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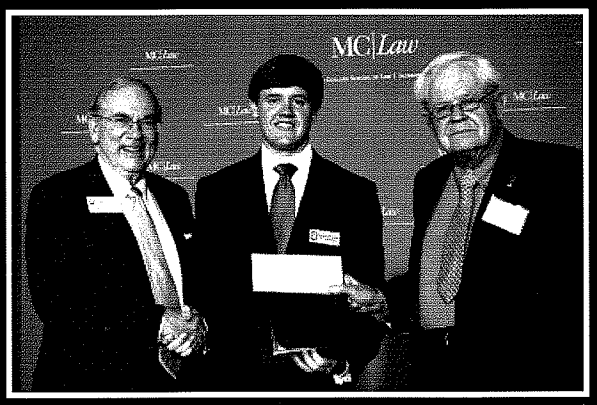

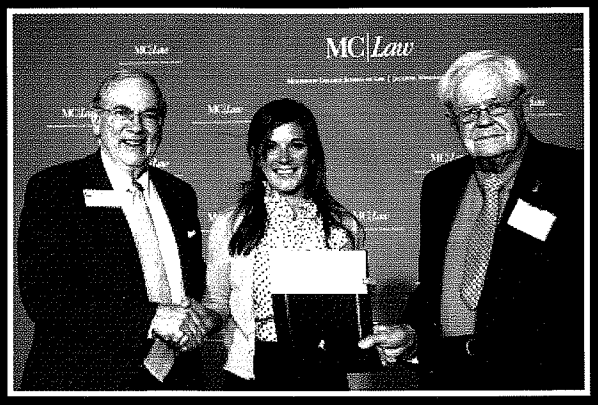

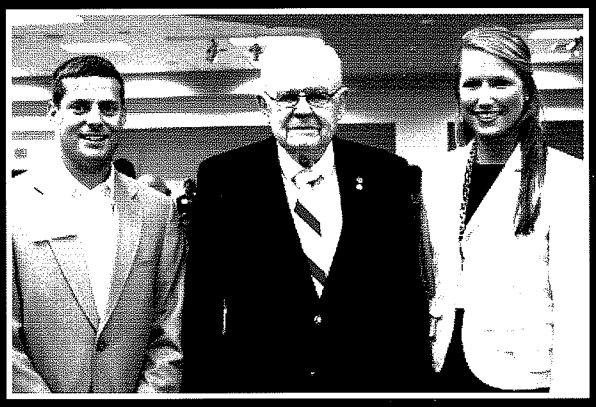

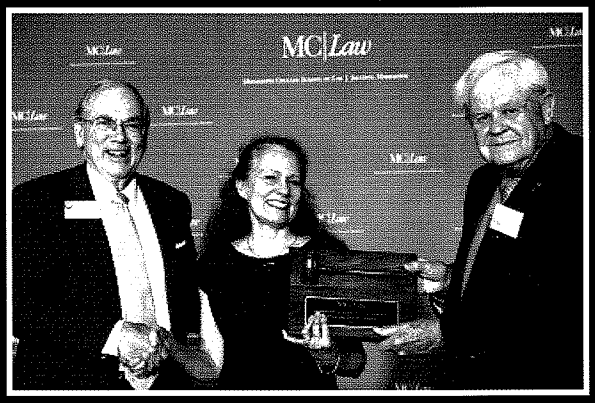

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Issue Highlights:

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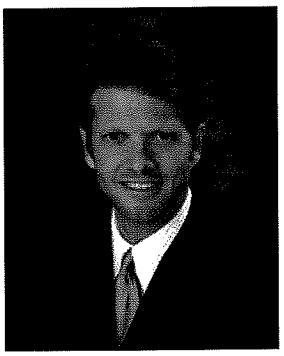
In This Issue:

Shanda M. Yates, Editor

Evidentiary Issues in Trucking Litigation

By Arthur D. Spratlin, Jr.[1]



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I. Introduction

In every type of litigation, a natural tension exists between what is "discoverable" and what is ultimately "admissible." The urge on both sides of a lawsuit is to limit the other side's access to documentary evidence that will be admissible at trial. There are a variety of reasons for this: expense, burden, leverage, etc. However, "relevance" is the test for discovery, not "admissibility." Rule 26 of the Federal Rules of Civil Procedure states, in pertinent part, as follows:

> Parties may obtain discovery regarding any nonprivileged matter *that is relevant to any party's claim or defense* . . . . Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

After any accident that might result in litigation, a defendant must think beyond the limits of "admissibility" and be prepared for what "appears reasonably calculated to lead to the discovery of admissible evidence." F.R.C.P. 26(b)(1).

That is not to say that admissibility should take a back seat to discoverability. It is equally important to recognize what is – and what is not – admissible. Rule 402 of the Federal Rules of Evidence gives us the initial test: "All relevant evidence is admissible . . . . Evidence which is not relevant is not admissible." "'Relevant Evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." F.R.E. 401. In other words, as the Comment to Rule 401 of the Mississippi Rules of Evidence (which are modeled after their federal counterpart) explains, "[e]vidence is relevant if it is likely to affect the probability of a fact of consequence in the case. If the evidence has any probative value at all, the rule favors its admission." (citations omitted).

While the initial test for the admissibility of evidence is its "relevance," F.R.E. 403 informs us that relevant evidence may be inadmissible when "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." For example, "[i]f the introduction of the evidence would waste more time than its probative value was worth, then a trial judge may rightly exclude such otherwise relevant evidence." M.R.E. 403, cmt. Note, however, the use of the word "may." A trial judge is given considerable discretion in his performance of the Rule 403 balancing test, and an appellate court will not overrule the administration of such discretion in the absence of abuse.

With these general concepts as our guide, we discuss spoliation and take a look at the specific application of the discovery and admissibility rules, along with some practical considerations, to certain selected issues and topics that commonly arise in trucking litigation.

II. Spoliation of Evidence

Spoliation refers to the destruction of or failure to preserve evidence by one party that is necessary to another party's ability to prove his or her case in contemplated or pending litigation. *Richardson v. Norfolk Southern Ry. Co.*, 923 So.2d 1002, 1014 (Miss. 2006); *Thomas v. Isle of Capri Casino*, 781 So.2d 125, 133-34 (Miss. 2001).

In Mississippi, proof of spoliation gives rise to the "spoliation inference," which entitles the non-spoliating party to an instruction to the jury that they may presume or infer that the spoliated evidence would have been unfavorable to the spoliator. *Dowdle Butane Gas Co., Inc. v. Moore*, 831 So.2d 1124, 1127 (Miss. 2002). "Other remedies exist as well, namely discovery sanctions pursuant to Miss. R. Civ. P. 37, criminal penalties provided by Miss.Code Ann. §97-9-55 (2000), contempt sanctions under Miss.Code Ann. §9-1-17 (2000), and disciplinary sanctions imposed against attorneys who participate in spoliation." *Id.* (citing Miss. R. Prof'l. Conduct 8.4).

The instruction is conditioned upon a party's deliberate or negligent actions. Thus, where the facts positively demonstrate that the evidence was lost without fault attributable to the purported spoliating party, there is no reason for the jury to be instructed on a presumption arising from the loss. *DeLaughter v. Lawrence County Hosp.*, 601 So.2d 818, 821 (Miss. 1992). Where evidence establishes that a party deliberately destroyed a material piece of evidence or where an item required by law to be kept is unavailable due to a party's negligence, then the jury will be instructed that an inference or presumption arises that the item of evidence would have been unfavorable to that party. *Id.* at 821-22. Accordingly, if a jury is entitled to a spoliation instruction, the jury should first be instructed to assess the explanation for the loss of evidence. *Id.* at 822.

The Mississippi Supreme Court's opinion in *Thomas v. Isle of Capri Casino*, 781 So.2d 125 (Miss. 2001), is an oft-cited example of the application of the "spoliation inference." *Thomas* was a casino patron's appeal from a Mississippi Gaming Commission decision that the patron had not won certain slot machine jackpots. While the patron's appeal to the Mississippi Gaming Commission was pending, the casino and the slot machine's owner removed the slot machine (machine 2947) from the premises and repurposed its central processing unit (CPU) as a replacement part for other slot machines. *Id.* at 129-30. The CPU's memory was erased and no longer retained information from machine 2947 – information that would have been dispositive evidence in the dispute. *Id.* at 130.

[1] Special thanks to Michael McCabe in Butler Snow's Gulfport, Mississippi office for his research and contributions to this paper. Additional analysis and contributions were made by Amanda Padgett at Covenant Transportation (Chattanooga, TN), Brian Combs at Great West Casualty Company (Knoxville, TN), Michael Miller at Drew, Eckl & Farnham, L.L.P. (Atlanta, GA), and Tom Harrison at Hornblower Manning (Corpus Christi, TX).

The Mississippi Supreme Court held that while other evidence supported the Commission's decision, the casino and slot machine owner engaged in spoliation of evidence when they removed the subject slot machine, raising a presumption that the evidence contained in the CPU of the machine was unfavorable. *Id.* at 133.

This holding was premised upon the Court's finding that the lost information would have conclusively established whether the Plaintiff had in fact won any jackpots and how much time had elapsed since the jackpot had occurred. *Id.* The following principles provided the legal foundation for the Court's ruling:

> When evidence is lost or destroyed by one party (the "spoliator"), thus hindering the other party's ability to prove his case, a presumption is raised that the missing evidence would have been unfavorable to the party responsible for its loss. According to Wigmore:
>
> > [S]poliation and all similar conduct is receivable against him as an indication of his consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the cause's lack of truth and merit. The inference thus does not necessarily apply to any specific fact in the cause, but operates indefinitely though strongly against the whole mass of alleged facts constituting his cause.
>
> 2 J. Wigmore, *Evidence* §278, at 133 (J. Chadbourn rev.1979). Because the presumption of unfavorability is not solely confined to the specific issue of what information was contained in the missing evidence, the fact finder is free to draw a general negative inference from the act of spoliation, regardless of what the spoliator's rebuttal evidence shows.
>
> *Id.*

In reaching its conclusion, the Court rejected the casino's argument that the negative presumption could only be drawn where the loss of the evidence is either unexplained or deliberate:

> Requiring an innocent litigant to prove fraudulent intent on the part of the spoliator would result in placing too onerous a burden on the aggrieved party. To hold otherwise would encourage parties with weak cases to 'inadvertently' lose particularly damning evidence and then manufacture 'innocent' explanations for the loss. In this way, the spoliator could essentially destroy evidence and then require the innocent party to prove fraudulent intent before the destruction of the evidence could be used against it.
>
> *Id.*

The Court found that the casino's actions were at least grossly negligent because it was aware that there was a dispute at the time the machine was removed, and that the Gaming Control Act required the casino to report the dispute to the Gaming Commission who may have performed a more thorough investigation that would have resulted in the preservation of the machine. *Id.* The Court emphasized that "the information contained in machine 2947 was not lost by act of God or in a fire, but was destroyed by the actions of Isle and CDS when at least one of them was aware of the pending dispute." *Id.* The Court also cited favorably to cases from Mississippi and other jurisdictions in which the spoliation presumption was allowed where the evidence was unavailable due merely to the spoliator's negligence. *Id.* at 134 (citing *DeLaughter,* 601 So.2d at 818 ("where a (medical) record required by law to be kept is *unavailable due to negligence,* an inference arises that the record contained information unfavorable to the hospital, and the jury should be so instructed.") (emphasis added)).

III. The Spoliation "Set Up" Letter

Increasingly, Plaintiffs' attorneys are sending pre-suit "spoliation letters," which request that the defendant trucking company retain and/or produce a litany of documents and information to aid in their investigation of the accident. The letters usually include a request for some obvious and likely relevant information, but also seek to place the burden on the trucking company to gather and maintain a voluminous amount of irrelevant, untimely and/or redundant information.

Such letters are often addressed directly to the trucking company. When a preservation letter is received, the company should compare it to the existing company policy for document retention, which will ultimately be discussed during the course of discovery, along with the various document retention requirements of the Federal Motor Carrier Safety Regulations ("FMCSR's"). If the company's retention policy incorporates measures which go beyond the FMCSR requirements, then the company policy can become the standard when addressing spoliation issues.

If the preservation letter is received after the FMCSA retention requirement expires, and certain documents have already been destroyed, the company must be prepared to explain why those documents are no longer available. The key will be whether the company was on notice of a potential claim, creating some practical or other obligation to retain documents, despite the expiration of the statutory retention period.

It is important to always retain what company policy dictates, regardless of the requests in the spoliation letter. If no company policy addresses document retention when a loss occurs, and changes on a case-by-case basis, retention policy questions/issues will likely be raised.

IV. The Reverse "Set-Up" Letter to the Plaintiff

In response to the spoliation "set-up" letter from Plaintiff's counsel, the trucking company may want to reply with a "set-up" letter of its own, objecting to the requested documents as overly broad, unduly burdensome, irrelevant, not required by the FMCSR's, etc., and requesting that the Plaintiff's attorney hold and/or produce certain documents and things as well. This creates a number of evidentiary retention issues for Plaintiff to consider, including:

A. Plaintiff's Vehicle

Plaintiff should know immediately if litigation is likely regarding an accident. Therefore, plaintiff is arguably on notice from the date of the accident to retain his vehicle for inspection. Many times, plaintiff's insurer handles the property damage aspect of the claim, and disposes of the vehicle if it is a total loss. In this case, if plaintiff does not give the other parties an opportunity to inspect the vehicle, a spoliation issue could arise, particularly as to any data on the car's ACM/ECM. In this regard, the defending adjuster/insurer/attorney should send plaintiff a "spoliation letter" instructing plaintiff not to destroy or alter the vehicle, and to grant permission for an inspection/download of the claimant vehicle before it is repaired or destroyed.

B. GPS Units

Increasingly, passenger vehicles are equipped with GPS units. These units can be built into the vehicle, or can "plug in" and be moved from vehicle to vehicle.

Also, some "smart phones" contain GPS capabilities. These units are able to store some information which could be useful in reconstructing an accident. Plaintiff should be instructed to retain any permanent or portable GPS units for inspection.

C. Cell Phone Records

The Mississippi Legislature is currently considering legislation that would ban all drivers from texting while driving in Mississippi. Thirty other states have approved similar bans on texting while driving. The bill would not affect the sending or receiving of cellular phone calls.

Plaintiff should be requested to hold all cell phone bills from the month of the accident, in order to determine if plaintiff was either texting or talking on the phone at the time of the accident, and to determine who they were texting/talking to immediately before and after the accident.

D. Internet Sites

Facebook and other social network sites can be a valuable tool in investigating the background of a claimant or witness. For example, comments and photographs posted on these sites can provide insight into a person's current physical condition, or attitudes about the accident and the litigation. From a spoliation standpoint, the defendant's letter should instruct the plaintiff's counsel not to allow the editing or altering of the content of any social media sites. From a practice standpoint, one must be careful in investigating these sites. It is generally not permissible to take on a false identity to gain access to another individual's account. However, the case law is changing daily on the proper and accepted methodology for securing social media data/evidence from claimants.

V. Other Evidentiary Issues Common to Trucking Cases

The following is a discussion of a number of topics/evidentiary issues likely to arise in a trucking liability case:

A. Hours of Service Violations

A skilled Plaintiff's attorney will routinely try to increase the value of a claim by shifting the focus from the liability of the driver to the carrier through allegations of FMSCR Hours of Service (HOS) violations. The trucking company must ensure that log books and related data are preserved appropriately in order to defeat this litigation strategy.

Even the most defensible case can be difficult to defend when Plaintiff can show the driver was beyond the mandated HOS. The HOS violation gives rise to the inference that fatigue could have been a factor in the loss, which could give rise to a case of punitive damages. When investigating a catastrophic loss, driver logs should always be pulled immediately to make sure the driver was in compliance. If he was not, then one can prepare in advance as to how to defend the case, i.e., by showing that the HOS violation was unrelated to the cause of the accident.

B. Driver Qualification File

If the Driver Qualification (DQ) file is blended with other personnel type items, (which can include anything from road tests to trainer comments), then the DQ file and the personnel file are considered to be one document. For example, if this information came out in a deposition of an HR person, the argument could be made that plaintiff was entitled to the entire personnel file, when just the DQ file was produced. On the other hand, if the DQ file is stored separately from a "personnel file," then preserve both.

If the company's retention requirement exceeds the FMCSA requirements, always follow the company policy (i.e., documents retained in each and every accident when that accident meets certain criteria). However, this can be a double-edged sword. When a company enforces stringent policies which go beyond FMSCA requirements, the company creates a new standard and can fall under scrutiny where spoliation matters are concerned if the company policy is not followed.

C. Prior Driving History/Prior Tickets

In Mississippi, evidence of a motorist's prior driving history is generally inadmissible to create the inference that, because the motorist had driven in a certain manner in the past, that he was driving in that manner on the date of the accident. *See Baxter v. Rounsaville*, 193 So. 2d 735, 740 (Miss. 1967) ("The general rule in most jurisdictions is that where 'either party to an automobile accident, in which the injury sued for was sustained, had prior thereto been a party to similar occurrences (such evidence) is inadmissible to show negligence.' We are of the opinion that introduction of evidence with reference to the cause of previous accidents under the facts in the instant case was prejudicial and is reversible error.") (citations omitted); *Nehi Bottling Co. of Ellisville v. Jefferson*, 84 So. 2d 684, 686 (Miss. 1956) (holding that trial court erred in admitting testimony regarding other accidents in which motorist allegedly was involved); *Washington v. Kelsey*, 990 So. 2d 242, 248 (Miss. Ct. App. 2008) (holding that trial erred in admitting testimony regarding defendant's prior history of speeding near location of accident because statement was clearly offered to create inference that, because Washington had sped in past, he was speeding on day of accident; this is precisely what Rule 404(b) prohibits); *Hood v. Dealers Transport Co.*, 459 F.Supp. 684, 685-86 (N.D.Miss.1978) (where defendant's vicarious liability is not in issue, evidence of an employee's prior traffic violations is not relevant, since such evidence has no relation to question of whether employee acted negligently on particular occasion).

D. ECM/EDR Data

Information gathered from an Event Data Recorder (EDR), commonly referred to as the "black box," can provide invaluable data.[2] Data records can include the Electronic Control Module (ECM), Airbag Control Module (ACM), or Power Train Control Module (PCM),. Depending on several factors, the EDR can record speed, acceleration rate, engine RPM, gear selection, engine malfunction information, airbag deployment information, etc. This data provides a remarkable foundation for accident reconstruction. The digital information is stored on the EDR itself and can be downloaded and printed out as a report.

Both sides have a stake in whether or not this information makes its way into the record. The actual data downloaded from the EDR is of such technical complexity that courts generally require an expert opinion as the method of introducing the evidence into the record. This requirement implicates the federal standards regarding expert testimony under *Frye* and *Daubert*.[3]

[2] While the data can be invaluable, it is not necessarily conclusive. *See Smith v. Waggoner Trucking Corp.*, 69 So.3d 773, 780 (Miss. Ct. App. 2011) (Finding triable issue of fact where driver disputed that she was speeding, even though her vehicle's computer data showed she was traveling at fifty-seven miles per hour in a forty-five mile per hour zone.).

One of the more recent EDR cases is *McQuiston v. Helms*, No. 1:06cv1668, 2009 WL 554101, at *1 (S.D. Ind. Mar. 4, 2009), where two plaintiffs were suing for personal injuries resulting from an 18-wheeler collision. Plaintiffs' expert analyzed the ECM data and was prepared to testify that there were a large number of counts of speeds greater than or equal to 66 miles per hour for the monthly activity reports. The court granted the defendants' motion to exclude this testimony on relevance grounds, holding that because plaintiffs had not asserted a negligent training or negligent supervision claim against the trucking company, the expert's testimony was not relevant under Fed. R. Evid. 401. The court also held that where the expert could not prove when and where these speeds occurred, the only use of the evidence was an attempt by plaintiffs to show the driver's character for speeding – that because he may have exceeded the speed limit in the past, he acted in conformity therewith at the time of the collision. The court excluded this evidence under Fed. R. Evid. 404(b). Finally, the court refused to grant an adverse inference instruction regarding the alleged spoliation of some of the ECM data because the plaintiffs did not establish that the trucking company had a duty to preserve the ECM data or that the trucking company acted in bad faith in allowing the destruction of ECM data.

Courts generally hold that EDR data is generally accepted and reliable, thus satisfying the requirements for admission, and opening the door for those in the transportation industry to take advantage of this technology in court. Because of its complexity, however, such information, must be introduced through an expert's interpretation. The federal standards of general acceptance and reliability under *Frye* or *Daubert* must usually be satisfied before EDR evidence can be admitted.

E. Qualcomm Data and GPS Units

Plaintiffs in trucking accident cases are increasingly requesting satellite tracking system data, commonly known as Qualcomm records. The FMSCA guidelines are somewhat silent on the retention of these records. From a practical standpoint, this would be good information to keep or back-up in the event it is requested a later date, because courts seem to be making their own law as to retention of these documents.

Other GPS devices also store potentially critical data regarding the movement of the vehicle. Carriers should consider several issues: Does the driver have a separate GPS device? The message position or GPS history can be used to see if the driver could have been distracted when the accident happened. Do the messages indicate that he was lost? Did he follow the dispatched route?

F. SafeStat/DOT Safety Ratings and Statistics - CSA 2010?

The stated purpose of The Motor Carrier Safety Status Measurement System ("SafeStat") is to prioritize motor carriers for DOT Compliance Reviews. SafeStat assigns motor carriers a ranking between 0 and 100 (with 100 being the worst) in four Safety Evaluation Areas (SEA):

- Accidents (crashes)
- Driver
- Vehicle
- Safety Management

SafeStat has been subject to criticism on the basis that the data utilized to create a SafeStat score are largely unreliable, misleading, and incomplete. Deficient areas of data include: (1) poor carrier census data; (2) poor crash data; (3) poor data on moving traffic violations; and (4) poor and inaccurate data records (i.e., improper data being entered into crash reports).

The admissibility of SafeStat information has been treated differently by the courts. At least two federal courts have permitted evidence of safety data and ratings in favor of plaintiffs in the context of negligent hiring claims. *See Jones v. C.H. Robinson Worldwide, Inc.*, 558 F. Supp. 2d 630 (W.D. Va. 2008) (denying defendants' motion for summary judgment on plaintiff's negligent hiring claim after consideration of low SafeStat rating); *Schramm v. Foster*, 341 F. Supp. 2d 536 (D. Md. 2004) (denying defendants' motion for summary judgment on plaintiff's negligent hiring claim after consideration of "conditional" safety rating.). Other federal courts, utilizing the same reasoning, admitted similar evidence in favor of motor carriers. *See Fike v. Peace*, 2007 WL 3132747 (N.D. Ala. 2007) (granting defendants' motion for summary judgment on plaintiffs' negligent hiring claim notwithstanding evidence of low safety data scores.); *Smith v. Spring Hill Integrated Logistics Mgmt., Inc.*, 2005 WL 2469689 (N.D. Ohio 2005) (granting defendants motion for summary judgment on plaintiff's negligent hiring claim based in part on evidence of high safety rating.). Other federal courts have refused to consider evidence of motor carrier safety data and ratings. *See FCCI Ins. Group v. Rodgers Metal Craft, Inc.*, 2008 WL 4185997 (M.D. Ga. 2008) (denying defendants' request that court take judicial notice of motor carrier's safety ratings as reported on www.safersys.org and finding that such data is not type of reliable evidence routinely contemplated by rules governing judicial notice); *Frederick v. Swift Transp. Co.*, 591 F.Supp.2d 1156, 1161 (D. Kan. 2008) (expert testimony regarding prior government safety compliance audit held inadmissible); *Kemper Ins. Cos. v. J.B. Hunt Logistics, Inc.*, 2003 WL 25672797 (N.D. Ga. 2003) (denying plaintiffs' motion to compel discovery regarding safety data and ratings because discovery was not reasonably calculated to lead to discovery of admissible evidence).

The FMCSA's Comprehensive Safety Analysis (CSA) 2010 is an effort to respond to some of the above noted criticisms by analyzing not only motor carriers, but drivers who are at risk from a safety standpoint through the evaluation and targeting of certain "behaviors" which can affect safety. Given its very recent enactment, there have been no substantive court decisions regarding the reliability or admissibility of CSA 2010 data. However, the system is apparently still vulnerable to the same weaknesses found in SafeStat, that is, poor and inaccurate data sets.

G. Internal Company Investigation

(1) Driver's Accident Report Kit

Many carriers train their drivers to use an "accident report kit" at the scene of the accident. The "kit" normally consists of a pre-printed form to be completed with information regarding the accident, a disposable camera, and a note pad. However, most drivers are not trained in how to perform an accident investigation. Sometimes, the information gathered (and photos taken) are helpful. However, at other times, the information can be harmful to the defense of the case. Even when the facts are "good," a misstatement or mistake by

[3] *See Commonwealth v. Zimmerman*, 873 N.E.2d 1215 (Mass. App. Ct. 2007). (holding that plaintiff seeking to introduce expert testimony in form of EDR interpretation may lay foundation by showing that theory underlying testimony is "generally accepted within the relevant scientific community, or by showing that the theory is reliable or valid through other means.") *See also Matos v. State*, 899 So. 2d 403 (Fla. Dist. Ct. App. 2005). (appellate court concluded that "recording and downloading [EDR] data is not a novel technique or method" and that State had proved that EDR data is "generally accepted in the relevant scientific field, warranting its introduction.")

the driver in the report can complicate the defense of the case.

These reports may be discoverable in many jurisdictions as a business record. If the driver is instructed to fill in the report, regardless of the type of accident or the existence of any injuries or damage, then it is difficult to argue that the report was generated in the anticipation of litigation. Also, it is important to review what kind of information (and conclusions) are to be provided by the driver in the report. Simple information such as the time, date and location of the accident and the names and addresses of witnesses should be gathered. Other information, such as conclusions regarding fault or culpability, may not be appropriate for this type of document.

(2) Preventability Determinations

Many companies have a policy of making in-house preventability determinations in all or some accidents. From the trucking company's perspective, preventability determinations are not required by the FMCSR's, and are not necessary in order to have an effective safety program. While discoverable in some jurisdictions, objections to admissibility can be made on relevance, undue prejudice, unqualified expert testimony, and subsequent remedial measures.

H. Driver Logs

Paper logs can be confusing for a driver to accurately complete. Often, what appears at first glance to be an HOS violation is simply a mistake in completing the log (e.g., logging on the incorrect line such as "off-duty not driving" when "on-duty not driving" applies)..

The log on the day of the accident is rarely complete, and often the driver forgets to capture the time when a loss occurs. The company needs to be sure that the driver completes the log accurately up until the time the accident happened. Logs are typically electronically stored when the driver turns his trip documents in for payment. However, if the driver is en route to deliver, those logs may not have been turned in to be electronically stored.

For companies that use electronic logs, the driver must electronically log in driving time, and the software syncs with the driving time of the truck. If HOS issues occur, the company knows in real time. Issues will arise based on the type of software package that the company uses. As electronic logs are not currently required under the FMCSR's, different software packages are available and offer a variety of features, which can include disabling the truck. What type of software will the FMCSA require in the future?

Plaintiff's attorneys will often seize upon the loss or destruction of driver's logs to support a claim for spoliation of evidence. In many cases, plaintiffs will argue that the spoliation of the logs justifies a presumption that the logs would have shown that the driver violated the driving time limitations, and that fatigue contributed to the collision. However, recent case law indicates that the courts will require more than this conclusory allegation.

In Georgia, two federal courts have held that plaintiff must show evidence that the collision resulted from fatigue or some other cause related to the logs in order to obtain a spoliation instruction. Without any evidence of causation, any such inference is inappropriate. (*See, Frey v. Gainey Transportation Services, Inc.*, 2006 WL 3734157 (N.D. Ga. 2006) and *Ballard v. Keen Transport, Inc., et al.*, CAFN 4:10-CV-54 (S.D. Ga.)). Alternatively, if the information in the logs is deemed to be relevant to the liability or causation issues in the case, the destruction of the logs could lead to sanctions for spoliation of evidence.

I. Alcohol Impairment/Blood Alcohol Levels/DOT Drug Test

When do the FMCSR's require a post accident drug/alcohol test? What happens when company guidelines are stricter, and require testing not required by the FMCSR's? The key here is to know when a post-accident D&A (drug and alcohol) test is required. Companies should be careful not to act prematurely. If it is not mandated or necessary due to the facts of the accident, a positive result could turn a case of favorable liability into a problem for the motor carrier and insurer. Also, don't forget to inquire about a D&A test for the claimant.

J. Maintenance Records

Maintenance records become relevant in a cause of action for negligent maintenance arising from a mechanical failure.[4] A prima facie case under this cause of action generally tracks the basic elements of negligence. *See, Hertz Corp. v. Goza*, 306 So. 2d 657, 660 (Miss. 1974); *Arnona v. Smith*, 749 So. 2d 63 (Miss. 1999).

In trucking litigation, proof of the first element – duty – will often be premised upon the FMCSR and/or related state statutes and regulations. *See, e.g.*, 49 C.F.R. §393 (pertaining to requirements and specifications for vehicle parts and accessories) and 49 C.F.R. § 396 (pertaining to inspections and maintenance). Note, however, that most states consider the federal regulations as setting forth minimal standards; therefore, it is important to review state statutory law or common law to determine if there is a heightened standard of care. *See, e.g., Nichols v. Coast Distrib. Sys.*, 621 N.E. 2d 738, 740 (Ohio 1993) ("Although violation of a statutory duty may constitute negligence, compliance with the statute does not necessarily establish ordinary care. As a general rule, the standard of care prescribed by a statute is a minimum standard of care. One who merely complies with a statute may still be found negligent, in certain situations, for filing to take the additional precautions that a reasonable person would.").

Proof of the second and third elements – breach and causation – will likely be premised, at least in part, upon the defendants' maintenance records. Did the company provide the maintenance or was another vendor used? What are the relevant retention periods? How are the older records stored and retrieved?

A typical allegation is that the brakes were out of adjustment. It is important to keep documentation to show compliance with FMCSR (49 C.F.R. Parts 393 and 396). A company should conduct regular pre-trip inspections, establish a written policy (and comply with it), and keep good maintenance records to defend such claims. Note that it may be more difficult to obtain maintenance records from owner/operators.

K. Seat Belt Usage/Non-Usage

The uncertainty surrounding the use of a seat belt defense can be quite frustrating and can make it very difficult to evaluate an automobile personal injury case. This difficult analysis must assess how evidence of "use" or "non-use" of seat belts may be admitted, and for what purposes. In most states, evidence of the "use" or "non-use" of the seat belt is restricted in one way or another. Many states generally prohibit the admission of seat belt "non-use" evidence. Where the states differ is on the issue of whether the evidence of seat belt "non-use" may be admitted at all, and if so, in what instances.

[4] Related theories of recovery may include negligence per se and *res ipsa loquitur*.

Mississippi law allows for evidence of seat belt "non-use" if the evidence has probative value other than as evidence of negligence. The admission of seat belt "non-use" has been allowed only in limited circumstances.[5]

L. Biomechanical Engineering Testimony

The admissibility of expert bio-mechanical engineering testimony is an ever evolving area. Generally speaking, bio-mechanical engineering uses a mechanical engineering approach to determining the forces involved in an accident and their effect on the Plaintiff, and whether the particular accident could have caused the particular injuries claimed by the Plaintiff. Currently, it seems that courts will generally allow the testimony of the bio-mechanical engineer to discuss the "big picture," as to whether the forces created in an accident could generally cause an injury, but the scope of their testimony is often limited when it comes to whether or not the particular accident caused the particular injuries claimed by Plaintiff.[6]

It is critical that the bio-mechanical engineer be able to meet the requirements of FRE 702, *Daubert* and/or *Frey*, in that the expert must rely on generally accepted principles and methods within the scientific community. It is also critical that the bio-mechanical engineer work hand-in-hand with your expert accident reconstructionist, and that the bio-mechanical engineer take a "hands-on" approach to the accident reconstruction, including visiting the scene and inspecting the subject vehicles. The accident reconstructionist must "set the table" for the bio-mechanical engineer, by providing accurate speed, time, distance data for the bio-mechanical engineer to rely upon.

In addition, the bio-mechanical engineer's testimony is strengthened by a computer animation of the accident scenario, which is even stronger evidence for a jury. There is a broad spectrum of case law on whether or not a particular state or a particular court will allow the video animation to be admitted into evidence or at least seen by the jury.

M. Guilty Plea/*Nolo Contendere* Plea

Questions often arise about the admissibility of evidence that the insured truck driver paid the fine for a violation charged in an accident (speeding, reckless driving, etc.). Sometimes the driver will simply pay the ticket. The answer will turn on whether this is considered a "guilty plea" or a "*nolo contendere* plea." If a guilty plea, it will generally come into evidence and the driver will be allowed to explain why he pled guilty (was from out of state, would have cost him more to fight it, etc.). If a *nolo* plea, it is generally inadmissible. Pursuant to Mississippi Code Section 99-19-3, payment of a ticket in advance is considered a *nolo* plea. As such, Rule 410 of the Federal Rules of Evidence - which bars evidence of *nolo* pleas in prior proceedings - in conjunction with the statute should render the ticket inadmissible. Note also that the back of the Mississippi Uniform Traffic Ticket contains language indicating that paying the ticket in advance is a *nolo* plea.

N. Negligent Entrustment, Hiring, Supervision, and Retention

The FMCSR imposes upon trucking companies the duty to hire minimally qualified drivers. Nearly all trucking cases include some allegation regarding negligent hiring, training, supervision, retention, and/or entrustment. A majority of jurisdictions have adopted the position that if the employer admits liability under a theory of respondent superior, then plaintiff cannot proceed against the employer for these types of imputed liability claims.

In Mississippi, negligent entrustment is likely only going to be an issue if the employer denies vicarious liability for the alleged negligence of its employee. As noted above, the Mississippi Supreme Court has held that it is error for a trial court to admit testimony regarding an employee's driving record prior to the subject accident if the employer has admitted the employee was acting within the scope of his employment at the time of the accident. *Nehi Bottling Co. of Ellisville v. Jefferson,* 84 So.2d 684, 686 (Miss.1956). Several Mississippi Federal courts have concluded that based upon the its holding in *Nehi*, that "the Supreme Court of Mississippi would approve the dismissal of a claim for negligent entrustment against an employer who has already confessed liability for its employee's conduct under the theory of respondeat superior." *Walker v. Smitty's Supply, Inc.*, 2008 WL 2487793, *5 (S.D. Miss. 2008). *See also, Cole v. Alton*, 567 F. Supp. 1084, 1087 (N.D. Miss. 1983).

O. Medical Specials – Gross amount or actual amount?

In Mississippi, the plaintiff will be allowed to present the gross amount of his medical bills at trial. *See Wal-Mart Stores, Inc. v. Frierson*, 818 So. 2d 1135 (Miss. 2002) and *Brandon HMA, Inc. v. Bradshaw*, 809 So. 2d 611 (Miss. 2001). The issue will generally arise when Medicaid or Medicare pay a portion of plaintiff's medical expenses, and pursuant to Medicaid/Medicare regulations, a portion of plaintiff's expenses are "written off." Typically defendants will file a motion in limine attempting to prevent the plaintiff from introducing evidence of any of the medical expenses which have been written off, arguing that allowing the introduction of these expenses would allow the plaintiff to realize an impermissible "windfall," as no one would ever be required to pay the amounts written off.

The Mississippi Supreme Court has rejected the "windfall" argument. Defendants will argue that allowing the plaintiff such a windfall runs counter to the purpose of compensatory damages, which is to make an injured party whole. *See generally Brandon*, 809 So. 2d at 618. Plaintiffs will counter that argument by pointing out that the long-standing collateral source rule prevents a tortfeasor from using "the money of others (insurance companies, gratuitous gifts, etc.) to reduce the cost of its own wrongdoing." *Id.* The *Brandon* Court agreed with the plaintiff's argument, and held as follows:

> Today for the first time, we hold that Medicaid payments are subject to the collateral source rule. Bradshaw's brief summarized the logic nicely: '[T]he Hospital (Brandon) does not get a break

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[5] *See* Miss. Code Ann. §63-2-1 and *Estate of Hunter v. General Motors Corp.*, 729 So.2d 1264 (Miss.1999) (holding that non-use of seat belts cannot be used to establish negligence, and endorsing use of limiting instruction that prohibits jury from considering such evidence to determine contributory negligence and causation). *See also, Palmer v. Volkswagen of America, Inc.*, 904 So.2d 1077 (Miss. 2005) (permitting introduction of such evidence to show that inadequate air bag warning was not proximate cause of injuries because plaintiffs' non-use of seat belts in spite of seat belt warnings demonstrated that they would not have heeded the airbag warnings even if they had been adequate). 6 See generally, *Hankla v. Jackson*, 699 S.E. 2d 610, 614 - 616 (Ga. Ct. App. 2010); *Burke v. TransAm Trucking, Inc.*, 617 F. Supp. 2d 327, 334-335 (M.D.Pa. 2009); and *Berner v. Carnival Corp.*, 632 F. Supp. 2d 1208, 1212 -1213 (S.D.Fla. 2009).

[6] See generally, *Hankla v. Jackson*, 699 S.E. 2d 610, 614 - 616 (Ga. Ct. App. 2010); *Burke v. TransAm Trucking, Inc.*, 617 F. Supp. 2d 327, 334-335 (M.D.Pa. 2009); and *Berner v. Carnival Corp.*, 632 F. Supp. 2d 1208, 1212 -1213 (S.D.Fla. 2009).

on damages just because it caused permanent injuries to a poor person." We conclude that the trial court did not err in admitting Bradshaw's medical bills which exceed the amount paid by Medicaid.

Id. at 619-20. In *Frierson*, the Mississippi Supreme Court explicitly extended this rule to Medicare payments. *Frierson*, 818 So. 2d at 1141. Given the generality of the collateral source rule, there is no reason to believe that these holdings can be limited to Medicaid and Medicare payments.

In *McGee v. River Region Medical Center,* 59 So.3d 575 (Miss. 2011), the Mississippi Supreme Court qualified its holdings in *Frierson* and *Bradshaw*: "We do not read these cases to establish a per se rule that 'written off' medical expenses are admissible." *Id.* at 581. Instead, "[f]rom an evidentiary perspective, every case turns on its own facts and the purpose for which the evidence is offered." *Id* . The question comes down to one of relevance, "[p]rovided he or she can demonstrate relevance, a plaintiff should be allowed to present evidence of his or her total medical expenses, including those amounts 'written off' by medical providers." *Id.*

The issue in *McGee* was framed as follows: "the question before this Court is whether an injured plaintiff may include in a claim for compensatory damages the amount 'written off' by a defendant health-care provider pursuant to its obligation as a Medicare provider." *Id.* at 580. "Pursuant to their agreements as Medicare providers, both hospitals adjusted or 'wrote off' the balance of those bills." *Id.* On the particular facts of that case, the Mississippi Supreme Court held that "although the entire medical bill may be relevant to aid the jury in assessing the seriousness and the extent of the injury, McGee may not recover as damages those amounts 'written off' by River Region." *Id.* at 581.

This holding was premised upon the fact that the collateral-source rule "applies only to prohibit the introduction of evidence of payments from collateral sources *wholly independent of the tortfeaser*." *Id.* (emphasis in original). However, in *McGee*, "River Region, to whom the bill was owed, [was] also the alleged tortfeasor[;] River Region provided medical services, but was not paid by McGee, Medicare, or any other source for a large portion of those services." *Id.* Therefore, the Mississippi Supreme Court held that the collateral-source rule did not even apply to the "written off" portion of the River Region bill. *Id.* The Court reasoned that "[t]o accept McGee's argument [that the "written off" amounts should be recoverable as damages] would require River Region to absorb the cost of the services rendered for which there was no reimbursement and then be potentially liable for those services again in damages." *Id.*

P. Accident Reports

The testimony of an investigating officer that the truck driver "caused" the accident as evidence of the driver's fault is generally not admissible. *See Ware v. State*, 790 So. 2d 201, 206-07 (Miss. Ct. App. 2001) (recognizing error in allowing officer not qualified by training, education, and experience to give expert opinion as accident reconstructionist on point of impact or how collision occurred); *see also Fleming v. Floyd*, 969 So. 2d 869, 872-73, 875-76 (Miss. 2007) (though reversing Court of Appeals' decision based on its improper re-weighing of evidence, Court did not overrule its holding that officer's opinions in accident report could not be extrapolated to show causation without being addressed by one qualified as accident reconstructionist). Similarly, testimony on causation is not admissible as lay testimony. If the officer did not see the accident - as a lay witness - he cannot testify to the cause of an accident he did not see. *See Ware*, 790 So. 2d at 206-07; Miss. R. Evid. 701 (requiring lay witness testimony to be "rationally based on perception of witness"). Further, the police report and the issuance of a traffic citation are not generally admissible proof of causation. The report and citation determination are "nothing more than a conclusion of the patrolman" and not admissible. *See Hall v. Boykin*, 207 So. 2d 645 (Miss. 1968) (error in admitting drawing made by highway patrolman with arrows depicting position of two vehicles before and after collision because patrolman did not witness accident; held that accident report which contained drawing was no more than impermissible conclusion of patrolman).

Q. Surveillance

Surveillance video can be a valuable tool for driving down the settlement value of a case. The use surveillance video at mediation can be dramatic, specifically in incidents where plaintiffs have testified that they are significantly impaired and they are recorded performing vigorous activities. Parties are generally required to produce surveillance video, but the critical question is when the surveillance has to be produced. Can the surveillance be held until trial and used for impeachment, or must it be disclosed during discovery? You need to carefully analyze the case law in your state to be sure you do not lose the ability to use your surveillance by waiting too late to disclose it.

R. Punitive Damages

How does the defense keep out all that highly prejudicial, irrelevant and unrelated information that, all of the sudden, makes you look like a "bad" trucking company?

An aggressive plaintiff's lawyer will, regardless of facts, treat each trucking case as if it involves fatigue; violations of HOS regulations; destruction of evidence by the defense; false log books; pressure put on the driver by the trucking company to meet an unreasonable delivery schedule; false driver qualification files; a driver with sleep apnea (or other sleep disorder); and punitive damages.

Plaintiff will try to create a trial that is no longer focused on the accident in question, but on whether you are "bad" company worthy of punitive damage award. Plaintiff will press fatigue issues and negligent entrustment claims. While the driver may be over hours, Plaintiff must still show **causation**, and the defense will expend many hours arguing that a fatigue theory is inadmissible. The majority rule favors defense as to negligent entrustment claims (when vicarious liability is admitted).

Plaintiff will attempt to show you are a "bad company," you hire and retain "bad drivers", and you both are guilty of "prior bad acts" as opposed to determining who was at fault, and whether or not Plaintiff was actually injured. Plaintiff will portray the driver as a "bad actor" and seek to create conflicts between trucking company and driver. Plaintiff will emphasize each FMCSR you have violated, each specific brake on your truck out of specification, each tire that has insufficient tread depth, each log book violation, a "fatigue theory" of some sort, and negligent hiring / training / supervision / entrustment claims (even though these issues may have absolutely nothing to do with the accident itself). Whenever possible, the trucking company should file an early motion for summary judgment on the issue of punitive damages.

S. Timing Effect – No Ruling on Motions In Limine until Eve of Trial

Many judges will wait until the eve of trial to rule on evidentiary motions, perhaps in hope that the lag time will spur settlement. Practitioners should have contingency plans in the event that an unfavorable ruling on evidentiary motions is received, especially if this decision will change the outcome/exposure of the case. The most successful strategy is to file them early and then attract the Court's attention to make a ruling. Generally, this can be accomplished with a scheduling order that provides early deadlines for evidentiary motions, and "builds in" time for the Court to resolve the motions prior to trial, or prior to the entry of the pretrial order. It is also helpful to set a pretrial conference at least 30 days prior to trial with the hope the Court will rule on all pending motions.

If the Court does not rule on Motions in Limine until just before a jury is selected, this can be very challenging when trying to evaluate a case with a client. If there are borderline admissibility issues, the value of the case can be significantly affected one way or the other depending on how the Court rules. It is suggested that practitioners research and brief the admissibility issues of critical importance well in advance of the pre-trial conference.

It is critically important to alert the client well in advance of admissibility issues that can dramatically affect the value of a case. The client needs to know that an adverse piece of evidence may or may not come into evidence and the resulting effect on the jury's verdict it might have. The client needs to know of any appellate issues created by the Court admitting such adverse evidence. While this makes valuing the case for settlement more challenging, if the client knows early they can more effectively assess the risks and make an informed decision.

VI. Conclusion

There are obviously numerous other evidentiary/admissibility issues that are likely to arise in a trucking liability case, which are beyond the scope of this article, but hopefully the selected topics and issues addressed herein will provide a good framework for your consideration as you evaluate your case, conduct discovery, engage in settlement negotiations, and assess trial strategy. ■

The Case for the Constitutionality...
Continued from page 6

Neither does the damages cap violate the right to trial by jury. Section 31 of the State Constitution provides that "[t]he right of trial by jury shall remain inviolate . . . ." In *City of Jackson v. Clark*,[17] the Mississippi Supreme Court expressly refused to adopt an "absolutist" construction of the term "inviolate," noting that Section 31 "does not mean that it shall be totally immune from all reasonable regulations."[18]

A party's right to trial by jury is not violated when the Legislature limits recoverable damages. The State Legislature has adopted numerous statutes that restrict the remedies available in negligence claims without violating Section 31. The most famous example is our State's comparative negligence statutes. This enactment, the first of its type in the nation, abolished the common law defense of contributory negligence and was upheld against a Section 31 attack in *Natchez & S. R.R. v. Crawford*.[19]

The Mississippi Supreme Court twice has considered the constitutionality of statutory damages limitations, and both times upheld the statute. In *Wells by Wells v. Panola County Bd. of Educ*,[20] the Court found the Mississippi Accident Contingent Fund Statute, which limited the damages to be recovered for school bus accidents, did not violate Section 31 because the plaintiff's personal injury claim against the county school board was not available at common law. In *Walters v. Blackledge*,[21] the Court upheld the Mississippi Workers' Compensation Act as constitutional since it "takes away the cause of action on the one hand and the ground of defense on the other and merges both in a statutory indemnity fixed and certain." The general tort of negligence was not recognized at common law or even when Mississippi first became a State in 1817, and it did not become generally recognized in our country until after 1850. Since the tort did not exist at common law, Section 31 does not inhibit the ability of the State Legislature to adopt laws that affect the contours of that action.

The limitation on recovery does not interfere with a party's right of trial by jury because the fact finder still determines whether the alleged injured party is entitled to recover noneconomic damages. The statute simply limits the amount to be recovered. Because the Legislature has the power to eliminate the right of recovery altogether, this limitation on the amount recovery does not violate Section 31.

The great majority of State Supreme Courts to address the issue have held that statutory caps on non-economic damages are constitutional, and they do not violate the plaintiff's right to trial by jury or other state constitutional provisions. While some of these state appellate courts struggle mightily with whether a state legislature can adopt a statute that affects the common law remedy of damages in negligence actions, the great majority of State supreme courts have uniformly upheld these types of statutes as a proper exercise of the Legislature's police power.

Justice Oliver Wendell Holmes would have had a field day with the suggestion that a state statutory cap on non-economic damages is beyond the ken of a state legislature. The enactment of such a statute is neither liberal nor conservative; it is what the Legal Department under a republican form of government is charged to do. To the extent the legislative solution becomes outmoded or thought to be unfair and unjust the solution is to alter or repeal the statute. ■

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[17] 118 So. 350, 353-54 (Miss. 1928)
[18] City of Jackson, 118 So. at 351 (trial court's order finding that the defendant had waived its right to a jury trial by failing to request trial by jury as authorized by state statute when filing its answer did not violate Section 31)
[19] 99 Miss. 697, 55 So. 596, 598 (1911)
[20] 645 So. 2d 883 (Miss. 1994)
[21] 220 Miss. 485, 71 So. 2d 433, 445 (1954)