MARYLAND

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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.

Maryland courts have found that black box data is sufficiently reliable to support qualified expert testimony in some circumstances (*see, e.g., Easter v. State*, 223 Md. App. 65 (2015)), and the Maryland Court of Special Appeals has cited with apparent approval cases in other jurisdictions that have more broadly concluded that data from motor vehicle recording systems are reliable and admissible. *Id.* at 80-81 (citing *Com. v. Zimmermann*, 70 Mass. App. Ct. 357, 873 N.E.2d 1215 (2007), *People v. Christmann*, 3 Misc. 3d 309, 776 N.Y.S.2d 437 (Just. Ct. 2004), and *Bachman v. Gen. Motors Corp.*, 332 Ill. App. 3d 760, 776 N.E.2d 262 (2002)). Additionally, accident animations and computer-generated evidence are not *per-se* inadmissible, and may be admitted subject to the existing rules of evidence. It should be noted that the Maryland Rules provide for pretrial notice of computer simulations and animations, so that objections may be made and ruled on pretrial. *See* Md. Rule 2-504.3.

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.

Maryland courts have not addressed in-depth many other sources of evidence, such as DriveCam, although, the Maryland Court of Appeals has found that GPS data does not necessarily require expert testimony to be admissible. *See Johnson v. State*, 457 Md. 513 (2018). However, a party opposing admission of GPS data is generally free to cross-examine the sponsoring witness concerning any defects in the data, or to present its own expert to contest the accuracy of a particular device. *See id.* In Maryland, determinations regarding the admissibility of evidence generally are left to the sound discretion of the trial court, and whether evidence is properly admitted at trial is typically reviewed on an abuse of discretion standard. *Id.*

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?

While not specific to post-accident claims, Maryland follows the traditional rule regarding spoliation, which is stated as follows:

> The destruction of or the failure to preserve evidence by a party may give rise to an inference unfavorable to that party. If you find that the intent was to conceal the evidence, the destruction or failure to preserve must be inferred to indicate that the party believes that his or her case is weak and that he or she would not prevail if the evidence was preserved. If you find that the destruction or failure to preserve the evidence was negligent, you may, but are not required to, infer that the evidence, if preserved, would have been unfavorable to that party.

Cost v. State, 417 Md. 360, 370 (2010). Under this rule, there is generally a duty to preserve evidence that may be relevant to a later claim, even absent a specific demand. *See id.*

Additionally, under Maryland law, documents produced by non-attorneys may enjoy work product privilege. Maryland's work product doctrine provides broad protection from discovery for materials prepared in anticipation of litigation by or for a party or its representative. A party representative includes not only an attorney, but also a consultant, surety, indemnitor, insurer, or agent. *See* Md. Rule 2-402(d). Under Md. Rule 2-402(d), a party may obtain discovery of "documents, electronically stored information, and tangible things prepared in anticipation of litigation or for trial" only if such materials are generally discoverable under Md. Rule 2-402(a) and if the party seeking discovery has "substantial need for 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." *Id.* Even if the required showing can be made, in ordering discovery of these materials, the court is required to "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." *Id.*

Related to interactions with law enforcement, guilty pleas to minor traffic offenses have been found to be admissible in subsequent civil litigation relating to the same accident as evidence of an admission of fault. *Crane v. Dunn*, 382 Md. 83 (2004). However, evidence of payment of a fine as a result of a traffic citation has been held to be inadmissible in a subsequent civil lawsuit relating to the same accident. *Briggeman v. Albert*, 81 Md. App. 482 (1990).

Maryland does not have a *per se* rule regarding pre-trial disclosure of social media investigations. However, if it is requested, it may be discoverable in response to written discovery requests.

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 Maryland, "[u]nder the doctrine of respondeat superior, an employer is vicariously liable for the tortious conduct of his employee or agent when that employee or agent is acting within the scope of the master-servant relationship." *Schramm v. Foster*, 341 F. Supp. 2d 536, 543 (D. Md. 2004) (citations omitted). An independent contractor is "one who contracts to perform a certain work for another according to his own means and methods, free from control of his employer in all details connected with the performance of the work except as to its product or result," and the general "rule of respondeat superior does not impose liability on an employer for the wrongdoing of an independent contractor." *Id.* at 544. Under Maryland case law, "the issue whether a master and servant relationship exists in any case is essentially a factual question which must be determined by the trier of fact where the evidence is conflicting." *Sea Land Indus., Inc. v. Gen. Ship Repair Corp.*, 530 F. Supp. 550, 563 (D. Md. 1982). Generally, to "establish a principal-agent relationship by inference, plaintiffs must show that 1) the agent was subject to the principal's right of control; 2) the agent had a duty to primarily act for the benefit of the principal; and 3) the agent held the power to alter the legal relations of the principal." *Schramm v. Foster*, 341 F. Supp. 2d 536, 543 (D. Md. 2004) (citing *Schear v. Motel Management Corp.,* 61 Md. App. 670, 687 (1985)).

Additionally, "under Maryland law, whatever the status of an employee under the 'borrowed servant' doctrine, the parties may allocate between themselves the risk of any loss resulting from the employee's negligent acts." *Sea Land Indus., Inc. v. Gen. Ship Repair Corp.*, 530 F. Supp. 550, 563 (D. Md. 1982). Also, "Maryland cases have distinguished between loaned and hired servants, concluding that in a case involving a hired servant, it is much more likely that the employee in question continues to do the work of his general employer." *Id. See also Perry v. Asphalt & Concrete Services, Inc*., 447 Md. 31 (2016) (a company that hired a dump truck driver to transport materials to job sites owed a duty of reasonable care to those who came into contact with the driver, regardless of whether the driver was considered an agent or independent contractor of such company); *Schramm v. Foster*, 341 F. Supp. 2d 536 (D. Md. 2004) (a broker of a shipment being transported by a tractor-trailer driver at the time of a collision could not be viewed as the driver's employer or equivalent, and thus could not be held liable for the negligent hiring of a driver under Maryland law).

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?

In the 1990's, the Maryland Court of Appeals adopted the Maryland Rules of Evidence, including Rule 5-702, which governs the admission of expert testimony. That rule provides:

> Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert

testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony.

Md. Rule 5-702. The Court of Appeals has further examined the third, "sufficient factual basis," prong of Rule 5-702, and explained that there are two sub-factors to that prong. First, the expert opinion testimony must be founded on an adequate supply of data, and second, it must be based on a reliable methodology. *Rochkind v. Stevenson*, 454 Md. 277, 286 (2017). Absent either, the opinion is "mere speculation or conjecture." *Id*.

Maryland also follows the *Frye-Reed* general acceptance test, which has been expanded by the Court of Appeals and applied to scientific conclusions, not just techniques. For example, in *Blackwell v. Wyeth*, 408 Md. 575 (2009), the Court of Appeals adopted the "analytical gap" concept, and emphasizing that "[g]enerally accepted methodology… must be coupled with generally accepted analysis in order to avoid the pitfalls of an 'analytical gap,'" the Court held that the plaintiff's expert's medical causation opinion was not generally accepted in the scientific community and therefore was not admissible, notwithstanding that it was based on generally accepted methods. *Id.* at 608. As some courts have acknowledged, the evolution of Maryland's *Frye-Reed* doctrine "to both maintain the general acceptance test and include a check for an 'analytical gap' has muddied our approach to expert testimony." *Savage v. State*, 455 Md. 138, 186 (2017) (Adkins, J., concurring).

There is no apparent general trend of success in striking experts or claims regarding mild traumatic brain injuries in Maryland.

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

Md. Code, Cts. & Jud. Proc. § 10-306 (entitled, "Admissibility of intoxication test results"), provides only that in specified "criminal trial[s]," a copy of a report of the results of a test of breath or blood to determine alcohol concentration or drug content may be "admissible as substantive evidence without the presence or testimony of the technician or analyst who performed the test," when certain requirements are met. *See* Md. Code, Cts. & Jud. Proc. § 10-306(a). However, the Maryland Court of Appeals has held that: "The amount of alcohol in the blood of a drinking driver is admissible in a civil action as well as in a criminal cause as evidence of the degree of the impairment of the driver's normal coordination, faculties, and abilities as a result of the consumption of alcohol." *Nast v. Lockett*, 312 Md. 343, 355 (1988), *overruled on other grounds by Owens-Illinois, Inc. v. Zenobia*, 325 Md. 420 (1992). *See also Hickey v. Kendall*, 111 Md. App. 577 (1996), *aff'd sub nom. Kendall v. Nationwide Ins. Co.*, 348 Md. 157 (1997) (holding in a personal injury action following a motor vehicle accident that hospital records concerning the defendant motorist's drug and alcohol use on night when accident occurred, including results of blood serum alcohol test, were admissible within the business records exception to the hearsay rule).

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

Maryland courts do not appear to have conducted any recent in-depth analysis of specific considerations for federally-mandated testing when drivers are Independent Contractors, Borrowed Servants, or Additional Insureds. The Fourth Circuit has noted in other circumstances, however, that various federal trucking regulations are "intended to safeguard the public by preventing authorized carriers from circumventing applicable regulations by leasing the equipment and services of independent contractors exempt from federal regulation." *Republic W. Ins. Co. v. Williams*, 212 F. App'x 235, 241 n.7 (4th Cir. 2007).

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

Under the Maryland Rules, a circuit court may order a party and the party's attorney to participate in ADR. *See* Md. Rule 17-201(a). There is no apparent wide-spread trend of local jurisdictions mandating cases to arbitration.

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

Yes. It should be noted that the Maryland Rules generally permit an adverse party to use corporate deposition testimony "for any purpose." *See* Md. Rule 2-419(a)(2) ("The deposition of… a person designated under Rule 2-412(d) to testify on behalf of a public or private corporation, partnership, association, or governmental agency which is a party may be used by an adverse party for any purpose.").

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

In tort cases, Maryland follows the doctrine of joint and several liability, and there is a right to contribution among joint tort-feasors for amounts paid beyond their pro rata share of the common liability. *See* Md. Code, Cts. & Jud. Proc. § 3-1402; *Owens-Illinois, Inc. v. Cook*, 386 Md. 468 (2005); *Parler & Wobber v. Miles & Stockbridge*, 359 Md. 671 (2000). The Maryland Uniform Contribution Among Joint Tort-Feasors Act provides for a "right of contribution... among joint tort-feasors," *i.e.*, "two or more persons jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them." Md. Code, Cts. & Jud. Proc. §§ 3-1401, 3-1402. Contribution may apply in cases of common liability, with joint tort-feasors responsible for the same damages "even though their liability may rest on different grounds." *Parler & Wobber v. Miles & Stockbridge*, 359 Md. 671, 687 (2000). Maryland precedent provides that a party may qualify as a joint tort-feasor upon adjudication as liable or upon conceding its own liability. *See Martinez v. Lopez*, 300 Md. 91, 94-95 (1984). Without an admission or adjudication of liability, a party who enters into a release is deemed a volunteer, not a joint tort-feasor. *See Scapa Dryer Fabrics, Inc. v. Saville*, 418 Md. 496, 529-30 (2011).

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

Maryland juries are traditionally more conservative in their verdicts and awards in the western and eastern counties of the state, and more generous in their verdicts and awards in middle municipalities, around the Baltimore-Washington metropolitan area. Some of the state's most litigious municipalities—Baltimore City and Prince George's County, for example—are the most likely to empanel a plaintiff-friendly jury, and located towards the center of the state. Prince George's County, in particular, tends to render larger jury verdicts. The landscape can change quickly, however, and generally tends to become more conservative the further from the center one moves. Baltimore County (surrounding Baltimore City, and a separate municipal entity), for example, tends to be more moderate in its awards than Baltimore City. Similarly, Montgomery County, which neighbors Prince George's County and also shares a border with Washington, D.C., tends to render more conservative jury verdicts.

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

There is no general cap on punitive damages in Maryland.

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

Under Maryland law, both paid and unpaid medical bills can be introduced in order to establish the existence or extent of a plaintiff's damages. It should be noted, however, that a plaintiff will typically need to provide expert testimony that the plaintiff's medical bills were reasonable, fair, and necessary for those bills to be admitted into evidence to support an award of special damages. *See, e.g., Desua v. Yokim*, 137 Md. App. 138, 143-44 (2001). In actions for less than $30,000.00, however, medical bills produced under certain procedures prior to trial can be admitted without the support of a health care provider's testimony as evidence of the amount, fairness, and reasonableness of the charges for the services or materials provided. *See* Md. Code, Cts. & Jud. Proc. § 10-104. It should be further noted that Maryland follows the collateral source rule, which "permits an injured person to recover the full amount of his or her provable damages, regardless of the amount of compensation which the person has received for his [or her] injuries from sources unrelated to the tortfeasor." *Lockshin v. Semsker*, 412 Md. 257, 284-85 (2010). Hence, under Maryland law, the collateral source rule "generally prohibits presentation to a jury of evidence of the amount of medical expenses that have been or will be paid by health insurance." *Id.* Under this rule, a plaintiff generally may seek to recover the full, reasonable value of the medical services rendered to them. *See id.; Haischer v. CSX Transp., Inc.*, 381 Md. 119, 132 (2004).