MISSISSIPPI

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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.

Computer generated animations and accident reconstruction simulations are admissible but are subject to strict evidentiary standards of relevancy and reliability. *Ethridge v. Harold Case & Co., Inc.*, 960 So. 2d 474 (Miss.Ct.App. 2006). Computer animation must be based upon scientific, identifiable and objective facts such as accurate physical measurements to be a fair and accurate representation. *Cox. v. State*, 849 So. 2d 1257 (Miss. 2003). EDR data, in order to be admissible, must be accurate and reliable.

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 evidence would include in-cab video, DriveCam, GPS data and possibly from devices such as a smart watch or fit bit. Use of this type evidence at trial must be based upon scientific and reliable data. *Cox. v. State*, 849 So. 2d 1257 (Miss. 2003).

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?

Discovery of post-accident investigation by opposing counsel depends on the circumstances of what the investigation consisted of and when and by whom it was conducted. As a general rule, if the investigation was done in the ordinary course of business, regardless of whether a claim or lawsuit had been made, then it is likely discoverable. If investigation was done at the request of counsel or after notice of a claim, then the investigation is likely not discoverable. *Haynes v. Anderson*, 597 So.2d 615 (Miss. 1992). The analysis under Mississippi law is whether the materials were prepared in the anticipation of litigation. *Dunn v. State Farm Fire & Cas. Co*, 927 F.2d 869 (5th Cir. 1991). Retention of counsel by the potential plaintiff is not necessary to trigger the protection; however, once attorneys are hired, it is reasonable to anticipate litigation. The protection does not extend to routine reports or investigation that is done in every case. *Id.*

There is a duty to preserve electronic evidence where a party is aware of potential litigation that would concern the data. *Grand Casino Biloxi v. Hallmark*, 823 So.2d 1185 (Miss. 2002).

In Mississippi, once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a "litigation hold" to ensure the preservation of relevant documents. *Zubulake IV*, 220 F.R.D. at 218.

It is imperative to have a social media search conducted of not only the injured party but of the driver, as well. Communication with law enforcement early may be helpful to establish a relationship and obtain information.

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?

Coverage issues may arise as an insurance policy's definition of "employee" may be more restrictive than the definition of employee set forth in FMCSR. 49 C.F.R. 390.5. Another factor is the ability to control the defense of the litigation by defending the driver where that is not adverse to the motor carrier's interest.

Mississippi common law provides that an employer is generally not vicariously liable for the acts of an independent contractor. This determination involves a fact intensive analysis 1) whether the principal master has the power to terminate the contact at will; 2) whether he has the power to fix the price in payment for the work, or vitally controls the manner and time of payment: 3)whether he furnishes the means and appliances for the work; 4) whether he furnishes the materials upon which the work is done and receives the output thereof; 5) whether he has the right to prescribe the details of the kind and character of the work to be done; 6)whether he has the right to supervise and inspect the work during the course of the employment; 7)whether he has the right to direct the details and manner in which the work is to be done; 8)whether he has the right to employee and discharge the subemployees and to fix their compensation; and 10) whether he is obligated to pay the wages of said employees. *Stewart v Lofton Timber Co., LLC*, 943 So. 2d 729(Miss. Ct. App. 2006).

However, the term "employee" as defined in 49 C.F.R. 390.5 specifically includes an independent contractor employed by a motor carrier while in the course and scope of operating a commercial motor vehicle. A motor carrier may be vicariously liable for the negligence of its statutory employee drivers, even if an independent contractor.

Mississippi recognizes that vicarious liability may extend to an employer who borrows a servant/employee of another employer when a person who is under the employee of one employer is temporarily loaned to another employer. The three factors are analyzed to determine if the borrower becomes the employer to the exclusion of the lender are: 1)whose work is being performed; 2) who has the right to control the worker in the duties on the job; and 3) the existence of an employment contract between the employee and the

borrowing employer whether actual or implied. *Banks v U.S.*, 623 F. Supp. 2d 751(S.D. Miss. 2009).

Again, the statutory "employee" definition in 49 C.F.R 390.5 may encompass vicarious liability for a borrowed employee who is in the course and scope of operating a commercial motor vehicle.

Depending on the status of an additional insured, there may not be vicarious liability, however the duty to defend may extend to the company.

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?

The legal standard is that the testimony must be that the opinion be based on scientific or specialized knowledge that will help the trier of fact understand the evidence; the testimony must be based on sufficient facts or data; the testimony is the product of reliable principles and methods; and the expert has reliably applied the principles and methods to the facts of the case. MRE 702. The testimony must also meet Daubert criteria to be admissible. One of the most important aspects to defend these mild TBI cases is to obtain an accurate history of pre-morbid data. In our experience, the focus on having the testimony excluded has been by attacking the testimony as not being based on sufficient facts or data and not being the product of reliable principles and methods.

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

A positive post-accident toxicology result may be admissible in a civil action if plaintiff can establish a predicate the driver was impaired and the testing and test results are proven to be reliable. *Jackson v. Daley*, 739 So.2d 1031 (Miss. 1999); *Edwards v. Ellis*, 478 So.2d 282 (Miss. 1985).

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

Post-accident testing requirements would apply to statutory employee drivers. A motor carrier would be responsible for testing in compliance with FMCSR of its driver employee, including those who are owner-operators(independent contractors). Owner-operators may meet testing requirements through a consortium. A motor carrier would be prudent to have proof that an owner operator complied with the testing.

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

There is no statewide mandatory ADR requirement; however, some state and federal courts require non-binding mediation prior to trial and others strongly suggest mediation. There are none that require binding mediation or arbitration.

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

Corporate or 30(b)(6) deposition testimony may be used to support a motion for summary judgment or other dispositive motion. MRCP 32(a) and MRCP 56(e). Further, a corporate deposition may be used by an adverse party for any purpose. MRCP 32(a)(2).

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

Mississippi has abolished joint and several liability and applies a pure comparative negligence standard. Liability is several only with a joint tortfeasor liable only for the amount of damages allocated to him in direct proportion to his percentage of fault. Miss. Code Ann. Section 85-5-7. However, "fault" shall not include any tort which results from an act or omission committed with a specific wrongful intent. Id. The exception is that joint and several liability shall be imposed on all who consciously and deliberately pursue a common plan to commit a tortious act or actively take part in it, i.e. a conspiracy. Id.

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

There are a number of liberal venues in Mississippi. Most of the counties bordering the Mississippi River are considered liberal. This trend extends to the adjacent counties. Also, other significant liberal counties are Hinds, Holmes, Smith, Panola, Marshall and Noxubee.

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

Yes. Punitive damages are limited to 2% of a defendant's net worth for a defendant with a net worth of $50,000,000. or less. Percentages and amounts increase on a sliding scale as a defendant's net worth exceeds $50,000,000. Miss. Code Ann. § 11-1-65(3).

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

Mississippi recognizes the collateral source rule which provides that compensation received by a plaintiff from a collateral source, wholly independent of the wrongdoer, cannot be used by a defendant in mitigation or reduction of damages. *Burr v. Mississippi Baptist Medical Center*, 909 So. 2d 721 (Miss. 2005). However, the rule is not absolute. "If evidence is introduced for a purpose other than to mitigate damages, the collateral source rule is not violated and the evidence may be admitted." *Burr*, 909 So. 2d at 729.

Under current Mississippi law, a plaintiff may recover for expenses written off by healthcare providers. Mississippi courts have recognized this as a form of the collateral source rule. *Williams v. Manitowoc Cranes, LLC*, 216 U.S. Dist. LEXIS 3553 (S.D.

Miss. January 12, 2016); *Wal-Mart Stores, Inc. v. Frierson*, 818 So. 2d 1135 (Miss. 2002); *Brandon HMA, Inc. v. Bradshaw*, 809 So. 2d 611 (Miss. 2001).

Mississippi allows the plaintiff to submit evidence of incurred medicals to the jury. *McCary v. Caperton*, 601 So. 2d 866 (Miss. 1992). Plaintiff can "board" the face amount of the bills regardless of adjustments/amount actually paid. Miss. Code Ann. Section 41-9-119 establishes a rebuttable presumption that the face amount of the bills are reasonable and necessary medical expenses incurred by plaintiff. A defendant is entitled to "rebut the necessity and reasonableness of the bills, and the ultimate question is for the jury to determine." *Herring v. Poirrier*, 797 So. 2d 797, 809 (Miss. 2000). Defendants in Mississippi are increasingly retaining medical billing experts to audit the face amount of medical bills and testify that the face amounts are unreasonable and have no relation to the cost of the service performed nor to the expected payment.