1. Requirements for use of hands free devices in each state

Florida appears to permit the use of hands free devices in its “Ban on Texting While Driving Law.” §316.305, Fla. Stat. (2016). The Ban specifically exempts “[c]onducting wireless interpersonal communication that does not require manual entry of multiple letters, numbers, or symbols, except to activate, deactivate, or initiate a feature or function” and “[c]onducting wireless interpersonal communication that does not require reading text messages, except to activate, deactivate, or initiate a feature or function.” §316.305(5) and (6), Fla. Stat.

However, Florida’s Ban prohibits all moving motor vehicle drivers from “manually typing or entering multiple letters, numbers, symbols, or other characters into a wireless communications device or while sending or reading data…for the purpose of nonvoice interpersonal communications…” § 316.305(3)(a) (emphasis added). The statute defines “wireless communications device” as “any handheld device used or capable of being used in a handheld manner,” that connects “to the Internet or communications service…and that allows text
communications.” *Id.* In addition to the hands free exceptions identified above, subpart (3)(b) of §316.305 sets forth a number of additional exceptions to this Ban, including reporting emergency, criminal, or “suspicious activity” to law enforcement; receiving messages that are related to operation or navigation of the vehicle, safety-related such as traffic and weather alerts, data used by the vehicle, or radio broadcasts, and using a device for navigation purposes. Enforcement of the Ban by law enforcement officers is accomplished only through secondary action, meaning when a motor vehicle operator has already been detained for a suspected violation of another offense. §316.305(5), Fla. Stat.

Like many states, Florida prohibits the use of handheld electronic devices while operating commercial motor vehicles, and prescribe fines for such violations. See §316.302(1), Fla. Stat. *generally adopting* 49 C.F.R. §§ 382, 385, and 390-397; *See also* §316.3025, Fla. Stat. This restriction applies to both texting and talking on handheld devices. See §316.3025(6)(a) *citing generally* 49 C.F.R. §§ 392.80, 392.82. A first offense violation is $500 for the driver and $2,750 for the company, §316.3025(6), Fla. Stat. A second offense violation will result in disqualification of the commercial driver’s license for 60 days, as well as a $1,000 fine for the driver and a $5,000 fine for the company. *Id.* Third and subsequent violations will result in a 120 day license disqualification, as well as a $2,750 fine for the driver and a $11,000 fine for the company. *Id.*

An emergency exemption to the prohibition on using handheld electronic devices is provided in the event of a declared emergency. See § 316.3025(6)(c), Fla. Stat. *citing generally* 49 C.F.R. § 392.82; *See also* 49 C.F.R. 392.80(d). The emergency exception allows use of handheld devices while driving when necessary to communicate with law enforcement officials or other emergency services. See §316.302(1)(c), Fla. Stat. *citing generally* 49 C.F.R. §§ 392.80(d), 392.82(c). Commercial motor vehicle drivers may also use handheld devices when they have moved the vehicle to the side of, or off, the highway and the vehicle is halted in a location where it can safely remain stationary. See §316.302(1), Fla. Stat. *citing generally* 49 C.F.R. §392.82(b).

2. **Discovery and admissibility of preventability determinations**

While there is no case law in Florida regarding the discovery or admissibility of “preventability determinations” per se, to the extent that a company conducts a post-accident risk management investigation in anticipation of litigation that addresses whether an accident was preventable, the information qualifies for work-product protection and is not discoverable absent a showing of need or undue hardship. *Heartland Express, Inc. v. Torres*, 90 So. 3d 365, 368 (Fla. 1st DCA 2012); *Royal Caribbean Cruises, Ltd. v. Doe*, 964 So. 2d 713, 718 (Fla. 3rd DCA 2007) (holding that incident reports filled out by employees and filed with the risk management department to be used to defend against potential litigation are protected as work-product).

3. **Spoliation of evidence, specifically related to electronic data, and whether there is a duty to preserve absent a specific demand**

Generally, the duty to preserve evidence is dictated by statute, contract, or by a properly served discovery request. *Royal & Sunalliance v. Lauderdale Marine Center*, 877 So. 2d 843, 845 (Fla. 4th DCA 2004). While there are currently no Florida Statutes mandating preservation of
evidence in trucking litigation specifically, the Florida Supreme Court has recognized a common law duty to preserve evidence when litigation is imminent. *League of Women Voters of Florida v. Detzner*, 172 So. 3d 363, 391 (2015). The duty to preserve evidence would extend to electronic data, including data from event data recorders, which is admissible evidence. *Matos v. State*, 899 So. 2d 403, 407 (Fla. 4th DCA 2005).

In *Martino v. Wal-Mart Stores, Inc.*, 908 So. 2d 342, 347 (2005), the Florida Supreme Court abolished first-party causes of action for spoliation of evidence. If the spoliation of evidence is negligent, and the absence of the evidence hinders the plaintiff’s ability to establish a prima facie case, a rebuttable presumption of negligence exists, and the burden of proof shifts to the defendant. *Id.* at 346-347; see also *Bulkmatic Transport Co. v. Taylor*, 860 So. 2d 436, 448-449 (Fla. 1st DCA 2003). If the spoliation of evidence is intentional, sanctions can be entered in accordance with Fla. R. Civ. P. 1.380(b)(2), and the jury can infer from such a finding that the records would have contained indications of negligence. *Martino*, 908 So. 2d at 346.

Florida Appellate Courts recognize an independent cause of action for spoliation against third-parties, however, these claims do not arise until the underlying action is complete. *Lincoln Ins. Co. v. Home Emergency Servs., Inc.*, 812 So. 2d 433, 434-435 (Fla. 3d DCA 2001); *Townsend v. Conshor, Inc.*, 832 So. 2d 166, 167 (Fla. 2d DCA 2002); *Jost v. Lakeland*, 844 So. 2d 656, 657-658 (Fla. 2d DCA 2003). In order to establish a third-party cause of action for spoliation, the party must show: (1) the missing or destroyed evidence existed at one time, (2) the non-moving, allegedly spoilating party had a duty to preserve the evidence, and (3) the allegedly spoiled evidence was crucial to the movant’s ability to prove a prima facie case or defense. *Walter v. Carnival Corp.*, 2010 WL 2927962 (S.D. Fla. 2010); *QBE Ins. Corp. v. Jorda Enterprises, Inc.*, 2012 WL 948838 (S.D. Fla. 2012).

4. Broker exposure or liability for motor carrier negligence

A “broker” is a person who, for compensation, arranges or offers to arrange, the transportation of property by an authorized motor carrier. FMCSR § 371.2(a). The most common cause of action alleged against brokers is negligent selection of the motor carrier. *See Davies v. Commercial Metals Co.*, 46 So. 3d 71 (Fla. 5th DCA 2010). To state a claim for negligent selection, a plaintiff must plead and prove: (1) the motor carrier was incompetent or unfit to perform the work, (2) the broker knew, or reasonably should have known, of the particular incompetence or unfitness, and (3) the incompetence or unfitness was a proximate cause of the plaintiff’s injury. *Id.* at 74.

The standard of care for a broker generally involves: (1) determining whether the motor carrier has federal operating authority, (2) checking the motor carrier’s safety ratings and statistics, (3) having a system in place for ongoing monitoring of the motor carrier’s safety statistics, (4) checking to see that the motor carrier is in a satisfactory financial condition, and (5) checking to see if the motor carrier maintains the proper insurance. A breach of any of these duties could signal a valid cause of action against a broker. That being said, establishing proximate cause can be difficult and prove fatal to a cause of action against the broker. *See Davies*, 46 So. 3d at 74.

Brokers can also face liability when the motor carrier is deemed to be the broker’s agent. In order to establish agency, the broker must have the right to control the driver as to the means of doing
his work (i.e. route driven, hours worked, payment of expenses, reporting requirements, etc.). See *King v. Young*, 107 So. 2d 751, 753 (Fla. 2d DCA 1958).

Other potential theories of liability include: (1) non-delegable duty to the public at large to avoid unreasonable risk of harm to others; (2) broker acting as a motor carrier; (3) joint venture between the broker and motor carrier; and (4) broker as the alter ego of the motor carrier.

5. **Logo or placard liability – whether motor carrier liable for any vehicle bearing its Department of Transportation identification placard, company name, or business logo**

Florida Courts generally recognizes that “logo liability” came to an end as a result of the changes to the Interstate Commerce Commission (ICC) regulations that occurred in the 1990s, along with the abolishment of the ICC and shift of licensing and regulation to the Department of Transportation. Therefore, motor carriers who lease tractors are no longer liable as a matter of law for the negligence of hired drivers merely because their company logo or placard was on the vehicle when the accident occurred. *Saullo v. Douglas*, 957 So. 2d 80 (Fla. 5th DCA 2007).

Under the current state of the law a motor carrier’s potential liability is fact-specific, and determined based on the theories of vicarious liability, and strict liability. *Id.*

In *Saullo v. Douglas*, a case of first impression, the Fifth District Court of Appeals (DCA) analyzed a motor carrier’s tort liability when the negligent driver was an independent contractor, and the motor carrier leased the tractor. In this situation, the motor carrier could be held vicariously liable if the independent contractor was acting within the scope of his agency. *Id.* at 86. The motor carrier could also be held strictly liable under the dangerous instrumentality doctrine when a valid lease of the tractor is demonstrated. *Id.* at 87.

6. **Offers of Judgment**

*See* Florida Rule of Civil Procedure 1.442 and Florida Statute §768.79 regarding Florida's rules on Proposals for Settlement.

F.S. §768.79 states in any civil action for damages filed in the courts of this state, if a defendant files an offer of judgment which is not accepted by the plaintiff within 30 days, the defendant shall be entitled to recover reasonable costs and attorney's fees incurred by her or him on the defendant's behalf pursuant to a policy of liability insurance or other contract from the date of filing of the offer if the judgment is one of no liability or the judgment obtained by the plaintiff is at least 25% less than such offer, and the court shall set off such costs and attorney's fees against the award. Where such costs and attorney's fees total more than the judgment, the court shall enter the judgment for the defendant against the plaintiff for the amount of the costs and the fees, less the amount of the plaintiff's award. If a plaintiff files a demand for judgment which is not accepted by the defendant within 30 days and the plaintiff recovers a judgment in an amount at least 25% greater than the offer, she or he shall be entitled to recover reasonable costs and attorney's fees incurred from the date of the filing of the demand. If rejected, neither the offer or the demand is admissible in subsequent litigation, except for pursuing penalties under this section.
7. Punitive Damages

a. Are punitive damages insurable?

No. Generally speaking, the inclusion of punitive damages within the liability insurance coverage is declared invalid as contrary to public policy. An active tortfeasor seeking the benefit of the liability coverage for protection against punitive damages normally will not prevail. However, if the insured seeking protection from punitive damages is liable only by reason of vicarious liability, the policy is often found to cover the damage award.

b. Any limitations or how much may be awarded as punitive damages?

Yes. Section 768.73, Florida Statutes, provides that an award of punitive damages may not exceed the greater of: (1) three times the amount of compensatory damages awarded to each claimant entitled thereto or (2) the sum of $500,000.00.

However, if the wrongful conduct was found to be (1) motivated solely by unreasonable financial gain and (2) the unreasonably dangerous nature of the conduct, together with the high likelihood of injury resulting from the conduct, was actually known by the managing agent, director, officer, or other person responsible for making policy decisions, then punitive damages are capped at the greater of either (1) four times the amount of compensatory damages awarded to each claimant, or (2) the sum of $2 million.

8. Citations or criminal convictions resulting from a motor vehicle accident

a. Are citations admissible in the civil litigation?

Under Florida law, a party's past driving record is not admissible under normal circumstances. See Dade County v. Carucci, 349 So. 2d 734 (Fla. 3d DCA 1977). Section 316.066, Florida Statutes, provides that crash reports made by a person involved in a crash and statements made by such a person to a law enforcement officer for the purpose of completing a crash report may not be used as evidence in any civil trial. See Angelucci v. Gov't Emples. Ins. Co., 412 Fed. Appx. 206 (11th Cir. 2011). Furthermore, Section 316.650, Florida Statutes, provides that traffic citations shall not be admissible evidence at trial, except when used as evidence of falsification, forgery, uttering, fraud, or perjury, or when used as physical evidence resulting from a forensic examination of the citation. Fla. Stat. § 316.650(9). However, the results of breath, urine, and blood tests administered in accordance with Sections 316.1932 or 316.1933, Florida Statutes, are not confidential and are admissible into evidence when otherwise admissible for any civil action arising out of acts alleged to have been committed by any person while driving, or in actual physical control of, a vehicle while under the influence of alcoholic beverages or controlled substances, when affected to the extent the person's normal faculties were impaired or to the extent that he or she was deprived of full possession of his or her normal faculties. See Fla. Stat. § 316.1934(2).
b. How does a guilty plea or verdict impact civil litigation? Plea of no contest?

Evidence of a criminal conviction, except for impeachment purposes, is typically inadmissible in a civil suit. *Stevens v. Duke*, 42 So. 2d 361 (Fla. 1949). A party may attack the credibility of any witness by evidence that the witness has been convicted of a crime punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, or if the crime involved dishonesty or a false statement regardless of the punishment, unless (1) the conviction was so remote in time that it has no bearing on the present character of the witness, or (2) the crime was a juvenile adjudication. Fla. Stat. § 90.610(1). Additionally, a record of any prior conviction may be introduced at trial to impeach the credibility of a witness who denies a prior conviction. *Rommell v. Firestone Tire & Rubber Company*, 394 So. 2d 572 (Fla. 5th DCA 1981). In Florida, a defendant's no contest plea with adjudication of guilt withheld constitutes a prior "conviction" under the sentencing guidelines. *See Montgomery v. State*, 897 So. 2d. 1282 (Fla. 2005). "Conviction" means a guilty verdict by a jury or judge, or a guilty or nolo contendere plea by a defendant, regardless of adjudication of guilt. Fla. Stat. § 960.291(3).

Section 318.14, Florida Statutes, provides that a person's admission to a noncriminal traffic infraction is not admissible in any civil proceeding. However, Section 318.19, Florida Statutes, provides that a traffic defendant's plea of guilty to (1) any infraction which results in a crash that causes the death of another, (2) any infraction that results in a crash that causes "serious bodily injury" of another as defined in Section 316.1933(1), (3) any infraction that involves driving a vehicle past a school bus on the side that children enter and exit when the school bus displays a stop signal, (4) any infraction that involves driving a vehicle on a highway which is not constructed so as to prevent any of its load from escaping therefrom, (5) any infraction that involves hauling, on a public road or highway open to the public, dirt, sand, lime rock, gravel, silica, or other similar aggregate or trash, garbage, any inanimate objects, or any similar materials that could fall or blow from such vehicle, without preventing such materials from escaping from such vehicle, or (6) any infraction of exceeding the speed limit by 30 miles per hour or more, may be admissible in a civil trial. *See Mackey v. Reserve Ins. Co.*, 349 So. 2d 830 (Fla. 1st DCA 1977).

9. Recent, significant trucking or transportation verdicts in each state

*State Farm Mut. Auto. Ins. Co.v. Bailey*, 203 So. 3d 995 (Fla. 2d DCA 2016). The Second District held that the employee of a named insured who was driving the insured’s crane truck, but who had exited the truck thirty (30) minutes and was standing ten (10) feet away from the truck before being struck was not entitled to uninsured motorist coverage, because under policy provisions, he was not “occupying” the vehicle at the time of the accident.

*Padilla v. Schwartz*, 199 So. 3d 516 (Fla. 4th DCA 2016). Where the rear driver rebutted the rear-end presumption, the Fourth District reversed a summary judgment in favor of the front driver. The rear driver introduced evidence that the front driver contributed to the accident by suddenly switching lanes.
Lesnik v. Duval Ford, LLC, 185 So. 3d 577 (Fla. 1st DCA 2016). In this products liability action, the First District held that a Ford dealer, whose subcontractor installed a lift kit for a new F-250 owner, who later modified the suspension, and the Chevrolet dealer who later sold the truck, were not liable to the subsequent owner, who was injured when the steering and suspension suddenly failed. At the time of the accident, although the tires were 2” larger than truck specifications, there was no evidence when the change occurred. Summary judgment was properly entered for the defendants because there was no evidence that the lift kit was defective, improperly installed or inherently dangerous. The Chevrolet dealer had no duty to inspect the vehicle for latent defects.

Carriuolo v. GM Co., 823 F.3d 977, 980 (11th Cir. 2016). The Eleventh Circuit affirmed the certification of a consumer class action under the Florida Deceptive and Unfair Trade Practices Act alleging misrepresentations as to the safety ratings stickers on 2014 Cadillac CTS sedans. Because FDUTPA did not require reliance, the consumers would not have to show that every class member saw the sticker and was subjectively deceived by it. Also, the court found that because a vehicle with more safety ratings might be able to attract greater market demand and a higher price than a car without safety ratings, the misleading sticker might support actual damages.

Edelbrock v. TT of Naples, Inc., 2016 U.S. Dist. LEXIS 103195, at *4-6 (M.D. Fla. Aug. 5, 2016). Where plaintiff alleged that defendant was a freight forwarder liable for damage to his Aston Martin under the Carmack Amendment, 49 U.S.C. § 14706, which makes a common carrier liable for actual loss of or damage to shipments in interstate commerce, defendant moved to dismiss on the ground that because it was akin to a broker, it was not subject to liability under the Carmack Amendment. Where Plaintiff tendered his car to defendant for transport and defendant then selected a carrier, the alleged facts permitted an inference that defendant could be liable as a freight forwarder.

Lloyd v. All My Sons Moving & Storage, 2016 U.S. Dist. LEXIS 92962 (M.D. Fla. July 18, 2016). Where plaintiff’s goods went missing during interstate transport by defendant, her claims for breach of contract and intentional infliction of emotional distress were held preempted by the Carmack Amendment.

Castillo v. Lara’s Trucking, Inc., 2017 U.S. Dist. LEXIS 20003 (S.D. Fla. Feb. 10, 2017). The federal court addressed whether the trucking company was subject to the jurisdiction of the Secretary of Commerce and, if so, whether the defendant was exempt from the FLSA pursuant to the Motor Carrier Act, such that the truck driver was not entitled to overtime compensation. The answer to the first question was yes. Although plaintiff argued that his employment involved transporting goods within the state, the shipped goods were part of a continuous stream of interstate commerce. With regard to the second question, the court addressed the SAFETA-LA Technical Corrections Act of 2008, which applied the MCA exemption if employees worked with vehicles weighing more than 10,000 pounds. Here, the evidence showed that defendant’s trucks weighed more than 10,000 pounds such that plaintiff was not entitled to overtime compensation.
10. **Admissible evidence regarding medical damages - can plaintiff seek to recover the amount charged by the medical providers or the amount actually paid, and is there a basis for post-verdict reductions or off-sets**

Generally, a Plaintiff is entitled to submit gross or “retail” medical bills to the jury, subject to a post-verdict collateral source setoff. The following exceptions apply:

a. Social Security Disability Insurance, Automobile Insurance (PIP/BI only), Health Insurance, HMO/PPO Insurance, and Voluntary Disability Insurance.

Plaintiff may submit gross or “retail” bills to the jury. Defendant is entitled to a post-verdict reduction in the amounts paid by automobile insurance (PIP/BI only). F.S. §786.76(1)(2)(a)(1)-(4). Defendant is further entitled to a post-verdict reduction in the amounts contractually adjusted by provider in accepting payment from any of the sources in 25(A). Plaintiff is entitled to collect damages for past medical expenses for health insurance and HMO/PPO lien amounts. *Goble v. Frohman*, 901 So. 2d 830, 833 (Fla. 2005).

b. Medicare, Medicaid, and Workers Compensation

The Florida Legislature has abrogated the common law collateral source damages rule. Trial courts must reduce awards by the total of all amounts which have been paid for the benefit of the claimant, or which are otherwise available to the claimant, from all collateral sources. § 768.76(1), Fla. Stat. There are certain exceptions to this rule. For example, there are no reductions for collateral sources for which a subrogation or reimbursement right exists. § 768.76(1), Fla. Stat.

Benefits received under Medicare, or any other federal program providing for a federal government lien on or right of reimbursement from the plaintiff's recovery, the Florida Worker's Compensation Law, the Medicaid Program of Title XIX of the Social Security Act or from any medical services program administered by the Florida Department of Health shall not be considered a collateral source. § 768.76(2)(b), Fla. Stat. This exception does not result in a windfall to plaintiffs because Medicare and similar collateral sources retain a right of subrogation or reimbursement. Additionally, § 768.76 does not allow reductions for future medical expenses. *Joerg v. State Farm Mut. Auto. Ins. Co.*, 176 So. 3d 1247 (Fla. 2015)

11. **Driver criminal history and how it affects negligent hiring and supervision claims**

In cases involving claims against an employer for negligent hiring, negligent supervision or negligent retention, evidence of a driver's past driving record and citations may be admissible. *See Petrick v. N.H. Ins. Co.*, 379 So. 2d 1287 (Fla. 1st DCA 1979). Furthermore, prior arrests and convictions unrelated to driving infractions may also be admissible in a claim for negligent hiring, retention or supervision if the arrests or convictions are sufficient to place the employer on notice of a driver's unfitness for employment or retention or to establish what information the employer likely would have found had it made reasonable inquiry. *See Tallahassee Furniture*
Co. v. Harrison, 583 So. 2d 744 (Fla. 1st DCA 1991). Finally, Florida courts have found an employee's psychiatric treatment history relevant and admissible in support of negligent hiring and supervision claims.