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Indiana

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Are preventability determinations and internal accident reports discoverable or admissible in your state? What factors determine discoverability or admissibility?

If these records/reports are prepared in the ordinary course of business, they will likely be discoverable. However, these documents may be privileged and therefore not discoverable if they are prepared in anticipation of litigation, prepared for an insurer, or prepared at the direction of counsel, or include the mental impressions, opinions legal theories, or conclusions of an attorney or representative of a party to the litigation. *Purdue Univ. v. Wartell*, 5 N.E.3d 797 (Ind. Ct. App. 2014); *Richey v. Chappell*, 594 N.E.2d 443 (Ind. 1992); Ind. R. Civ. P. 26(B). Regarding the admissibility of a preventability determination, one district court within the 7th Circuit has ordered a defendant to produce preventability determinations and incident review board reviews for crashes involving a litigant driver for crashes which occurred prior to the one in suit. *Pruitt v. K&B Transp., Inc.*, 2022 U.S. Dist. LEXIS 210002 (S.D. Ill.).

An internal accident report if kept in the ordinary course of business may be admissible if it is relevant to the case issues and proper foundation for the information within is established. Ind. R. Evid. 401, 803. Argument could be made that preventability determinations should not be admissible during trial as it invades the province of the jury.

Does your state permit discovery of 3rd party litigation funding files and, if so, what are the rules and regulations governing 3rd party litigation funding?

Indiana permits civil proceeding advance payments (CPAP). *See* Indiana Code 24-12 et. sec. CPAP means a nonrecourse transaction in which a CPAP provider provides a funded amount to a consumer claimant to use for any purpose other than prosecuting the consumer claimant to use for any purpose other than prosecting the consumer claimant's civil proceeding, if the repayment of the funded amount is:

- Required only if the consumer prevails in the civil proceeding; and
- Sourced from the proceeds of the civil proceeding, whether the proceeds result from a judgment, a settlement, or some other resolution.

I.C. 24-12-10.5.

Regarding discovery, no communication between the consumer claimant's attorney in the civil proceeding and the CPAP provider with respect to the CPAP transaction limits, waives, or abrogates the scope or nature of any statutory or common law privilege, including the work product doctrine and the attorney client privilege. I.C. 24-12-8-1.

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Every CPAP transaction must meet the requirements set forth in I.C. 24-12-2-1, which include:

- The contract must be completely filled in when presented to the consumer claimant for signature;
- The CPAP contract must contain, in bold font contained within a box, a right of rescission, allowing the consumer claimant to cancel the contract without penalty or further obligation if, not later than 5 business days after the funding date, the consumer claimant either:
  - Returns to the CPAP provider the full amount of the disbursed funds; or
  - Mails to the address specified in the contract, a notice of cancellation and includes a return of the full amount disbursed.

Additional requirements at I.C. 24-12-2-1

Any person engaging in more than 15 CPAP's per year with consumer claimants must obtain a CPAP license. I.C. 24-12-9-1

What is the procedure for the resolution of a claim for injuries to a minor in your state? Does the minor's age affect the statute of limitations for a personal injury claim?

Minors are considered legally incompetent to bring a personal injury action on their own. Therefore, claims of a minor may be brought by a parent, guardian, or "next friend". A next friend for a minor plaintiff is required only when the minor is without a parent or general guardian since ordinarily it is the duty of the parent or guardian to institute and prosecute an action on behalf of a minor to protect their rights. *In re Paternity of S.A.M.*, 85 N.E.3d 879, 886 (Ind. Ct. App. 2017). However, the injured minor may pursue a personal injury action within 2-years of reaching the age of majority (also called removal of disability), or 20-years-old. I.C. 34-11-6-1.

Custodial parents may act on behalf of their minor children to maintain actions for injuries to their children caused by the wrongful acts or omission of another. I.C. 34-23-2-1. A minor may sue or be sued in any action in his/her own name by a guardian ad litem or next friend or in the name of his/her representative if the representative is court appointed. Ind. R. Civ. P. 17(C). The responsibility to learn of a child's injuries and recognize they may have been caused by the tortious act of another must fall to the parents or legal guardians. *Ledbetter v. Hunter*, 842 N.E.2d 810 (Ind. 2006). For purposes of accrual of a cause of action, the parent's knowledge is imputed to a child regarding the injury. *Id*. When a child is injured, the parent has a cause of action against the tortfeasor to recover compensation for the necessary medical treatment arising from the tortious conduct. *Hockema v. J.S.*, 832 N.E.2d 537 (Ind. Ct. App. 2005).

What are the advantages or disadvantages in your State of admitting that a motor carrier is vicariously liable for the fault of its driver in the context of direct negligence claims?

An advantage of admitting that a motor carrier is vicariously liable for the fault of its driver is that it limits the discovery into past incidents and the employment record of the driver. Further, once vicarious liability is established, alternative negligence theories cannot proceed simultaneously because those theories become redundant, unnecessary, and confusing. *Sedam v. 2JR Pizza Enters., LLC* 84 N.E.3d 1174 (Ind. 2017). Once vicarious liability has been admitted or established, summary judgment or judgment on the pleadings for all other theories of negligence is appropriate. *Sedam*. In the Sedam case, the Indiana Supreme Court held that claims against the corporate defendant Pizza Hut for vicarious liability and direct negligence could not be sought simultaneously because those claims sought to hold the same party (employer) liable for the same conduct (employee's negligence). The Sedam court reasoned that once an employer stipulates to vicarious liability, it

assumes indirect liability, transforming direct negligence claims into duplicative and unnecessary claims that improperly seek to hold the same party liable for the same negligent.

What is the standard applied for spoliation of physical and/or documentary evidence in your state?

Under Indiana law, spoliation is defined as the intentional destruction, mutilation, alteration, or concealment of evidence. If proved, spoliation may be used to establish that the evidence was unfavorable to the party responsible. *Loomis v. Ameritech Corp.*, 764 N.E.2d 658 (Ind. Ct. App. 2002). Indiana's Supreme Court has found that the spoliation rule applies to altered as well as destroyed documents. Id.

Indiana law does not recognize a claim for first-party negligent or intentional spoliation of evidence. *Gribben v. Wal-Mart Stores, Inc. 824 N.E.2d 349, 355 (Ind. 2005).* Indiana courts recognize spoliation of evidence as an independent tort only in narrow circumstances where a relationship exists between the claimant and the third party sought to be held responsible for a failure to preserve evidence, such as an insurer. *Kelley v. Patel*, 953 N.E.2d 505, 510 (Ind. Ct. App. 2011); *Thompson v. Owensby,* 704 N.E.2d 134 (Ind. Ct. App. 1998).

The Indiana Court of Appeals in *Miller v. Federal Express Corporation*,[1] while deciding an issue of spoliation of a defendant's computer, cited to the "seminal case in electronic discovery", *Zubulake v. UBS Warburg LLC*[2] which stated that anyone who anticipates being a party to a lawsuit must not destroy unique, relevant evidence that might be useful to an adversary. While a litigant is under no duty to keep or retain every document in its possession…it is under a duty to preserve what it knows, or reasonably should know is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request.

Is the amount of medical expenses actually paid by insurance or others (as opposed the amounts billed) discoverable or admissible in your State?

Yes, to both. The measure of medical expenses in Indiana is the reasonable value of such expenses. Stanley v. Walker, 906 N.E.2d 852 (Ind. 2009). The discounted amount of medical bills is admissible to rebut the reasonableness of charged introduced by a plaintiff. Stanley v. Walker, 906 N.E.2d 852 (Ind. 2009). The Supreme Court in Stanley noted that the discount of a particular provider usually arises out of a contractual relationship with insurers or government agencies, however, the court reasoned that evidence of the discounted amount billed if of value in the fact-finding process leading to the determination of the reasonable value of medical services. The collateral source statute does not bar evidence of discounted amounts in order to determine the reasonable value of medical services. To the extent the adjustments or accepted charges for medical services may be introduced into evidence without referencing insurance, they are allowed.

What is the legal standard in your state for obtaining event data recorder ("EDR") data from a vehicle not owned by your client?

Under Indiana Civil Rule of Procedure 34(C), a witness or person <u>other than a party</u> may be requested to produce electronically stored information, documents, drawings, or data compilations, etc. Additionally, a party may request entry upon land or property in possession or control of the nonparty for purposes of inspection and measuring, testing, photographing, etc. within the scope of discovery permitted under Indiana Civil Rule 26. Such

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[1] 6 N.E.3d 1006, 1013 (Ind. Ct. App. 2014)
[2] 220 F.R.D. 212, 217 (S.D.N.Y 2003).

requests must be served on other parties and include a subpoena to be served upon such witness or nonparty.

What is your state's current standard to prove punitive or exemplary damages against a motor carrier or broker and is there any cap on same?

Before a person may recover punitive damages in any civil action, that person must establish by clear and convincing evidence all of the facts that are relied upon by that person to support the recovery of punitive damages. I.C. 34-51-3-1

A punitive damage award may not be more than the greater of: 1) 3 times the amount of compensatory damages awarded in the action; or 2) $50,0000. A punitive damages award is paid to the clerk of the court where the action is pending. The clerk then pays 1) the person to whom the punitive damages were awarded 25% of the award and 2) pay the remaining 75% of the punitive award to the treasurer of the state who will then deposit the funds into the Violent Crime Victims Compensation Fund. I.C. 34-51-3-5.

Has your state had any noteworthy recent punitive damages verdicts? If so, what evidence was admitted supporting issuance of a punitive damages instruction? Finally, are any such verdicts currently on appeal?

There have not been any noteworthy "recent" damage verdicts in Indiana as they related to punitive damages. Indiana does not recognize an independent cause of action for punitive damages. *Crabtree ex rel. Kemp v. Estate of Crabtree*, 837 N.E.2d 135, 137–38 (Ind. 2005). This means that compensatory damages are a prerequisite to an award of punitive damages. *First Bank of Whiting v. Schuyler*, 692 N.E.2d 1370 (Ind. 1998). *See also Cheatham v. Pohle*, 789 N.E.2d 467, 473–74 (Ind. 2003); *Allstate Ins. Co. v. Axsom*, 696 N.E.2d 482, 485 (Ind. Ct. App. 1998); *Bright v. Kuehl*, 650 N.E.2d 311, 317 (Ind. Ct. App. 1995); *Sullivan v. Am. Cas. Co.*, 605 N.E.2d 134, 140 (Ind. 1992). Instead, punitive damages are a remedy, not a separate cause of action, and must be attached to an award for actual damages. *Best Formed Plastics, LLC v. Shoun*, 51 N.E.3d 345, 355–56 (Ind. Ct. App. 2016); *Allstate*, 696 N.E.2d at 485.

Still, once compensatory damages are found, punitives can be awarded. To award punitives, evidence must show the defendant exhibited a quasi-criminal mental state, that is, willful and wanton misconduct that the defendant should have known would probably result in injury. *Cacdac v. West*, 705 N.E.2d 506 (Ind. Ct. App. 1997); *Mitchell v. Stevenson*, 677 N.E.2d 551 (Ind. Ct. 1997). Evidence merely consistent with the hypothesis of malice, fraud, gross negligence, or oppressiveness is insufficient; some evidence must show that the tortious conduct was beyond mistake of law or fact, honest error of judgment, overzealousness, mere negligence, or other non-iniquitous human failing. *Yost v. Wabash College*, 3 N.E.3d 509, 523–24 (Ind. 2014); *Travelers Indem. Co. v. Armstrong*, 442 N.E.2d 349 (Ind. 1982); *Dow Chemical Co. v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 553 N.E.2d 144 (Ind. Ct. App. 1990).

The cap for punitive damages in Indiana is $50,000 or three times the total compensatory damages award, whichever is greater. Indiana Code § 34-51-3-4.

To illustrate how this has been applied, federal trucking cases have required more than excessive speed or lack of skill. *See Wanke v. Lynn's Transp. Co.*, 836 F.Supp. 587 (N.D. Ind. 1993); *Austin v. Disney Tire Co.*, 815 F.Supp. 285 (S.D. Ind. 1993). The Indiana Court of Appeals addressed the issue head on in *Westray v. Wright*, 834 N.E.2d 173 (Ind. Ct. App. 2005).

In *Westray*, plaintiffs sued a semi-truck driver and his employer after the driver rear-ended plaintiffs' car while

they were stopped at a red light. *Id.* at 175–77. Plaintiffs sought punitive damages, and at trial, the jury awarded $1,145,000 in compensatory damages and $15 million in punitives. *Id.* at 177–78. However, the Indiana Court of Appeals found the evidence failed to establish that the driver acted purposefully, with malice, or with gross negligence and therefore the evidence did not support the punitive damages award. *Id.* at 180–81. The court reasoned that the driver was not speeding, he was alone, he was not listening to the radio or a CD, he had been driving only for four hours prior to the accident, and there was no evidence that he was drowsy, intoxicated, or otherwise affected by any foreign substance. *Id.* at 176, 181.

By contrast, recall that in *Binkowski*, similar circumstances occurred in which a semi-truck driver rear-ended plaintiff who was stopped at a red light. *Binkowski v. Grand Island Express*, JVR No. 1808310042, 2018 WL 4190503 (Ind. Sup. Ct., Porter Co., April 12, 2018). There, however, although not appealed, the jury returned a verdict of $9.5 million in compensatory damages and awarded $7 million in punitives. Evidence that the semi-truck driver was texting his employer while driving at an excessive speed, coupled with the employer's knowledge of the driver's conduct and failure to implement policies preventing such unlawful conduct or otherwise take corrective action was sufficient to uphold the award for punitive damages. In other words, the jury found recklessness that rose above mere negligence.

Thus, evidence required to support an award for punitive damages requires more than mere excessive speed and necessitates some type of conduct that rises above mere negligence.

Does your state permit an expert to testify as to content of the FMCSRs or the applicability of the FMCSRs to a certain set of facts?

It depends. Indiana courts have varied as to how rulings challenging an expert's ability to testify to the content and/or applicability of the FMCSRs. However, it is likely that an expert would be able to testify to these issue, as long as the testimony did not go into whether a FMCSR was violated. *Est. of Arama v. Winfield*, No. 2:13-CV-381-JD, 2017 WL 1951462, at *1 (N.D. Ind. May 11, 2017), is the only case in Indiana, though in federal court, that expressly addresses such expert testimony. In *Winfield*, the plaintiff retained a commercial vehicle operation and safety specialist and director of safety, who, after reviewing various materials, made various conclusions about the applicability and violation of various FMCSRs. The defendant objected to such testimony, alleging the expert's conclusions were more than just addressing ultimate issues, which is allowable Fed.R.Evid. 704, but constituted "testimony as to legal conclusions that will determine the outcome of the case" which are inadmissible. *Good Shepherd Manor Found., Inc. v. City of Momence*, 323 F.3d 557, 564 (7th Cir.2003) (emphasis added). The Court admitted that: "The line between a permissible and impermissible opinion under Rule 704 is sometimes difficult to draw [as] there is a substantial 'grey area' between 'ultimate issues' and 'legal conclusions.'" *Richman v. Sheahan*, 415 F.Supp.2d 929, 945 (N.D.Ill.2006).

The Court ultimately held that the expert could testify "about relevant professional standards or whether a defendant's conduct conformed to those standards," but could not give "naked legal conclusions (e.g., "the driver was negligent") or testify whether certain conduct violated a law or regulation." *Klaczak v. Consol. Med. Transp. Inc.*, No. 96 C 6502, 2005 WL 1564981, at *4 (N.D.Ill. May 26, 2005) ("[A]n expert may not offer opinion testimony as to whether a defendant violated a statute or regulation, at least where that statute or regulation is at issue in the case."

The defendant also argued that the expert should not be able to concepts that are within the experience of the average juror, which the Court agreed with. The Court stated: "Thus, though she may testify about safety standards peculiar to the trucking industry, but may not, for example, testify about who had the right of way

during merging as the rules about merging apply to all vehicles: to a semi-truck as much as to a Mini Cooper."

The Court went on to explain that the exact line where such testimony should be "better sorted out at trial through live objections as "expert testimony can still be 'helpful and relevant' (and thus admissible) even if it 'to a greater or lesser degree, cover[s] matters that are within the average juror's comprehension."

Does your state consider a broker or shipper to be in a "joint venture" or similar agency relationship with a motor carrier for purposes of personal injury or wrongful death claims?

Indiana courts have yet to address whether a broker or shipper is in a "joint venture" or similar agency relationship with a motor carrier for purposes of persona injury or wrongful death claims. The roadmap ahead for broker and/or shipper liability for negligent selection/supervision claims in Indiana will likely be guided by the analyses contained in the federal district court cases that are occurring across the country.

Provide your state's comparative/contributory/pure negligence rule.

Indiana has adopted the Comparative Fault Act which governs any tort action based upon fault to recover damages for injury or death to a person or harm to property. Ind. Code § 34-51-2-1. In an action based on fault, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault. Ind. Code § 34-51-2-5. However, compensation is barred if the claimant's contributory fault is found to be greater than the fault of all persons whose fault proximately contributed to the claimant's damages. Ind. Code § 34-51-2-6. In other words, plaintiff's claim will be barred if (s)he is found to be more than 50% at fault.

However, this act does not apply to governmental entities, and public employees are excepted from the Indiana Comparative Fault Act. Tort claims against governmental entities such as Department of Transportation are subject to common law principles of negligence since the Comparative Fault Act is inapplicable to government entities. *Hopper v. Carey*, 716 N.E.2d 566, 570 (Ind. Ct. App. 1999).

Provide your state's statute of limitations for personal injury and wrongful death claims.

According to Ind. Code Ann. § 34-11-2-4, the statute of limitations for a personal injury claim in Indiana is two years from the date of the cause of the action.

According to Ind. Code Ann. § 34-23-1-1, when the death of one is caused by the wrongful act or omission of another, a personal representative may maintain an action against the later. The action must be commenced by the personal representative of the decedent within two years of the date of the accident.

In your state, who has the authority to file, negotiate, and settle a wrongful death claim and what must that person's relationship to the decedent be?

Who had authority to file, negotiate, and settle a wrongful death claim in Indiana is dependent on the age of the decedent. First, only the personal representative may maintain an action against the person whose wrongful act or omission caused the death of an adult person. I.C. §34-23-1-2(b). There is not a requirement in Indiana for there to be a relationship with the decedent to file a claim for wrongful death. However, it is typical for a personal representative to be the next of kin or an individual outlined in the decedent's last will and testament should outline. However, the personal representative must be at least 18 years old, of sound mind, and cannot have any felony convictions.

If the decedent is a "child", which is defined as unmarried child less than twenty years of age or less than twenty-three years of age and enrolled in technical school or college (I.C. 34-23-2-1), the action must be maintained by the parents, not by the child's estate. For this reason, under most circumstances, the claim must be pursued by the parents jointly, or by either of them personally and by naming the other parent as a defendant to answer as to his or her interest.

Is a plaintiff's failure to wear a seatbelt admissible at trial?

No. Indiana does not allow the failure of wearing a seatbelt admissible at trial to demonstrate fault in an action based upon negligence under the Comparative Fault Act, or in a civil case regarding mitigation of damages. *Hopper v. Carey*, 716 N.E.2d 566 (Ind. Ct. App. 1999).

In your state, are there any limitations on damages recoverable for plaintiffs who do not have insurance coverage on the vehicle they were operating at the time of the accident? If so, describe the limitation.

This kind of claim may trigger Indiana's "No Pay No Play" statute, I.C. §34-39-29.2-3. The purpose is to punish vehicle owner's that do not have insurance from claiming noneconomic damages, e.g., pain and suffering. The law covers an individual (1) who owns a motor vehicle that is involved in an accident where the motor vehicle is not insured for at least the minimum coverage amounts required under Indiana law; and (2) who, during the immediately preceding five years, has been required to provide proof of future financial responsibility, a requirement triggered by the individual's prior operation of a vehicle without financial responsibility. I.C. § 27-7-5.1-4; I.C. § 9-25-8-6. Thus, the law is aimed at individuals with a history of driving with no insurance, not first-time offenders. Additionally, there are three instances where the 'No Pay, No Play' law does not apply: (1) if a driver is under 18 years of age and has a previous uninsured violation; (2) if a person other than the driver incurs damages (i.e., a passenger); and (3) if the accident is intentional.

How does your state determine applicable law/choice of law questions in motor vehicle accident cases?

In Indiana, choice of law for tort actions is determined by following a hybrid rule that includes the traditional rule of lex loci delicti and the Second Restatement. A court will look at the difference of law between the potential forums. If there are differences between the state laws, the court will apply the traditional rule, or the place where the wrongful act occurred. Under the traditional rule, the court will apply the substantive law of the state. However, this presumption is not definite. If the court finds that the forum in which the wrongful act occurs has little relation or connection with the legal action [such as the residence of the parties, etc.], the court could determine a different forum is more appropriate.