MISSOURI

Hal D. Meltzer
Jonathan E. Benevides
BAKER, STERCHI, COWDEN & RICE, LLC
2400 Pershing Rd., Suite 500
Kansas City, Missouri 64108
Phone: (816) 471-2121
Fax: (816) 472-0288
Email: meltzer@bscr-law.com
Email: benevides@bscr-law.com
www.bscr-law.com

BROWN & JAMES, P.C.
800 Market Street Suite 1100
St. Louis, Missouri 63101
Phone: (314) 421-3400
Fax: (314) 421-3128
www.brownandjames.com

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

Following the passage of the Driver Privacy Act of 2015, which addressed many of the privacy concerns involved with data collection from "black boxes" and the simulations created from the data recovered from these black boxes, many states moved to pass their own legislation on the matter. Unfortunately, of the seventeen (17) states that have enacted these "black box" laws, Missouri is not one of them. Without any state statute governing black box technology or the use of simulations, the Missouri Rules of Evidence and Missouri Supreme Court Rules would apply to their discovery and admissibility in Missouri Courts.

In Missouri, information from black boxes and simulations (such as accident reconstructions) are discoverable. Rule 58.01(a) states that parties may request, in discovery, "electronic records and other data compilations from which information can be obtained, translated, if necessary, by the requesting party through detection devices into reasonably usable form." *See* Mo. Sup. Ct. R. 58.01(a). Further, the rules state that a party may request "to inspect and copy, test, or sample any tangible things that constitute or contain matters that are relevant to subject matter involved in the pending action." *See* Mo. Sup. Ct. R. 56.01(b) regarding scope of discovery. Lastly, to retrieve the data from black boxes and to provide the interpretation and significance of same, set up the simulations or reconstruction analysis using that data, the use of experts (often engineers) would be needed and their testimony would likely be admissible as well. Experts and their testimony in Missouri Courts are governed by Mo. Rev. Stat. § 490.065.

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.

Common sources of technological evidence include:

Air Bag Control Modules
Cell Phone Data including call records and forensic inspection
Collision Mitigation Systems
Dashboard Cameras
Infotainment Centers (via Berla iVe)
Electronic Logging Devices
Anti-Lock Braking Systems
Lane Departure Warning Systems
GPS/Telematics
Video doorbell cameras, and
Miscellaneous Internet Connected Devices (IoT)

The use of technological evidence is rarely given specific treatment under Missouri law – especially in regard to civil litigation. However, broadly applicable rules tend to have a unique impact on such evidence. In addition, recent updates to Missouri's discovery rules will likely impact the scope of data that parties can obtain.

First, the rules regarding the preservation of evidence in Missouri differ substantially from the federal rules. Where the federal rules impose a duty to preserve evidence once a party reasonably anticipates litigation, Missouri rules require evidence of fraud or a desire to suppress the truth in order to establish spoliation of evidence. *Compare* Fed. R. Civ. P. 37(e), *and Morris v. J.C. Penney Life Ins. Co*., 895 S.W.2d 73 (Mo. App. 1995). In order to show fraud or a desire to suppress the truth, it must be further demonstrated that the opposing party should have recognized a duty to preserve the evidence. *Id.* It is generally accepted that, until a party is put on notice of a potential action and the evidence is specifically identified, it is difficult to establish that the duty to preserve evidence has been breached. Missouri's spoliation doctrine presents special difficulties for technological evidence given the ease with which electronic data can be erased.

While Missouri's discovery rules have historically allowed parties to seek discovery of a wider range of information than permitted under the federal rules, 2019 saw the passage of Senate Bill 224 which imposes some limits on the scope of discovery and may impact the range of discoverable technological evidence. Missouri's Rule 56.01(b)(1) now limits the scope of discoverable information to that which is "proportional to the needs of the case." This will require balancing the need for, and probative value of, the information sought with the importance of the issues at stake, the amount in controversy, and the costs or burdens of the discovery – a new standard that mirrors that of Fed. R. Civ. P. 26(b)(1).

Although electronically stored information has been a fixture in discovery for years, the updated rules address ESI for the first time. ESI is now expressly discoverable and the requesting party may require that the information be produced in its native format. Mo. Sup. Ct. R. 58.01. ESI will still be subject to the new proportionality provision above which will require balancing the need for information with accessibility and cost considerations, among others.

Missouri's courts have yet to further define the boundaries of discoverable information in light of the 2019 changes. However, Rule 58.01, governing the production of documents, and now ESI, has typically received a broad interpretation from the courts and requires the production of documents and things not only in the possession of the party, but also that which the party has the right, authority, or practical ability to obtain. *Hancock v. Shook*, 100 S.W.3d 786 (Mo. 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?

A. Legal issues in Missouri with preservation/spoliation of evidence

Missouri does not recognize intentional or negligent spoliation as a basis for liability to an action for which the evidence was to be used. *Fisher v. Bauer Corp.*, 239 S.W.3d 693, 701 (Mo. App. 2007). If spoliation is found to have occurred, the court may grant a party relief via an adverse evidentiary inference as a remedy. *Pisoni v. Steak 'N Shake Operations, Inc.*, 468 S.W.3d 922, 926 (Mo. App. 2015). The inference holds that the missing evidence would have been unfavorable to the spoliators' position but does not prove liability. *Id.* The inference will be limited to the evidentiary question and requires that the spoliator admit what the evidence would show if available. *Id.*

An adverse evidentiary inference does not entitle a party to relief in the form of a jury instruction upon the finding of spoliation. *Hill v. SSM Health Care St.Louis*, 563 S.W.3d 757, 764 (Mo. App. E.D. 2018). This prohibition is based upon the principle that the court should not comment on the evidence. *Id.*

B. Legal issues in Missouri with claims documents

The insurer-insured privilege is recognized in Missouri as protected under the attorney client privilege. *State ex rel. Cain v. Barker*, 540 S.W.2d 50, 58 (Mo. 1976). Communications between an insured and their liability insurer are deemed not discoverable. *Id.* The privilege requires an existing insured-insurer relationship where the insurer is obligated to defend the insured. *May Dep't Stores Co. v. Ryan*, S.W.2d 134, 136 (Mo. App. 1985). This privilege exists even if no attorney has been employed regarding the occurrence. *State ex. rel. Cain*, 540 S.W.2d 50, 58 (Mo. 1976); *State ex. rel. Day v. Patterson*, 773 S.S.2d 224 (Mo. App. 1989).

The insurer-insured privilege protects communications. *Id.* Investigation and claims documents created by an insurer for possible litigation are protected under the "work product" privilege. *Id.* Thus, if a document is created in anticipation of litigation, the document is privileged. *Id.* The test for when documents are "prepared in anticipation of litigation" is "in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." *Id.* Missouri courts will allow discovery of "work product" if there is a waiver by one of the parties to the privilege or if a party can show a substantial need with no alternate way of obtaining the information.

Certain arguments may be faced in opposition to the insurer-insured privilege. One issue that may arise surrounding insurer-insured privilege is whether "statements were obtained in performance of the insurer's obligation to investigate and settle or defend claims made against the defendants and were intended for the use of the attorneys selected by the insurer to represent the defendant." *Ratcliff v. Sprint Missouri, Inc.*, 261 S.W.3d 534, 548 (Mo. App. 2008). Another issue is whether claims documents were prepared in anticipation of litigation to be utilized by an attorney in defense of the insured. *Id.* These issues can be minimized by retaining legal counsel early or near to investigation of the incident giving rise to the claim.

C. Legal issues in Missouri with early law enforcement dealings

When a truck driver is convicted of a traffic violation based on a guilty plea, he will be estopped from denying his guilt for the subject offense in a civil action. *Myers v. Morrison*, 822 S.W. 2d 906, 909 (Mo. App. 1991); *James v. Paul*, 49 S.W.3d 678, 685 (Mo. 2001). This admission of guilt and estoppel will have a detrimental effect upon the outcome of litigation for co-defendants of the driver.

Another issue concerning early dealing with law enforcement is the preservation of evidence and crash report. Law enforcement agencies conduct post-crash investigations that result in evidence and data being collected. Cooperation with law enforcement can also work to secure crash data that can be downloaded from the vehicles involved to be used in litigation. Downloads of driver dash cam video, ECM, EDR, and ACM data can be obtained from law enforcement and can work to prevent or speed litigation. If a potential party to litigation does not act quickly to preserve potential evidence, some may be lost or misplaced.

D. Legal issues in Missouri with social media

Social media can be used as evidence that a driver was in a particular location at a specific time, that a plaintiff's injuries are not necessarily what they have claimed, what a plaintiff's physical abilities are, or for specific information about an accident. A dilemma for counsel is whether plaintiff's harvested social media must be disclosed to plaintiff. In Missouri, "a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party." Mo. Sup. Ct. R. 56.01(b)(5). A statement made on social media is admissible in Missouri courts as a statement by an

opposing party. However, is an adverse party required to disclose material that the party posted? If a party wishes to use the statement, to err on the side of caution, it should be disclosed before trial. There are no work product protections on those statements in Missouri, even if the party's social media page is not public.

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?

Where Federal Motor Carrier Safety Regulations *do not* apply, "someone who contracts for the services of an independent contractor is generally not responsible for the wrongs committed by an independent contractor." *Hougland v. Pulitzer Pub. Co.*, 939 S.W.2d 31 (Mo. App. 1997); *See also Lee v. Pulitzer Pub. Co.*, 81 S.W.3d 625 (Mo. App. 2002).

Missouri has a rebuttable presumption of logo liability for federally regulated motor carriers. *Horner v. FedEx Ground Package Sys. Inc.*, 258 S.W.3d 532 (Mo. App. 2008). Motor carriers are vicariously liable for the conduct of drivers when trucks are hauling regulated freight and displaying the motor carrier's signs or identifying placard at the time of the accident. *Johnson v. Pacific Intermountain Exp. Co.*, 662 S.W.2d 237 (Mo. 1983). A carrier can be held liable even after the termination of a trip lease if a jury finds: "(1) that a sign or identifying legend was furnished by a carrier in connection with a lease; (2) that the sign was on the truck at the time of the accident; and (3) that the truck was hauling regulated freight at the time of the accident." *Parker v. Midwestern Distribution, Inc.*, 797 S.W.2d 721, 723–24 (Mo. App. 1990).

The presumption of logo liability may be rebutted only in the following limited circumstances: "(1) where the carrier-lessee has attempted to end the lease and reclaim its placards, or (2) where the driver has embarked upon a personal mission." *Horner v. FedEx Ground Package Sys. Inc.*, 258 S.W.3d 532, 539 (Mo. App. 2008).

The borrowed servant doctrine "can block a general employer's vicarious liability for its employee's negligence." *Wren v. Vaca*, 922 S.W.2d 408, 410 (Mo. App. 1996). "To escape liability the general employer must surrender full control of the employee in the performance of the particular work, it not being sufficient if the servant is partially under the control of a third party." *Koirtyohann v. Washington Plumbing & Heating Co.*, 471 S.W.2d 217, 219–20 (Mo. 1971). An owner-operator and its motor carrier-lessee, acting as a special employer, will be subject to logo liability for the actions of a borrowed servant; a general employer will not. *See Wren v. Vaca*, 922 S.W.2d 408 (Mo. Ct. App. 1996).

In Missouri, "[W]here an insurer requires a determination of liability as a prerequisite to coverage for the additional insured, the insurer can and must include such a prerequisite in the plain language of the policy." *Peterson v. Discover Prop. & Cas. Ins. Co.*, 460 S.W.3d 393, 408–09 (Mo. Ct. App. 2015).

Where an "employee" or "employees" is listed as Additional Insured(s) in an insurance policy, it is a question of fact as to whether an individual falls into said classification. *Aetna Cas. & Sur. Co. v. Pavlovitz,* 826 S.W.2d 362 (Mo. App. 1992). Missouri courts will use a similar framework to that of a workers' compensation claim analysis to determine the existence of an employer-employee relationship. *Id.* at 366. This includes an examination into 1) whether there was a master-servant relationship, and 2) the degree of control asserted by the purported employer. *Id.* at 366.

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 Missouri, the legal standard for allowing expert testimony on mild traumatic brain injury claims is not treated differently, it falls under the general legal standard for expert testimony. In 2017, Missouri revised the legal standard for allowing expert testimony through R.S.Mo. § 490.65 which essentially adopts the *Daubert* standard. Under § 490.65, a trial court must determine whether: "(1) the expert is qualified; (2) the expert's testimony will assist the trier of fact; (3) the expert's testimony is based upon facts or data that are reasonably relied on by experts in the field; and (4) the facts or data on which the expert relies are otherwise reasonably reliable." *Potter v. Hy-Vee, Inc.*, 560 S.W.3d 598, 606 (Mo. App. 2018).

Since Missouri just recently changed the legal standard for expert testimony, there are no appellate court cases indicating whether Missouri has fully adopted the *Daubert* standard or whether the Missouri appellate courts will provide a new interpretation. Thus, there are no appellate examples of instances where an expert or a claim for mild traumatic brain injury was stricken under the new legal standard. If Missouri courts decide to fully adopt the *Daubert* standard, federal case law should provide a roadmap for grounds in striking an expert such as: lack of foundation for expert opinion, lack of credentials, lack of qualifications, and failure to tailor the analysis to specific, individual methodologies and facts of the case.

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

Yes, but only if the post-accident toxicology result is relevant and material to the law suit and is not unfairly prejudicial.

In Missouri, "evidence of alcohol consumption is admissible, if otherwise relevant and material." *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 108 (Mo. 1996). This standard applies in two situations: (1) "when the proponent does not allege intoxication as an independent act of negligence, the evidence of drinking may be part of the proof of other negligent acts alleged. In such cases, consumption of alcohol as an independent negligent act may not be submitted;" and (2) "when intoxication is alleged as an independent act of negligence, assuming a submissible case is made, intoxication is a basis for the verdict directing jury instruction." *Id.* In the first situation, to minimize prejudice, "the party against whom the evidence of alcohol consumption is admitted may

request a limiting instruction." *Id.* In the second situation, "the appropriate jury instruction serves to diminish any undue prejudice." *Id.*

Missouri case law recognizes "a substantive distinction between evidence required to sustain a finding that a person is impaired as a result of the ingestion of alcohol verses other drugs." *Secrist v. Treadstone, LLC*, 356 S.W.3d 276, 281 (Mo. App. 2011). Alcohol impairment "has been set by statute and is established when blood alcohol concentration reaches eight-hundredths of one percent." *Id.* A finding for alcohol impairment can further be identified by the effects of excessive consumption of alcohol, such as loss of balance and bloodshot eyes. The same is not true for drug impairment since different drugs have different effects on behavior and "do not necessarily produce readily recognizable symptoms and behavior patterns." *Id.*

In *Secrist*, the court found that "there must be evidence beyond the mere fact that a drug was present in someone's system in a particular quantity before a reasonable inference can be made that the person is impaired therefrom." *Id.* at 282. The appellate court found that it was improper to admit evidence of a positive drug test result for purposes of comparative fault and impeachment due to a failure to lay proper foundation of impairment evidence in conjunction with the drug test. "Evidence of the level of drugs in the person's system is meaningless to the layperson until there is *some* evidence as to what effect those levels of that drug in a person's system would be expected to have on the individual in question." *Id.* at 283. Thus, when considering the admissibility of a positive post-accident drug test, it is also necessary to consider expert testimony to prove impairment.

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

Missouri 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 Missouri 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.

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

Missouri does not have a state mandated ADR requirement, but many circuit courts either by selective jurisdiction or selective judges, require ADR – usually mediation. There are early mediation programs or requirements in federal courts in Missouri, 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 or federal law or by judicial fiat in Missouri.

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 dispositive motion.

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

In Missouri, joint and several liability only applies if a party is found to be at least 51% at fault. MO. REV. Stat. § 537.067.1. A defendant that is found to be less than 51% at fault cannot be held jointly and severally liable with other "at fault" defendants. *Id.* A right of contribution still exists except that there can be no contribution sought from a settling defendant or tortfeasor; instead, a defendant against whom a tort judgment is obtained is entitled to a setoff for any amount paid or agreed to be paid by a settling defendant or tortfeasor. MO. REV. Stat. § 537.060.

In the event multiple defendants are found liable in tort for a judgment obtained by a plaintiff, each defendant pays its percentage share of that judgment attributed to it by the jury except that a defendant found more than 51% at fault can be held jointly and severally liable up to the full amount of the judgment obtained against all defendants at trial less any percentage of the judgment equal to the percentage of fault attributed to plaintiff. Mo.RS. Stat. § 537.067.1. However, a defendant that is held jointly and severally liable is only liable for the amount of punitive damages specifically assessed to that defendant in the event of a finding that such defendant is liable for punitive damages. See Mo.RS § § 510.263 and 537.067.2.

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

The most dangerous/plaintiff-friendly venues are unquestionably St. Louis City, and Jackson County (Kansas City). The largest jury verdicts in the state are usually awarded in these jurisdictions. St. Louis City has frequently been included on the American Tort Reform Foundation's ("ATRF") annual list of "Judicial Hellholes." In 2018-2019, the ATRF listed St. Louis City as the fourth worst "judicial hellhole" in the country noting that "excessive lawsuit advertising has inundated jury pools, making it difficult for defendants to receive a fair trial."

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

In 2015, the Missouri Supreme Court held that the statutory cap on punitive damages found in RSMO. § 510.265 was unconstitutional. In *Lewellen v. Franklin*, 441 S.W.3d 136 (MO. 2014), the Missouri Supreme Court held that applying the punitive damages cap statute to common law causes of action which existed before Missouri adopted its

Constitution in 1820 would violate a plaintiff's constitutional right to a trial by jury. Thus, the statutory cap on punitive damages is unconstitutional when applied to common law causes of action that pre-existed the Constitution.

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

As part of the 2005 Missouri tort reform, Mo. Rev. Stat. § 490.715 was amended to include a new subsection 5 that addressed valuation of the medical expenses, including a provision that there was a rebuttable presumption that the "value" of medical treatment is "the dollar amount necessary to satisfy the financial obligation to the health care provider." Plaintiffs were not permitted to introduce evidence of medical expenses that exceeded the reasonable "value" of medical care and treatment. *See id.*

Missouri cases, however, significantly undermined this statutory tort reform by allowing evidence of "sticker price" bills to get to the jury upon a very low showing of the "reasonableness" of the full-price bill, which could be satisfied by affidavits or the testimony of the health care providers or their records custodians. *See Deck v. Teasley*, 322 S.W.3d 536 (Mo. banc 2010). The bar to rebut the presumption was so low in practice that the statutory reform failed to have the desired effect.

Revised section 490.715, which went into effect on August 28, 2017, attempts to streamline the evidentiary requirements for recovery of medical bills by eliminating the presumption from the statute and replacing it with an "actual cost" standard. More specifically, Missouri law now defines the "actual cost of the medical care or treatment" recoverable as follows:

> [The] sum of money not to exceed the dollar amounts paid by or on behalf of a plaintiff or a patient whose care is at issue plus any remaining dollar amount necessary to satisfy the financial obligation for medical care or treatment by a health care provider after adjustment for any contractual discounts, price reduction, or write-off by any person or entity.

In short, Missouri has significantly altered the evidentiary standard for proving the value of medical treatment rendered to an injured party. The new law appears to be sufficiently clear that medical bill evidence will be the amount actually paid and/or owed, and not the originally billed amount, or including any amounts written off, discounted or adjusted to the bill as a result of contracts with insurers or government programs. Further, the new law eliminates the need for evidence establishing that the full amount billed or charged represents the true value of the medical treatment, and thus may lessen some of the burdens discussed above.