KANSAS

Hal D. Meltzer
Jonathan E. Benavides
BAKER, STERCHI, COWDEN & RICE, LLC
9393 W. 110th St., Suite 500
Overland Park, KS 66210
Phone: (913) 451-6752 or (816) 471-2121
Fax: (816) 472-0288
Email: meltzer@bscr-law.com
Email: benevides@bscr-law.com
www.bscr-law.com

J. Philip Davidson
Paul J. Skolaut
HINKLE LAW FIRM, LLC
1617 N. Waterfront Parkway, Suite 400
Wichita, KS 67206
Phone: (316) 267-2000
Fax: (316) 264-1556
Email: pdavidson@hinklaw.com
Email: Jskolaut@hinklaw.com
www.hinklaw.com

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

Event data recorders (EDRs), also known as "black boxes," capture information a variety of information and can be downloaded and analyzed in the event of a collision. In December 2015, the Driver Privacy Act of 2015 was enacted which placed limitations on data retrieval from EDRs and provided that the information collected belonged to the owner or lessee of the vehicle. Seventeen (17) states have enacted these "black box" laws, which provide that data collected from a motor vehicle EDR may only be downloaded with the consent of the vehicle owner or policyholder, with certain exceptions, but Kansas has not yet done so.

Absent an explicit "black box" law limiting data retrieval from EDRs, information from black boxes are discoverable in Kansas. K.S.A. 60-234(a) states that a party may request another party to "produce and permit the requesting party, or its representative, to inspect, copy, test or sample the following items in the responding party's possession, custody or control: (A) Any designated documents or electronically stored information, including writings, drawings, graphs, charts, photographs, sound recordings, images and *other data or data compilations*, stored in any medium from which information can be obtained

either directly or, if necessary, after translation by the responding party into a reasonably usable form" (emphasis added).

Kansas state appellate courts have not formally analyzed the admissibility requirements for an accident animation or computer-generated simulation. Victoria Webster, *The Use of Computer-Generated Animations and Simulations at Trial*, 83 Def. Couns. J. 439 (2016). However, the Kansas Court of Appeals affirmed the admission of a computer-generated accident animation in a criminal case. *State v. Lockett*, 2000 Kan.App. Unpub, LEXIS 542, *6 (2000). In *Lockett*, the animation was designated for demonstrative purposes and was used by the State to reflect its expert's opinion. *Id.* As for federal courts, the Tenth Circuit has recognized that "[v]ideo animation adds a new and powerful evidentiary tool" that carries the danger of confusing "art with reality" for the jury. *Robinson v. Mo. Pac. R.R. Co.*, 16 F.3d 1083, 1088 (10th Cir. 1994). In *Robinson*, however, the court affirmed the admission of video animation for a limited, illustrative purpose that was accompanied by a cautionary instruction and the opportunity for vigorous cross-examination. *Id.* at 1087-88.

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.

Other sources of technological evidence include dashboard cameras, cell phone data, back up camera systems, automatic emergency braking (AEB) systems, anti-lock braking systems (ABS), electronic logging devices, lane departure warning systems, blind-spot warning systems, rear cross traffic alert systems, GPS/telematics, and internet connected devices.

In Kansas, technological evidence is typically treated the same as other evidence. K.S.A. 60-237(e) states that sanctions can be imposed against a party "if electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery." Thus, if a party reasonably anticipates litigation post-accident, it should preserve and maintain the electronically stored data and other technological evidence that it has related to the accident.

Moreover, technological evidence is generally discoverable in Kansas as long as it is proportional to the needs of the case. Specifically, K.S.A. 60-226, which discusses the scope of discovery, states:

> Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in

> controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Therefore, absent a privilege or court order, most technological evidence will be discoverable, especially because Kansas recognizes that evidence can be discoverable even if it is not ultimately admissible at trial.

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. Legal issues in Kansas with preservation/spoliation of evidence

Regarding spoliation, broadly speaking, there is no common law duty to preserve evidence, and spoliation is not recognized as an independent tort under Kansas law. *Superior Boiler Works, Inc. v. Kimball*, 292 Kan. 885, 259 P.3d 676 (2011); *see also Koplin v. Rosel Well Perforators, Inc.*, 241 Kan. 206, 734 P.2d 1177 (1987).

K.S.A. 60-237(e) specifically addresses the remedies available for a party's failure to preserve electronically stored information. The statute provides:

> If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:
>
> (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
>
> (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation, may:
>
> > (A) presume that the lost information was unfavorable for the party;
> >
> > (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
> >
> > (C) dismiss the action or enter a default judgment.

B. Legal issues in Kansas with claims documents

If counsel has been retained, any investigation into an accident is protected under attorney-client privilege. If counsel has not been retained when the investigation occurs,

the insurer or client's post-accident investigation is discoverable. In other words, there is no claim file privilege in Kansas. "The liability insurance carrier functions in an independent role. Statements obtained by it from its insured do not come into the category of communications of a client to his lawyer, none of the essentials of the professional lawyer-client relationship being present." *Alseike v. Miller*, 412 P.2d 1007, 1017 (Kan. 1966); s*ee also Heany v. Nibbelink*, 23 Kan.App.2d 583 (1997).

Nor are such materials protected under the work product doctrine. Rather, Kansas courts have determined that an initial investigation of a potential claim, made by an insurance company, is done in the ordinary course of business and not "in anticipation of litigation." *Henry Enterprises., Inc. v. Smith*, 225 Kan. 615 (1979).

C. Legal issues in Kansas with early law enforcement dealings

"A plea of guilty to a traffic charge growing out of an accident is an admission of the acts which were the basis of the charge. The plea of guilty may be shown in a civil action growing out of the same accident as an admission of the acts charged." *Scogin v. Nugen*, 204 Kan. 568, 572, 464 P.2d 166, 171 (1970). This admission of guilt can have a detrimental effect upon the outcome of litigation for the driver, as well as any co-defendants.

D. Legal issues in Kansas with social media

Social media can be used as evidence as long as it is relevant. In Kansas, all evidence is generally admissible if relevant. K.S.A. 60-407(f). Evidence is relevant if it has "any tendency in reason to prove any material fact." K.S.A. 60-401(b). "This definition encompasses two elements: whether the evidence is material and whether the evidence is probative. Evidence is material when the fact it supports is in dispute and is significant under the substantive law of the case. Evidence is probative if it furnishes, establishes, or contributes toward proof." *State v. Flores,* 449 P.3d 456, at *2 (Kan.App. 2019). For example, in *Flores,* the district court held that the cropped photograph from Flores Facebook page was admissible because the photograph was relevant.

Moreover, a plaintiff's social networking activity that references in any way defendant or matters asserted in plaintiff's complaint is relevant. *Smith v. Hillshire Brands*, No. 13-2605-CM, 2014 WL 2804188, at *4 (D.Kan. June 20, 2014). Further, a statement made on social media is admissible in Kansas courts as a statement by an opposing party. *State v. Walker*, 452 P.3d 889, at *6 (Kan.App. 2019).

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?

Under Federal Motor Carrier Safety Regulation (FMCSR) 390.5, "an independent contractor is an employee for purposes of the Federal Motor Carrier Safety Regulations. 49 C.F.R. § 390.5 eliminates the common law distinction between employees and independent contractors for drivers of commercial motor vehicles, defining an employee as: 'any individual, other than an employer, who is employed by an employer and who in the course of his or her employment directly affects commercial motor vehicle safety. Such term includes a driver of a commercial motor vehicle (including an independent contractor while in the course of operating a commercial motor vehicle), a mechanic, and a freight handler." *Joyce v. Pedersen*, No. CIV.A.01-2609-GTV, 2003 WL 367320, at *4 (D.Kan. Feb. 14, 2003).

In Kansas, "an employer who temporarily borrows an employee may become liable for the employee's negligence. The 'borrowing employer' is sometimes referred to as the 'special employer,' and the 'lending employer' is sometimes referred to as the 'general employer.'" *Bright v. Cargill, Inc.*, 251 Kan. 387, 404, 837 P.2d 348, 362 (1992). In order to determine whose employee the worker was at a particular time, that is, which employer was vicariously liable for worker's negligence, the fact finder must examine "whose work was the person doing at the particular time, what person had the authority to discharge the workman, and who had the right to exercise supervision and control over the workman and to determine the manner in which the work was to be done rather than who actually exercised such control." *Id.* at 404-405. When a general employer "rents" an employee to the special employer, the general employer may still be held vicariously liable for the employee's negligence, unless the general employer relinquished sufficient control to establish abandonment. *Id.* at 406.

Insurance policies may contain clauses providing coverage for certain individuals or entities as additional insureds. This might occur if a truck driver is a subcontractor and is required to name the contractor as an additional insured on its policy. Both the insured and the additional insured would be covered under that policy in the event of an accident.

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 general, neuropsychological testimony and Positron Emission Tomography (PET) Scan testimony are the main types of expert testimony on mild traumatic brain injury claims. While this testimony is subject to rigorous challenges, Kansas does not have any applicable statutes or case law on expert testimony for mild traumatic brain injury claims. Thus, the legal standard for allowing expert testimony on mild traumatic brain injury claims in Kansas is the same legal standard for any other expert testimony. Specifically, K.S.A. 60-456(b) states: "If scientific, technical or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue, a witness who

is qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise if: (1) The testimony is based on sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the witness has reliably applied the principles and methods to the facts of the case."

Moreover, in deciding whether an expert's testimony is scientific knowledge that will assist trier of fact to understand or determine a fact in issue, a court may consider whether "the theory or technique is capable of being tested, whether the theory or technique has been subjected to peer review and publication, the known or potential rate of error, and the existence and maintenance of standards controlling the technique's operation, and the particular degree of acceptance within that community." *Stover v. Eagle Prod., Inc.*, 896 F. Supp. 1085, 1090 (D. Kan. 1995).

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

In Kansas, post-accident toxicology results are admissible in civil actions if the following foundation and relevance requirements are met: (1) the blood sample is taken under appropriate conditions to guard against contamination; (2) the sample is properly marked and conveyed to the laboratory, (3) the chemical testing is properly conducted by competent personnel, and (4) the test results are relevant and material to the issues presented in the litigation. *Wiles v. Am. Fam. Life Assurance Co. of Columbus*, 302 Kan. 66, 74, 350 P.3d 1071 (2015). This standard for foundation should apply to urine, vitreous humor, and other bodily fluids or cell samples and causal relation testimony should be required based on this statement of admissibility.

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

Kansas does not have any state statutes or regulations that require or warrant testing different than that required by the FMCSRs. While there are considerations regarding the issue of control as it relates to the relationship between principals and independent contractors, we are of the opinion that under both federal and Kansas law, federally mandated testing required by the FMCSRs applies to independent contractors, borrowed servants or additional insureds if they are driving or otherwise serving in a safety sensitive position on behalf of the company. Additional Insureds pose a different issue if they are not employees or owner/operators (contract/leased) drivers, but someone should be monitoring to be sure they are tested if they are performing in a safety sensitive position under the FMCSRs.

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

Kansas does not have a state mandated ADR requirement (except in cases involving alleged medical malpractice), but many district courts either by selective jurisdiction or selective judges, require ADR – usually mediation. There are early mediation programs

or requirements in the federal courts in Kansas, but those are judicially imposed rather than statutorily imposed, and there is no mandatory binding or non-binding arbitration that has been imposed either by state law or by judicial fiat in the federal or state courts in Kansas.

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 used to support a motion for summary judgment or other dispositive motion.

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

Kansas is an independent liability state by statute. *Brown v. Keill*, 580 P.2d 807 (Kan. 1978), 224 Kan. 195 (1978); 60-258a. Thus, there is no joint and several liability amongst unrelated (independent) defendants, rather liability for negligence, warranty and strict liability in tort is independent liability amongst defendants other than a defendant vicariously liable for the fault of another defendant. Similarly, there is no right of contribution amongst joint tortfeasors in Kansas because all of the liability as between such joint tortfeasors is independent; accordingly, each defendant is only responsible for his/her assigned portion of fault. See K.S.A. Section 60-258a.

It should be noted that contractual indemnity still exists between joint tortfeasors who have a contract between them providing for indemnity, but indemnity for one's own negligence generally requires specific language and is to be strictly construed. *Johnson v. Board of Pratt County Commissioners*, 259 Kan. 305, 328-29 (1996).

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

The most dangerous/plaintiff-friendly venues are unquestionably Wyandotte County (Kansas City) and Sedgwick County (Wichita). The largest jury verdicts in the state are usually awarded in these jurisdictions.

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

Yes. Kansas has a statutory cap on punitive damages which is an amount that does not exceed the **lesser** of (a) the annual gross income earned by the defendant in any of the five years immediately before the punitive conduct (unless the court determines that amount to be inadequate to penalize the defendant in which case it can ward up to 50% of the net worth of the defendant), or (b) $5 million dollars. K.S.A. 60-3702(e)(1) and (2). In lieu of those limitations, however, if the court finds that the profitability of the defendant's misconduct exceeds or is expected to exceed those amounts, the court can award an amount equal to 1.5 times the amount of profit that the defendant gained or is expected to gain as a result of the defendant's punitive conduct. See K.S.A. 60-3702(f).

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

Under Kansas law, the plaintiff may present the amount billed by the medical providers and the defendant may present the amount accepted by the medical providers in full satisfaction of the amount billed. It is then left to the finder of fact to determine the reasonable value of the medical care and expenses for the treatment of the plaintiff's injuries. In *Martinez v. Milburn Enterprises, Inc.*, 290 Kan. 572, 574, 233 P.3d 205, 208 (2010), the Kansas Supreme Court considered the issue of "whether in a case involving private health insurance the collateral source rule applies to bar evidence of (1) the amount originally billed for medical treatment or (2) the reduced amount accepted by the medical provider in full satisfaction of the amount billed, regardless of the source of payment." *Id.* at 208. The court held that evidence of both (1) the original amount billed and (2) the amount accepted by the hospital in full satisfaction of the amount billed were admissible. *Id.* at 229. "However, evidence of the source of any actual payments is inadmissible under the collateral source rule." *Id.* "The finder of fact is permitted to determine from these and other facts, the reasonable value of the medical services provided." *Id.*