GEORGIA

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

In *Howard v. Alegria*, a pickup truck driver was prejudiced by spoliation of evidence through deletion of a tractor trailer's computer data in a pickup truck driver's personal injury action against the driver of tractor trailer and its owner and owner's insurer. The pickup truck driver's expert testified that computer modules on the tractor trailer recorded significant amounts of relevant information which could have been downloaded and used to determine what occurred at the time of the collision, and the information that could have been obtained from the onboard computers was the highest and best evidence of what actually occurred. *Howard v. Alegria*, 321 Ga. App. 178 (2013).

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.

Besides black box data, other sources of technological evidence may include: GeoLogic, Qualcomm, and GPS data; cell phone records (e.g., calls, messages, data from cell phone applications); and surveillance footage. Georgia courts have addressed and discussed such evidence in the context spoliation and sanctions, as addressed further in response to Question 3. *See, e.g., Sentry Select Ins. Co. v. Treadwell*, 318 Ga. App. 844 (2012).

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?

A common legal issue that often rises when handling post-accident claims includes the preservation of evidence. Generally, the duty is on a party to preserve such evidence. A party's agent that destroys or fails to preserve evidence may bind the party and result in sanctions. *See, e.g., Lustre-Diaz v. Etheridge,* 309 Ga. App. 104 (2011). In many instances, courts in Georgia have found that a defendant's liability insurer is his or her agent and therefore liable for sanctions if the insurer fails to preserve evidence. *Id.* However, at least one Georgia court has recently held otherwise. *French v. Perez*, 349 Ga. App. 763 (2019).

In *French v. Perez*, the Georgia Court of Appeals held that sanctions for spoliation cannot be applied against a driver or owner of a vehicle who did not destroy evidence—especially, when there is no evidence to show that the destroying party (e.g., insurer) was acting at the behest of the party (e.g., driver). Simply put, the court affirmed that sanctions are not warranted unless the insurer or other third-party acted as the driver's agent in destroying or failing to preserve the evidence.

In *French*, a driver was sued following a motor vehicle accident. Before litigation commenced, the driver's insurer took possession of the vehicle involved in the accident and sold it despite being sent a notice to preserve any evidence related to the accident (e.g., the blackbox). Importantly, the insurer was not named a defendant in the suit and a notice was not sent to the defendant driver to preserve the vehicle. During litigation, the plaintiff filed a motion for sanctions against the driver for spoliation of evidence arising out of loss of the vehicle. However, the trial court denied plaintiff's motion for sanctions. On appeal, the appellate court affirmed the trial court's decision. The appellate court reasoned it was not in a position to decide whether the insurer operated as the driver's agent and the driver was not on notice to retain a vehicle he no longer possessed.

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?

Generally, in Georgia, when a vehicle is owned and operated by an independent contractor, the person who engages the contractor's services is not liable for an injury caused by the contractor's negligence. *Tect Const. Co., Inc. v. Frymyer*, 146 Ga. App. 300 (1978). Moreover, the employer is not liable for the negligence of the independent contractor's employees. *Flowers v. U. S. S. Agri-Chemicals*, 139 Ga. App. 430 (1976). Nevertheless, an employer may be liable for negligence of an independent contractor who is performing

employer's nondelegable statutory duty. *Perry v. Soil Remediation, Inc.*, 221 Ga. App. 386 (1996).

The legal considerations involved when determining whether an employee of the bailor is a borrowed servant of the hirer, courts examine two primary factors: (1) if the hirer had complete control and direction of the bailor's employee for the occasion, whereas the bailor had no such control, and (2) if the hirer had the exclusive right to discharge the bailor's employee. *Coe v. Carroll & Carroll, Inc.*, 308 Ga. App. 777, 779-80 (2011) (internal citations and quotations omitted). Conversely, where there is a rental of a motor vehicle together with a driver, the driver is not a borrowed servant of the hirer if the hirer has no supervision or control of the driver's operation of the vehicle and has no right to discharge the driver and take over the operation of the vehicle himself or put it in the hands of another to operate. *Id*. Under such circumstances, the owner of the vehicle who employs the driver (that is, the bailor), rather than the hirer, is responsible for the driver's negligence. *Id.*

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?

In Georgia, medical testimony as to the mere possibility of a causal relation between an accident and a subsequent physical condition (e.g., mTBI) of an injured person will not establish a causal relationship. *Jacobs v. Pilgrim*, 186 Ga. App. 260, 262(1) (1988). However, medical evidence which shows the possibility of a causal relationship in conjunction with other evidence, including non-expert evidence, indicating that such a relationship exists may be sufficient to establish such a causal relation. *Id.*

This principle can be seen in *Hert v. Gibbs* where the Georgia Court of Appeals affirmed the admission of expert testimony on a victim's brain injury claims. *Hert v. Gibbs*, 191 Ga. App. 471 (1989). There, a car accident victim appeared uninjured at the scene, but later began suffering from gran mal seizures. At trial, the victim's wife testified as to changes in his behavior after the accident and her testimony was corroborated by the victim's doctor. The doctor's testimony included responses to hypothetical questions on whether, in his expert medical opinion, there was a causal relationship between the automobile accident and a victim's brain injury. Notably, the hypothetical questions asked at trial assumed facts concerning the victim's physical condition that were not in evidence. Moreover, the doctor did not rely on the physical problems exhibited by the victim in giving his testimony. Following the reasoning of *Jacobs*, the Courts of Appeals found that the doctor's testimony was properly admitted because, in conjunction with the wife's non-expert testimony, it could be shown that a causal relationship between the accident and victim's injuries. Accordingly, the court held that the evidence allowed for a finding of a causal connection between the accident and the victim's brain injuries.

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

Yes. Georgia has codified the right to submit a positive post-accident toxicology result in a civil action at O.C.G.A. § 40-6-392. This section states, in relevant part:

(a) Upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person in violation of Code Section 40-6-391, evidence of the amount of alcohol or drug in a person's blood, urine, breath, or other bodily substance at the alleged time, as determined by a chemical analysis of the person's blood, urine, breath, or other bodily substance shall be admissible.

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

The Federal Motor Carrier Safety Administration ("FMCSA") and the Department of Transportation ("DOT") require that persons subject to the commercial driver's license ("CDL") requirements and their employers follow alcohol and drug testing rules. The FMCSA further requires that temporary drivers undergo drug testing. The employer is responsible for ensuring that the temporary driver, or staffing service providing said driver, complies with all testing rules under the USDOT standard.

Moreover, 49 C.F.R. § 382.103, requires companies to implement a DOT drug and alcohol program for all drivers operating a commercial motor vehicle ("CMV") that requires the driver to possess a CDL. 49 C.F.R. § 382.103. Federal regulations define "Driver" as "any person who operates a commercial motor vehicle." 49 C.F.R. § 382.107. This includes, but is not limited to full time, regularly employed drivers; casual, intermittent or occasional drivers; leased drivers and independent owner-operator contractors. Thus, companies must either cease all operations of CMVs on public roads or implement a DOT drug and alcohol testing program for any driver before he/she may operate a CMV, regardless of whether driver is an employee, independent contractor, or borrowed servant.

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

No. Nonetheless, the Georgia Supreme Court encourages every court in Georgia to consider the use of an ADR process to provide a system of justice which is more efficient and less costly in human and monetary terms. The Georgia Supreme Court strongly urges that courts with established ADR programs cooperate with courts seeking to establish new programs. Courts should assist new programs by providing information and by allowing mediator trainees from new programs to observe veteran mediators in established programs for the purpose of completing training requirements.

Additionally, many Georgia courts require parties to attempt ADR (usually mediation) as part of a standing order or scheduling order before their case is placed on the trial calendar.

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

Yes. Corporate deposition testimony can be relied upon as evidence to support a dispositive motion. *McGuire Holdings, LLP v. TSQ Partners, LLC*, 290 Ga. App. 595, 599 (2008); *Division Six Sports, Inc. v. Hire Dynamics, LLC*, 348 Ga. App. 347, 347 (2019).

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

Georgia's apportionment statute regulates contribution claims and requires that damages be apportioned in a case based upon the percentages of fault among parties and non-parties. O.C.G.A. § 51-12-32 potentially creates a right of contribution among joint tortfeasors, *except* as provided in O.C.G.A. § 51-12-33 which states specifically that any right to contribution is subject to Georgia's apportionment statute,[1] and which requires the trier of fact to apportion damages among liable persons "according to the percentage of fault of each person." Thus, apportioned damages are not subject to a right of contribution. O.C.G.A. § 51-12-33(b); *see also McReynolds v. Krebs*, 290 Ga. 850, 852 (2012) (noting that "[a]s to contribution, O.C.G.A. § 51-12-33 (b) flatly states that apportioned damages 'shall not be subject to any right of contribution.'").

Under, Georgia's apportionment statute, "[w]hen fault is divisible and the other requirements of O.C.G.A. § 51-12-33 (b) are met, then the trier of fact 'shall' apportion [damages]." *FDIC v. Loudermilk*, 305 Ga. 558, 572 (2019).

That said, the apportionment statute did not completely abrogate Georgia's common law rule imposing joint and several liability on persons who act in concert. *Loudermilk*, 305 Ga. at 576. Instead, the statute shifted the inquiry away from the "paradigm of damages analysis based on injury – where the courts asked whether, even absent 'voluntary intentional concert,' joint and several liability applied where 'the separate and independent acts of negligence of several persons combine naturally and directly to produce a single indivisible injury.'" *Id*. at 571. The court stated that under the 2005 amendments to the apportionment statute, to evaluate whether the statute applies the "touchstone inquiry" is "whether fault is divisible." *Id*. In fact, the statute specifically states that "the trier of fact, in its determination of the total amount of damages to be awarded, if any, shall…apportion its award of damages among the persons who are liable according to the percentage of fault of each person." O.C.G.A. § 51-12-33 *et seq*. Thus, to impose joint and several liability a party must show that the tortfeasors acted in concert or that the apportionment statute does not apply because the fault of the parties is indivisible. The Georgia Supreme Court in *Loudermilk* explained that concerted action applied to situations where tortfeasors engage "in pursuit of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt the wrongdoer's acts done for their benefit, are equally liable." 305 Ga. at 569.

[1] "Except as provided in Code Section 51-12-33, where a tortious act does not involve moral turpitude, contribution among several trespassers may be enforced just as if an action had been brought against them jointly." O.C.G.A. § 51-12-32(a).

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

At this time, any county in Georgia may be considered "dangerous" considering the current trucking litigation environment. For example, in May 2019 a jury in Whitfield County, generally considered to be a conservative county, awarded $21,600,000.00 to a plaintiff who suffered a below the knee leg amputation in a disputed liability trucking accident. That said, the following Georgia counties are considered to be the most plaintiff-oriented: Bibb, Chatham, Clayton, Dekalb, Dougherty, Gwinnett, Muscogee and Richmond.

12. Is there a cap on Punitive Damages in your State.

Except in product liability cases, or those involving intentional harm or drugs or alcohol, punitive damages are limited to $250,000. O.C.G.A. § 51-12-5.1(g). The "intentional harm" exclusion from the cap on punitive damages applies only to the active tortfeasor. O.C.G.A. § 51-12-5.1(f). Consequently, vicarious liability does not attach when considering uncapped punitive damages. *Corrugated Replacements, Inc. v. Johnson*, 340 Ga. App. 364, 372 (2017) (holding that the family purpose doctrine did not apply to allow a plaintiff to pursue unlimited punitive damages against the owner of a vehicle that was driven by another person who was under the influence of alcohol).

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

In Georgia, a plaintiff can recover billed medicals. For medical expenses, the plaintiff has the burden to show that such expenses were proximately caused by the tort and that the expenses were reasonable and necessary. O.C.G.A. § 51-12-7; *Emory Healthcare, Inc. v. Pardue*, 328 Ga. App. 664, 673 (2014); *Allen v. Spiker*, 301 Ga. App. 893, 896 (2009). Incurred medical expenses are a legitimate item of damages and proof thereof is generally admissible. O.C.G.A. § 51-12-7 ("In all cases, necessary expenses consequent upon an injury are a legitimate item in the estimate of damages.").

Georgia follows the collateral source rule, barring the defendant from presenting any evidence as to payments of expenses of a tortious injury paid for by a third party and taking any credit toward the defendant's liability and damages for such payments. *Kelley v. Purcell*, 301 Ga. App. 88, 91 (2009). "The collateral source rule applies to payments made by various sources, including insurance companies, beneficent bosses, or helpful relatives." *Hoeflick v. Bradley*, 282 Ga. App. 123, 124 (2006) (citations omitted). A write-off or write-down of medical expenses by the provider is also a collateral source, and evidence of such is inadmissible. *See*, *e.g.*, *Olariu v. Marrero*, 248 Ga. App. 824, 825-26 (2001); *Candler Hosp. v. Dent*, 228 Ga. App. 421, 422 (1997). Evidence regarding payments made by collateral sources is deemed irrelevant. *See*, *e.g.*, *Hoeflick*, 282 Ga. App. at 124. "Evidence which is not relevant shall not be admissible." O.C.G.A. § 24-4-402.