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

The admissibility and discoverability of internal accident reports or preventability determinations depends on the underlying purpose or motivation for creating the reports. If an internal accidental report was created in anticipation of litigation, it may 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 accident report was created in the ordinary course of business, it is likely discoverable by the adverse party. *Id.*

Work product protection can be overcome by a showing by the requesting party that it both needs the protected material and cannot obtain the substantial equivalent of the material. *Transit Authority of River City (TARC) v. Vinson*, 703 S.W.2d 482, 486 (Ky. App. 1985).

Even if discoverable, evidence of preventability determinations may be inadmissible to prove negligence based on evidentiary rules like FRE 407, excluding the admission of subsequent remedial measures, or by the "self-critical analysis" doctrine. However, the evidence may be admissible for another purpose.

In *Harper v. Griggs*, the U.S. District Court for the Western District of Kentucky analyzed the admissibility of a post-accident investigation including the company's preventability determination. No. 04-260-C, 2006 U.S. Dist. LEXIS 64691 (W.D. Ky. Sept. 11, 2006). The defendant sought to exclude any and all evidence related to the defendant's accident review board investigation following the accident including its issuance of a "preventable accident ruling." *Id.* at *3. Citing FRE 407 and the self-critical analysis doctrine, the court found that any evidence pertaining to the board's analyses, inferences, or thoughts pertaining to the facts of the accident were inadmissible, as were any recommendations pertaining to policies or employment decisions based upon the accident. *Id.* at *7. However, factual findings or information developed during the course of the investigation, including evidence relating to the cause or circumstances of the accident, were admissible.

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?

Kentucky courts have not directly addressed the issue of the discoverability of third-party litigation funding files. The discovery of third-party litigation funding files would likely be subject to Kentucky Rule of Civil Procedure 26.02(1). Pursuant to Kentucky Rule of Civil Procedure 26.02(1) discovery is limited to "any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of any other party."

In *Harper v. Everson*, the Western District of Kentucky while applying the federal counterpart of Kentucky Rule of Civil Procedure 26.02(1) held that information regarding the third-party funding of the plaintiff's litigation was not relevant to the ERISA-related issues to be resolved at an upcoming preliminary injunction hearing. No. 3:15-CV-00575-JHM, 2016 U.S. Dist. LEXIS 197894, 2016 WL 8201785, at **10-18 (W.D. Ky. June 27, 2016).

Additionally, neither the Kentucky Court of Appeals nor the Supreme Court of Kentucky has addressed whether third-party litigation funding agreements violate Ky. Rev. Stat. § 372.060, Kentucky's champerty statue which voids any contract or agreement to provide funding for another party's case in exchange of the proceeds. In *Boling v. Prospect Funding Holdings, LLC*, the Sixth Circuit Court of Appeals predicted that the Kentucky Supreme Court would most likely hold that such agreements would violate Ky. Rev. Stat. § 372.060 and that such agreements would be inconsistent with Kentucky's public policy. *Boling v. Prospect Funding Holdings, LLC*, 771 Fed. Appx. 562, 581-82 (6th Cir. 2019).

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?

There is a new procedure, codified by Ky. Rev. Stat. § 387.278, for approval of minor settlements under $25,000, net of liens and attorney's fees. Under that statute, a person who has legal custody of a minor may settle and enter into a settlement agreement if a guardian or conservator has not been appointed for the minor and the person entering the settlement agreement on behalf of the minor completes an affidavit or verified statement attesting to certain facts designed to ensure that the minor will benefit from the settlement funds.

If resolution of a claim for injuries to a minor will be higher than $25,000 then an administrator or guardian must be appointed by the court pursuant to Ky. Rev. Stat. § 387.025. The proposed settlement should be attached to the application. In order to be appointed by the court the person must prepare a petition that discloses a variety of information such as why an appointment is necessary and information about the parents of the minor.

A minor's age does affect the statute of limitation for personal injury claims because the statute of limitation does not begin to run until the minor turns eighteen years old.

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?

Admitting that a motor carrier is vicariously liable in the state of Kentucky will not have the effect of preventing the admission of unfavorable facts supporting direct claims against the motor carrier, such as negligent entrustment, hiring, retention, supervision or training. *MV Transp. Inc. v. Allgeier*, 433 S.W.3d 324, 336-37 (Ky. 2014). The Kentucky Supreme Court in *Algeier* held that "a plaintiff may assert and pursue in the same action a claim against an employer based upon respondeat superior upon the agent's negligence, and a separate claim based upon the employer's own direct negligence in hiring, retention, supervision, or training." *Id.* at 337. The court went on to state that an "employer's admission to the existence of an agency relationship from which vicarious liability may arise does not supplant the claim that the employer's own negligence, independent of the negligence of the employee, may have caused or contributed to the injury." *Id.*

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

Kentucky has created a flexible standard regarding the spoliation of physical and/or documentary evidence. Trial courts retain broad discretion to determine whether spoliation has occurred. *See Norton Healthcare, Inc. v.*

Disselkamp, 600 S.W.3d 696, 730-31 (Ky. 2020); *Univ. Med. Ctr., Inc. v. Beglin*, 375 S.W.3d 783, 789 (Ky. 2011). The Kentucky Supreme Court found that a trial court may consider circumstantial evidence and reasonable inferences when deciding whether to admit missing testimonial evidence or to give a corresponding instruction because of spoliation. *Beglin*, 375 S.W.3d at 789. A party does not need to provide direct and conclusive evidence that the party accused of spoilation acted intentionally and in bad faith when the evidence was destroyed. *Id.* at 789-90. The trial court has the discretion to decide whether a missing evidence instruction is appropriate. *Id.* 790-91. The Kentucky Supreme Court in *Beglin* listed several examples of when a missing evidence instruction should not be given. *Id.* at 791. For example, a missing evidence instruction should not be given if the evidence was lost due to mere negligence because this negates any claim of bad faith. *Id.* Additionally, a missing evidence instruction is not warranted if evidence is lost because of natural disaster such as a fire. Furthermore, if documents are destroyed in the normal course of file maintenance, particularly in accordance with industry or regulatory standards then a spoilation instruction is not warranted. *Id.*

Recently, the Kentucky Supreme Court stated that a party is entitled to a missing evidence or spoliation instruction where significant evidence was lost forever which has prejudiced the party. *Disselkamp*, 600 S.W.3d at 730. The court in *Disselkamp*, confirmed that the trial court within its discretion is able to give a missing evidence instruction when: (1) the evidence is material or relevant to an issue in the case; (2) the opponent had "absolute care, custody, and control over the evidence,"; (3) the opponent was on notice that the evidence was relevant at the time he failed to produce or destroyed it; and (4) the opponent, "utterly without explanation," in fact failed to produce the disputed evidence when so requested or ordered. *Id.* at 731.

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

Kentucky has adopted the collateral source rule. *Baptist Healthcare Systems v. Miller*, 177 S.W.3d 676, 682-684 (Ky. 2005). Pursuant to this rule a plaintiff is allowed to seek recovery for the reasonable value of medical services for an injury without consideration of insurance payments made on behalf of the injured party. *Id*. at 682. Therefore, the total amount billed is generally admissible and discoverable as evidence of the value of medical services provided. The amount paid by insurance or any other collateral source is not admissible but may be discoverable. *Chrispen v. USA,* Case No. 7:16-cv-00132-ART-EBA (E.D. Ky. Jan. 25, 2017) (collateral source rule does not govern discoverability of amounts paid, only admissibility).

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

The state of Kentucky has not adopted a legal standard specific to the acquisition of event data recorder ("EDR") data from a vehicle not owned by a client. Typically such data would have to be obtained by consent of the vehicle owner, by issuance of formal discovery under Civil Rule 34 (for a party) or by subpoena under Civil Rule 45 (for a non-party).

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?

Kentucky has no limits or caps on the award of punitive damages other than constitutional limitations that may apply under decisions of the United States Supreme Court.

Pursuant to Ky. Rev. Stat. § 411.184 punitive damages may be awarded against a person to punish and to discourage him and others from similar conduct in the future. According to Ky. Rev. Stat. § 411.184(2) a plaintiff

must prove by clear and convincing evidence that a defendant acted towards the plaintiff with "oppression, fraud or malice" in order to recover punitive damages. The word "oppression" for purposes of the statue means "conduct which is specifically intended by the defendant to subject the plaintiff to cruel and unjust hardship." Ky. Rev. Stat. § 411.184(1). Additionally, "fraud" for purposes of punitive damages is defined as the "intentional misrepresentation, deceit, or concealment of [a] material fact known to the defendant and made with the intention of causing injury to the plaintiff." *Id.* Lastly, "malice" means "either conduct which is specifically intended by the defendant to cause tangible or intangible injury to the plaintiff or conduct that is carried out by the defendant both with a flagrant indifference to the rights of the plaintiff and with a subjective awareness that such conduct will result in human death or bodily harm." *Id.*

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?

Godwin, et. al. v. Eaton Asphalt Paving Co., Inc., Boone County, 19-CI-00328 ($50 million in punitive damages, verdict in July 2021)

A mother of three was killed in a head-on crash with a commercial truck that dipped off the road and lost control. Two of the mother's minor children were in the car and were traumatized because they witnessed her death. The mother's third child arrived on the scene minutes later to witness the scene of the crash. The three children sought damages from a paving company alleging it had acted with gross negligence in making a road repair a few weeks before the collision. Specifically, the contractor did not perform milling at the road edge causing a height differential between the two surfaces. The plaintiffs also sued the driver and owner of the commercial truck. At first the driver was charged criminally for alleged intoxication, speeding and texting but all charges were later dropped based on evidence provided by plaintiffs' attorneys. During the five-day trial the plaintiff called the Boone County Accident Reconstructionist who testified that he ruled out impairment, speeding and texting of the driver as the cause of the collision and ultimately concluded that the road edge was the cause of the accident.

The jury awarded each child $3 million in emotional distress and $5 million for loss consortium. The children were awarded joint punitive damages of $50 million for a total verdict of $74 million. The decision is not on appeal.

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?

Kentucky courts certainly do not require an expert to explain the FMCSRs or the applicability of the FMCSRs to a certain set of facts. Such expert testimony may be admissible as long as the proposed expert is qualified and the testimony otherwise meets the requirements of Kentucky Rules of Evidence 702, 703, and the United States Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceutical, Inc.*, 509 U.S. 579 (1993). Witnesses are not generally permitted to testify to conclusions of law, *Tamme v. Commonwealth*, 973 S.W.2d 13, 32 (Ky. 1998), but a properly qualified expert may be permitted to testify about trucking industry standards and whether particular conduct comported with those standards.

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?

The Kentucky appellate courts have not addressed this specific issue or the issues surrounding broker liability. However, the elements of a joint venture claim in Kentucky are: "(1) an agreement, express or implied, among the members of the group; (2) a common purpose to be carried out by the group; (3) a community of pecuniary interest in that purpose among the members; and (4) an equal right to a voice in the direction of the enterprise, which gives an equal right to control."

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

Kentucky is a pure comparative fault state. KRS 411.182 provides that "[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." KRS 411.182. In a negligence case, this requires fault to be apportioned amongst all negligent parties, including plaintiffs, and settling parties and non-parties, based upon the percentage of fault attributed to them a jury. The plaintiff's damage, if any, will be reduced by his/her own percentage of fault.

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

Non Motor Vehicle Personal injury: Non-motor vehicle personal injury actions must be brought within one (1) year of the date of the injury. KRS 413.140.

Motor Vehicle Personal Injury: For motor vehicle accident claims, KRS 304.39-060(6) extends the statute of limitations to two (2) years from the date of the accident or last PIP payment for actions with respect to accidents occurring in Kentucky and arising from the ownership, maintenance, and use of a motor vehicle, when not abolished by the MVRA. *Fields v. BellSouth Telecommunications, Inc.*, 91 S.W.3d 571 (Ky. 2002). Where the cause of action is both a motor vehicle accident and a personal injury claim, the two (2) year statute of limitation applies. *Troxell v. Trammell*, 730 S.W.2d 525 (Ky. 1987). However, the two (2) year statute of limitations does not apply to subrogation suits, only to the institution of a suit by an injured person or those entitled to recover survivor benefits. *Gray v. State Farm Mut. Auto. Ins. Co.*, 605 S.W.2d 775 (Ky. App. 1980).

Wrongful Death: An action for wrongful death does not accrue until the death of the person injured, regardless of the date of the injury. *Louisville & N.R. Co. v. Simrall's Adm'r*, 104 S.W. 1011 (Ky. 1907). The statute of limitations is one (1) year from the appointment of the personal representative, not to exceed two (2) years from the date of death. KRS 413.180.

Loss of Consortium: Kentucky recognizes a one (1) year statute of limitations from the date of injury for loss of consortium claims asserted by a spouse. KRS 413.140. Spousal consortium following death must still be filed within one (1) year from the date of the injury. KRS 411.150. A parent can assert a claim for loss of consortium of a minor child. KRS 411.135. A minor child also can assert a loss of consortium claim for the loss of a parent. *Giuliani v. Guiler*, 951 S.W.2d 318 (Ky. 1997). The statute of limitations for loss of consortium is not extended by personal injury/motor vehicle/wrongful death statute of limitations.

Product Liability Claims: Kentucky recognizes a one (1) year statute of limitations for product liability claims. KRS 413.140(1)(a).

Tolling: If at the time the action accrued, the person entitled to bring the action was an infant or of unsound mind, the action may be brought within the same number of years after the removal of the disability or death of the person, whichever happens first. KRS 413.170.

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?

Kentucky's wrongful death statute requires that a wrongful death action be prosecuted by the personal representative of the deceased. KRS 411.130(1). The court-appointed personal representative has the authority to file, negotiate, and settle the wrongful death claim. If the personal representative of the deceased refuses, the action may be maintained by the deceased's beneficiaries. *Leach v. Owensboro Railway Co.*, 137 Ky 292 (1910). The state district court where the decedent resided appoints this representative – often an immediate family member of the deceased, such as a surviving spouse, parent, or adult child – to act as an executor or administrator of the decedent's estate. If the decedent does not have a surviving spouse, parent, or adult child, the court will appoint a more remote relative as a representative. The person does not have to be related to the decedent but must be appointed in the probate action.

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

A plaintiff's failure to wear a seatbelt is generally admissible. If there is relevant and competent evidence that a plaintiff, claiming injuries as a result of a motor vehicle accident, was contributorily at fault by failing to wear an available seatbelt and that such fault was a substantial factor in contributing to or enhancing the plaintiff's injuries, then the issue of the plaintiff's fault is submitted to the jury for determination. *Geyer v. Mankin*, 984 S.W. 104, 107 (Ky. App. 1998). If the jury determines that the plaintiff has some degree of fault due to failure to wear a seatbelt, the liability of the parties is then apportioned by their respective degrees of fault under KRS 411.182. *Id*.

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.

No, Kentucky law does not limit the damages a plaintiff can recover when he/she does not have insurance coverage on the vehicle they were operating at the of time of an accident. However, plaintiffs who do not have insurance coverage on the vehicle they own were operating at the time of an accident will not be entitled to PIP/BRB no-fault benefits. KRS 304.39-160; 304.39-170. If the plaintiff was not the owner of the uninsured vehicle he/she was operating at the time of the accident, said plaintiff can recover PIP/BRB no-fault benefits from his/her own policy. If there is no other insurance policy available, the nonowner plaintiff can make a claim for PIP/BRB no-fault benefits to the Kentucky Assigned Claims Plan, which assigns PIP/BRB claims to servicing insurers doing business in the Commonwealth of Kentucky.

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

Kentucky law is applied in motor vehicle accident cases if there are significant contacts, not necessarily the most significant contacts, with Kentucky, unless there is a valid reason not to apply that law. *Arnett v. Thompson*, 433 S.W.2d 109 (Ky. 1968); *Foster v. Leggett*, 482 S.W.2d 827 (Ky. App. 1972).

In *Arnett*, the Court of Appeals of Kentucky held that Kentucky law governed an Ohio motor vehicle accident. Although the accident occurred in Ohio and the driver was domiciled and had a residence there, Ohio law was not applicable because the passenger involved in the accident was a resident of Kentucky, the driver kept a room rented near his work in Kentucky, where he stayed on average two nights per week, and the driver had all of his employment and social relationships in Kentucky. Further, the fatal journey began in Kentucky and was to have

been concluded in Kentucky.

Choice of law issues often arise in the context of underinsured motorist ("UIM") claims asserted by out of state plaintiffs. With regard to contracts, Kentucky courts follow the *Restatement (Second) of Conflicts of Law* § 188(1) (1971), which states that:

> [t]he rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6.

Restatement (Second) of Conflicts of Law § 188(1) (1971). This is often referred to as the "most significant relationship" approach. Among the factors a court making that determination should consider are the place or places of negotiating and contracting; the place of performance; the location of the contract's subject matter; and the domicile, residence, place of incorporation and place of business of the parties. *Id*. § 188(2). With respect to casualty insurance contracts in particular, a key factor is the expectation of the parties concerning the principal location of the insured risk. *Id*. § 193.

In cases involving UIM claims of out of state plaintiffs, the Supreme Court of Kentucky has held that the mere fact that an accident occurred in Kentucky is far outweighed by the significant relationship the foreign state has with the parties and the insurance transaction. Absent some compelling reason not to apply Kentucky's general choice-of-law rule, the foreign state's law will control UIM claims of out of state parties. This rule is only disregarded when Kentucky's public policy clearly and overwhelmingly disfavors application of the foreign state's law. *LaCrosse v. Owners Insurance Company*, 531 S.W.3d 25, 30 (Ky. App. 2016) citing *Hodgkiss-Warrick*, 413 S.W.3d at 879-80 (Ky. 2013).