VIRGINIA

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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.

Virginia does not have any specific laws related to black box technology or admissibility of that technology. However, expert testimony is generally required to get any black box data into evidence at trial. Retention of an accident reconstruction expert early in the case is critical to ensure preservation of all available data on the involved vehicles. Failure to preserve this data could later lead to a spoliation of evidence motion with a wide range of sanctions.

Accident animations and/or computer-generated evidence is generally not admissible as evidence in Virginia because they do not account for all variables that were or could have been in play leading up to and during the accident. These animations can, however, be used as demonstrative aids with the proper foundation testimony from the expert who created the animation.

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.

We also can use electronic on board recorders, GPS software, personal GPS devices, and fleet management software. Some vehicles now have additional data from lane control devices, radar, and braking systems. Few cases have addressed the admissibility of this data. However, it should be admissible provided an expert can testify to its reliability. In many instances it can be admitted simply by identifying that the data constitutes a business record, but under these circumstances, you will usually want an expert witness to explain the source and content of the data.

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?

Preservation/Spoliation: All potential litigants are expected to take reasonable steps to preserve evidence when the party knows or reasonably should know that the evidence

would be material in a pending or reasonably probable litigation. A formal litigation hold from opposing counsel is not required. Such data should be preserved until the statute of limitations has run for the plaintiff to file his or her claim, which is two years in personal injury actions.

Virginia's legislature recently passed a new law regarding spoliation of evidence which generally tracks the language of Rule 37(e) of the Federal Rules of Civil Procedure, but permits the granting of an adverse inference in situations of either intentional *or reckless* destruction of evidence. *See* Va. Code § 8.01-379.2:1.

Claims documents: Whether documentation generated as part of a post-accident investigation is discoverable varies depending on jurisdiction and whether counsel was involved in the post-accident investigation. Virginia circuit courts are split on the discoverability of these materials. The standard argument is that such materials were prepared in anticipation of litigation. Certain courts have held that materials cannot be prepared in anticipation of litigation if no attorney has been retained and such information collection is done in the normal course of business. Other courts have held that because litigation is reasonably foreseeable and the insurance adjuster (or whoever conducts the post-accident investigation) is carrying out its duty to defend, the materials are protected.

Dealing with Law Enforcement Early: Retention of counsel to facilitate early interaction with responding/investigating law enforcement can be critical in obtaining necessary information and protecting our drivers/companies. Virginia does not have any specific rules related to attorney interaction with law enforcement.

Social Media: Preservation of social media data follows the same rules discussed above. Purposeful deletion of social media posts relevant to the litigation is a sanctionable offense, to include monetary sanctions against the party and the attorney, if the attorney was involved in the attempt to cover up the social media posts. *See Lester v. Allied Concrete*, 285 Va. 295 (2013).

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?

Independent Contractors: The factors to be considered when determining whether an individual is an employee or an independent contractor are well established in Virginia: (1) selection and engagement; (2) payment of compensation; (3) power of dismissal; and (4) power to control the work of the individual. The fourth factor is determinative. This factor refers to control over the means and method of performing the work. It is immaterial whether this power is exercised, if an employer may control the employee's work, then he is not an independent contractor. *McDonald v. Hampton Training Sch. For Nurses*, 254 Va. 79, 81 (1997). We are not aware of any cases where owner-operators were considered actual employees, instead of statutory employees, of a trucking company.

Borrowed Servants: Under the borrowed servant doctrine, a worker, although directly employed by one entity, may be transferred to the service of another so that he becomes the employee of the second entity "with all the legal consequences of the new relation." One of the legal consequences of the "new relation" is that workers' compensation is the injured employee's exclusive remedy against the second entity-employer. *Metro Machine Corp. v. Mizenko,* 244 Va. 78, 82 (1992). The relevant considerations for a borrowed employee include: (1) who has control over the employee and the work he is performing; (2) whether the work performed is that of the borrowing employer; (3) was there an agreement between the original employer and the borrowing employer; (4) did the employee acquiesce in the new work situation; (5) did the original employer terminate its relationship with the employee; (6) who is responsible for furnishing the work place, work tools and working conditions; (7) the length of the employment and whether it implied acquiescence by the employee; (8) who had the right to discharge the employee; and (9) who was required to pay the employee. *Id.* at 83. Similarly, if a loaned or borrowed servant is under the control of the "borrowing" employer as to the work to be done and the time and method of doing it, the exclusivity provisions of the Virginia Act preclude his common law recovery for personal injuries against an employee of the borrowing employer because he is a fellow servant of the injured party. The exclusivity provisions also bar a similar claim by a borrowed servant against the borrowing employer. *Id.* at 83-84.

Additional Insureds: In certain instances, entities agree to provide Additional Insured coverage to other individuals or companies. Generally, this is part of a contractual relationship and a provision requires one party (first party) to provide Additional Insured coverage for another party (second party) to the contract. In this situation, the first party has its insurer list the second party as an additional insured on the liability policy. Counsel should also investigate whether there are any agreements providing for Additional Insured coverage and any insurance policies that provide such coverage.

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?

Medical experts testifying regarding mTBI claims must meet the same standard as any other expert, i.e., show that he has sufficient knowledge, skill, or experience to render himself competent to testify as an expert on the subject matter of the inquiry. *Combs v. Norfolk & W.Ry.*, 256 Va. 490, 496 (1998). Virginia does require a medical expert to testify regarding the causality of the mTBI, whereas a neuropsychologist is often utilized to relate a plaintiff's alleged ongoing cognitive or behavioral deficits.

We have had success in limiting the scope of testimony that both medical experts and neuropsychologists/psychiatrists can offer at trial regarding a plaintiff's mTBI and alleged resulting cognitive deficits. More specifically, we have successfully excluded certain speculative opinions regarding possible future problems, i.e., that the mTBI may make the plaintiff more prone to develop Alzheimer's/dementia, social anxiety, trouble

making friends, etc. We have also had success in excluding certain animations and photographs that a medical doctor wanted to utilize at trial to show the purported damage to the plaintiff's brain.

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

A post-accident toxicology report is admissible in civil trials in Virginia, which test results can form the foundation for a punitive damages claim.

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 for all drivers who are operating their leased or operator-owned commercial vehicles under the carrier's operating authority, to include those considered to be independent contractors, borrowed servants, and additional insureds.

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

There is not a mandatory, statutorily imposed ADR requirement in Virginia civil cases, except that insurers must arbitrate and settle all disputed claims made for automobile physical damage between them in accordance with the terms of the nationwide Intercompany Arbitration Agreement. Va. Code Ann. §38.2-2231.

With that said, state courts vary by jurisdiction as to whether they will request parties attempt mediation or a judicial settlement conference prior to trial.

Federal courts in Virginia, particularly the Eastern District of Virginia, require settlement conferences with a federal magistrate judge a certain number of days after the pretrial order has been entered or prior to trial (depending on the judge). At these federal settlement conferences, all parties are required to attend and the defendant or insurer of the defendant must represent that they have authority to settle the case up to the amount of the ad damnum. The Eastern District Court will hold parties in contempt or sanction them if a party fails to appear or if it becomes apparent that the insurer failed to attend with full settlement authority/not in good faith.

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

In general, no deposition testimony can be used to support a motion for summary judgment in Virginia state courts, unless all parties agree that the depositions may be used. Depositions can, however, be used to support a motion for summary judgment in cases where all parties are business entities and the amount in controversy is $50,000 or more. Va. Code Ann. §8.01-420.

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

In Virginia, the doctrine of contribution is recognized. However, the right to contribution only arises when one tortfeasor has paid or settled a claim for which other wrongdoers are also liable, though the suit can be brought prior to payment being issued or liability being found. *Shiflet v. Eller*, 228 Va. 115, 121 (1984). The doctrine of contribution may be enforced when the wrong results from negligence and involves no moral turpitude. A suit for contribution can be brought within three years after one tortfeasor has issued payment.

Virginia follows the doctrine of joint and several liability.

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

There are a number of venues in Virginia that are considered to be liberal and dangerous for defendants, including Petersburg, Portsmouth, Newport News, Hampton, Louisa County, City of Richmond, City of Roanoke, and City of Charlottesville.

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

There is a cap on punitive damages in Virginia of $350,000.

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

Virginia permits plaintiffs to recover the amount charged for medical treatment, not the amount paid. No evidence of write-offs is permitted to be introduced and there is no post-verdict basis for reductions or offsets in relation to the plaintiff's medical bills.