

IDAHO

Thomas J. Collins
Christopher A. Campbell
MERRICK, HOFSTEDT & LINDSEY, P.S.
3101 Western Avenue, Suite 200
Seattle, WA 98121
Phone: (206) 682-0610
Fax: (206) 467-2689
E-Mail: tcollins@mhlseattle.com
www.mhlseattle.com

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

Idaho is traversed by two major interstate highways, some portions of which are situated in challenging mountainous terrain. It is the type of scenario that likely would lend itself to collection of information from an event data recorder (EDR) in the event of an accident, which may be used for purposes of accident reconstruction and creation of animations or simulations that may be used for illustrative purposes at trial. *See State v. Stevens*, 146 Idaho 139 (2008).

While Idaho does not currently have legislation regarding EDR privacy or related matters, other Western states do have such legislation, requiring disclosure of EDR installation and/or limiting access to stored information. *See, e.g.*, Wash. Code § 46.35.010; Ore. Rev. Stat. §§ 105.925; Mont. Code §§ 61-12-1001; Utah Code § 41-1a-1501; Colo. Rev. Stat. § 42-4-2401; Cal. Vehicle Code § 9951; Nev. Rev. Stat. § 484D.485. It is important to consider these other laws when interstate transportation is involved, and to understand that similar legislation may be enacted in Idaho eventually.

To use EDR information in litigation, it is commonplace for parties to retain and rely upon an expert in data forensics to retrieve and preserve devices or data. Additionally, the interpretation of raw data or its use for purposes of developing animations or simulations requires involvement of an expert in accident reconstruction. The decision to retain a qualified accident investigator early in litigation is important, particularly because there are relatively few such experts based in the Northwest.

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.

Obviously, a factory installed “black box” is not the only source of information that may be in play when an accident occurs. Any device that is capable of recording audio,

video, or data that may be captured during an accident event should be considered. Just to name a few vehicle devices that come to mind: other factory vehicle computers or modules; GPS navigation units; satellite phones, televisions, or radios; cellular phones or tablets; vehicle infotainment systems; and, dashboard or in-cab camera systems.

While discoverability and admissibility are likely treated in a manner similar to EDR information (discussed above), it is important to discuss with counsel any device or technology that will be implemented to assess how litigation might be impacted (and to prepare a plan for proper handling of potential evidence in the event of an accident).

It is advisable to inform your claim handlers, accident investigators, and attorneys of all the devices currently implemented *early* in the investigation process, or even as a best practice *before* an accident happens. For timely updates that may include, among other things, utilization of technology in the transportation industry, Idaho maintains a website that you can review periodically, located at: <https://trucking.idaho.gov/rules-regulations-manuals/>.

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?

Early Action. It is extremely important to promptly conduct initial inspections, non-destructive testing, and downloads of electronic data from vehicles involved in accidents. This initial process of collecting and preserving potential evidence should be completed before any repairs are completed, or before a total loss vehicle is disposed of. The custodian of an involved vehicle should have clear instructions on how to secure and preserve the vehicle during the resolution of claims.

In all cases, it is highly advisable to send correspondence to all parties involved in an accident providing initial information regarding the location of involved vehicles, as well as a timeline for either repair or disposal of such vehicles. The key is providing reasonable notice so that an adverse party cannot later claim being deprived of an opportunity to have access to evidence.

Preservation and Spoliation. Idaho law does not create a duty to preserve evidence. *Patton v. Ackerman*, 2013 WL 3614601 (D. Idaho 2013). However, spoliation occurs where evidence is destroyed or significantly altered, or where a party fails to preserve property for another's use of evidence in pending or reasonably foreseeable litigation. *Id.*

The doctrine of spoliation is a general principle of civil litigation which provides that “upon a showing of intentional destruction of evidence by an opposing party, an inference arises that the missing evidence was adverse to the party’s position.” *Stuart v. State*, 127 Idaho 806 (1995). Courts in Idaho recognize that spoliation of evidence is treated as an admission by conduct, in that the party destroying or concealing evidence “is said to provide a basis for believing that he or she thinks the case is weak and not to be won by fair means.” *Courtney v. Big O Tires, Inc.*, 139 Idaho 821 (2003). Application of spoliation doctrine is within the discretion of the trial court. *Id.*

Before imposing a sanction for spoliation, four factors must be satisfied: [1] the evidence was within the party’s control; [2] there was an actual suppression or withholding of evidence; [3] the evidence that was destroyed or withheld was relevant to the claims or defenses; and [4] it was reasonably foreseeable that the evidence would be discoverable. *See Fleming v. Escort, Inc.*, 2015 WL 561156 (D. Idaho 2015). Idaho courts have granted sanctions based on the spoliation of evidence requested through discovery. *Id.* Conversely, courts have declined to impose sanctions where there was no duty to preserve and no discovery request for the information. *See Patton v. Ackerman*, *supra*.

Claim Documents. Careful review of claim file materials is important early in threatened or active litigation in order to: establish a general litigation strategy; identify strengths and weaknesses of the case; determine what materials are subject to a claim of privilege or work product immunity; identify additional information to be collected or work to be completed in support of the litigation.

Law Enforcement. In Idaho, the issuance of a traffic citation is not admissible in court. However, payment of a citation can be treated as an admission of guilt and is admissible. *Kuhn v. Proctor*, 141 Idaho 459 (2005). Thus, early intervention in the process on behalf of the driver can have a significant impact on the defense further down the road.

In a related matter, post-accident investigations may be discoverable but should not be admissible at trial. The Federal Motor Carrier Safety Act (FMCSA) dictates that reports required by the act may not be admitted into evidence. *See* 49 USC § 504(f). Nevertheless, it is wise to carefully consider how these types of documents might impact discovery and litigation.

Social Media. It is no surprise that the modern era of social media has started to significantly impact civil litigation. There is no shortage of publications regarding the use of social media, both offensively and defensively, in civil litigation. One of the most important considerations is how to collect and preserve social media materials in a manner that will best provide an ability to use such materials as evidence at trial. It is advisable to monitor and download social media content for parties involved in an accident with some

frequency, beginning as early as feasible in the course of litigation. It is becoming more commonplace for litigators to retain vendors who specialize in collecting and preserving social media materials in a manner that should support admissibility at trial. *See* Fed.R.Evid. 902 (13) and (14). If there is any reason to believe that social media materials could play an important role as evidence based upon initial investigation, retaining a vendor to establish a defensible “chain of custody” for such materials is a best practice.

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?

In Idaho as in most other jurisdictions, a driver who is an independent contractor is typically indemnified by the company or covered by the company’s insurance policy. Defense of a driver acting in the course and scope of his or her agreement with the company is generally consistent with defense of the company. Plaintiffs will often challenge the designation of a driver as an independent contractor or borrowed servant, arguing that an “owner/operator” is in reality an agent of his or her “employer” (i.e., the company) as a basis to impute liability for the driver’s negligence to the company.

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?

The Idaho Rules of Evidence are similar to the federal rules, and Idaho courts utilize a “Daubert-like approach in addressing a challenge to the expert testimony.” *State v. Konechny*, 134 Idaho 410 (2000). Conclusions from scientific studies need not be universally accepted in order to be relied upon by experts. *Id.* Idaho courts recognize a number of factors to consider when analyzing proposed scientific evidence, including: (1) the presence of safeguards in the technique; (2) analogy to other scientific techniques whose results are admissible; (3) the nature and breadth of inferences drawn; (4) the extent to which the basic data are verifiable by the court and jury; (5) availability of other experts to test and evaluate the technique; (6) the probative significance of the evidence in the circumstances of the case. *Id.*

In cases involving mild traumatic brain injury (mTBI), there are no special rules regarding qualification of experts. *See, e.g., Hanks v. Sawtelle Rentals, Inc.*, 133 Idaho 199 (1999). Generally, an expert’s testimony will be allowed if it meets the “Daubert-like approach” articulated above. It should also be noted that conflicting or disputed expert testimony generally will not support resolution at the dispositive motion stage because it is

not a trial court's function on summary judgment to "resolve an issue of fact based on conflicting expert testimony." *Scharf v. U.S. Atty. Gen.*, 597 F.2d 1240 (9th Cir. 1979); *see Thomas v. Newton Intern. Enterprises*, 42 F.3d 1266 (9th Cir. 1994) ("Expert opinion evidence is itself sufficient to create a genuine issue of disputed fact sufficient to defeat a summary judgment motion.").

Additionally, courts generally give greater weight to the testimony of a treating physician. *Winans v. Bowen*, 853 F.2d 643 (9th Cir. 1987). However, if a party retains treating doctor to opine on subjects beyond the opinions formed during the course of treatment of the patient, that treating physician must be properly qualified as an expert and needs to complete a comprehensive expert report in compliance with Rule 26(a)(2)(B). *See Goodman v. Staples The Office Superstore, LLC*, 644 F.3d 817 (9th Cir. 2011).

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

Post-accident toxicology is subject to discovery and generally admissible, subject to measures of scientific reliability under Evidence Rule 702 and provided the testing results are authenticated and presented by a witness qualified to interpret the results. *See State v. Gleason*, 123 Idaho 62 (1992). Among other reasons for admission, post-accident toxicology could be relevant: to a plaintiff's motion to remove the cap on noneconomic damages; where a plaintiff asserts corporate negligence claims (i.e., supervision, hiring or retention); and, in determining the availability of punitive damages.

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

Generally, even if a driver is an independent owner/operator, they still must undergo the same drug testing (pre-employment, post-accident, etc.) as an employee of the trucking company.

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

Idaho does not have mandatory ADR requirements but does have a civil rule that provides for referral to mediation. *See Idaho Rule of Civil Procedure 37.1*. Idaho has also adopted the Uniform Arbitration Act. *See Idaho Code, Title 7, Chapter 9*.

The federal court in Idaho has a rule governing alternative dispute resolution (ADR) options for litigants. *See* District Local Rule Civ 16.4. Cases are not referred to arbitration if monetary damages sought exceed \$150,000. *Id.*

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

Yes, corporate deposition testimony can be used in the context of a dispositive motion. However, it is important to consider a couple of well-established rules when contemplating use of such testimony. First, in acting on a dispositive motion, courts must resolve factual issues and draw all reasonable inferences in favor of the party opposing the motion. *See Crown v. State, Dep't of Agric.*, 127 Idaho 175 (1995). Second, “a corporation generally cannot present a theory of the facts that differs from that articulated by the designated Rule 30(b)(6) representative.” 7 James Wm. Moore et al., *Moore’s Federal Practice* § 30.25[3] (3d ed. 2016). As such, “courts have ruled that because a Rule 30(b)(6) designee testifies on behalf of the entity, the entity is not allowed to defeat a motion for summary judgment based on an affidavit that conflicts with its Rule 30(b)(6) deposition or contains information that the Rule 30(b)(6) deponent professed not to know.” *Id.* Thus, to dependably rely upon corporate deposition testimony, it should be consistent as between the particular deponent and the corporate representative under Rule 30(b)(6), and the facts sought to be established by offering such testimony should be reasonably clear or undisputed in order to avoid an inference being drawn in favor of the party opposing the dispositive motion.

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

Idaho is a modified comparative fault state, which generally means that a plaintiff’s recovery is reduced in proportion to the plaintiff’s degree of fault in causing damages and that a plaintiff cannot recover if his or her fault is equal to or greater than the defendant’s fault. *See* Idaho Code § 6-801. Percentage of negligence or comparative responsibility can be attributed by separate special verdicts at trial. *See* Idaho Code § 6-802.

In Idaho, defendants are only jointly and severally liable for vicarious liability claims, or where such defendants acted in concert. *See* Idaho Code § 6-803. The statute applies only if the issue of proportionate fault is litigated between joint tortfeasors in the same action. *Id.*

Generally, a plaintiff's release of one joint tortfeasor, whether before or after judgment, does not discharge the other tortfeasors unless the release so provides. *Id.* The release may reduce the claim against the remaining tortfeasors in the amount of the consideration paid for the release, but there is no such reduction where the negligence or comparative responsibility of the tortfeasor being released is presented to and considered by the jury, whether or not responsibility is in fact apportioned by the jury. *Id.*

A released tortfeasor is not relieved from liability to make contribution to another tortfeasor, unless the release is given before the right of the other tortfeasor to secure a money judgment for contribution has accrued, and provides for a reduction, to the extent of the pro rata share of the released tortfeasor, of the insured person's damages recoverable against all the other tortfeasors. *Id.*

A contribution plaintiff is entitled to contribution from a tortfeasor whose liability was extinguished by the settlement, either in main action or separate action. *See Horner v. Sani-Top, Inc.*, 143 Idaho 230 (2006). The statute of limitations applicable to contribution actions is three years. *See Porter v. Farmers Ins. Co. of Idaho*, 102 Idaho 132 (1981).

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

Counties traversed by Interstate 84 in Southern Idaho will tend to have more liberal jury pools, including Canyon, Ada, Boise, and Bannock counties.

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

Noneconomic damages are capped for personal injury and wrongful death plaintiffs. *See Idaho Code § 6-1603.* The cap is adjusted periodically based on the average annual wage; as of June 2019 the noneconomic damages cap was \$357,210. The cap is concurrent and cumulative, meaning that a plaintiff is subject to the cap regardless of the number of persons responsible for the damages or the number of actions filed. Juries are not informed of the cap during trials. Causes of action involving willful, reckless, or felonious conduct, if proven, are not subject to the cap.

Punitive damages are capped at \$250,000 or three times the plaintiff's compensatory damages, whichever is greater. Juries are not informed of the cap during trials. *See Idaho Code § 6-1604.*

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

Idaho Code §6-1606 directs the trial judge to reduce a plaintiff's judgment by the amount received from a collateral source, such as a contractual or statutory write-down by Medicare or a private insurer.