FOR MORE INFORMATION

WRIGHT, LINDSEY & JENNINGS LLP
Little Rock, Arkansas
www.wlj.com
Michael Barnes
mbarnes@wlj.com
Greg Jones
gjones@wlj.com
Antwan Phillips
mphillips@wlj.com
Jerry Sallings
jsallings@wlj.com
WRIGHT, LINDSEY & JENNINGS LLP
Rogers, Arkansas
Glenn Ritter
gritter@wlj.com
Zach Trail
ztrail@wlj.com

Arkansas

Are preventability determinations and internal accident reports discoverable or admissible in your state? What factors determine discoverability or admissibility?

No specific statutory or common law privilege under Arkansas law excludes preventability determinations or internal accident reports from discovery or admissibility in civil litigation. Routine driver "call-in" reports of accidents will normally be deemed discoverable. However, Ark. R. Civ. P. 26(b)(3) provides that materials prepared in anticipation of litigation may be protected from disclosure under the work-product doctrine. Such materials may be discoverable, but only "upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means."

At least one federal district court in Arkansas has ruled preventability determinations inadmissible. *See McLane v. Rich Transport, Inc.*, 2012 WL 3996832. And, to the extent preventability determinations or internal accident reports can be construed as subsequent remedial measures, Ark. R. Evid. 407 provides they can be excluded from trial unless offered to show ownership, control, or feasibility of precautionary measures, if controverted, or for purposes of impeachment.

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?

Third-party litigation funding is not yet prevalent in Arkansas and no specific rules or regulations currently exist. However, it may be discoverable under the Arkansas Rules of Civil Procedure to the extent not subject to privilege, such as attorney-client privilege.

What is the procedure for the resolution of a claim for injuries to a minor in your state? Does the minor's age affect the statute of limitations for a personal injury claim?

A minor is presumed incapable of contracting or prosecuting litigation. Accordingly, settlement of a minor's tort claim is typically finalized one of two ways: (1) through court-approved removal of the disabilities of minority (for minors age 16 and over); or (2) through appointment of a guardian of the minor's estate. That guardian is required to seek court-approval of the settlement of the minor's tort claim and permission to execute the release agreement on the minor's behalf. The balance of settlement proceeds must be placed into an interest-bearing account at a bank or credit union, unless a surety bond is posted with the Court. There is an exception for settlements less than $5,000, for which the requirement of a guardianship may be set aside by a petition for a court order.

The minor's right to bring a cause of action commences at the time the minor's

disabilities have been removed, either by reaching the age of majority or by judicial determination. In other words, the statute of limitations does not begin to run until the minor's disabilities have been removed, which could be many years into the future.

What are the advantages or disadvantages in your State of admitting that a motor carrier is vicariously liable for the fault of its driver in the context of direct negligence claims?

In *Elrod v. G&G Constr. Co.,* 275 Ark. 151, 628 S.W.2d 17 (1982), the Arkansas Supreme Court held that if an employer admits an employer/employee relationship, the plaintiff may pursue fault against the employer only under *respondeat superior* liability. Thus, the main benefit of admitting *respondeat superior* liability is that it blocks a plaintiff from pursuing claims against the company for negligent hiring, training, or supervision. There are exceptions to this rule, including (1) when a plaintiff makes a *prima facie* case for punitive damages, (2) when the motor carrier provided defective equipment. and (3) when substantial evidence establishes that the company did not follow, enforce, or teach specific policies and the failure to follow those policies proximately caused the injury. *See Regions Bank v. White*, 2009 WL 3148732 (E.D. Ark. Sept. 24, 2009). A potential disadvantage to admitting *respondeat superior* liability is that if punitive damages are imposed, the employer is responsible for those damages.

What is the standard applied for spoliation of physical and/or documentary evidence in your state?

Arkansas and the Eighth Circuit have different standards for spoliation of evidence. In Arkansas state court, a negative inference may be drawn if a party fails (without satisfactory explanation) to produce relevant evidence in its control despite the fact it would be in that party's interest to produce it.. *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). Any sanction for spoliation requires specific findings on all three points: (1) intentional; (2) destruction; (3) of evidence. *See Bedell v. Williams*, 2012 Ark. 75, at 20, 386 S.W.3d 493, 506. Arkansas recognizes spoliation when a party intentionally destroys or suppresses 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 need not make a finding of bad faith by the spoliator before giving the instruction. *Bunn Builders, Inc. v. Womack*, 2011 Ark. 231, at 11, 2011 WL 2062393.

By contrast, the Eight Circuit, does require bad faith by the spoliator. So, in federal cases, a district court must make two findings to instruct on spoliation: "(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).

Is the amount of medical expenses actually paid by insurance or others (as opposed the amounts billed) discoverable or admissible in your State?

The collateral source rule excludes evidence of medical expenses *actually paid*. However, lienholder claims and evidence of parallel sources of reimbursement to the plaintiff are typically discoverable, though there is no express provision that provides that they are discoverable. Earlier this year, the Arkansas General Assembly rejected a bill that would have imposed limitations on recovery of damages to only those that were "actually owed" to third-party sources. In short, the plaintiff can "blackboard" the amount billed, whether or not those bills have been paid. Evidence of insurers' discounts or voluntary write-offs by the medical care provider normally are excluded unless the plaintiff has "opened the door" by misleading the jury.

What is the legal standard in your state for obtaining event data recorder ("EDR") data from a vehicle not owned by your client?

Consent for download can be obtained from the registered owner, the vehicles' lessee, or an "authorized representative" of the registered owner. In instances where no such person or entity does not voluntarily consents, the data is obtainable in one of three ways: 1) A court of competent jurisdiction in Arkansas orders production of the data; 2) A law enforcement officer obtains the data based on probable cause of an offense under the laws of the State of Arkansas; or 3) A law enforcement officer, firefighter, or an emergency medical services provider obtains the data in the course of responding to or investigating an emergency involving physical injury or the risk of physical injury to any person. *Ark. Code Ann. § 23-112-107.* The statute does not set out the legal standard that a court must use in determining whether to order production of the data. This firm has obtained court orders to obtain this data using the "high risk of irreparable and permanent damages" if the data is not retrieved and saved. There are no appellate court decisions on this standard. The statute does note that even if the data is obtained, "the use of data from a motor vehicle event data recorder shall not be permitted into evidence in a civil or criminal matter pending before a court in the State of Arkansas unless it is shown to be relevant and reliable pursuant to the Arkansas Rules of Evidence."

What is your state's current standard to prove punitive or exemplary damages against a motor carrier or broker and is there any cap on same?

Punitive and exemplary damages are available in limited circumstances. Punitive damages may be awarded "when a tortfeasor has acted with malice, intent to cause injury, or with conscious indifference such that malice could be inferred." This is codified at statute as Ark. Code Ann. § 16-55-206. There is no cap on punitive damages separate from the due process limitations outlined by *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408 (2003). In the motor carrier context, such damages are typically available only if the vehicle was being operated in a knowingly unsafe condition, if the driver was racing, or if the driver was intoxicated.

There are very few claims against brokers in Arkansas. There is divided authority as to whether those are actionable under Arkansas law, but there is a dearth of authority as to what facts might sustain an award of punitive damages against a broker.

Has your state had any noteworthy recent punitive damages verdicts? If so, what evidence was admitted supporting issuance of a punitive damages instruction? Finally, are any such verdicts currently on appeal?

Although punitive damages were not awarded- there was a $ 75 million trucking verdict in December 2021 against a trucking company. It involved toxic fumes being inhaled by the first responders at the accident scene and whether the load was properly marked. It is on appeal.

In August 2022, a $25-million judgment was awarded against a hotel in Northwest Arkansas relating to a sex-trafficking claim. This judgment included $19 million in punitive damages. However, the verdict is not illustrative because the hotel had defaulted and was not represented by an attorney.

Does your state permit an expert to testify as to content of the FMCSRs or the applicability of the FMCSRs to a certain set of facts?

Whether a witness may give expert testimony rests largely within the sound discretion of the trial judge. The trial judge will determine if the proposed expert testimony will aid the trier of fact in understanding the evidence or in determining a fact in issue. A qualified expert may testify and explain the FMCSR (or other "industry standards") if the Court finds that an expert would explain a complicated issue. However, the admissibility and proper expert witness would be subject to a *Daubert* analysis. Additionally, an expert witness could not testify to legal conclusions,

or submit an opinion on the "ultimate issue" of the lawsuit. At least one federal district judge has barred an expert from opining that the motor carrier or driver violated the FMCSRs.

Does your state consider a broker or shipper to be in a "joint venture" or similar agency relationship with a motor carrier for purposes of personal injury or wrongful death claims?

There is no state-based liability for brokers or shippers in personal injury or wrongful-death claims. Arkansas courts have generally rejected claims for negligent entrustment, hiring, training, and supervision against brokers. *Russell v. Northeast Texas Land and Timber*, 2009 Ark. App. 828, at 2–3, 372 S.W.3d 816, 818. If the broker is unaware of any character issues, recklessness, or incompetency on the part of the motor carrier there is no basis for liability. Indeed, in *Russell* the court granted summary judgment to a timber broker in a personal-injury case even though the broker knew the contractor was uninsured and had failed safety classes. *Id.* at 4, 372 S.W.3d at 818–89. Because "one employing an independent contractor is not liable for the contractor's negligence," *id.*, the plaintiff's claim against the broker failed.

Additionally, in Arkansas, the elements of a joint venture are "(1) two or more persons combine in a joint business enterprise for their mutual benefit; (2) right of mutual control or management of the venture; and (3) an expressed or implied understanding that they are to share in the profits or losses of the venture." *Tackett v. Gilmer*, 254 Ark. 689, 693, 496 S.W.2d 368, 372 (1973) (quotation omitted). No motor-vehicle cases discuss this standard, but any claim would likely fail the second and third elements.

Provide your state's comparative/contributory/pure negligence rule.

Arkansas is a modified comparative fault state, meaning if plaintiff is apportioned 50% or more of fault for his/her own injuries, then he/she is completely barred from recovery. If the plaintiff is apportioned less than 50% of fault, then his/her damages are reduced by that percentage of fault.

Provide your state's statute of limitations for personal injury and wrongful death claims.

General negligence claims are subject to a three-year statute of limitations, Ark. Code Ann. 16-56-105(3), and they accrue the moment the right to commence an action comes into being, *Gunn v. Farmers Ins. Exchange*, 2010 Ark. 434, at 7, 372 S.W.3d 346, 352 (citation omitted). Wrongful-death claims also face a three-year statute of limitations. Ark. Code Ann. § 16-62-102(c)(1).

In your state, who has the authority to file, negotiate, and settle a wrongful death claim and what must that person's relationship to the decedent be?

Arkansas's wrongful-death statute, Ark. Code Ann. § 16-62-102, requires that every action for wrongful death be brought in the name of the appointed personal representative of the deceased person. *Davenport v. Lee*, 348 Ark. 148, 159, 72 S.W.3d 85, 91 (2002). If there is no personal representative, then all heirs at law—those listed under Ark. Code Ann. 16-62-102(d)—must be joined as plaintiffs. *Brewer v. Poole*, 362 Ark. 1, 11, 207 S.W.3d 458, 464 (2005).

Is a plaintiff's failure to wear a seatbelt admissible at trial?

In motor vehicle cases, a plaintiff's failure to wear a seatbelt can be admissible, depending on several factors. A state statute, Ark. Code Ann. § 27-34-106(a), which has survived constitutional challenge, *see Edwards v. Thomas*, 2021 Ark. 140, at 5–6, 625 S.W.3d 226, 229, forecloses admissibility where a child is involved. Thus, even though the child is statutorily *required* to be placed in a proper child restraint system, failure to have a child placed in such a child safety seat is normally inadmissible in a civil damages case. The analysis is different for adults. Failure to wear a seatbelt *can* be admissible provided that the proponent can offer adequate proof linking the non-use to the injury being claimed. *Mendoza v. WIS International, Inc.*, 2016 Ark. 157, at 9–10, 490 S.W.3d 298, 303–04.

In your state, are there any limitations on damages recoverable for plaintiffs who do not have insurance coverage on the vehicle they were operating at the time of the accident? If so, describe the limitation.

None.

How does your state determine applicable law/choice of law questions in motor vehicle accident cases?

In tort cases, courts use five factors when considering choice-of-law questions: (1) predictability of results; (2) maintenance of interstate and international order; (3) simplification of the judicial task; (4) advancement of the forum's governmental interests; and (5) application of the better rule of law. *Gomez v. ITT Educational Services, Inc.*, 348 Ark. 69, 76–77, 71 S.W.3d 542, 546 (2002). In motor-vehicle cases, courts consider the place of the injury "within the framework of the five . . . factors." *Miller v. Pilgrim's Pride Corp.*, 366 F.3d 672, 674 (8th Cir. 2004).