WEST 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.

The Supreme Court of Appeals of West Virginia has not yet addressed the issues surrounding current black box technology and simulations.

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.

A trial court has discretion to admit accident animations and/or computer-generated evidence and an expert qualified in accident reconstruction may testify if such testimony will assist the trier of fact to understand the evidence or to determine a fact in issue.

Presently, there is no case law in West Virginia which specifically addresses the admissibility of in-cab videos. Therefore, as with other evidence, a trial court would be required to apply the balancing test of Rule 403 of the West Virginia Rules of Civil Procedure to determine whether or not the probative value of the evidence is substantially outweighed by a danger of unfair prejudice. An expert qualified in accident reconstruction may testify if such testimony will assist the trier of fact to understand the evidence or to determine a fact in issue.

The Supreme Court of Appeals addressed the admissibility of "Day-in-the-Life" videos in *Roberts v. Stevens Clinic Hosp., Inc.*, 345 S.E.2d 791 (W.Va. 1986). In that decision, the majority held:

> The same evidentiary rules that govern the admissibility of recordings and photographs govern the admissibility of videotape evidence. *W.Va.R.Evid.* 1001(2). The general rule is that pictures or photographs that are relevant to any issue in a case are admissible. Furthermore, the trial judge is afforded wide discretion in determining the admissibility of videotapes and motion pictures.

Szeliga v. General Motors Corp., 728 F.2d 566, 567 (1st Cir.1984); *Ilosky v. Michelin Tire Corp.,* 172 W.Va. 435, 307 S.E.2d 603, 618 (1983).

We are not unmindful of the potential dangers inherent in such presentations. As one court has explained:

> Almost always an edited tape necessarily raises issues as to every sequence portrayed of whether the event shown is fairly representative of fact, after the editing process, and whether it is unduly prejudicial because of the manner of presentation.

Bolstridge v. Central Maine Power Co., 621 F.Supp. 1202 (D.C.Me.1985) (Plaintiff's "Day-in-the-Life" videotape excluded when open court testimony could demonstrate similar evidence, and admission of videotape would create risk of distracting jury and unfairly prejudicing defendant). A videotape's tone and editing, as well as the availability of similar evidence through in-court testimony, are all factors a trial court should consider in deciding whether to admit a videotape.

Roberts, 345 S.E.2d at 796 (footnote mark omitted). The Court held that the trial court had not erred in admitting the video tape in question because, "as a preliminary matter, the videotape was relevant" under Rules 401 and 402 of the West Virginia Rules of Evidence; and because Court "found nothing inflammatory or prejudicial about [the video]" such as "artistic highlighting that emphasizes some scenes or photographs more than others" or that would evoke "an unduly sentimental atmosphere." *Id.* Thus, the typical defenses to the admissibility of recordings and photographs also apply in the context of day-in-the-life videos.

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.

Although there does not appear to be any case law in West Virginia which specifically addresses the retention and spoliation of in-cab videos, in West Virginia, a party who reasonably anticipates litigation has an affirmative duty to preserve relative evidence. *Hannah v. Heeter*, 584 S.E.2d 560, 566-67 (W.Va. 2003) (quoting *Tracey v. Cottrell*, 524 S.E.2d 879 (W.Va. 1999). Intentional spoliation of evidence is recognized as a cause of action against parties to a civil action. *Id.* at 571. A party to a suit that causes spoliation of evidence may be subject to Rule 37 sanctions or an adverse jury instruction. *See* Syl. Pt. 2, *Tracey v. Cottrell*, 524 S.E.2d 879.

With respect to third parties, "there is no general duty to preserve evidence." *Hannah*, 584 S.E.2d at 568. However, intentional spoliation of evidence is recognized as a cause of action against third parties, and negligent spoliation of evidence is recognized as a cause of action against third parties having a special duty to preserve evidence. Syl. Pts. 5 and 9, *Id*.

West Virginia has not addressed spoliation of evidence relating directly to electronic data. It also does not appear that West Virginia has a law or regulation which directly addresses the retention of telematics data. Therefore, the law of spoliation, as discussed above, would likely apply generally to these circumstances.

A post-accident investigation that was generated prior to litigation is generally discoverable. *State ex rel. Allstate Ins. Co. v. Gaughan*, 508 S.E.2d 75, 90 (W.Va. 1998). *See, also, State ex. rel. State Farm Mut. Auto. Ins. Co v. Bedell*, 697 S.E.2d 730 (W.Va. 2010). Similarly, documents in an insured's claim file that were generated prior to litigation are generally discoverable. *State ex rel. Allstate Ins. Co. v. Gaughan*, 508 S.E.2d 75, 90 (W.Va. 1998).

Further, West Virginia has no specific disclosure rule for surveillance/social media investigations. Disclosure would be pursuant to discovery served upon a defendant or by scheduling order imposed by a trial court requiring disclosure of witnesses and/or exhibits at a particular date in discovery.

There are not any cases (federal or state) specifically addressing the discovery and admissibility of preventability determinations in West Virginia. Therefore, preventability determinations might arguably be excluded on grounds that they constitute evidence of subsequent remedial measures under W.Va.R.Evid. 407 or that the probative value is substantially outweighed by a danger of unfair prejudice under W.Va.R.Evid. 403.

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.

The Supreme Court of Appeals of West Virginia has held that the fact that the name of the motor carrier, the International Commerce Commission certificate number, and various state regulatory permit numbers were "prominently displayed" on a leased tractor-trailer contributed to the existence of an employer-employee relationship between the owner/driver and motor carrier, despite a clause in the contract specifically stating that the relationship was that of an independent contractor, and that, therefore, negligence of the owner/driver could be imputed to the motor carrier. *Griffith v. George Transfer & Rigging, Inc.*, 201 S.E.2d 281 (W.Va. 1973).

The Supreme Court of Appeals of West Virginia does not appear to have ruled directly on the issue of broker liability for motor carrier negligence. However, in another context, the Court has held that a real estate broker who volunteers to secure an inspection of property may be held liable to the buyer for civil damages if the broker is negligent in the selection and retention of the third party, and if such negligence proximately causes harm to the buyer. *See Thompson v. McGinnis*, 465 S.E.2d 922 (1995) (cited in *King v. Lens Creek Ltd. Partnership*, 483 S.E.2d 265 (W.Va. 1996).

West Virginia has not also directly addressed the liability of persons further up the chain of distribution from the driver and carrier for acts of the driver and carrier. The general rule governing the vicarious liability of employers in West Virginia is an employer is ordinarily not liable for the negligent acts of an independent contractor. *Rogers v. Boyers*, 170 S.E. 905 (W.Va. 1933). The exceptions to this general rule include where the work to be done is unlawful or intrinsically dangerous. *Pasquale v. Ohio Power Co*., 418 S.E.2d 738 (W.Va. 1992). Additionally, an employer may be liable where it exercises direct control or supervision over the contractor or hires an incompetent contractor. *Id*. Some special categories of employers may have special duties imposed by law. *Carrico v. W.Va. R.R. Co*., 14 S.E. 12 (1891).

To constitute an inherently dangerous activity sufficient to place a nondelegable duty upon the one ordering the work, the work must be dangerous in and of itself and not dangerous simply because of the negligent performance of the work, and that danger must be naturally apprehended by the parties when they contract. *King v. Lens Creek Ltd.*, 483 S.E.2d 265 (W.Va. 1996). In the selection of an independent contractor, the employer is charged with the duty of exercising reasonable care to secure a person of skill and prudence. *Dunbar Tire & Rubber Co. v. Crissey*, 114 S.E. 804 (W.Va. 1922).

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?

While the Supreme Court of Appeals of West Virginia has not yet specifically addressed expert testimony in mild traumatic brain injury claims, West Virginia's Rules of Civil Procedure and Rules of Evidence are modeled after the federal rules. Generally speaking, it is the legal culture in West Virginia that courts establish, by order in each individual case, the dates that expert witnesses must be disclosed and that the expert reports must be disclosed. It is also the legal culture that expert disclosures in state court are not required to provide as much detail or to be provided as soon as in federal court.

Rule 26(b)(4) of the West Virginia Rules of Civil Procedure is the general rule regarding expert discovery. Under that rule, the discovery of expert facts and opinions for expert witnesses who are anticipated to testify at trial are discoverable only as the rule provides. First, parties may discover by interrogatories the identity of each expert, the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion. *W.Va. R. Civ. P. 26(b)(4)(A)(i)*. Any expert so identified may be deposed. *W.Va. R. Civ. P*. 26(b)(4)(A)(ii).

As to experts who were retained in anticipation of litigation but who are not expected to testify, a party may only discover facts and opinions "only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means." *W.Va. R. Civ. P. 26(b)(4)(B)*. West Virginia Rule of Civil Procedure 35(b) deals with reports of treating physicians or other physical or mental health providers when the condition being treated or examined is at issue in the case.

Parties are required to supplement discovery responses to include "[t]he identity of each person expected to be called as an expert witness at trial, the subject matter on which the expert is expected to testify, and the substance of the expert's testimony." *W.Va. R. Civ. P. 26(e)(1)(B)*.

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

In the context of an administrative revocation of a driver's license, a positive post-accident toxicology result is admissible. *Lowe v. Cicchirillo*, 672 S.E.2d 311, 316 (W.Va. 2008). There does not appear to be any case law in West Virginia which specifically addresses the admissibility of a positive post-accident toxicology result in other civil actions. Therefore, as with other evidence, a trial court would likely apply the balancing test of Rule 403 of the West Virginia Rules of Civil Procedure to determine whether or not the probative value of the evidence is substantially outweighed by a danger of unfair prejudice.

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

The Supreme Court of Appeals of West Virginia does not appear to have ruled directly on the issue of federally-mandated testing for Independent Contractors, Borrowed Servants, or Additional Insureds other than to note that where an employee's job responsibilities involve public safety or the safety of others, random drug testing is permissible. *See, e.g., Syl. Pt. 2, Twigg v. Hercules Corp.*, 406 S.E.2d 52 (W.Va. 1990).

However, the Supreme Court of Appeals of West Virginia has held that the fact that the name of the motor carrier, the International Commerce Commission certificate number, and various state regulatory permit numbers were "prominently displayed" on a leased tractor-trailer contributed to the existence of an employer-employee relationship between the owner/driver and motor carrier, despite a clause in the contract specifically stating that the relationship was that of an independent contractor, and that, therefore, negligence of the owner/driver could be imputed to the motor carrier. *Griffith v. George Transfer & Rigging, Inc.*, 201 S.E.2d 281 (W.Va. 1973).

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

Many circuit courts require mediation before allowing trial; however, that decision is discretionary with the trial court judge pursuant to West Virginia Trial Court Rule 25.03.

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

Although the Supreme Court of Appeals of West Virginia does not appear to have specifically addressed the use of corporate deposition testimony in support of a motion

for summary judgment or other dispositive motion, West Virginia Rule of Civil Procedure 56(c) provides, in relevant part, that "[t]he judgment sought shall be rendered forthwith if the pleadings, **depositions**, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (emphasis added). This rule does not, on its face, distinguish between corporate deposition testimony and other deposition testimony, nor does West Virginia Rule of Civil Procedure 30(b)(7), which addresses corporate depositions, make any such distinction. Therefore, in the absence of authority to the contrary, it appears that corporate deposition testimony may be used in support of a motion for summary judgment or other dispositive motion.

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

The doctrine of joint and several liability has been abolished in West Virginia in lieu of a modified comparative fault standard. W.Va. Code § 55-7-13c. Although the Supreme Court of Appeals of West Virginia has not yet directly addressed this issue, it is probable that most contribution claims have been abolished as a result.

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

Although all of West Virginia tends to favor plaintiffs, some counties tend to favor plaintiffs more than others. Defendants should use caution when litigating in the state courts of any of the following counties: Boone, Lincoln, Logan, Marshall, McDowell, Mingo, Ohio, and Wyoming. The state courts of the following counties tend to be less plaintiff-oriented than the remainder of the state: Berkeley, Grant, Hampshire, Hardy, Jefferson, Mineral, Morgan, Pendleton, and Pocahontas.

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

Punitive damages are limited to acts of actual malice or a conscious, reckless and outrageous indifference to the health, safety and welfare of others, must be proven by clear and convincing evidence, and are capped at no more than four (4) times compensatory damages or Five Hundred Thousand Dollars ($500,000.00); whichever is greater. W.Va. Code § 55-7-29.

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

A plaintiff can recover the full amount charged by medical providers regardless of whether the plaintiff actually paid the bills himself or herself or whether some or all of such bills were paid by insurance under the "collateral source rule." *Kenney v. Listen*, 760 S.E.2d 434 (W.Va. 2014). A plaintiff may also recover the value of services which were gratuitously provided or later written off by the medical provider. *Id*. A Court may

reduce or off-set medical bills if it determines they are not "reasonable and necessary." *Id*.