SOUTH CAROLINA

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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.

South Carolina does not have any unique law regarding the privacy of information obtained from event data recorders, nor have South Carolina's appellate courts specifically addressed the issue. Expert witness testimony is likely required to obtain, interpret, and establish the reliability of such data; expert testimony is governed by the applicable rules of evidence. A court order or consent from the vehicle owner is typically required prior to obtaining this data from a vehicle involved in an accident. Law enforcement will typically seek consent from the vehicle owner and/or obtain a search warrant to download if necessary during investigation of a motor vehicle accident. Failure to preserve data contained within event data recorders may subject the party to possible sanctions for spoliation if the Court deems such sanctions are warranted.

Accident animations, simulations, and/or computer-generated evidence are admissible if "screened carefully and admitted cautiously." Computer-generated video animation and/or simulations are admissible as demonstrative evidence when the proponent shows that the animation is (1) authentic under Rule 901, SCRE; (2) relevant under Rules 401 and 402, SCRE; (3) a fair and accurate representation of the evidence to which it relates, and (4) its probative value substantially outweighs the danger of unfair prejudice, confusing the issues, or misleading the jury under Rule 403, SCRE. *Clark v. Cantrell*, 339 S.C. 369, 384, 529 S.E.2d 528, 536 (2000), internal citations omitted.

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.

In-cab videos will generally be admissible absent a ruling from the trial court that the video is more prejudicial than probative pursuant to Rule 403 SCRCP or Rule 403 FRCP. As it relates to other telematics data (electronic logs, messaging systems, lane departure, etc.), if the information is maintained by third party vendors, a party may be required to obtain and preserve such evidence. With respect to notification of any third party vendors as it relates to spoliation/retention, South Carolina courts have stated that "documents are considered to be under a party's control when that party has the right, authority, or practical ability to

obtain the documents from a non-party," *Waters v. Lake City Police Ofc.*, No. 4:15-CV-4143-RBH-TER, 2018 WL 650461, at *3 (D.S.C. Jan. 31, 2018), citing, *Goodman v. Praxair Servs., Inc.*, 632 F.Supp.2d 494, 515 (D. Md. 2009)(citation and internal quotation marks omitted). Accordingly, if a non-party is control of telematics data which the party has the "right, authority, or practical ability to obtain," the party must make an effort to obtain the documents, or if unable to obtain, be able to document and/or provide to the court reasonable efforts made to obtain the same. South Carolina courts have not ruled on limits for upstream liability for spoliation.

There is no specific requirement with regard to spoliation of electronic data; however, the specter of potential sanctions for spoliation must be considered. In our experience, preservation of such materials, if any, is generally preferred and best protects the interests of the driver and/or carrier.

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?

In general, unless protected by the attorney-client and/or work product privileges, information related to the handling of post-accident claims is typically discoverable. South Carolina does not recognize any self-critical privilege. Where a post-accident investigation (inclusive of preventability determinations) is done or created in the ordinary course of business it is likely a South Carolina court may order that it be disclosed pursuant to proper discovery requests. The analysis then turns on whether the plaintiff/claimant is able to prove that he has a substantial need for the work product privileged materials *and* that he cannot obtain substantially similar materials via alternative means. Written or recorded statements and photographs, communications with law enforcement, and/or investigation of publicly available social media materials done during accident investigation are typically discoverable unless such fall under the category of privilege as discussed above.

As it relates to retention and spoliation, South Carolina does not recognize an independent tort for the negligent spoliation of evidence. *Cole Vision Corp. v. Hobbs*, 394 S.C. 144, 154, 714 S.E.2d 537, 542 (2011). Sanctions, however, remain a viable mechanism for the party claiming that spoliation of evidence has occurred. Courts in South Carolina have granted various forms of relief as a result of spoliation, including striking a pleading and giving an adverse inference jury instruction.

A party bringing a motion for sanctions based on spoliation bears the burden of establishing three independent elements before the court may determine which sanction, if any, is appropriate. These elements are:

> (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed;
> (2) that the records were destroyed with a culpable state of mind; and
> (3) that the destroyed evidence was relevant to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.

Id. (internal citations omitted).
Note that a South Carolina appellate court, affirmed by the Fourth Circuit, has found that negligent spoliation of evidence may be a basis for summary judgment and/or dismissal if such conduct significantly prejudices the other party's ability to prosecute and/or defend the matter. *Silvestri v. General Motors Corp.,* 271 F.3d 583, 590 (4th Cir.2001).

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?

Truck drivers who may be defined as independent contractors or borrowed servants pursuant to the terms of a lease agreement or other independent contractor agreement may be considered a statutory employee for the purposes of respondeat superior analyses or workers compensation coverage depending on the facts and circumstances of each case. South Carolina courts consider whether the alleged employer has "the right and authority to control and direct the particular work or undertaking as to the manner or means of its accomplishment." It is not the actual control that matters; rather, the issue is whether the alleged Employer had the authority to control. *See Porter v. Labor Depot*, 372 SC 560, 643 S.E.2d 96 (Ct. App. 2007). There are four factors to consider in this determination:

1. Direct evidence of the right to or exercise of control.
2. The method of payment.
3. The furnishing of equipment, and
4. The right to fire.

Of note, the court also stated that, while the employer/employee relationship is contractual in nature, no formality is required. If the acts of the parties suggest a recognition of the employer/employee relationship, then the courts will respect that relationship

For injuries occurring on or after July 1, 2007, S.C. Code Ann. § 42-1-360 provides that owner operators, along with drivers operating under a lease-purchase or installment-purchase agreement under a valid independent contractor agreement are excluded from coverage under South Carolina's Workers' Compensation Act. The South Carolina Supreme Court also clarified that a motor carrier's requirement that its carrier lessee's adhere to the federal trucking regulations, as well as the motor carrier's own compliance with these regulations with regard to its relationship with a carrier lessee, *should not affect a determination on employment status* by a state court applying the common law test of control in a workers' compensation claim. *See Wilkinson v. Palmetto State Transp. Co.*, 382 S.C. 295, 676 S.E.2d 700 (2009), with guidance from Pennsylvania case law in *Universal Am-Can, Ltd. v. Workers' Comp. Appeal Board*, 762 A.2d 328 (Pa. 2000).

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 admissibility of expert testimony on mild traumatic brain injury is subject to the provisions and limitations of Rules 702 and 703 and other applicable standards under the South Carolina Rules of Evidence and the Federal Rules of Evidence. Such expert testimony is typically rebutted by testimony from competing expert and/or may be challenged by filing motions with respect to the purported expert's credentials and/or methodology subject to analyses under the above-referenced Rules of Evidence.

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

Yes, absent a finding by the court that the admission of the post-accident toxicology result is more prejudicial than probative (Rule 403 SCRCP and FRCP).

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

Carriers should comply with federally-mandated testing with respect to independent contractors, borrowed servants, and/or additional insureds who are operating their leased or other-owned commercial motor vehicles under the carrier's operating authority.

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

Yes. Effective January 1, 2016, all civil court cases in South Carolina are subject to mandatory mediation. There are no local jurisdictions mandating arbitration.

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

Yes, subject to the provisions of Rule 56 SCRCP and Rule 56 FRCP; the evidence in the record, inclusive of corporate deposition testimony, will be considered in the light most favorable to the non-moving party.

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

South Carolina provides for the apportionment of damages under S.C. Code Ann. § 15-38-15, also known as the Uniform Contribution Among Tortfeasors Act ("the Act"). Under the Act a defendant who is found to be less than 50% at fault as compared to the total fault for damages (including any fault of the plaintiff), will only be liable for its percentage of the damages as determined by a jury or trier of fact. A defendant found to be more than 50% at fault is jointly and severally liable for the entire award (less any fault apportioned to the plaintiff).

Where there are two or more defendants, a defendant may make a motion to specify the percentage of liability attributable to each defendant. A defendant may also argue that a non-party had liability for the alleged injury. Upon such a motion, the court will after the

initial verdict awarding damages but before the special verdict on percentages of liability is rendered, allow each defendant time for oral argument on the determination of percentage of attributable fault. No additional evidence may be entered. The jury will then apportion damages among the defendants.

This section does not apply to a defendant whose conduct is determined to be willful, wanton, reckless, grossly negligent, or intentional or conduct involving the use, sale, or possession of alcohol or the illegal or illicit use, sale, or possession of drugs.

Note that a non-party tortfeasor will not be included on a verdict form for the purposes of apportionment of fault/liability by the jury.

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

In South Carolina, the forum, county or venue is a particularly important factor with regard to case valuation, as it can have a rather dramatic impact on a verdict. The following venues in South Carolina are considered to be very liberal and/or plaintiff-oriented: Allendale, Hampton, Jasper, Orangeburg, and Williamsburg Counties. The following venues are also liberal, but to a somewhat lesser degree: Bamberg, Barnwell, Chesterfield, Clarendon, Colleton, Darlington, Dillon, Fairfield, Lee, and Marion Counties.

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

There are limitations applicable to punitive damages sought under South Carolina law. A defendant may request a bifurcated trial on the issue. Punitive damage awards are capped to the greater of either three times the amount of compensatory damages or $500,000. In certain situations, where the defendant's actions could subject the defendant to conviction for a felony and such actions were the proximate cause of the plaintiff's damages or where the wrongful conduct was motivated primarily by unreasonable financial gain and known, or approved by, a person responsible for making policy decisions on behalf of the defendant, the cap can be increased to four times the compensatory damages or $2 million, whichever is greater. Finally, there is no cap on a punitive damages award where the defendant acted with an intent to harm; was convicted of a felony for the same conduct which caused the plaintiff's damages; or acted, or failed to act, while under the influence of alcohol, drugs, or other substances which impaired the defendant's judgment. S.C. Code Ann. § 15-32-530 (C). Note that the limitations and caps on punitive damages must be specifically pled as an affirmative defense or a defendant's right to assert the caps may be deemed waived at the trial of the matter.

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

In South Carolina, the Plaintiff may seek to recover the amount charged. A plaintiff in a personal injury action seeking damages for the cost of medical services is entitled to recover the reasonable value of those medical services, not necessarily the amount paid. *Haselden v. Davis*, 353 S.C. 481, 484, 579 S.E.2d 293, 295 (2003) (citing 22 Am. Jur. 2d

Damages, § 198 (1988)). Thus, a plaintiff can present to the jury the total medical bills incurred, regardless of payment, Medicare reduction, and like factors. *Id.; Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 595-96, 686 S.E.2d 176, 189 (2009) (holding the trial court did not err in permitting the jury to evaluate the value of the plaintiff's medical care in assessing damages despite the fact that the plaintiff received the medical care for free).
Offsets are generally not available under South Carolina law. Under the collateral source rule, a plaintiff's damages may not be reduced by benefits received from some source like unemployment compensation or first party insurance. HUBBARD & FELIX, SOUTH CAROLINA LAW OF TORTS 560 (3d ed. 1990); *Citizens & S. Nat'l Bank of S.C. v. Gregory,* 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995) ("compensation received by an injured party from a source wholly independent of the wrongdoer will not reduce the amount of damages owed by the wrongdoer.").

The collateral source rule also applies to Medicaid and Medicare payments "such that the amount a plaintiff is billed by her medical provider may be recoverable as compensatory damages, despite the fact that the Plaintiff's Medicaid may have paid a lower amount." *Haselden*, 353 S.C. at 483, 579 S.E.2d at 294, n.3 (recognizing that, although several courts in other jurisdictions find that allowing a plaintiff to claim the billed amount, as opposed to the paid amount, would result in a windfall, South Carolina courts do not find the amount paid to be dispositive).