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1. Identify the venues/areas in your State that are considered dangerous or liberal.

Montana can be described as both conservative and populist. Montanans tend to be skeptical of both government and big business. Our voters lean Republican pretty strongly (Trump won by 20 points), but we have elected Democrats as governor and one U.S. Senator for many years. The areas that vote Democrat also tend to present the greatest risk to corporate defendants and are around Great Falls, Butte/Anaconda, and Missoula, and there are pockets of increasing liberalism around Bozeman and Helena, and south of Missoula. In those areas, and on the Montana Supreme Court, the judges are often plaintiff-friendly. However, even in those venues, most jurors have at least a high school education, are employed full-time or retired after a full career, and have some experience working with or around equipment. As a result, shocking high-dollar verdicts are relatively infrequent here.

2. Identify any significant trucking verdicts in your State during 2017-2018, both favorable and unfavorable from the trucking company's perspective.

There have not been any significant civil jury verdicts involving trucking cases in the past year. However, there was one significant criminal verdict. Woody's Trucking LLC and its

owner, Donald Wood Jr., were found guilty of 13 of 14 federal charges in 2018, including conspiracy, wire fraud, mail fraud, transportation of hazardous materials without placards, transportation of hazardous materials without proper shipping papers and obstruction of justice. In February 2012, the trucking company began taking natural gas condensate, a flammable hazardous material, from eastern North Dakota to Custom Carbon Processing Inc., an oil processing plant in Eastern Montana. Later in 2012, an explosion occurred during the offloading of hazardous natural gas condensate being transported by the company. Three people were injured and extensive damage done to property. Wood misrepresented to his insurer the contents of the material the company was hauling and falsified documents to back up his story. *U.S. v. Woody's Trucking, LLC*, U.S. District Court, District of Montana, Cause No. CR 17-138-BLG-SPW.

In 2016, there was a defense verdict on a significant trucking accident in Flathead County. In that case, a state court jury rendered a defense verdict in a catastrophic injury case involving a collision between a motorcyclist and a truck operated by Rocky Mountain Transportation. The defense argued plaintiff's motorcycle crossed into the truck's lane as the two vehicles passed each other traveling opposite directions. It appears the case was won on expert testimony. The defense had a reconstructionist who was allowed to testify the truck was traveling in his own lane and the plaintiff was traveling too fast for the road conditions. Plaintiff's expert was excluded except on rebuttal. *Holoyuk v. Rocky Mountain Transportation*, Montana Eleventh District Court, Flathead County, DV-14-1167 (Jan. 6, 2016).

In 2017, a state district court in Roosevelt County granted summary judgment to the operator of a fertilizer truck that was involved in a multiple vehicle accident. In granting summary judgment, the court noted that one of the co-defendants was driving while under the influence of THC and that he set the chain of events into action that caused the accident. The court rejected plaintiffs' arguments that the fertilizer truck violated a Montana statute requiring the use of a flag man and held that even if the truck driver had violated the statute, the violation was not the cause of the accident and was therefore immaterial. *Means v. Beckers*, 2017 WL 9083846 (2017).

3. Are accident animations and/or computer-generated evidence admissible in you State?

Yes. Montana district courts have discretion to admit such evidence provided that such evidence is supported by an adequate factual foundation, determined to be reliable, and the requirements of Mont. R. Evid. 702 are met. See *Wheaton v. Bradford*, 2013 MT 21, ¶¶ 18-19, 370 Mont. 93, 300 P.3d 1162 ("Generally, accident reconstruction is not a novel science and has been commonly recognized and used in the courts"). Accident reconstruction evidence involving computer simulations has been admitted after inquiry regarding whether the reasoning or methodology behind the testimony is scientifically valid and whether the reasoning or methodology can be applied to the facts in issue. *Id.*, ¶ 17.

4. Identify any significant decisions or trends in your State in the past two (2) years regarding (a) retention and spoliation of in-cab videos and (b) admissibility of in-cab videos.

(a) retention and spoliation of in-cab videos

There are no cases addressing spoliation of in-cab videos, but the issue would be handled like preservation of any other evidence. Direct party spoliation is treated as a discovery abuse and punishable by the district court under the Montana Rules of Civil Procedure, even when the evidence is lost or destroyed prior to a lawsuit being filed. *Spotted Horse v. BNSF R.R. Co.*, 2015 MT 148, ¶¶ 20-22, 379 Mont. 314, 320, 350 P.3d 52, 56. The Montana Supreme Court will uphold a district court's sanction for spoliation of evidence where a civil lawsuit is "reasonably foreseeable," and the party either negligently or intentionally failed to preserve relevant evidence. *Id.*, ¶¶ 20-39. District courts are free to impose a variety of sanctions to address spoliation, including an adverse inference jury instruction, attorneys' fees and costs for discovery into the issue, or a default judgment. *Id.* In *Spotted Horse*, the plaintiff appealed the district court's decision not to issue a default judgment against BNSF for its failure to preserve video footage of an accident. *Id.* The Montana Supreme Court found the district court erred in its handling of the spoliation and remanded the case for a new trial with instruction that the district court impose a sanction "commensurate with the significance of BNSF's actions." *Id.*, ¶ 39. Recently, however, the Montana Supreme Court held that extreme sanctions involving truncating the litigation on the merits are "generally proper only when the predicate discovery abuse is so inexcusable and prejudicial that it outweighs the express preference in M. R. Civ. P. 1 for adjudication on the merits." *Montana State U.-Bozeman v. Montana First Jud. Dist. Ct.*, 2018 MT 220, ¶ 21, 392 Mont. 458, 469, 426 P.3d 541, 550. The party seeking the extreme sanction of precluding or truncating litigation on the merits has the burden of showing that: (1) the lost item or evidence was subject to a duty to preserve; (2) the other party intentionally, knowingly, or negligently breached the duty; and (3) the loss was sufficiently prejudicial to outweigh the overarching policy of M. R. Civ. P. 1 for resolution of disputed claims on the merits. *Id.*, ¶ 25.

(b) admissibility of in-cab videos

There have not been any Montana cases addressing the admissibility of in-cab videos in trucking cases. However, in-cab videos are routinely admitted in criminal proceedings. *See State v. LaTray*, 432 P.3d 707.

5. What is your State's applicable law and/or regulation regarding the retention of telematics data, including but not limited to, any identification of the time frames and/or scope for retention of telematics data and any requirement that third party vendors be placed on notice of spoliation/retention letters.

Montana requires that a telematics agreement specify the length of time the insurer or third party may collect, store, transmit, or otherwise retain the data. Mont. Code Ann. § 33-23-222. Under this section, the agreement must also specify the recording device and types of data retained. *Id.* Furthermore, data collected, stored, or transmitted by a recording device under a telematics agreement may not be used by an insurer or third party named in the agreement for uses other than those disclosed in the agreement. Mont. Code Ann. § 33-23-224(2).

The requirements to retain the data would be analyzed like any other evidence, as outlined in the section regarding spoliation above.

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

Evidence of any measured amount or detected presence of alcohol, drugs, or combination of both is admissible “upon the trial of a criminal action or *other proceeding* arising out of acts alleged to have been committed by a person in violation of driving under the influence of alcohol or drugs.” Mont. Code Ann. § 61-8-404. However, absent a criminal conviction opening the gateway to admission, Montana has not taken a stand on admissibility for civil matters.

7. Is post-accident investigation discoverable by adverse counsel?

Not if it was prepared in anticipation of litigation. Under *Lindberg v. Leatham Bros., Inc.*, plaintiffs are “not entitled to accident reports prepared by defendant and its insurer in anticipation of litigation absent substantive reasons why reports should have been turned over to them.” 215 Mont. 11, 20, 693 P.2d 1234, 1240 (1985). In this a case, the defendant trucking company and insurance company cooperated with an attorney to prepare documents in anticipation of litigation. The trial court disallowed admission of the documents, including accident photos, and the defendant failed to offer a substantive reason they should be admitted.

However, the timing of communications plays an essential role in refining the term “prepared in anticipation of litigation.” Previously, Montana held, in *Kuiper v. Dist. Ct. of Eighth Judicial Dist. of State of Mont.*, work product protection must be afforded from the time the claim file is opened because there is always some prospect of litigation and an investigation must be geared to the ultimate eventuality of litigation. 193 Mont. 452, 465, 632 P.2d 694, 701 (1981). However in 1986, *Cantrell v. Henderson* held that where there was no indication that an attorney had been hired or that the statement was made at the request of an attorney, *Kuiper* failed to extend to statements given by truck drivers to employer’s insurer prior to filing of complaint. 221 Mont. 201, 208, 718 P.2d 318, 322 (1986).

8. Describe any laws in your State which regulate automated driving systems (autonomous vehicles) or platooning.

Montana currently has no such laws and, as of the time of this writing, no such laws are under consideration in the 2019 legislative session.

9. Describe any laws or Court decisions in your State which would preclude a commercial driver from using a hands-free device to have a conversation over a cell phone.

Montana has adopted the portion of the Federal Motor Carriers Safety Act (FMCSA), as promulgated, which incorporates the rule prohibiting commercial drivers from texting using electronic devices while operating commercial motor vehicles in interstate commerce. Admin. R. Mont. 18.8.1502; *see also* 49 C.F.R. § 383. Texting is defined as “manually entering alphanumeric text into, or reading text from, an electronic device.” 49 C.F.R. § 383.5. As a

caveat, texting does not include inputting text into a navigation system, pressing a single button to initiate or terminate a voice communication, or “using a device capable of performing multiple functions (e.g., fleet management systems, dispatching devices, smart phones, citizens band radios, music players, etc.) for a purpose that is not otherwise prohibited in this subchapter.” *Id.* Therefore, a commercial driver is precluded from using an otherwise “hands-free” device if it takes more than one touch to activate/disable or requires the driver to read alphanumeric text (excepting the excluded devices).

10. Identify any Court decisions in your State precluding Golden Rule and/or Reptile style arguments by Plaintiffs’ counsel.

Although the Montana Supreme Court has not yet specifically addressed “Golden Rule” or Reptile style arguments in civil cases, it has indicated that an express invitation to the jury to “put itself in the shoes of the victim” is improper and would be reversible error. *Clausell v. State*, 2005 MT 33, ¶¶ 17-18, 326 Mont. 63, 106 P.3d 1175; *State v. Ugalde*, 2013 MT 308, ¶ 62, 372 Mont. 234, 248, 311 P.3d 772, 784.

In considering a motion *in limine* to exclude both golden rule and reptile theory arguments at trial, a Montana district court prohibited the use of golden rule arguments but declined to prohibit the use of reptile theory arguments. The court first noted the lack of Montana precedential authority on the issue and held that it would not issue a blanket prohibition denying counsel the use of any perceived strategy to try his or her case that falls within the confines of Montana law. The court said that it would instruct the jury on the law and inform the jury that it must render a verdict based upon the evidence presented and admitted. *Steffensmier v. Huebner, D.P.M.*, Montana Eighth Judicial District, Cascade County, Cause No. ADV-10-0402 (May 4, 2017).

11. Compare and contrast the advantage and disadvantages of Federal Court versus State Court in your State.

When removal to federal court is possible, we almost always recommend doing that because the judges have lighter caseloads, more experience with complex civil litigation, and less bias favoring plaintiffs. Also, the juries are drawn from larger geographic areas, which can moderate some of the more troubling local mind-sets. And because the judges on the Montana Supreme Court are elected, they can be influenced by political considerations that do not infect the Ninth Circuit. We generally prefer federal court even though the juries are smaller (6 instead of 12) and must be unanimous (instead of a 2/3 majority). Of course, we do not recommend removal to federal court for a case in which we have specific concerns about a judge who is likely to preside. That occurs rarely because most of our federal judges are fair and intelligent.

12. How does your State handle the admissibility of traffic citations (guilty plea, pleas of no contest, etc.) in subsequent civil litigation?

Evidence of the citation is generally admissible. Additionally, Montana courts generally treat a violation of a motor vehicle statute as negligence as a matter of law. *Etter v. Safeco Ins.*

Co. of Illinois, 192 F. Supp. 2d 1071, 1076, 2002 WL 497216 (D. Mont. 2002) (citing *Craig v. Schell*, 293 Mont. 323, ¶ 29, 975 P.2d 820, ¶ 29 (1999)).

13. Describe the laws in your State which regulate whether medical bills stemming from an accident are recoupable. In other words, can a plaintiff seek to recover the amount charged by the medical provider or the amount paid to the medical provider? Is there a basis for post-verdict reductions or offsets?

A plaintiff is entitled only to recover the amount paid to resolve the medical bills. However, the plaintiff may present evidence of the total amount billed, and the court must hold a separate collateral source proceeding (*see* Mont. Code Ann. § 27-1-308) after the verdict has been rendered to reduce the award to the amount paid. The amount billed may also be considered by the jury for purposes of determining the seriousness of the plaintiff's injuries, his pain and suffering, and the necessity of future medical care. *Meek v. Montana Eighth Jud. Dist. Ct.*, 2015 MT 130, ¶ 22, 379 Mont. 150, 155, 349 P.3d 493, 497, 2015 WL 2242419.

14. Describe any statutory caps in your State dealing with damage awards.

Montana has a statutory cap on punitive damages awards of \$10 million or 3% of a defendant's net worth, whichever is less. Mont. Code Ann. § 27-1-220(3). This limitation does not apply to punitive damages awards in class actions. Some Montana trial courts have recently held the cap to be unconstitutional, but the Montana Supreme Court has thus far declined to consider the issue on appeal.

With regard to statutory limits on damages in general, damages in all cases must be reasonable. Mont. Code Ann. § 27-1-302. A party is entitled to receive compensation for future damages only if such damages are shown to be *reasonably certain to occur*. *See* Mont. Code Ann. § 27-1-203.