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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.

Black boxes are now present in almost every new vehicle on the road in in Florida. Black boxes record useful technical crash data including vehicle recorded speed and braking data, the vehicle's delta-v, steering input, yaw rate, angular rate, safety belt status, system voltage, and airbag warning lamp information. However, the data from the vehicle's black box can be fairly difficult (and expensive) to obtain, requiring an expert and/or even the someone designated by the vehicle's manufacturer to download the data.

Florida has seen an increased use of black box data over the years. In order to use the data retrieved from a black box, an expert will be needed to interpret and establish the reliability of the data. Florida courts have held that black box data is sufficiently reliable and admissible when it is accompanied by the testimony of an expert. *See Matos v. State*, 899 So. 2d 403 (Fla. 4th DCA 2005) (holding that the trial court did not err in admitting black box data through the use of two experts, an accident reconstructionist trained in black box technology, and an industrial engineer who was the chairman of the Society of Automotive Engineers). However, the use of such data is subject to a proper evidentiary predicate and an inquiry into its probative versus prejudicial value. As the technology advances, we can expect to see more *Daubert* challenges to the admissibility of this type of scientific or technical expert testimony.

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

A. DriveCam

Drive cams can be beneficial in evaluating a case. Drive cams which face forward are frequently beneficial from a defense prospective, as they will often show the negligence of the other driver. However, drive cams facing inward toward the driver often do more harm than good. The inward facing cam often creates evidence and sometimes liability where none would otherwise exist.

Drive cam video can be used in court proceedings, including a trial. Within the past few years, the law in Florida regarding the admissibility of in-cab videos has solidified. As video evidence, in-cab videos are subject to the same evidentiary rules regarding admissibility as other surveillance videos. "Since there must be proper authentication prior to the admission of a videotape, videotapes are not self-authenticating. There are two types of authentication methods for admitting videotapes: (1) through 'pictorial testimony,' and (2) through the 'silent witness' theory." *Richardson v. State*, 228 So. 3d 131, 133 (Fla. 4th DCA 2017).

Method one requires the witness to identify the video evidence as a "fair and accurate representation" of what is purported to be contained on the video. This witness does not have to be the actual person who took the video but can be a witness who saw what the video portrays personally and can testify to the accuracy of the video. *See Bryant v. State*, 810 So. 2d 532, 536 (Fla. 1st DCA 2002). The second method is sometimes referred to as the "silent witness" method

of authentication. This second method of authentication can be satisfied if there is sufficient witness testimony to establish the reliability of the video evidence. The witness does not have to be someone who witnessed the events captured on video.

The court will focus on the following factors in determining if reliability is established: (1) evidence establishing the time and date of the photographic evidence; (2) any evidence of editing or tampering; (3) the operating condition and capability of the equipment producing the photographic evidence as it relates to the accuracy and reliability of the photographic product; (4) the procedure employed as it relates to the preparation, testing, operation, and security of the equipment used to produce the photographic product, including the security of the product itself; and (5) testimony identifying the relevant participants depicted in the photographic evidence. *See Wagner v. State*, 707 So. 2d 827, 831 (Fla. 1st DCA 1998). The "silent witness" method of authentication can often be satisfied by an evidence custodian.

However, at the moment, dash cam video evidence cannot justify dismissing a case without a trial. In July 2019, the Florida Fifth District Court of Appeals reversed a trial court's decision in *Lopez v. Wilsonart, LLC,* 275 So. 3d 831 (Fla. 5th DCA 2019), exonerating a trucker for a fatal crash because it relied on dash camera video evidence. The Fifth District Court of Appeals held that the trial court erred when it concluded that the video evidence "blatantly contradicts the eyewitness testimony and the opinion of plaintiff's expert." In coming to this conclusion, the trial court relied on *Scott v. Harris*, 550 U.S. 372 (2007) (applying the federal summary judgment standard and concluding that no genuine issue of material fact existed where video footage blatantly contradicted the motorist's version of events); and *Wiggins v. Florida Department of Highway Safety and Motor Vehicle*, 209 So. 3d 1165 (Fla. 2017) (holding that in first-tier certiorari review of driver's license suspension hearing—not summary judgment—circuit court does not err where it rejects police officer testimony, which is refuted by video evidence).

The Fifth District Court of Appeals opined that although both *Scott* and *Wiggins*:

> …stand for the proposition relied upon by the trial judge—that clear, objective, neutral video evidence can be so contradictory to the opposing party's evidence so as to render that evidence incompetent—it was error to apply those holdings to a summary judgment proceeding under Florida's much more restrictive standard. In fact, by finding that the video evidence, as compelling as it was, completely negated both the independent eyewitness testimony as well as the Estate's expert's opinion, the trial court improperly weighed competing evidence on material facts.

As such, the Fifth District Court of Appeals held that current standards do not allow video evidence, no matter how compelling, to be used as the deciding factor in granting summary judgment. However, noting that technological advancements in our society will likely increase the likelihood of video and digital evidence being more frequently used in both trial and pretrial proceedings, the Fifth District Court of Appeals certified the following question to the Florida Supreme Court: Whether there should be an exception to the current summary judgment standards that are applied in Florida state courts that would allow entry of summary judgment "when the

movant's video evidence completely negates or refutes any conflicting evidence presented by the nonmoving party in opposition to the summary judgment motion and there is no evidence or suggestion that the videotape evidence has been altered or doctored?" The Florida Supreme Court accepted the case on October 15, 2019. This matter is currently being briefed.

B. Recreation of Accident Using Animation/Simulation

Animation/Simulation is another source of technological evidence that can be used in evaluating accidents. However, same are subject to a proper evidentiary predicate and an inquiry into its probative versus prejudicial value. In Florida, both accident animations and computer-generated evidence are admissible as demonstrative evidence under certain conditions in support of expert witness testimonies. There are three stages to admissibility: (1) laying a proper foundation; (2) establishing the reasonably related facts in the subject area of which the testimony is given; and (3) portraying an accurate depiction of what it purports to be.

As with all demonstrative evidence, laying the proper foundation is fairly straight-forward, yet absolutely necessary step in the process. Courts have opined that a foundation for accident animations and computer-generated evidence is proper if (a) the opinion evidence is helpful to the trier of fact; (b) the expert is properly qualified; (c) the demonstrative evidence is properly applied to the evidence at trial; and (d) the evidence is not portrayed in a way that presents an unfair prejudice that outweighs its probative value. *Pierce v. State of Florida*, 671 So. 2d 186, 190 (Fla. 4th DCA 1996). The probative versus unfair prejudice balancing test is especially treacherous. *See Coddington v. Nunez*, 151 So.3d 445, 447-48 (Fla. 2d DCA 2013) (Upholding the trial Court's decision that an accident simulation was inadmissible because the circumstances "'depicted in the simulation might be right, but the jury is likely to place undue and extraordinary emphasis on the simulation' which 'could very well lead the jury to defer to the opinion of the expert.'").

In the second stage, the party seeking admission of demonstrative evidence must establish that the facts or data used by the expert to form his or her opinion expressed by the accident animation or the computer-generated evidence are of a type of information reasonably relied upon by experts in the same subject area. *Pierce at 809.* However, the facts or data themselves do not need to be admitted into evidence. Likewise, the reasonableness of the expert reliance upon that facts or data information may be challenged through cross-examination. *Id.*

Finally, the animation or computer-generated evidence must be a fair and accurate depiction of what it purports to be, similar to the admission of photographs, videos, etcetera. *Id.* If applied correctly, an accident animation or computer-generated evidence can effectively support and simplify an expert witness' testimony; however, the effort, time, and cost in creating an animation may all be for naught if it is mishandled during litigation. Additionally, a cost benefit analysis may be warranted as the cost of creating an animation may outweigh the effectiveness of showing it to a jury, especially as demonstrative evidence, by its very nature, is not permitted in the jury room for deliberations. *Pierce* at 808.

C. Inspection of Opposing Party's Devices

Inspection of the opposing party's devices is a great technological tool that can be used to evaluate a case. However, Florida protects a responding party from over intrusive inspections by the requesting party. As such, inspections will be allowed if: there is evidence of destruction of evidence or thwarting of discovery; the device likely contained the requested information; and no less intrusive means existed to obtain the requested information. *Holland v. Barfield*, 35 So. 3d 953, 955 (Fla. 5th DCA 2010); *see also Menke v. Broward Cnty. Sch. Bd*., 916 So. 2d 8, 12 (Fla. 4th DCA 2005).

In *Antico v. Sindt Trucking, Inc*., 148 So. 3d 163 (Fla. 1st. DCA 2014), a truck operated by defendant collided with a vehicle driven by decedent, Ms. Antico. Defendant denied liability in the wrongful death action brought by Ms. Antico's estate and asserted that she was either comparatively negligent or was the sole cause of the accident because she was distracted by her iPhone. While defendant had received some calling and texting records from decedent's wireless provider, other cellphone data was not disclosed, such as location information, internet website access history, email messages, and social and photo media posted and reviewed on the day of the accident. As a result, defendant filed a motion with the trial court seeking to have an expert inspect the iPhone's data from the day of the accident. Specifically, the defendant argued that with GPS enabled phones, the data can be inspected to determine conclusively what occurred in the moments before the accident—whether the decedent "was stopped at a stop sign or not and whether she was texting, Facebooking, Tweeting, or nothing at the time of the accident." Plaintiff objected citing privacy rights under the Florida Constitution. The trial court granted the motion and plaintiff filed for writ of certiorari.

The First District Court of Appeals held that "privacy rights do not completely foreclose the prospect of discovery of data stored on electronic devices. Rather, limited and strictly controlled inspections of information stored on electronic devices may be permitted." *See id*. (citing *Menke*, 916 So. 2d 8, 11 (Fla. 4th DCA 2005) ("[Rule 1.350 is] broad enough to encompass requests to examine [electronic information storage devices] but only in limited and strictly controlled circumstances"); *cf. Freidman v. Heart Inst. of Port St. Lucie, Inc*., 863 So. 2d 189, 194 (Fla. 2003) (finding that privacy rights limit compelled disclosure to that which is necessary to determine contested issues).

Importantly, the First District Court of Appeals noted that the trial court did not allow the inspection "simply because Respondents made assertions that decedent was on her cellphone, or because the decedent happened to possess a cellphone in her car." *Antico*, 148 So. 3d at 166. Instead defendants supported its request for inspection with specific evidence demonstrating that decedent was texting just before the accident. Defendants cited to decedent's cellphone records showing that she was texting before the accident; two witnesses indicated that the decedent may have used her cell phone at the time of the accident; and the responding troopers lent support to the conclusion that decedent was using her cellphone when the accident occurred. *Id*. at 166-167. Accordingly, the First District Court of Appeals opined that defendant's discovery request comported with the rules allowing for discovery of relevant information, including information from devices like cellphones, and that its interest in the discovery was "quite substantial." *Id*. at 167 (citing Fla.R.Civ. P. 1.280(b)(1).

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.

A. Preservation / Spoliation of Evidence

The duty to preserve materials arises 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). Additionally, the duty to preserve materials arises when a person or organization "should reasonably foresee litigation". *League of Woman Voters of Florida v. Detzner*, 172 So. 3d 363, 391 (Fla. 2015) ((holding that litigation was inevitable and the systematic deleting of emails and other documents relating to the dispute, justified the trial court judge in giving an adverse inference against the organization deleting the materials.). Thus, the duty to preserve any item may arise prior to commencement of litigation, if the person or organization in custody or control of the item reasonably should know that the item relevant to imminent or pending litigation. A duty to preserve evidence can also arise as a result of an express or implied agreement. *Miller v. Allstate Insurance Co.*, 573 So. 2d 24, 27 (Fla.3d DCA 1990) (plaintiff's insurer had agreed with plaintiff that it would preserve her vehicle which she needed in a planned product liability action against the manufacturer, which vehicle had been totaled, allegedly as a result of the accelerator becoming stuck. Her insurer sold the vehicle to a salvage yard, thereby significantly impairing her ability to bring a claim against the manufacturer for a defect. The court found that the insurer owed a contractual duty to plaintiff to preserve the vehicle.).

A successful assertion of spoliation requires proof of: (l) existence of a potential civil action; (2) a legally recognized duty to preserve evidence; (3) destruction of that evidence: (4) a significant impairment in the ability to prove the claim or defense; (5) a causal relationship between the evidence destruction and the inability to prove the claim or defense; and (6) damages. *See Continental Ins. Co. v. Herman*, 576 So. 2d 313, 315 (Fla. 3d DCA 1990); *Royal & Sunalliance v. Lauderdale Marine Center*, 877 So. 2d 843, 845 (Fla. 4th DCA 2004); *Hagopian v. Publix Supermarkets, 1nc.*, 788 So. 2d 1088, 1091 (Fla. 4th DCA 2001).

The Florida Supreme Court has abolished "first party" spoliation claims. Accordingly, a plaintiff cannot bring an independent cause of action against a defendant/tortfeasor who negligently or intentionally destroys evidence. *Martino v. Wal-Mart Store, Inc.*, 908 So.2d 342, 347 (Fla. 2005). Instead, the available remedies against a first party for spoliation of evidence range from discovery sanctions and striking a party's pleadings for intentional spoliation, to adverse inferences, in circumstances of negligent destruction of evidence. *Id.* In its discretion, a court may allow for an adverse inference because of the spoliation of evidence in the first-party context if it finds that: (1) the evidence existed at one time; (2) the spoliator had a duty to preserve the evidence; and (3) the evidence was critical to an opposing party being able to prove its prima facie case or a defense. *Id.* See also, *Hagopian v. Publix Supermarkets, Inc.*, 788 So. 2d 1088, 1090 (Fla. 4th DCA 2001); *Fed. Ins. Co. v. Allister Mfg. Co.*, 622 So. 2d 1348, 1351 (Fla. 4th DCA 1993).

In contrast, an independent cause of action for third-party spoliation continues to exist in Florida. *Martino*, 908 So.2d at 346, n.2. But as a general rule, a third-party spoliation claim does not accrue until the underlying lawsuit is completed. *Yoder v. Kuvin*, 785 So. 2d 679, 681 (Fla. 3d DCA 2001); *Shaw v. Cambridge*, 888 So. 2d 58, 63 (Fla. 4th DCA 2004)("A spoliation claim compensates the plaintiff for the loss of recovery in the underlying case due to the plaintiff's inability to prove the case because of the lost or destroyed evidence and not for the 'bodily injury' actually sustained. 'Because of the nature of the claim, liability for spoliation does not arise until the underlying action is completed.'). *But see Miller v. Allstate Ins. Co.*, 573 So. 2d 24, 28 (Fla. 3d DCA 1990) (for reasons of "judicial economy, and to prevent piecemeal litigation" destruction of evidence claim permitted before underlying lawsuit complete.)

However, under Rule 1.380(e) of the Florida Rules of Civil Procedure, a party cannot be sanctioned for the failure to produce electronically stored information that was lost due to the "routine, good faith operation of an electronic information systems." Nevertheless, Rule 1.380's Committee Notes make clear that a person or organization cannot avoid preservation obligations simply because electronically stored information was destroyed in the routine operation of an electronic information system. As a rule, when an item of electronically stored information is potentially relevant to reasonably anticipated litigation a "litigation hold" should be put in place to ensure preservation of the electronically stored information, and particularly to avoid inadvertent destruction by routine operations.

B. Claims Documents

There is a "well-established" rule in Florida "that an insurer's claims file constitutes work-product." *See Illinois Nat. Ins. Co. v. Bolen*, 997 So.2d 1194, 1196 (Fla. 5th DCA 2008). The Florida Supreme Court in *Allstate Indemnity Co. v. Ruiz*, 899 So.2d 1121 (Fla. 2005), recognized Florida's long-standing policy that "[g]enerally, an insurer's claim and litigation files constitute work product and are protected from production[,]" but receded from prior precedent and held that a claim file prepared in anticipation of coverage litigation is discoverable in an insurance bad faith suit upon the conclusion of the coverage litigation. A request can be made that the trial court conduct an in-camera inspection of the withheld documents to ensure that each properly meets the specific criteria of the work product and/or attorney-client privilege. *State Farm Fla. Ins. Co. v. Aloni*, 101 So.3d 412, 414 (Fla. 4th DCA 2012) (*quoting Superior Ins. Co. v. Holden*, 642 So.2d 1139, 1140 (Fla. 4th DCA 1994)).

Additionally, a party may obtain privileged work product documents by making the required showing of a good cause exception to the work product privilege under Rule 1.280(b)(4), Florida Rules of Civil Procedure. This rule allows a party to obtain documents that are otherwise protected by the work product privilege if it can show that it 'has need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

In contrast to the uniform position of Florida's state courts on this issue, the federal courts in Florida have criticized this rule and "generally have found that no work-product protection attaches to an insurer's claim file (even if an employee handling the claim is an attorney, or if the insurer hired outside or monitoring counsel to assist with the claim processing) because the claim

file is a business record, prepared in the ordinary course of the insurer's business, until the date on which coverage is denied." *MapleWood Partners, L.P. v. Indian Harbor Ins. Co*., 295 F.R.D. 550, 629 (S.D. Fla. 2013).

C. Dealing with Law Enforcement Early

When a motor vehicle crash is brought to the attention of law enforcement, Florida requires that a crash report be prepared by the investigating agency no later than 10 days "when an accident results in death or injury, when a party involved flees the scene of the accident, when a party is under the influence of alcohol, or when a vehicle is so damaged it must be towed." Fla. Stat. § 316.066(1). In order for the investigating agency to investigate the crash scene, there must be cooperation from the parties involved. Recognizing that providing information to the investigating agency may put the parties in a position of making incriminating statements, Florida Statute section 316.066(5) provides an accident reporting privilege that protects the information provided so that it cannot be used against the party in any civil or criminal trial.

But not all information included in the crash report is covered by the privilege. For instance, the location of the vehicles, skid marks, damage to the involved vehicles, and observations of the investigating agency are not protected. In addition, statements made to the investigating agency by those not actually involved in the accident or statements made that are not related to the cause of the accident are not protected. For instance, in *Wise v. W.U. Telegraph Co*., 177 So. 2d 765 (Fla. 1st DCA 1965) the employer of a party involved in the accident came to the scene of the accident and admitted that the party was in the scope of his employment at the time of the accident. The defendant later moved to exclude the statement. However, the court held that the statement was not protected by the accident reporting privilege.

Likewise, in *Alexander v. Penske Logistics, Inc*., 867 So. 2d 418 (Fla. 3rd DCA 2003) one officer performed the accident investigation while other officer performed the traffic homicide investigation. Later the estate moved to exclude statements made to the traffic homicide investigator by the truck driver, but the court held that no accident reporting privilege attached to the statements made to the traffic homicide investigator after Miranda warnings were issued to the truck driver and same were waived. The court clarified that if no Miranda warnings had been issued, the accident reporting privilege would have attached to the truck driver's statements.

Thus, having defense counsel present at the accident scene shortly after the accident takes place can be key to protecting the rights of the truck driver and ensuring that no statements are made that are not protected by the accident reporting privilege, or having defense counsel invoke the truck driver's right not to make a statement.

In addition to protecting the truck driver's rights, early involvement with law enforcement is often key to quick access to the tractor/trailer for an inspection and download of the black box data. Depending on the investigating agency, and sometimes the individual investigator, early involvement with law enforcement can lead to additional information and details being provided to defense counsel regarding the accident investigation.

D. Social Media

Social media evidence is generally discoverable (assuming relevance under the facts and circumstances), not subject to privilege and not protected by a right to privacy. For instance, in *Nucci v. Target Corp.*, 162 So.3d 146 (Fla. 4th DCA 2015), prior to the plaintiff's deposition, defense counsel saw that her Facebook profile contained 1,285 photographs. When photographs disappeared after the plaintiff's deposition, the defendant moved to compel inspection of the plaintiff's Facebook profile. Plaintiff argued that such access was overbroad and would violate her right to privacy. After the trial court denied defendant's motion, the defendant filed narrower discovery requests. The trial court ultimately compelled the plaintiff to produce, among other things, all photographs associated with the account for the two years prior to the incident to the present.

The plaintiff then sought certiorari relief to quash the trial court's order compelling production of the photographs, arguing the order violated her right to privacy. In a very thorough opinion, the Fourth District denied the plaintiff's petition for certiorari and upheld the trial court's order. Notably, the Fourth District held that, generally, photographs on a social networking site are not privileged, nor are they protected by any right of privacy, regardless of the privacy settings a user elects to establish on their account. Because the information shared on a social networking site can be copied and disseminated by another user, the Fourth District wrote, "[t]he expectation that such information is private, in the traditional sense of the word, is not a reasonable one." Although *Nucci* specifically dealt with photographs, the court relied on cases involving the discovery of social media materials beyond photographs.

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. Independent Contractors

Generally, in Florida, the employer of an independent contractor is not liable for the negligence of the independent contractor because the employer has no control over the manner in which the work is done. *Suarez v. Gonzalez*, 820 So. 2d 342, 344 (Fla. 4th DCA 2002). However, under the Restatement (Second) of Torts, as well as Florida case law, a party who hires an independent contractor may still be liable where a nondelegable duty is involved. *Tuong Vi Le v. Colonial Freight Systems, Inc.*, 2019 WL 6519440 (December 4, 2019) (citing *Dixon v. Whitfield*, 654 So. 2d 1230, 1232 (Fla. 1st DCA 1995). A nondelegable duty may be imposed by statute, contract, or common law. *Dixon*, 654 So. 2d at 1231. While there is no specific criteria for determining whether or not a duty is nondelegable, the *Dixon* court held that the "defining characteristic that the responsibility is so important to the community that the employer should not be allowed to transfer it to a third party." *Id.* at 1232; *see also Armiger v. Associated Outdoor Clubs, Inc.*, 48 So. 3d 864, 875 (Fla. 2d DCA 2010) (noting that the liability for a nondelegable duty that is imposed directly on an employer of an independent contractor is grounded in a special public policy to protect third persons in an area of inherent danger and to encourage conscientious adherence to standards of safety where injury will likely result in the absence of precautions).

A party who negligently hires an independent contractor may be liable as well. In order to state a claim for negligent selection of an independent contractor, a plaintiff must plead ultimate facts demonstrating that (1) the independent contractor acted negligently; (2) the independent contractor was incompetent or unfit at the time of its hiring; (3) the employer knew or reasonably should have known of this incompetence or unfitness; and (4) the plaintiff's injury was the proximate result of this incompetence or unfitness. *Davies v. Commercial Metals Co*., 46 So. 3d. 71 (Fla. 5th DCA 2010).

B. Borrowed Servants

Florida has the common law "borrowed servant" doctrine that one employer can lend its employee to another temporary employer. *Pensacola Christian College v. Bruhn*, 80 So. 3d 1046, 1049 (Fla. 1st DCA 2011). The temporary employer is sometimes called the "special employer." There is a presumption that even though the employee has been borrowed, the employee's general employment with his regular employer continues. However, the presumption can be overcome if three factors are met. First, whether there was an express or implied contract between the special employer and the employee and there was "deliberate and informed consent by the employee" to the contract. *Biggin v. Fantasma Prods*., 943 So. 2d 952, 957 (Fla. 4th DCA 2006) (citations omitted); *see also Sagarino v. Marriott Corp*., 644 So. 2d 162, 165 (Fla. 4th DCA 1994) (opining that the special employer is required to show a "definite arrangement between the general and special employer and the employee's knowledge thereof."). Second, the work being done at the time of the injury was essentially that of the special employer. Third, the power to control the details of the work resided with the special employer. *Coleman v. Mini-Mac Maint. Serv. Inc*., 706 So. 2nd 393, 393 (Fla. 1st DCA 1998).

C. Additional Insureds

Most insurance policies state that the insurance company will provide a lawyer to represent the additional insured truck driver's interests (the carrier's interests too) as well as those of the motor carrier. As such, statement of insured's rights must be sent to the client(s) advising them of their rights regarding their legal representation.

During the representation, a conflict of interest may arise. The lawyer is responsible for identifying conflicts of interest and advising the clients of them. If an actual conflict of interest arises that cannot be resolved, the insurance company may be required to provide the additional insured truck driver with another lawyer.

In addition, the truck driver has a duty to cooperate in the investigation of the claim and any subsequent litigation. Thus, defense counsel must warn of the possible consequences of a failure to cooperate. However, it's rare that a carrier will deny coverage for a failure to cooperate unless it is egregious in nature.

Likewise, if the carrier denies the attorney the ability to undertake the retention of experts and/or undertake any other action that the attorney believes is necessary to the client's defense, the attorney must inform the client that the carrier has declined authorization of same.

Furthermore, the carrier only retains the attorney to defend the lawsuit. Thus, if the client wants to pursue a claim against the other party and/or requires legal services that are not directly related to the defense of the lawsuit, the client will need to separately retain the attorney.

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?**

Florida has recently reversed course on the standard courts will adopt when evaluating the admissibility of expert testimony. Though the federal courts long ago adopted the *Daubert* standard as outlined in *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993) when judging the reliability of expert testimony, Florida stood by the prior *Frye* standard, which required expert testimony based on new or novel science be "sufficiently established to have gained general acceptance in the particular field in which it belongs." *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). In 2013 the Florida legislature attempted to move Florida away from the *Frye* standard by amending the Florida Evidence Code to reflect the *Daubert* standard in accordance with Federal Rule of Evidence 702; however, the Florida Supreme Court struck down the legislative amendment in 2018 in the case of *DeLisle v. Crane Co*., 258 So. 3d 1219 (2018), serving to reaffirm the proper test for admissibility was *Frye*, and not *Daubert*, stating "*Frye* relies on the scientific community to determine reliability whereas *Daubert* relies on the scientific savvy of trial judges to determine the significance of the methodology used."

Fast-forward seven months following the court's decision in *DeLisle*, the Florida Supreme Court reversed course and in *In Re: Amendment to the Florida Evidence Code*, No. SC19-107, 278 So.3d 551 (Fla. 2019) the court overruled its own decision in *DeLisle* and declared that Florida will now apply the *Daubert* standard to determine whether scientific evidence is admissible. In doing so, the Florida Supreme Court adopted Chp. 2013-107, Sections 1 and 2, amending Section 90.702, Fla. Stat., to state as follows:

> Section 1:
>
> If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if:
>
> (1) The testimony is based upon sufficient facts or data;
> (2) The testimony is the product of reliable principles and methods; and
> (3) The witness has applied the principles and methods reliably to the facts of the case
>
> Section 2:
>
> The facts or data upon which an expert bases an opinion or inference may be those perceived by, or made known to, the expert at or before the trial. If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence. Facts or data that are otherwise

inadmissible may not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

In adopting *Daubert*, the court chose not to address the constitutional or other concerns about the *Daubert* standard, instead reserving such issues for a proper case or controversy before the court. Though it appears the issue of evaluating the admissibility of expert testimony is settled and now lies with *Daubert*, in line with the majority of other states, as no controversy has brought the issue back before Florida's highest court, the standard may still be in flux in the future. As the adoption of *Daubert* was so recent, and abrupt, no mTBI cases evaluating expert testimony under *Daubert* have gone before the district courts or Supreme Court. In sum, *Daubert* is now the controlling legal standard for allowing expert testimony in Florida.

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

Yes. Under Florida law, the results of breath, urine, and blood tests administered in accordance with Sections 316.1932 or 316.1933, Fla. Stat., 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). These results are admissible in a civil trial regardless of whether the test was made for the purpose of accident report investigation or criminal investigation. *Brackin v. Boles*, 452 So. 2d 540 (Fla. 1984). It is permissible for a plaintiff to introduce any competent and relevant evidence on the question of the defendant's intoxication at the time of the accident in order to support the charge of negligence. *Frazee v. Gillespie*, 98 Fla. 582, 124 So. 6 (1929).

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

As a brief overview, in 1991, the United States Congress passed the Omnibus Transportation Employee Testing Act, requiring Department of Transportation agencies to implement drug and alcohol testing of transportation employees. These regulations were then codified in the Code of Federal Regulations under 49 CFR Part 40. This regulation applies to all DOT transportation employees regardless of method of transport; meaning, it equally applies to airline pilots as well as truck drivers.

Since that time, the Federal Motor Carrier Safety Administration (FMCSA) has established drug and alcohol testing rules and regulations for drivers of commercial vehicles who hold a commercial driver's license (CDL). The FMCSA regulations have been codified separately under 49 CFR 382, though commercial drivers are also bound to Part 40. In accordance with 49 CFR 382.103, the mandate for drug and alcohol testing applies to "every person, and to all employers of such persons who operate a commercial motor vehicle in commerce in any state and are subject to the CDL requirements of 49 CFR 383." The legislation has only very limited exceptions to its enforcement including those who are already required to comply with the Federal Transit

Administration alcohol and controlled substances testing regulations, active and reserve military personnel, and those exempted under Part 383 including operators of farm personnel, and firefighters and emergency personnel in the business of "preservation of life or property or the execution of emergency governmental functions."

As it pertains to Independent Contractors, Borrowed Servants, or Additional Insureds, Part 382 has a very broad definition of the term "Driver," which it defines as: "any person who operates a commercial motor vehicle. This includes, but is not limited to: Full time, regularly employed drivers; casual, intermittent or occasional drivers; leased drivers and independent owner-operator contractors." The Implementation Guidelines for Alcohol and Drug Regulations in Highway Transportation (FMCSA-CMO-04-001) make it clear that independent drivers are to be included in the drug and alcohol program, whether they are directly employed or under lease, and whether they operate their own commercial vehicle, or one owned by the subject company. It goes on to state as long as the driver is operating under the owner or company's direction, they must be included. As a result, the federal regulations make it clear that anyone, including the most casual or intermittent operators, such as a maintenance technician, must be included under the federally mandated testing program, and with the broad scope of employees subject to testing, all considerations should be made for independent contractors, borrowed servants, and additional insureds, if they operate a commercial motor vehicle, and are under the company's direction, be included in the testing program.

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

Florida does not have a mandatory alternative dispute resolution (ADR) requirement, though as a practical matter, the majority of civil cases pending in Florida will go through the mediation or arbitration process, either via agreement of the parties or by court order. Arbitration for instance can be voluntary or mandated by an agreement or contract between opposing parties when a dispute arises, but even if a contract or agreement does not require the parties to arbitrate, mediation or arbitration is still an option to parties embroiled in litigation.

In 1988, Florida enacted Chp. 44, Fla. Stat., entitled "Mediation Alternatives to Judicial Action." According to Section 44.102, Fla. Stat., a court, must, upon request of one party, refer to mediation any filed civil action for monetary damages, provided the requesting party is willing and able to pay the costs of the mediation or the costs can be equitably divided between the parties, with limited exceptions, including landlord-tenant disputes, debt collection actions, and medical malpractice claims.

Similar to mediation, Florida as a general rule does not have a mandatory binding or non-binding arbitration requirement, which are similarly governed by Sections 44.103 and 44.104, Fla. Stat. Section 44.103 mandates a court may refer any contested civil action filed in a circuit or county court to non-binding arbitration. Upon an arbitrator rendering a decision, the arbitration award will become final if a request for trial de novo is not filed timely. Section 44.104 prescribes that two or more opposing parties may also agree to submit the matter to binding arbitration in lieu of litigation. Appeals of binding arbitration awards are limited to those issues on the record, and not de novo.

Though not mandatory by statute, various judicial circuits in Florida, citing to Chp. 44, Fla. Stat., and Rule 1.700, Fla. R. Civ. P., have issued Administrative Orders mandating that upon the court's own motion, any and all civil actions may be referred to mediation, and further, the 20th Judicial Circuit for example, which consists of Charlotte, Collier, Glades, Hendry and Lee Counties, issued Administrative Order 1.15 mandating the referral of Circuit and County Civil cases to non-binding arbitration.

Ultimately it is the goal of Florida courts to see matters resolved without the time and expense of drawn out litigation, and the courts will always favor parties participating in the ADR process.

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

Rule 1.310(b)(6), Fla. R. Civ. P., governs corporate representative depositions in Florida, and their manner of operation. The Rule mandates that the party seeking the deposition of a corporate representative describe, with reasonable particularity, the matter(s) for examination. *Carriage Hills Condominium, Inc. v. JBH Roofing & Constructors, Inc*., 109 So.3d 329 (Fla. 4th DCA 2013). A corporate representative speaks as the "voice" of the corporation and is required to "testify about matters known or reasonably available to the organization." Fla. R. Civ. P. 1.310(b)(6). Importantly however, Rule 1.310(b)(6) does not require—or for that matter even contemplate—that the corporation produce the witness with the "most knowledge" on the specified topics, and the witness is not required to possess any personal knowledge. *Id. Carriage Hills Condominium, Inc*. 109 So.3d at 334.

In Florida the deposition testimony of a corporate representative can be used in support of a motion for summary judgment. Motions for summary judgment, and in turn, proper summary judgment evidence, is governed in Florida by Rule 1.510, Fla. R. Civ. P. Specially Rule 1.510(c) defines summary judgment evidence as "any affidavits, answers to interrogatories, admissions, depositions, and other materials as would be admissible." The Rule was further amended in 2005 requiring the moving party and adverse party to notify each other of the summary judgment evidence on which the other party relies and required any evidence not already on file with the court be served with the motion. See *In re Amendments to the Fla. Rules of Civil Procedure (Two Year Cycle)*, 917 So.2d 176, 177 (Fla.2005). A corporation is bound by its Rule 1.310(b)(6) testimony, and "when met by a motion for summary judgment, may not repudiate or contradict by affidavit [its] previous deposition testimony so as to create a jury issue." *Cary v. Keene Corp*., 472 So.2d 851, 853 (Fla. 1st DCA 1985). There are very limited exceptions to this rule absent a credible explanation. Ultimately, as long as the moving or adverse party properly seeks to introduce and rely upon corporate testimony in its motion, and informs the opposing party, such evidence can be properly relied upon and such testimony speaks for the corporation.

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

In negligence matters the doctrine of joint and several liability has been statutorily abolished, except in statutorily specified circumstances. Since Florida is a pure comparative

negligence state the judgment against a negligent defendant is based solely on that defendant's percentage of fault. *See* §768.81, Fla. Stat. Hence, a defendant cannot be responsible for more than percentage of fault assigned to them. The negligence judgment cannot be entered based on the doctrine of joint and several liability. *See* §768.81, Fla. Stat. The substance of claim determines whether it is a negligence matter, not the form of the allegations. Thus, matters sounding in negligence, strict liability, products liability, professional malpractice, breach of warranty, or similar theories are negligence matters, regardless attempts in a plaintiff to allege them in some other manner. *See* §768.81(1)(c) & (d), Fla. Stat.

Although Florida retains a contribution statute (*see* §768.31, Fla. Stat.) seeking contribution against a joint tortfeasor is not available as each parties' liability for damages would have already been apportioned in the negligence judgment. A percentage of fault can be assigned to non-party defendants, frequently referred to as *Fabre* defendants who are specifically identified in the *Fabre* affirmative defense.

However, in a few limited, statutorily defined circumstance, joint and several liability may be imposed. §768.81(4), Fla. Stat. (comparative fault "does not apply to any action … to recover actual economic damages resulting from pollution, to any action based upon an intentional tort, or to any cause of action as to which application of the doctrine of joint and several liability is specifically provided by [Florida statute] chapter 403, chapter 498, chapter 517, chapter 542, or chapter 895.")

11. What are the most dangerous/Plaintiff-friendly venues in Florida?

As always, demographics, lifestyles, recent events, economic state, percentages of accidents, and location of highways are factors that affect the verdict and settlement trends in trucking cases. According to the Florida Department of Highway and Motor Vehicles "Traffic Crash Facts Annual Report 2018," of all Florida counties, Miami-Dade County, Broward County, Palm Beach County, Orange County, Hillsborough County, and Duval County had the highest numbers of reported Commercial Motor Vehicle related motor vehicle crashes in 2018, as well as on a 3 year average. The 2019 numbers are not yet available.

Further, Broward, Duval, Hillsborough, Miami-Dade, Orange, Palm Beach, Pinellas, Polk and Volusia Counties reported the highest number of CMV-related traffic fatalities in 2018, as well as on a 3-year average.

According to Westlaw's verdict and settlement trends case evaluator, from 2017 to 2020, Palm Beach, Miami-Dade, Broward, Pinellas, and Duval County had the highest number of jury awards. However, the highest award was in 2017 in Marion County, Florida for $51,000,000. Apart from that outlier, the average for counties with more than 10 jury awards, Volusia, Alachua, Sarasota, Hillsborough, Polk, Broward, Duval, Miami-Dade, and Orange County had the highest jury awards.

Additionally, South Florida is considered a particularly unfavorable venue for insurers in bad faith cases which is potentially indicative of significant jury awards. The Eleventh Circuit noted in *Novoa v. Geico Indem. Co.*, that "Florida's third-party bad faith cause of action creates an incentive

for a claimant in [the Plaintiff's] situation to reject any proposed settlements and instead plan to proceed with a bad faith claim." *Novoa v. GEICO Indem. Co.*, 542 Fed. Appx. 794, 796 (11th Cir. 2013).

Escambia, Gadsden, Jefferson, Volusia, Orange, Hillsborough, Palm Beach, Broward, and Miami-Dade counties are considered the most dangerous venues due to their historically high jury verdicts and settlements. Several of these counties, such as Escambia (Pensacola), have disproportionately high numbers of plaintiffs' attorneys when compared to their general total populations. Moreover, Miami-Dade, Broward, and Palm Beach counties have the most diverse populations which result in more diverse jury pools. Thus, themes that resonate with each member of the jury are considered more challenging to craft. A recent development in the past decade has been Duval County's shift as a venue traditionally more moderate to one that has produced a large number of high verdicts typically seen in venues further south.

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

Yes, however, the caps vary depending on the type of case, and in some instances, there is no cap. Florida Statute 768.73 outlines the caps:

> (1)(a) Except as provided in paragraphs (b) and (c), 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, consistent with the remaining provisions of this section; or
>
> 2. The sum of $500,000.
>
> (b) Where the fact finder determines that the wrongful conduct proven under this section was motivated solely by unreasonable financial gain and determines that 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 on behalf of the defendant, it may award an amount of punitive damages not to exceed the greater of:
>
> 1. Four times the amount of compensatory damages awarded to each claimant entitled thereto, consistent with the remaining provisions of this section; or
>
> 2. The sum of $2 million.
>
> (c) Where the fact finder determines that at the time of injury the defendant had a specific intent to harm the claimant and determines that the defendant's conduct did in fact harm the claimant, there shall be no cap on punitive damages.
>
> (d) This subsection is not intended to prohibit an appropriate court from exercising its jurisdiction under s. 768.74 in determining the reasonableness of an award of punitive damages that is less than three times the amount of compensatory damages.

(2)(a) Except as provided in paragraph (b), punitive damages may not be awarded against a defendant in a civil action if that defendant establishes, before trial, that punitive damages have previously been awarded against that defendant in any state or federal court in any action alleging harm from the same act or single course of conduct for which the claimant seeks compensatory damages. For purposes of a civil action, the term "the same act or single course of conduct" includes acts resulting in the same manufacturing defects, acts resulting in the same defects in design, or failure to warn of the same hazards, with respect to similar units of a product.

(b) In subsequent civil actions involving the same act or single course of conduct for which punitive damages have already been awarded, if the court determines by clear and convincing evidence that the amount of prior punitive damages awarded was insufficient to punish that defendant's behavior, the court may permit a jury to consider an award of subsequent punitive damages. In permitting a jury to consider awarding subsequent punitive damages, the court shall make specific findings of fact in the record to support its conclusion. In addition, the court may consider whether the defendant's act or course of conduct has ceased. Any subsequent punitive damage awards must be reduced by the amount of any earlier punitive damage awards rendered in state or federal court.

Additionally, there is relevant case law that may limit a punitive damage award that is grossly inconsistent with the underlying award as unconstitutional and subject to a reduction.

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

Generally, although evidence of the gross medical bills is admissible, a post-verdict hearing is used to reduce the actual damages award by the amount of the medical bills paid or otherwise resolved without actual payment by the plaintiff. The harmonizing concept is that the tortfeasor or wrongdoer cannot benefit from the plaintiff's earned benefit or foresight in contracting for protection against losses, but as a corollary the plaintiff cannot actually recover for damages never suffered – no windfalls.

Florida's Collateral Sources statute requires that "the court shall reduce the amount of such [damages] award by the total of all amounts which have been paid for the benefit of the claimant [plaintiff], or which are otherwise available to the claimant [plaintiff], from all collateral sources." §768.76(1), Fla. Stat. The statute defines the payment types that must be deducted from the medical damages jury award. Generally, the statute excludes any payment made under a right of subrogation.

By way of example, private health insurer negotiated discounts with the health care providers are collateral sources which means evidence of the full charges (before application of the contractual discount) are admissible, but post-verdict hearing deducts those discount from the past medicals award. *See Nationwide Mutual Fire Insurance Company v. Harrel*, 53 So. 3d 1084 (Fla. 1st DCA 2011) (holding that gross amounts billed were admissible medical damages because the plaintiff paid premiums to a private insurer to earn the benefits); *Goble v. Frohman*, 901 So. 2d 830 (Fla. 2d DCA 2003) (the $400,000 difference between the amount billed and amount paid

by plaintiff's insurance to constituted a collateral source, to "allow[ ]… such a windfall completely undermines the purpose of the [Collateral Sources] Act by requiring insurers to pay damages based on a billing fiction ….").