KENTUCKY

Marc A. Lovell
Justin L. Duncan
HARLIN PARKER
519 E. 10th Street
Bowling Green, KY 42101
Tel: (270) 842-5611
Fax: (270) 842-2607
E-Mail: lovell@harlinparker.com
E-Mail: duncan@harlinparker.com
www.harlinparker.com

Palmer Gene Vance II
Samuel T. Reinhardt
STOLL KEENON OGDEN PLLC
300 West Vine Street
Suite 2100
Lexington, KY 40507
Tel: (859) 231-3000
Fax: (859) 253-1093
E-Mail: gene.vance@skofirm.com
E-Mail: sam.reinhardt@skofirm.com
www.skofirm.com

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

A black box is also known as an electronic control module (ECM) or event data recorder (EDR). Although the data you can obtain from a black box will vary depending on the engine manufacturer, a black box can be a useful source of information. A black box can record numerous measurables and events, including, but not limited to, speed, sudden acceleration/deceleration, hard brakes, whether brakes were applied and when, seat belt use, air bag deployment, RPMs, tire pressure, crashes, GPS location information, communications between the driver and company, and usage data.

The preservation of black box data is a common request from opposing attorneys. Kentucky recognizes a general requirement to preserve evidence when litigation is pending or it is reasonable to assume an adverse party will seek discovery of the evidence. *Tinsley v. Jackson*, 771 S.W.2d 331 (Ky. 1989); *Sandborn v. Commonwealth*, 754 S.W.2d 534 (Ky. 1988). As black box technology advances and the data that can be captured by a black box becomes more detailed, a greater obligation could be imposed on companies to monitor their fleet and drivers. If a company institutes a policy of regularly reviewing black box data of its fleet, but regularly ignores or misses dangerous activities of its drivers which are being recorded, the company could be documenting a pattern of what a plaintiff's attorney may frame as negligent supervision by the company of its drivers. Nonetheless, having the

information readily available can protect a company and its fleet, and can assist in the defense of the company and its driver in the event of an accident.

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

In addition to black box data, other technological evidence can be used to evaluate accidents including, but not limited to, DriveCam or other on-board camera systems, OmniTRAX or other GPS/tracking systems, cell phone data, social media data gathered through surveillance or investigation, YouTube videos, and even cameras installed in private vehicles used for ridesharing such as Uber and Lyft. Like black box data, evidence obtained from these technologies must be preserved when litigation is pending or it is reasonable to assume an adverse party will seek discovery of the evidence. *Tinsley,* 771 S.W.2d 331.

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

The general rule in Kentucky is that a party has a duty to preserve relevant information when that party has notice that the evidence is relevant to litigation or should have known that the evidence may be relevant to future litigation. *Univ. Med. Ctr., Inc. v. Beglin,* 375 S.W.3d 783, 789-91 (Ky. 2011). This would include post-accident investigative findings, materials, information, and social media accounts. Except in cases of mere negligence or loss by accident, a party's non-production of relevant evidence can give rise to a jury instruction that permits, but does not compel, the jury to draw a negative inference from the non-production if it finds the non-production to have occurred intentionally or in bad faith. *See, e.g., Johnson v. Commonwealth,* 892 S.W.2d 559. Whether to provide the instruction is soundly within the trial court's discretion. *Beglin,* 375 S.W.3d at 789-91.

With regard to claim documents, if the investigation is being conducted in anticipation of litigation, it will be shielded from discovery under the work-product doctrine. *Duffy v. Wilson,* 289 S.W.3d 555, 559 (Ky. 2009). If, on the other hand, the investigation is being conducted in the ordinary course of business, it is discoverable by the adverse party. *Id.*

The Kentucky Supreme Court has acknowledged that "prudent parties anticipate litigation and begin preparation prior to the time suit is formally commenced." *Duffy*, 289 S.W.3d at 559. The test for whether a particular document constitutes work product is "whether, in light of the nature of the document and the factual situation of the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." *Id.* In *Duffy,* Kentucky's highest court held that documents prepared by an insurance investigator constituted work product because they were prepared in anticipation of litigation. *Id.*

Accordingly, a document need not be created by a party's attorney to constitute work product. *Id.* Generally, the work product doctrine extends to any representative of the client, if the work they were doing was in "anticipation of litigation." *Transit Authority of River City (TARC) v. Vinson*, 703 S.W.2d 482, 485, 489 (Ky. App. 1985) ("The policy of protecting counsel's work product prior to litigation applies with equal force to the work product of the party's other representatives."). For example, in *TARC,* the court held that the work product doctrine can extend to private investigators. *Id.*

Kentucky also recognizes an insurer-insured privilege when the insurance policy requires cooperation with respect to potential litigation as a condition of coverage. *Asbury v. Beerbower,* 589 S.W.2d 316 (Ky. 1979). This privilege protects a statement given by the insured to a representative of the insurer from discovery. *Id.* For example, in *Asbury,* the plaintiff sought to discover a statement the defendant had given to her insurance adjuster before suit was filed or defense counsel retained. *Id.* The *Asbury* Court held the statement to the insurer fell within the scope of the attorney-client privilege even though no attorney was involved. *Id.*

As noted, not all investigatory materials are protected by the work product doctrine. *Id.* Work product that does not reflect the mental impressions of the investigator and is primarily factual, "receives a qualified protection which is overcome if the opposing party shows substantial need of the material and inability to obtain it elsewhere without undue hardship." *Id.*

In Kentucky, to obtain the disclosure of documents deemed work product, the requesting party must show that "it has a substantial need for, and is unable to obtain the substantial equivalent of" the material. *TARC*, 703 S.W.2d at 486. In *TARC*, the Kentucky Court of Appeals held that the photographs and reports were factual in nature and did not contain the mental impressions or legal opinions of the investigation. *Id.* at 485. Therefore, the materials received a qualified protection that could be overcome by the requesting party's showing of substantial need and inability to obtain the material elsewhere without undue hardship. *Id.* Because it was impossible to obtain a substantial equivalent to the materials, the court ordered its disclosure. *Id.*

In regard to dealing with law enforcement early in the post-accident process, it can be important to develop a rapport with the investigating officer(s), which can improve the flow of information and communication with said officers. However, the investigating officer(s) could view the involvement of the company, adjusters, or attorneys in the post-accident process as an impediment to their investigation or a nuisance, which could disrupt the flow of information and communication. As such, dealing with law enforcement early in the post-accident process will differ on a case-by-case basis depending on the size of the investigating department, the particular jurisdiction, the parties involved in the accident, and the individual officers themselves.

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?

In Kentucky, under the doctrine of respondeat superior, the employer is strictly liable for damages resulting from the tortious acts of his employee which were committed in the scope of the employment. *Patterson v. Blair*, 172 S.W.3d 361 (Ky. 2005).

Generally, an employer "is not liable for the torts of independent contractor in performance of its job, unless work to be performed is either nuisance or is inherently dangerous, in which case employer will not be absolved from liability." *Miles Farm Supply v. Ellis*, 878 S.W.2d 803 (Ky. App. 1994). The question of whether an individual is an employee or independent contractor is a question of fact if the facts are disputed, but a question of law if the facts are substantially undisputed. *Pinter v. Jones*, 2018 WL 3006150 (Ky. App. 2018). Kentucky appellate courts have adopted the following nine (9) factors to be considered when determining whether a particular individual is working as an employee or as an independent contractor:

(a) The extent of control which, by agreement, the master may exercise over the details of the work;
(b) Whether or not the one employed is engaged in a distinct occupation or business;
(c) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
(d) The skill required in the particular occupation;
(e) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
(f) The length of time for which the person is employed;
(g) The method of payment, whether by the time or by the job;
(h) Whether or not the work is a part of the regular business of the employer; and
(i) Whether or not the parties believe they are creating the relationship of master and servant.

Id.

Additionally, the common law borrowed/loaned servant doctrine "captures the notion that an employee of one person can become the servant of another, alternatively or simultaneous, or wholly or partly." *Kentucky Uninsured Employers' Fund v. Hoskins*, 449 S.W.3d 753 (Ky. 2014). However, "a fundamental principle of the loaned servant doctrine is that a worker may not be held to be an employee of a business entity unless he or she has knowledge of that master-servant relationship." *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?

Although no Kentucky appellate court has addressed this specific issue, generally, under Kentucky Rule of Evidence 702:

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

KRE 702.

KRE 702, as well as FRE 702, embodies the United States Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceutical, Inc.*, 509 U.S. 579 (1993), and its progeny with regard to assessing the admissibility of proposed opinion testimony.

When a party is challenging expert testimony under KRE 702, the trial judge must determine whether the expert is proposing to testify to: (1) scientific, technical, or other specialized knowledge that (2) will assist the trier of fact to understand or determine a fact in issue; in order to meet this standard, the proffered expert testimony must be both relevant and reliable. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575 (Ky. 2000).

The factors that a trial court may apply in determining the admissibility of an expert's proffered testimony include, but are not limited to: (1) whether a theory or technique can be and had been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) whether with respect to a particular technique, there is a high known or potential rate of error and whether there are standards controlling the technique's operation; and (4) whether the theory or technique enjoys general acceptance within the relevant scientific, technical, or other specialized community. *Id*.

When seeking to strike an expert under *Daubert*, attacking an expert's qualification, methodology, and the helpfulness of the expert's opinions in reference to the particular facts of the case can be successful. Demonstrating the unreliability of the particular expert's opinions, the amorphous dimensions of the alleged mild traumatic brain injury, and the limits of medical and neurological/neuropsychological testing can also persuade the Court to strike an expert pursuant to KRE 702 and corresponding case law.

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

Kentucky appellate courts have not directly touched on the issue; however, admissibility of the toxicology result would likely be subject to Kentucky Rules of Evidence 401 and 403. Kentucky Rule of Evidence 401 defines "[r]elevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRS 401. A post-accident toxicology result can be relevant in a civil action, especially in the transportation context. Nonetheless, Kentucky Rule of Evidence 403 provides, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by

the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." KRE 403. Considering the prejudice inherent in a positive drug-test, the moving party would need to connect the positive test with the alleged negligence and/or improper conduct. A positive drug or alcohol test could also be relevant to the issue of causation, punitive damages, or a party's credibility as to their memory of the accident.

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

Kentucky courts do not appear to have conducted any recent in-depth analysis of specific considerations for federally-mandated testing when drivers are Independent Contractors, Borrowed Servants, or Additional Insureds. However, as the United States Court of Appeals for the 6ith Circuit Court has confirmed, the FMCSA sets forth detailed safety and health standards for all operators, which include federally-mandated testing standards, in order to promote the safety of commercial motor vehicles and other operations. *Black v. Dixie Consumer Products LLC,* 2013 WL 645954 (6th Cir. 2013).

8. Is there a mandatory ADR requirement in Kentucky?

No, there is no mandatory ADR requirement in Kentucky. However, some Kentucky Circuit Court judges may require that the parties participate in mediation prior to allowing the parties engaged in litigation to have a trial date. *See Ky. Farm Bureau Mut. Ins. Co. v. Wright*, 136 S.W.3d 455, 458-59 (Ky. 2004) (holding that Ky. R. Civ. P. 16(1)(f) grants express authority to trial courts to order the parties to mediation).

9. Use of corporate representative deposition testimony in support of motion for summary judgment.

Everything in the record, including corporate representative deposition testimony, at the time of the hearing on the motion for summary judgment may be considered by the court. This would include, in addition to pleadings, affidavits, depositions, admissions, answers to interrogatories, and stipulations. Ky. R. Civ. P. 56.03; *Brett v. Media Gen. Operations, Inc.,* 326 S.W. 3d 452 (Ky. App. 2010).

10. Claims for contribution and joint and several liability.

A claim for contribution among co-defendants to an action is no longer viable since the passage of Kentucky's apportionment statute, KRS 411.182. *See Sommerkamp v. Linton*, 114 S.W.3d 811, 817 (Ky. 2003) ("Contemporary apportionment requirements including KRS 411.182 provide that fault in a tort action is automatically subject to apportionment among the parties to the action. This statute renders a cross-claim for contribution ... needless.").

Passage of KRS 411.182 effectively abolished joint and several liability in Kentucky for tort claims. *Degener v. Hall Contracting Corp.*, 27 S.W.3d 775, 779 (Ky. 2000). Liability

among joint tortfeasors in negligence cases is several only. *Id.* KRS 411.182 provides, "[i]n all tort actions . . . involving fault of more than one (1) party to the action . . ., the court . . . shall instruct the jury to [determine] . . . [t]he percentage of the total fault of all the parties to each claim that is allocated to each claimant, defendant, third-party defendant, and person who has been released from liability." This statute is simply a codification of the common law evolution of the procedure for determining the respective liabilities of joint tortfeasors, whether joined in the original complaint or by third-party complaint. *Kentucky Farm Bureau Mut. Ins. Co. v. Ryan*, 177 S.W.3d 797, 802-03 (Ky. 2005). While KRS 411.182 provides a right to an apportionment interrogatory or finding where underlying substantive fault exists, it does not provide a substantive cause of action itself. *Hall v. MLS Nat'l Med. Evaluations, Inc.,* No. 05-185-JBC, 2007 U.S. Dist. LEXIS 33909, at *8 (E.D. Ky. May 7, 2007).

11. Plaintiff-friendly venues in Kentucky:

Counties in Appalachian eastern Kentucky are generally considered plaintiff-friendly venues that corporations and insurance companies seek to avoid. This area is comprised of the following counties: Bell, Breathitt, Clay, Estill, Floyd, Harlan, Jackson, Johnson, Knott, Knox, Laurel, Lee, Leslie, Letcher, Lincoln, Magoffin, Martin, McCreary, Menifee, Morgan, Owsley, Perry, Pike, Powell, Pulaski, Rockcastle, Wayne, Whitley, and Wolfe. From 1998 to present, there have been at least sixty-three (63) verdicts exceeding $1 million by juries in these counties, including a $270 million award in Knott County in a case involving personal injuries sustained in a gas explosion. Depending on the circumstances of the case, Jefferson County (Louisville) can also be a plaintiff-friendly jurisdiction, and there are isolated locations throughout the state that can fall into this category. Careful analysis of venue with defense counsel is always prudent.

12. Are punitive damages capped in Kentucky?

No, there are no limits or caps on how much may be awarded as punitive damages other than constitutional limitations that may apply under decisions of the United States Supreme Court.

13. Admissibility of medicals paid/reduced vs. total bills submitted.

Total bills are admissible regardless of amount paid. *Baptist Healthcare Systems v. Miller*, 177 S.W.3d 676 (Ky. 2005). Kentucky's collateral source rule "provides that benefits received by an injured party for his injuries from a source wholly independent of, and collateral to, the tortfeasor will not be deducted from or diminish the damages otherwise recoverable from the tortfeasor." *Schwartz v. Hasty*, 175 S.W.3d 621, 626 (Ky. App. 2005). Accordingly, a plaintiff is allowed to "(1) seek recovery for the reasonable value of medical services for an injury, and (2) seek recovery for the reasonable value of medical services without consideration of insurance payments made to the injured party." *Miller*, 177 S.W.3d at 682.