MICHIGAN

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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 box data consists primarily of data from a vehicle's electronic control module (ECM) and event data recorder (EDR) and is an obligatory request from Plaintiff counsel in all commercial vehicle litigation.

Electronically stored information is expressly stated in Michigan's rules for Discovery.

MCR2.032(B)(1), states in pertinent part, "Parties may obtain discovery regarding any matter, not privileged … including the existence, description, nature, custody, condition and location of ….electronically stored information.

Plaintiff's counsel will usually issue a preservation letter once they have been retained. Failure of defendant to preserve the back box data, regardless of its evidentiary relevance allows plaintiff to try to make the inference the data would be adverse to the defendant.

Michigan's Court of Appeals has held that an appropriate sanction from not preserving evidence may be either the exclusion of evidence or an instruction to the jury that it may draw an inference adverse to the culpable party. *Brenner v. Kolk,* 226 Mich. App. 149, 161(1997).

However, missing evidence gives rise to an adverse presumption only when the complaining party can establish 'intentional conduct indicating fraud and a desire to destroy [evidence] and thereby suppress the truth.'" *Ward v Consolidated Rail Corp*, 472 Mich 77: 84-85; 693 NW2d 366 (2005).

Regarding simulations, Michigan courts have distinguished between evidence offered to recreate an event and that was offered only to illustrate an expert's opinion. For both uses, the evidence must aid the fact finder, be relevant, and be probative.

In *People v. Unger*, 278 Mich. App. 210, 749 NW 2d 272, 299 (2008), the court permitted certain computer animations of a victim's fall, which were based on the expert's calculations, but disallowed others that were based on calculations and the expert's speculation. The court reasoned that the basis of the expert's opinion for the latter set of

animations was not in evidence as required by Michigan Rule of Evidence 702, and the animation was irrelevant to the trial.

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.**

Dash cam video and a passenger vehicle's airbag deployment module are other common sources of additional technological evidence to evaluate accidents.

Legal issues include the preservation and admissibility of such technology.

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?**

Post-accident evidence needs to be preserved before notice of litigation. In Michigan, a trial court has the authority, derived from its inherent powers, to sanction a party for failing to preserve evidence that it knows or should know is relevant before litigation is commenced. *MASB–SEG Property/Casualty Pool, Inc v. Metalux*, 231 Mich.App. 393, 400, 586 N.W.2d 549 (1998).

Claims documents may be discoverable, unless a privilege can be established.

Pursuant to MCR 2.302(B)(3):

> ... a party may obtain discovery of documents and tangible things otherwise discoverable under subrule (B)(1) and prepared in anticipation of litigation or for trial by or for another party or another party's representative (including an attorney, consultant, surety, indemnitor, insurer, or agent) only on a showing that the party seeking discovery has substantial 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 ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

MCR 2.302(B)(3)(a) is virtually identical with its federal counterpart, F.R. Civ. P. 26(b)(3). As a result, it is appropriate to rely on federal cases for guidance in determining the scope of the work-product doctrine. Although the rule protecting work product from discovery is most often used to protect attorneys' litigation files, under the plain language of the rule litigation files prepared by insurers are also protected. MCR 2.302(B)(3)(a) applies to litigation files of a party's "representative (including an ... indemnitor [or] insurer ...)." Federal courts have recognized this protection for nonlawyer "representatives," including insurers. See *Logan v. Commercial Union Ins. Co.,* 96 F.3d 971, 977 (C.A.7, 1996); *United Coal Cos. v. Powell Constr. Co.,* 839 F.2d 958, 966 (C.A.3, 1988). Finding the rule inapplicable

to “anyone other than a lawyer is inconsistent with the plain language of the rule.” Id.

Michigan’s law enforcement agencies are responsive to request for post-accident records through a Freedom of Information Act request.

Social media is an excellent source of information. However, accessing private social media can be challenging. Despite the lack of guiding precedent from Michigan’s judiciary, this issue has been addressed by Sixth Circuit in *Tompkins v. Detroit Metropolitan Airport*, 278 F.R.D. 387 (E.D. Mich 2012). In *Tompkins,* the Court held “material posted on an allegedly private social networking website page that is accessible to a selected group of recipients but not available for viewing by the general public, is generally not privileged, nor is it protected by common law or civil law notions of privacy.” *Id*. at 388

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?

Determining the employment status of a truck driver in Michigan is critical in light of the exclusive remedy provision of Michigan’s Worker’s Disability Compensation Act.

MCLA 418.161(1)(n), “employee” is defined as:

Every person performing service in the course of the trade, business, profession, or occupation of an employer at the time of the injury, if the person in relation to this service does not maintain a separate business, does not hold himself or herself out to and render service to the public, and is not an employer subject to this act.

Michigan’s Worker’s Disability Compensation Act, MCL 418.1, et. seq. provides the exclusive remedy through which an employee may recover against his employer for injuries incurred during course of employment. The right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease. Thus, ordinarily, an employee's sole remedy against an employer for a workplace-related injury is provided by the WDCA. *Bagby v. Detroit Edison Co*., 308 Mich.App. 488, 491, 865 N.W.2d 59 (2014).

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?

Three criteria must be satisfied before expert testimony will be admitted: (1) the expert must be qualified; (2) the evidence must provide the trier of fact with a better understanding of the evidence or assist in determining a fact in issue; and (3) the

evidence must be from a recognized discipline. Whether a witness is an expert is a determination within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. Michigan allows a liberal grant of witness qualification, and the rule is not applied narrowly.

Michigan courts have acknowledged that a Traumatic Brain injury may be classified as mild, moderate or severe. *Churchman v. Rickerson* 240 Mich App. 223, 611 N.W. 2d 333 (2000).

In regard to determining the classification of a traumatic brain injury, Michigan statute permits a licensed allopathic or osteopathic physician to act as an expert. MCL 500.3135(2)(a)(ii) provides, in pertinent part, as follows:

a licensed allopathic or osteopathic physician who regularly diagnoses or treats closed-head injuries testifies under oath that there may be a serious neurological injury.

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

Yes.

MCL 257.625a(6)(a).

The following provisions apply to chemical tests and analysis of a person's blood, urine, or breath, other than a preliminary chemical breath analysis:

(a) The amount of alcohol or presence of a controlled substance or other intoxicating substance in a driver's blood or urine or the amount of alcohol in a person's breath at the time alleged as shown by chemical analysis of the person's blood, urine, or breath is admissible into evidence in any civil or criminal proceeding and is presumed to be the same as at the time the person operated the vehicle.

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

Anyone who assigns drivers to operate commercial motor vehicles are subject to the FMCSA drug and alcohol testing requirements.

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

Yes.

Pursuant to MCR 2.410(A)(1), All civil cases are subject to alternative dispute resolution processes unless otherwise provided by statute or court rule.

MCR 2.403(A)(2) states, "Case evaluation of tort cases filed in circuit court is mandatory…" Case evaluation is a process where three experienced attorneys, with no prior knowledge of the case or the parties, review written summaries and entertain oral presentations by the attorneys for each party. The three attorneys, "the case evaluators", then issue an award at the time of the oral presentation based on their collective assessment of the settlement value of the case. Each party may accept or reject the award within 28 days. If both parties accept the award the case settles at that figure. Depending on the verdict at trial, any party who rejects the award may be subject to sanctions specified in the court rule governing case evaluations, MCR 2.403.

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

Yes.

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

Generally, any Michigan tort defendant is severally liable for damages attributed to its percentage of fault. MCL 600.6304; *Romain v. Frankenmuth Mutual. Ins*., 762 N.W.2d 911 (Mich. 2009). Absent special circumstances, a party cannot be liable for damages in an amount greater than its percentage of fault.

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

In Michigan, the most dangerous venue continues to be Wayne County, which encompasses the City of Detroit. In 2018, a Wayne County jury awarded a $135 million dollar verdict on a medical malpractice case. The verdict is believed to be the largest single medical malpractice verdict in the country.

In 2015, a Wayne County jury awarded a $22.6 million verdict in a trucking negligence case.

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

Michigan does not allow for recovery of punitive damages. *Gilroy v Conway* 151 Mich App 628, 391 NW2d 410 (1986).

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

Medical expenses are not admissible in Michigan in a motor vehicle accident case because the PIP carrier is responsible to pay all reasonable and necessary medical expenses.

Under MCL 500.3107(1)(a), Plaintiff may seek "all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery or rehabilitation. Allowable expenses include, but not limited to, medical expenses."

In Michigan, the amount a plaintiff may seek for medical expenses is determined by if the charge for the service was reasonable, the expense was reasonably necessary and the expense was incurred. *Spect Imaging, Inc. v. Allstate Ins. Co.*, 246 Mich.App.568, 574, 633 N.W.2d 461 (2001). The amount paid is not a factor in the reasonableness determination.   Nowhere in the statute does it state that the contractual amounts agreed upon by the medical providers and health care insurers or the statutory amounts allowed for government benefits like Medicaid is binding on medical providers under the no-fault act. *Hofmann v. Auto Club Ins Ass'n*., 211 Mich App 55, 114, 535 N.W.2d 529.

There is a basis for post-verdict reductions. Section 3116 of Michigan's No Fault statute requires that personal injury protection no-fault benefits be reduced to the extent the insured has received equivalent compensation from tort judgments arising from accidents outside of the state, from accidents with uninsured motorists, and from intentionally caused harm. This is consistent with Michigan's adoption of the collateral source rule set forth in MCLA 600.6303.

Further, Michigan recognizes the common-law rule of setoff among joint tort defendants. This will reduce a jury verdict by an amount the plaintiff had recovered from a settlement from a co-defendant. The purpose of this rule is to prevent a plaintiff from receiving more than a single recovery for their single injury. *Greer v. Advantage Health*, 305 Mich.App.192, 852 N.W.2d. 198 (2014).

However, on June 11, 2019, revisions to Michigan's No-Fault insurance laws were signed by Governor Whitmer. Effective July 1, 2020, Michigan will no longer require all automobile drivers to purchase unlimited No-Fault Michigan PIP benefits. For auto insurance policies issued or renewed after July 1, 2020, drivers will now have the choice of the following No-Fault medical benefit coverage levels: $50,000 (if a driver is enrolled in Medicaid); $250,000; $500,000; or "no limit." Any medical bills incurred in excess of an individual's policy, may now be sought in addition to any excess wage loss claim.