not been a need to establish discovery rules of third-party litigation finding files.

3. Who travels in your State with respect to a Rule 30(b)(6) witness deposition; the witness or the attorney and why?

If the deponent is a party, he is obligated to attend a deposition at the place specified in the notice unless he or she obtains a protective order directing that it be held elsewhere. In practice, however, a defendant is presumed to be examined at his or residence or place of business or employment. *§21:6.Depositions upon oral examination, 2 Arkansas Civil Prac. & Proc. § 21:6 (5th ed.)*.

4. What are the benefits or detriments in your State by admitting a driver was in the "course and scope" of employment for direct negligence claims?

Arkansas law, as established in the case of *Elrod v. G&G Constr. Co.,* 275 Ark. 151, 628 S.W.2d 17 (1982), holds that if the employer/employee relationship is admitted then plaintiff may only pursue fault against the employer on the theory of *respondeat superior*. In other words, generally, plaintiff may not pursue separate claims for negligent hiring, training, or supervision against the company. There are some limited exceptions to this rule (where punitive damages are alleged and there is a *prima facie* case made to support them; and where substantial evidence establishes that specific policies by the company were not followed, enforced, or

taught and the failure to follow those policies were proximately related to the injury - *see Regions Bank v. White,* 2009 WL 3148732 (E.D. Ark. Sept. 24, 2009)). A potential detriment to admitting the course and scope is that if punitive damages are imposed, the employer is responsible under Arkansas law even for such conduct.

5. Please describe any noteworthy nuclear verdicts in your State?

There have not been any nuclear verdicts in the transportation industry in Arkansas in the past year.

6. What are the current legal considerations in terms of obtaining discovery of the amounts actually billed or paid?

Arkansas applies the collateral-source rule, which prohibits the admissibility of evidence showing that the injured person received payments from another source, unless relevant for some purpose other than mitigation or reduction of damages. *Ebbing v. State Farm Fire & Cas. Co.,* 67 Ark. App. 381, 389, 1 S.W.3d 459, 463 (1999). However, Arkansas recognizes four limited exceptions to the rule. Evidence of a collateral source may be introduced in four situations: (1) to rebut the plaintiff's testimony that he was compelled by financial necessity to return to work prematurely or to forego additional medical care; (2) to show that the plaintiff had attributed his condition to some other cause, such as sickness; (3) to impeach the plaintiff's testimony that he has paid his medical expenses himself; or (4) to show that the plaintiff had actually continued to work instead of being out of work, as claimed. *Wal-Mart Stores, Inc. v. Kilgore,* 85 Ark. App. 231, 239–40, 148 S.W.3d 754, 759–760 (2004).

7. How successful have efforts been to obtain the amounts actually charged and accepted by a healthcare provider for certain procedures outside of a personal injury? (e.g. insurance contracts with major providers)

Arkansas adheres to the collateral source rule, which is both a substantive law of damages and a rule of evidence. In other words, it allows the plaintiff to seek recovery of the full amount charged for his medical bills, irrespective of payments, write-offs or reductions from third parties. It also precludes a defendant from eliciting or introducing evidence of collateral benefits or payments at trial.

8. What legal considerations does your State have in determining which jurisdiction applies when an employee is injured in your State?

Arkansas' choice-of-law rule utilizes a flexible approach. The Arkansas Supreme Court has identified five "choice influencing considerations" to determine which jurisdiction's laws apply to an action: (1) the predictability of results (2) maintenance of interstate and international order (3) simplification of judicial tasks (4) advancement of the forum's governmental interest and (5) application of the better rule of law. *Wallis v. Mrs. Smith's Pie Co*., 261 Ark. 622, 629, 520 S.W.2d 453, 456 (1977). These factors, though, are to be considered along with the more mechanical *lex loci delicti* rule, which provides that the law of the place where the tort was committed applies. *Miller v. Pilgrim's Pride Corp.*, 366 F.3d 672, 674 (8th Cir. 2004).

Consideration of the first factor goes to the theory "that the decision in litigation on a given set of facts should be the same regardless of where the litigation occurs . . . ." *Gomez v. ITT Educational Services, Inc.*, 348 Ark. 69, 78, 71 S.W.3d 542, 547 (2002) (quotation omitted). The second and third factors generally do not guide decisions, as parties rarely seek "to undertake tortious behavior" in other states and application of any state law creates a minor concern in most instances. *Miller v. Pilgrim's Pride Corp.*, 366 F.3d 672, 674 (8th Cir. 2004). The fourth factor is usually critical, and requires a reflection of the traditional *lex loci delicti* rule, which held that a forum state's interest in retaining jurisdiction was strong, and the more flexible approach, which understands in this "age of global commerce" governmental interests are not confined to the older rule. *Id.* at 674–75. And the last factor, application of the better rule of law, "points towards the application of one law when the conflicting law is 'archaic and unfair.'" *Hughes v. Wal-Mart Stores, Inc.*, 250 F.3d 618,

621 (8th Cir. 2001) (quoting *Schlemmer v. Fireman's Fund Ins. Co.*, 292 Ark. 344, 347, 730 S.W.2d 217, 219 (1987)).

9. What is your State's current position and standard in regards to taking pre-suit depositions?

Rule 27(a) of the Arkansas Rules of Civil Procedure controls the standard for pre-suite depositions. The Rule provides that a party "who desires to perpetuate his own testimony or that of another person regarding any matter that may be cognizable in any court of this state may file a verified petition in the circuit court in the county of the residence of any expected adverse party." When filing this petition, the movant must show (1) that it expects to be "a party to an action cognizable in a court in this state but is presently unable to bring it or cause it to be brought"(2) the "subject matter of the expected action" and its interest therein (3) the facts the petitioner "desires to establish by the proposed testimony and his reasons for desiring to perpetuate it" (4) the names (or a description) of the persons it expects will be adverse parties and their known addresses; and (5) the names and addresses of the potential deponents "and the substance of the testimony which" plaintiff expects to elicit from them. Ark. R. Civ. P. 27(a).

Rule 27(b) requires the petitioner serve a notice on the potential adverse parties with a copy of the filed petition. The notice must "state that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition." Ark. R. Civ. P. 27(b). And 20 days before any hearing on the issue, "the notice shall be served either within or without the state in the manner provided in Rule 4 for service of summons." If the petitioner cannot complete service, the Court "may make such order as is just for service by publication or otherwise . . . ." *Id.*

A petitioner's burden to qualify for a pre-suite deposition has not been discussed by an Arkansas court in many years. But earlier cases note that, as long as the petitioner provides reasonable notice, depositions in this matter are appropriate. *See Pine Bluff & W.R. Co. v. McCaskill*, 88 Ark. 177, 114 S.W. 208, 209–10 (1908).

10. Does your State have any legal considerations regarding how long a vehicle/tractor-trailer must be held prior to release?

There is no case law, statute, or regulation in Arkansas that requires a motor vehicle to be held for a certain period of time prior to repairing or salvaging the vehicle. However, there is a jury instruction for spoliation of evidence, which allows the jury to draw a negative inference that the evidence destroyed was unfavorable to the party responsible for its spoliation. AMI Civil (2020 ed) 106. The spoliation instruction is designed to remedy litigation misconduct and can give rise to discovery sanctions and constitute a factor in the award of punitive damages. *See* Ark. R. Civ. P. 37(b)(2); *see also Union Pac. R.R. Co. v. Barber*, 356 Ark. 268, 149 S.W.3d 325 (2004). Additionally, the spoliation instruction can give rise to an inference of negligence on the part of the defendant. *Carr v. St. Paul Fire & Marine Ins. Co.*, 384 F. Supp. 821, 831 (W.D. Ark. 1974) (recognizing that the jury had a right to infer that the record, had it been retained, would have been probative of negligence).

Because of the spoliation jury instruction, most liability insurers and defense lawyers in Arkansas retain a vehicle/tractor-trailer in its original post-accident condition until all claimants have an opportunity to either inspect the vehicle or state in writing that they do not wish to inspect the vehicle and the vehicle can be released. If there is a vehicle inspection, after the inspection is completed it is best to obtain an agreement in writing that the vehicle can be released. If the claimant or his/her attorney is non-responsive, then the best course of action is to send a letter establishing a deadline (e.g. 30 days) for when the vehicle will be released.

11. What is your state's current standard to prove punitive or exemplary damages and is there any cap on same?

In Arkansas, the standard for an award of punitive damages is set by statute. Ark. Code Ann. § 16-55-206. In order to recover punitive damages, a plaintiff must first prove that a defendant is liable for compensatory

damages. *Id*. Next, the plaintiff must establish, by clear and convincing evidence, that the defendant knew, or should have known, that his or her conduct would lead to injury and continued the conduct with malice or in reckless disregard of the consequences. *Id.* Alternatively, engaging in a course of conduct for the purpose of causing harm would also suffice. Ark. Code Ann. § 16-55-206(2).

There is no cap on punitive damages under state law, and the Arkansas Supreme Court has struck down a statutory cap as unconstitutional under the Arkansas constitution. *See generally Bayer CropScience LP v. Schafer*, 2011 Ark. 518, 385 S.W.3d 822 (Ark. 2011) (striking down Ark. Code Ann. § 16-55-208 as violative of Ark. Const. Art. 5, § 32)). Consequently, the only restraint on the maximum amount of punitive damages arises from limits required by the federal due process clause. *See generally State Farm Mut. Auto. Ins. Co. v. Campbell*. 538 U.S. 408 (2003); *see also BMW of N. Am. Inc. v. Gore*, 517 U.S. 559, 568 (1996); *see also* Comment to Ark. Mode Jury Instr., Civil AMI 2213.

12. Has your state mandated Zoom trials? If so, what have the results been and have there been any appeals.

No.

13. Has your state had any noteworthy verdicts premised on punitive damages? If so, what kind of evidence has been used to establish the need for punitive damages? Finally, are any such verdicts currently up on appeal?

Generally, the Arkansas Supreme Court has limited punitive damages in the motor vehicle context to racing and intoxicated driving. However, the Supreme Court has affirmed the award of punitive damages where a trucking company, despite particular knowledge of specific defects to a specific truck's brakes, failed to make repairs to the brakes for at least five years, and where the driver had received five citations for speeding/defective equipment in the preceding five years. *D'Arbonne Construction Co. v. Foster*, 354 Ark. 304, 123 S.W.3d 894, 898 (Ark. 2003).

However, subsequent opinions have used *D'Arbonne* to show how *difficult* it is to establish clear and convincing evidence to permit imposition of punitive damages outside the context of purposeful conduct, racing, or intoxicated driving. *Bizzell v. Transport Corporation of America, Inc.*, 2017 WL 3381358 (E.D. Ark 2017). Outside the transportation context, the Eighth Circuit Court of Appeals recently affirmed a trial court's remittitur of an Arkansas jury's award of $5.8 million in punitive damages, reducing the total to $500,000. *Adeli v. Silverstar Automotive, Inc.*, 960 F.3d 452 (8th Cir. 2020).