ARIZONA

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1. Provide an update on current black box technology and simulations in your State and the legal issues surrounding these advancements.

Arizona courts have manifested a willingness to accept data collected by "black box" systems such as event data recorders (EDR) and crash data retrieval (CDR) systems so long as it complies with the applicable evidentiary standard of "general acceptance" as a legitimate technology, thus overcoming the *Daubert* standard for admissibility.

The Arizona Court of Appeals dealt with the use of "black box" technology in *State v. Clary*. *State v. Clary*, 1 CA-CR 13-0694, 2016 WL 4525041, at 5 (App. Aug. 30, 2016). In *Clary*, the defendant caused a high-speed collision on the U.S. 60 freeway in Mesa, killing two and injury three others. *Id.* at 1. The trial court admitted an expert's testimony based on the CDR report retrieved from the vehicle. *Id.* at 5. The expert used the CDR report to verify his own conclusion that the defendant's car was travelling 122 to 124 miles per hour upon collision. *Id.* The expert testified both at the evidentiary hearing and at trial that the known error rates associated with CDR data had been tested, that his reconstruction opinions were subject to peer and supervisor review, and that the error rates were approximately plus or minus four miles per hour for speed and ten miles per hour for a change in velocity. *Id.* The court also took into account the fact that courts outside of Arizona have expressly determined that downloading CDR technology is generally accepted in accident reconstructions, and that the expert testified that he was trained and certified by the Collision Safety Institute to download and analyze CDR data, indicating standards exist to control how such data should be used by accident reconstructionists. *Id.* As such, the Court of Appeals affirmed the trial court, holding that the application of the relevant *Daubert* factors indicated that the CDR data was reliable and thus, admissible at trial. *Id.* at 7.

2. Besides black box data, what other sources of technological evidence can be used in evaluating accidents, and describe the legal issues in your State involving the use of such evidence.

Arizona generally allows a party to offer any sort of technologically based evidence available, including GPS data and computer-based accident reconstructions, so long as the evidence or exhibit produced can overcome admissibility concerns, such as the foundation of the data used as evidence to create the exhibit, and the supporting testimony of an expert witness. Ariz. R. Evid. 901

Although Arizona has revised Rule 702 regarding the admissibility of expert testimony to be in line with the Supreme Court's decision in *Daubert*, Arizona's courts have generally refrained from excluding technologically based evidence purely on admissibility concerns. Ariz. R. Evid. 702.

3. **Describe the legal issues in your State involving the handling of post-accident claims with an emphasis on preservation / spoliation of evidence, claims documents, dealing with law enforcement early and social media?**

Preservation of Evidence. The Arizona Rules of Civil Procedure impose a duty on parties to preserve electronically stored information relevant to an action upon reasonable anticipation of the action's commencement. *See* Ariz. R. Civ. P. 37(g). The types of electronically preserved evidence that may be relevant in a truck accident claim include black box technology and even social media posts. Failing to preserve such evidence may subject the party to an adverse jury instruction or default judgment.

Claims Documents. Arizona Rule of Evidence 502 protects documents prepared in anticipation of litigation from discovery. A party asserting the work product doctrine bears the burden of establishing that materials it seeks to protect are documents prepared in anticipation of litigation by or for a party or by or for a party's representative. While case law in Arizona doesn't yet address the issue, other courts have held that insurance claims files and investigation reports of an insurance adjuster are protected from discovery by work product privilege when it was obvious on the night of the accident that claims would be asserted against the insured; it is reasonable to believe those documents were created in anticipation of litigation. *See Schipp v. Gen. Motors Corp.*, 457 F. Supp. 2d 917 (E.D. Ark. 2006).

Law Enforcement. Under Arizona law, a law enforcement officer or public employee who, in the regular course of duty, investigates a motor vehicle accident resulting in bodily injury, death or damage to the property of any person in excess of $2,000 or the issuance of a citation shall complete a written report of the accident either at the time of and at the scene of the accident or after the accident by interviewing participants or witnesses. The report is to be completed within twenty-four hours after completing the investigation. A.R.S. §28-667.

While the accident report sets forth a good foundation for the facts of any accident, in many cases involving a transportation accident, the investigating authority may wish to perform a full scale reconstruction of the accident. By virtue of its complexity, a reconstruction, as opposed to a simple report, is not subject to a twenty-four hour production requirement.

Social Media. Arizona has not yet specifically addressed preservation of social media in circumstances concerning a transportation accident, but there is no reason to believe that it will not treat such evidence any differently from other evidence that is subject to being preserved after an accident. Social media has the potential to affect nearly every legal action, and transportation cases are no exception. When they are hired, periodically throughout their employment, and upon commencement of a legal action, drivers must be informed of how social media can be used against them in court, but also that their social media websites are considered to be evidence and thus, must be preserved. Sanctions and discipline can arise for deleting specific posts, even if they seem irrelevant to the litigation at hand. Yet, social media may also be used to the advantage of the defense. For example, a plaintiff may claim injury but is nonetheless posting on a social media account about participating in a cross-fit class, thus defeating or seriously damaging his claim. A party must be diligent in using social media to its advantage while at the same time, protecting itself from potential social media backlash.

4. Describe the legal considerations in your State when defending an action involving truck drivers who may be considered Independent Contractors, Borrowed Servants or Additional Insureds?

A foremost concern in any commercial vehicle accident litigation is whether a company is liable for the torts of its driver. This usually depends on the classification of the driver as either an independent contractor or an employee. In Arizona, whether a driver is an independent contractor or employee is fundamentally a question of control. *See Santorii v. MartinezRusso, LLC*, 240 Ariz. 454, 459, 381 P.3d 248, 253 (App. 2016). Even if contracted as an independent contractor, the court may determine that a driver is an employee if the company sets the driver's hours, controls mileage rates and load assignments, or if the company uses a satellite system to track the driver's location. Thus, the company would be legally responsible for the torts of that driver regardless of his or her company classification as an independent contractor.

Arizona Courts have also recognized the existence of a non-delegable duty with respect to independent contractors. In *Wiggs v. City of Phoenix*, the plaintiff's daughter was hit and killed by an automobile while crossing a City of Phoenix street at dusk. *Wiggs v. City of Phoenix*, 198 Ariz. 367, 368, 10 P.3d 625, 626 (2000). When the plaintiff brought a wrongful death action against the City, the City named Arizona Public Service (APS) as an independent contractor, as a non-party at fault because APS was contracted to maintain the streetlight. *Id.* While the court agreed that APS was an independent contractor, they nonetheless recognized a "non-delegable duty" exception to the general rule that an employer is not liable for the negligence of its independent contractor. *Id.* at 369. The court held that "if the employer delegates performance of a special duty to an independent contractor and the latter is negligent, the employer will remain liable for any resulting injury to the protected class of persons, as if the negligence had been his own." *Id.* This exception "is premised on the principle that certain duties of an employer are of

such importance that he may not escape liability merely by delegating performance to another." *Id.* The court explained that here, the City had a non-delegable duty to maintain its highways in a reasonably safe condition. *Id.* It is likely that a court will determine that transportation companies have similar non-delegable duties to ensure the safety of other motorists that share the roadway with its independent contractor drivers.

It is important to note, however, that the Ninth Circuit, which includes Arizona, has held that an employer of an independent contractor is justified in presuming that a careful contractor will not create an unreasonable risk and therefore, has no non-delegable duty to prevent the risk. *See Ek v. Herrington*, 939 F.2d 839, 844 (9th Cir. 1991). In *Ek v. Herrington*, Defendant David Hill, who owned a logging operation in Idaho, hired Herrington as an independent contractor to haul logs from a place of logging to two mills. *Id.* at 840. While en route to one of the mills, carrying a load that was at least 10,000 pounds overweight, Herrington's truck drifted across the centerline as it gained speed at the bottom of a hill. *Id.* The logs broke loose from the truck and landed on the Ek's vehicle, resulting in Mrs. Ek's death. *Id.* All of Herrington's brakes were out of adjustment at the time. *Id.* The court found that under these circumstances, Hill could not be held vicariously liable for the injuries resulting from any negligence of his independent contractor. *Id.* at 841. The court relied on the fact that "the risk posed by overloading a logging truck is not a peculiar risk that arises in the normal course of logging and for which special precautions must be taken." *Id.* at 844. Rather, "[i]t is a risk that would not arise, but for the independent contractor's negligence, and which can be avoided by the ordinary precaution of not overloading the truck." *Id.*

5. What is the legal standard in your state for allowing expert testimony on mild traumatic brain injury (mTBI) claims and in what instances have you had success striking experts or claims?

There have not been any specific standards set forth for expert testimony in Arizona concerning mild traumatic brain injury (mTBI) claims. Notably though, After following the *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) standard for admission of expert testimony for nearly forty years, the Arizona Supreme Court has amended Arizona Rule of Evidence 702 to reflect the *Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 579 (1993) standard. As such, the rule currently states as follows:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> **(a)** the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> **(b)** the testimony is based on sufficient facts or data;
> **(c)** the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

Ariz. R. Evid. 702

Despite the change in Rule 702, we have not observed an appreciable change in the courts' assessment of whether an expert may offer testimony concerning a plaintiff's mTBI. It appears that Arizona courts are not taking a more proactive "gatekeeper" role than they did prior to the rule change.

On a related note, although a court may hold a pretrial evidentiary hearing to address admissibility under Arizona Rule of Evidence 702, such a hearing is not mandatory. *Glazer v. State*, 234 Ariz. 305, 315, 321 P.3d 470, 480 (Ct. App. 2014), *opinion vacated in part*, 237 Ariz. 160, 347 P.3d 1141 (2015). In fact, the trial court has great discretion on the matter and may resolve the issue in either a pretrial hearing or during the trial. *Sandretto v. Payson Healthcare Mgmt., Inc.*, 234 Ariz. 351, 357, 322 P.3d 168, 174 (Ct. App. 2014).

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

Yes, it is. Supporting this conclusion is the decision in *State ex rel. McDougall v. Superior Court in & for Cty. of Maricopa*, in which evidence of a driver's .15 blood alcohol content (BAC) within two hours of an accident was admissible, even if the investigating officer did not smell alcohol on driver's breath. *State ex rel. McDougall v. Superior Court in & for Cty. of Maricopa*, 172 Ariz. 153, 835 P.2d 485 (Ct. App. 1992).

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

All drivers that operate a commercial motor vehicle, as defined in 49 CFR 382.107, are subject to the drug and alcohol testing requirements in 49 CFR Parts 40 and 382. This includes full time, regularly-employed drivers; casual, intermittent or occasional drivers; leased drivers and independent owner-operator contractors.

Owner-operators are expected to self-monitor, registering with a consortium and participating in that consortium's random testing pool. Trip-leased drivers are generally employed by another motor carrier and are subject to their main employer's testing policies. However, a motor carrier that contracts with an owner-operator or leased driver must ensure that the driver has participated in a substance testing program and while in the program was tested for controlled substances within the past 6 months or participated in random controlled substances testing program for the previous 12 months. If the employer cannot verify that the independent contractor is participating in a controlled substances testing program, the employer shall conduct a pre-employment controlled substance test.

Staffing agencies that supply commercial drivers to motor carriers may be responsible for ensuring compliance with all DOT drug and alcohol testing program requirements for

commercial drivers subject to parts 382 and 383 of the FMCSRs and 49 C.F.R. part 40. These requirements include, but are not limited to drug and alcohol testing, and requesting drug and alcohol information from a driver's previous employers. 81 FR 94481. If a driver staffing agency chooses not to establish its own DOT drug and alcohol testing program when it provides a CDL driver to a motor carrier, the motor carrier is solely responsible for complying with part 382 prior to allowing the driver to perform a safety-sensitive function. 81 FR 94481.

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

Under Ariz. R. Civ. P. 16(c), the parties are to submit a scheduling order to the court that establishes a deadline for holding a Rule 16.1 settlement conference or a private mediation. Either proceeding is to take place no more than 15 months after the action commenced, and in no event later than 60 days after the date discovery closes.

Ariz. R. Civ. P. 16

There are fifteen counties in Arizona, each of which has its own rule establishing the amount in controversy below which a case must be submitted to mandatory (non-binding) arbitration. Each county and its amount in controversy requirement are set forth below:

Apache County

All civil cases which are filed with the Clerk of the Superior Court in which the Court finds or the parties agree that the amount in controversy does not exceed $10,000, except those specifically excluded by Rules 72 through 76 of the Rules of Civil Procedure, shall be submitted to and decided by an arbitrator in accordance with the provisions of A.R.S. § 12-133 and Rules 72 through 76 of the Rules of Civil Procedure.

AZ ST APACHE SUPER CT Rule 8

Cochise County

Pursuant to the provisions of A.R.S. § 12-133 and Rules 72 through 76, Arizona Rules of Civil Procedure, arbitration is required in all cases filed in the Superior Court which qualify pursuant to Rule 72(b), Arizona Rules of Civil Procedure, and in which the court finds or the parties agree that the amount in controversy does not exceed $50,000.

AZ ST COCHISE SUPER CT Rule 11

Coconino County

All civil cases in which the court finds or the parties agree that the amount in controversy does not exceed the limit set in A.R.S. § 12-133 (which is $65,000), except those specifically excluded by Rules 72 through 77, Rules of Civil Procedure, may be

submitted to and decided by an arbitrator or arbitrators in accordance with A.R.S. § 12-133 and Rules 72 through 77, Rules of Civil Procedure.

AZ ST COCONINO SUPER CT Rule 16

Gila County

All civil cases in which the Court finds or the parties agree that the amount in controversy does not exceed $25,000 exclusive of costs and attorneys fees shall be subject to arbitration pursuant to A.R.S. § 12-133 and Rules 72-76, Arizona Rules of Civil Procedure.

AZ ST GILA SUPER CT Rule 13

Graham County

All civil cases in which the court finds or the parties agree that the amount in controversy does not exceed $30,000, exclusive of costs and attorneys' fees, shall be subject to arbitration pursuant to A.R.S. § 12-133.

AZ ST GRAHAM SUPER CT Rule 2.1

Greenlee County

All civil cases, which are filed with the Clerk of the Superior Court in which the court finds or the parties agree that the amount in controversy does not exceed $1,000, except those specifically excluded by Rules 72 to 76, Arizona Rules of Civil Procedure, shall be submitted to and decided by an arbitrator or arbitrators in accordance with the provisions of A.R.S. § 12-133 and Rules 72 to 76, Arizona Rules of Civil Procedure.

AZ ST GREENLEE SUPER CT Rule 7

LaPaz County

All civil cases, which are filed the Clerk of the Superior Court in which the Court finds or the parties agree that the amount in controversy does not exceed $1,000, except those specifically excluded by Rules 72 through 76 of the Rules of Civil Procedure, or except those in which there is a waiver as provided in A.R.S. § 12-133, shall be submitted to and decided by an arbitrator or arbitrators in accordance with the provisions of A.R.S. § 12-133 and Rules 72 through 76 of the Rules of Civil Procedure.

AZ ST LA PAZ SUPER CT Rule 10

Maricopa County

All civil cases, which are filed with the Clerk of the Superior Court in which the Court finds or the parties agree that the amount in controversy does not exceed $50,000, except

those specifically excluded by Rule 72, Arizona Rules of Civil Procedure, shall be submitted to and decided by an arbitrator or arbitrators in accordance with the provisions of A.R.S. § 12-133 and Rules 72 to 76, Arizona Rules of Civil Procedure.

AZ ST MARICOPA SUPER CT Rule 3.10

Mohave County

All civil cases, which are filed with the Clerk of Superior Court in which the court finds or the parties agree that the amount in controversy does not exceed $50,000 except those specifically excluded by Rules 72 to 77, Arizona Rules of Civil Procedure, shall be submitted to and decided by an arbitrator or arbitrators in accordance with the provisions of A.R.S. § 12-133 and Rules 72 to 77, Arizona Rules of Civil Procedure. Upon request arbitrators shall be paid $140.00 per day in accordance with the provisions of A.R.S. 12-133(G).

AZ ST MOHAVE SUPER CT Rule CV-6

Navajo County

Navajo County has not established a specific amount in controversy limit and therefore, it can be presumed to be $65,000 as set forth in A.R.S. §12-133.

Pima County

All civil cases filed with the Clerk of the Court in which the Court finds or the parties agree the amount in controversy does not exceed $1,000, except those specifically excluded by Rules 72 through 77, Arizona Rules of Civil Procedure, must be submitted to and decided by an arbitrator or arbitrators in accordance with the provisions of A.R.S. § 12-133 and Rules 72 through 77, Arizona Rules of Civil Procedure.

AZ ST PIMA SUPER CT Rule 2.9

Pinal County

Except cases specifically excluded by Rules 72 through 76, Arizona Rules of Civil Procedure, all civil cases that are filed with the clerk in which the court finds or the parties agree that the amount in controversy does not exceed $40,000, shall be decided by an arbitrator or arbitrators in accordance with the provisions of A.R.S. § 12-133 and Rules 72 through 76, Arizona Rules of Civil Procedure.

AZ ST PINAL SUPER CT Rule 3.11

Santa Cruz County

Pursuant to the provision of A.R.S. § 12-133, arbitration is required in all cases filed in this Court in which the Court finds or the parties agree that the amount in controversy does not exceed $1,000.

AZ ST SANTA CRUZ SUPER CT Rule 5

Yavapai County

All civil cases filed with the clerk of the Court in which the court finds or the parties agree that the amount in controversy does not exceed $65,000, except those specifically excluded by Rules 72 to 77, Arizona Rules of Civil Procedure, shall be submitted to and decided by an arbitrator or arbitrators in accordance with the provisions of A.R.S. § 12-133 and Rules 72 to 77, Arizona Rules of Civil Procedure.

AZ ST YAVAPAI SUPER CT Rule 10

Yuma County

All civil cases filed with the Clerk of the Court in which the Court finds or the parties agree that the amount in controversy does not exceed $50,000 shall be subject to the provisions of A.R.S. § 12-133 and Rules 72 to 77 of the Arizona Rules of Civil Procedure governing compulsory arbitration.

AZ ST YUMA SUPER CT Rule 10

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

Yes. Pursuant to Ariz. R. Civ. P 30, a party may name as the deponent a public or private corporation, a limited liability company, a partnership, an association, a governmental agency, or other entity, and must then describe with reasonable particularity the matters for examination. The named entity must then designate one or more officers, directors, managing agents, or other persons who consent to testify on its behalf. If the entity designates more than one person to testify, it must set out the matters on which each designated person will testify. Each designated person must testify about information known or reasonably available to the entity. Ariz. R. Civ. P. 30

The deposition testimony of corporate representatives may then be used in support of a motion for summary judgment on any issue pertinent to the case. Under Arizona's summary judgment standard, if the party with the burden of proof on the claim or defense cannot respond to the motion by showing that there is evidence creating a genuine issue of fact on the element in question, then the motion for summary judgment is to be granted. *Orme Sch. v. Reeves*, 166 Ariz. 301, 310, 802 P.2d 1000, 1009 (1990).

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

For the vast majority of circumstances, A.R.S. §12-2506 abolished joint and several liability in Arizona, in favor of a "pure comparative fault" scheme. A.R.S. §12-2506(A). Although there are three exceptions to this rule: where the liable parties are acting in concert; where one liable party was acting as an agent or servant of another liable party;

and where the party's liability arises out of a duty created by the federal employers' liability act. A.R.S. §12-2506 (D)(1-3) *Cramer v. Starr*, 240 Ariz. 4, 7–8, 375 P.3d 69, 72–73 (2016).

If a party is found jointly and severally liable under any of the three exceptions listed above, that party has a right to contribution from other liable parties. An action for contribution shall be adjudicated and determined by the same trier of fact that adjudicates and determines the action for the plaintiff's injury or death. The trier of fact shall adjudicate and determine an action for contribution after the court enters a judgment for the plaintiff's injury or death. On motion before the conclusion of the trial, the plaintiff is entitled to an award against the defendant for actual expenses the plaintiff incurred as a direct result of the defendant's claim for contribution. The expenses shall include reasonable attorney fees as determined by the court. A.R.S. § 12-2506.

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

On the whole, Arizona tends to lean Republican, although recent voting history indicates that Arizona may be turning more neutral politically than it has been in the past. Several counties, including Apache County, Coconino County, Pima County and Santa Cruz County, lean Democratic. Regardless, it seems that Arizona juries in civil matters continue to tend to be predisposed towards defendants.

The two largest Arizona counties by population are Maricopa County, followed by Pima County. Maricopa County leans Republican, with the largest recent plaintiff's verdict being an award of $7.9 million. *Dupray v. JAI Dining Services, Inc., et. al.*, CV2014-007697. In contrast, the largest reported verdict in Pima County was for $15 million. *Tripp v. University of Arizona Medical Center, et al.,* C2014-4811. This verdict is consistent with the general consensus that Pima County is the most plaintiff-friendly county in Arizona.

For reference, major cities and towns in Pima County include Tucson, Oro Valley, and Marana. Major Interstate highways through Pima County are Interstate 10 and Interstate 19, and major Arizona State Routes in Pima County are State Route 77, 85, and 86.

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

Like several states, punitive damages in Arizona are generally calculated as a ratio relative to compensatory damages. While there is no "bright-line" acceptable ratio between the two forms of awards, "single-digit multipliers are more likely to comport with due process, [and] a factor more than four comes close to the line of constitutional impropriety." *Arellano v. Primerica Life Ins. Co., Co.*, 235 Ariz. 371, 379, 332 P.3d 597, 605 (Ct. App. 2014). That being said though, the court has also acknowledged that punitive damages are to be assessed on a case by case basis, thus leaving open the possibility that a ratio of greater than 4 to 1 may in fact be constitutional. *Id.* at 380.

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

Grounded in Arizona's broad application of the collateral source rule, in a personal injury lawsuit, a plaintiff may seek to recover what he or she is charged for medical services, regardless of what was actually paid by plaintiff's insurer. *Lopez v. Safeway Stores, Inc.*, 212 Ariz. 198, 129 P.3d 487 (Ct. App. 2006).

In its decision, the court acknowledged that as a consequence of its application, the collateral source rule creates a windfall for one party, but a shortfall for the other. *Lopez* at 496–97. As many other courts have, it justified this outcome by rationalizing that if "the law must sanction one windfall and deny the other, it favors the victim of the wrong rather than the wrongdoer.'" *Id.* at 497

Recognizing that such a result is not equitable, the court noted that "the legislature is free to limit or abandon the collateral source rule in various areas, as it did in the medical malpractice arena. *See* A.R.S. § 12–565 (permitting medical malpractice defendant to introduce evidence of collateral source payments, which the trier then may consider in assessing damages); virtually putting up a signpost for those who wish to alter the collateral source rule. *Id.*