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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.

Montana law provides that data from a motor vehicle event data recorder may be used without the owner's consent if a court orders production pursuant to a valid search warrant; to facilitate or determine the need for emergency medical care for the driver or passenger of a motor vehicle involved in a crash or emergency; by order of the district court provided the owner has notice and 48 hours to object and request a hearing; or for purposes of improving motor vehicle safety, security, or traffic so long as the identity of the owner is not disclosed. Mont. Code Ann. § 61-12-1004. Outside of these uses, recorded data may not be retrieved or used without the owner's consent. Mont. Code Ann. § 61-12-1002.

See discussion below concerning admissibility of black box technology and simulations.

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.

There are no Montana cases limiting introduction of evidence from event data recorders or other electronic evidence relevant to a trucking accident. It is likely that evidence would be treated similar to computer-generated or animated evidence, which is admissible so long as the evidence is supported by an adequate factual foundation, found to be reliable, and meets Mont. R. Evid. 702. *Wheaton v. Bradford*, 300 P.3d 1162, 1166 (Mont. 2013). In *Wheaton*, the Court allowed accident reconstruction evidence involving computer simulations after determining the methodology was scientifically valid and could be applied to the facts in issue. *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?

a. Preservation/Spoliation

"The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation." *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003) (*quoting Fujitsu Ltd. v. Fed. Exp. Corp.*, 247 F.3d 423, 436 (2d Cir. 2001)). "Identifying the boundaries of the duty to preserve involves two related inquiries: *when* does the duty to preserve attach, and *what* evidence must be preserved?" *Id*. (emphasis in original).

Regarding the first inquiry, as soon as a potential claim is identified, a litigant is under a duty to preserve evidence which it knows or reasonably should know is relevant to the action. *Webster v. Psychiatric Med. Care, LLC*, 386 F. Supp. 3d 1358, 1363 (D. Mont. 2019) (*quoting In re Napster, Inc. Copy. Litig.*, 462 F. Supp. 2d 1060, 1067 (N.D. Cal. 2006)). Once litigation is reasonably foreseeable, a litigant 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. *Zubulake*, 220 F.R.D. at 217.

Direct party spoliation is treated as a discovery abuse and punishable by the court under the Montana Rules of Civil Procedure, even when the evidence is lost or destroyed prior to a lawsuit being filed. *Spotted Horse v. BNSF R.R. Co.*, 2015 MT 148, ¶¶ 20-22, 379 Mont. 314, 320, 350 P.3d 52, 56. The Montana Supreme Court will uphold a district court's sanction for spoliation of evidence where a civil lawsuit is "reasonably foreseeable," and the party either negligently or intentionally failed to preserve relevant evidence. *Id*., ¶¶ 20-39. Courts are free to impose a variety of sanctions to address spoliation, including an adverse inference jury instruction, attorneys' fees and costs for discovery into the issue, or a default judgment. *Id*. In *Spotted Horse*, the plaintiff appealed the district court's decision not to issue a default judgment against BNSF for its failure to preserve video footage of an accident. *Id*. The Montana Supreme Court found the district court erred in its handling of the spoliation and remanded the case for a new

trial with instruction that the district court impose a sanction "commensurate with the significance of BNSF's actions." *Id*., ¶ 39.

b. Claims Handling/Claims Documents

Montana's claim handling practices are governed by the Montana Unfair Trade Practices Act (UTPA). Mont. Code Ann. § 33-18-101, et seq. The UTPA requires insurers (and self-insurers) to pay or deny a claim within 30 days after receipt of a proof of loss unless the insurer makes a reasonable request for additional information in order to evaluate the claim. Mont. Code Ann. § 33-18-232. If the insurer requests additional documentation, then it must pay or deny the claim within 60 days of receiving the proof of loss or advise the insured of its reasons for not issuing payment. Mont. Code Ann. § 33-18-232. Insurers must acknowledge and act promptly upon communications with respect to claims. Mont. Code Ann. § 33-18-201(2). Insurers must pay interest on claims over $5 that were paid late under the statute.

Further, insurers are obligated to pay, in advance of settlement, reasonable and necessary expenses incurred by a claimant as a result of the accident when liability for those expenses is "reasonably clear." *Ridley v. Guaranty Nat. Ins. Co.*, 951 P.2d 987 (Mont. 1997); *Dubray v. Farmers Ins. Exchange*, 36 P.3d 897 (Mont. 2001). On the other hand, the court has acknowledged that this obligation to pay "does not mean that an insurer is liable for all expenses submitted by an injured plaintiff" unless liability for that expense is also reasonably clear. *Ridley*, 951 P.2d 987. Additionally, the Montana Supreme Court has held that a general release of the insurer or insured is not required by UTPA as a condition to settlement. *Shilhanek v. D-2 Trucking, Inc.*, 70 P.3d 721, 727 (Mont. 2003).

The work-product doctrine usually applies from the time a claim file is opened because claims files normally are commenced in anticipation of litigation and geared toward the eventuality of litigation. *Palmer by Diacon v. Farmers Ins. Exchange*, 861 P.2d 895, 909-10 (Mont. 1993) (*quoting Kuiper v. Dist. Court of Eighth Jud. Dist. of State of Mont.*, 632 P.2d 694, 701 (Mont. 1981)). However, in bad faith cases, the claims file does not enjoy protection from disclosure. *Id*. at 910. Ordinary work-product prepared in anticipation of litigation is discoverable "upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." *Id*. (*quoting* Mont. R. Civ. P. 26(b)(3)). Opinion work product is discoverable when the mental impression is directly at issue in the case and the need for the material is compelling, meaning public policy and the administration of justice outweigh protecting the mental impressions of the opposing party's attorneys. *Id*. at 911 (*quoting Kuiper*, 632 P.2d at 701-02). Even where an attorney was involved in the handling of a claim, the file and the attorney's mental impressions may be discoverable in a bad faith action, particularly if the defendant is relying on an "advice of counsel defense." *Dion v. Nationwide Mut. Ins. Co.*, 185 F.R.D. 288, 295-96, 1998 WL 1037795 (D. Mont. 1998).

c. Social Media

The Montana Supreme Court has not ruled directly on discovery of social media. However, the general rules of discovery still apply to requests involving social media: the evidence must be relevant and the request must be reasonably calculated to lead to admissible evidence. *Keller v. Nat. Farmers Union Prop. & Cas. Co.*, 2013 WL 27731, 5 (D. Mont.).

d. Early Contact With Law Enforcement

Early contact with law enforcement can expedite receipt of the crash report and your expert's inspection of the accident site. Montana's law enforcement conduct their own investigation into trucking accidents to determine if any criminal charges or citations are necessary. At a minimum, law enforcement will compose a crash report of the accident. Accident reports are considered confidential but may be obtained without court order by, among others, a person named in the report or involved in the accident, the representative of the insurance carrier of that person, or a party to a civil action arising from the accident. Mont. Code Ann. § 61-7-114(2). Counsel need to remain cognizant of the confidential nature of the crash report while using it during the pendency of the case and thereafter. Any unlawful disbursement of the crash report is basis for misdemeanor criminal charges. Mont. Code Ann. § 61-7-118. It is important to obtain the crash report to determine right away key witnesses and other information which can be used by your expert and/or investigator.

Pursuant to the Federal Motor Carrier Safety Administration, post-accident drug and alcohol testing is required of drivers. Most often, the responding law enforcement agency will await toxicology results prior to making a decision regarding criminal charges. Counsel should be aware of any potential criminal charges and the potential need for the driver to obtain separate criminal defense counsel.

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?

Generally, an employer is not liable for the tortious acts of its independent contractor. *Stricker v. Blaine County*, 453 P.3d 897, 901 (Mont. 2019) (*citing Dick Irvin, Inc. v. State*, 310 P.3d 524, 532 (Mont. 2013)). Exceptions arise when (1) there is a non-delegable duty based on contract; (2) the activity is inherently or intrinsically dangerous; or (3) the employer negligently exercises control reserved over a subcontractor's work. *Beckman v. Butte-Silver Bow County*, 1 P.3d 348, 350 (Mont. 2000).

However, the tort of negligent hiring applies to independent contractors, though liability is limited to physical harm. *Gurnsey v. Conklin Co., Inc.*, 751 P.2d 151, 157-58 (Mont. 1988) (adopting Restatement (Second) of Torts, § 411). The Montana Supreme Court has not decided a negligent supervision case involving an independent contractor, and likely, if the company were "supervising" the independent contractor, the court would find the individual an employee or would, at minimum, apply an exception to the rule that the employer is not liable for the independent contractor's torts. *See Stricker*, 453 P.3d at 901; *Wild v. Fregein Constr.*, 68 P.3d 855, 861-62 (Mont. 2003); *Spain v. Montana Dep't*

of Revenue, 2002 MT 146, ¶ 23, 310 Mont. 282, 287, 49 P.3d 615, 618 (*citing Walling v. Hardy Const.*, 247 Mont. 441, 447, 807 P.2d 1335, 1338 (1991)). A similar analysis applies to the case of borrowed servants or a property owner's liability for someone else's workers on its property. *Watts v. Montana Rail Link, Inc.*, 975 P.2d 283, 293-94 (Mont. 1999)

Moreover the U.S. District Court for the District of Montana has held the Montana Supreme Court would likely follow the majority rule on claims for negligent hiring/supervision, which provides a negligent retention/supervision claim is not allowed where the employer acknowledges the employee was acting in the course and scope of his employment. Thus, in a case where a company acknowledges the driver (whether an IC or borrowed servant) was in the course and scope of employment for the company, a negligent retention/supervision claim should not be allowed. However, the U.S. District Court also held the Montana Supreme Court would likely recognize an exception and allow negligent hiring/supervision claims to proceed, despite the employer's acknowledgment, if the claimant has a valid claim for punitive damages. *Parrick v. FedEx Grounds Package System, Inc.*, CV 09-95-M-DWM-JCL, 2010 WL 1981451, at *3 (D. Mont. Apr. 21, 2010), *report and recommendation adopted sub nom.*, *Parrick v. FedEx Ground Package System, Inc.*, CV 09-95-M-DWM-JCL, 2010 WL 1981422 (D. Mont. May 14, 2010); *Mann v. Redman Van & Storage Co., Inc.*, CV 10-128-M-DWM-JCL, 2011 WL 5553044, at *3 (D. Mont. Oct. 17, 2011), *report and recommendation adopted*, CV 10-128-M-DWM-JCL, 2011 WL 5553241 (D. Mont. Nov. 15, 2011).

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?

Montana case law on the admissibility of expert testimony regarding mild traumatic brain injuries (mTBI) requires the testimony to be neither speculative nor lacking a causal connection to the symptoms. In *Kimes v. Herrin*, a two-year old child injured in a car accident began exhibiting symptoms years later, prompting her parents to bring a suit alleging brain trauma. 705 P.2d 108, 110 (Mont. 1985). The defendant tried to introduce evidence of family fighting and an alcoholic environment as an alternative cause to the child's injuries but failed to establish a medical connection between the poor environment and the symptoms, so the evidence was barred from admission under Mont. R. Evid. 403. *Id*. Conversely, in *Peterson-Tuell v. First Student Transp., LLC*, the plaintiff alleged she suffered TBI after being rear-ended by a school bus; she showed no symptoms for nearly two months. 339 P.3d 16, 18 (Mont. 2014). The defendants provided expert testimony that the plaintiff's TBI symptoms were psychosomatic and the result of her prior anxiety and depression. *Id*. at 20. The district court allowed the testimony, and the Montana Supreme Court affirmed, finding that the evidence met the relevancy bar of Mont. R. Evid. 401 and medically connected the plaintiff's symptoms to something other than the accident. *Id*.

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

Positive post-accident toxicology results are admissible in Montana so long as there is evidence linking the results to causation. *Havens v. State*, 945 P.2d 941, 944 (Mont. 1997). In *Havens*, Havens sued the State for negligence after a motorcycle crash, and at trial, the State was able to introduce evidence of his intoxication. *Id*. at 942. The Montana Supreme Court reversed only because the State failed to connect Havens' alcohol consumption to his motorcycle crash; the results were thus prejudicial and should have been barred by Mont. R. Evid. 402. *Id*.

7. What are some considerations for federally-mandated testing when drivers are independent contractors, borrowed servants, or additional insureds?

Because parties are generally not liable for the actions of their independent contractors under Montana law, such parties are required to conduct federally mandated testing. If any of the exceptions apply and create liability for the employer, then the employer absolutely must follow federally mandated testing. Because the exceptions are liberally applied, especially where the employer exercises any degree of control over the independent contractor, testing is a double-edged sword. *See*, e.g., *Gibby v. Noranda Minerals Corp*., 273 Mont. 420, 423, 905 P.2d 126, 128 (1995). Performing testing on independent contractors could be construed as exercising control over safety measures, causing an exception to apply. On the other hand, if the company does not require testing, it may be liable for physical harm resulting from an accident caused by the independent contractor. The best practice would be for the company to put a requirement in its contract with independent contractors and borrowed servants that those individuals must perform their own testing.

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

While not required by state rules, most district courts require mediation prior to trial. No district courts require arbitration, binding or non-binding. In Montana's U.S. District Courts, mediation is not required, but in our experience, if one party moves the court for an order referring the case to a magistrate for settlement conference, that order is granted, regardless of the other party's position on the matter. Recently, those orders have included a requirement that the parties exchange at least one round of offers prior to the settlement conference. However, the parties are under no obligation to settle the case in a U.S. District Court settlement conference.

Montana Rule of Appellate Procedure 7 requires mediation for all workers' compensation appeals, appeals involving domestic relations, appeals in actions seeking monetary damages, and appeals that the Montana Supreme Court deems appropriate.

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

Yes.

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

If the negligence of a party to an action is an issue, each party against whom recovery may be allowed is jointly and severally liable for the amount that may be awarded but has the right of contribution from any other person whose negligence may have contributed as a proximate cause. Mont. Code Ann. § 27-1-703(1). This statutory language does not allow for a separate contribution claim; the defendant must seek to join the party from whom contribution is sought as a third-party defendant. However, Mont. Code Ann. § 27-1-703(5) allows a named defendant to seek contribution from another alleged tortfeasor (with whom the plaintiff has not settled or released) if contribution cannot be obtained from that party in the primary action for any reason. The distinction between these two statutory sections is that § 27-1-703(5) requires there to be some obstacle that prevents the named defendant from joining the alleged tortfeasor as a third-party defendant; § 27-1-703(1) bars separate actions for contribution if there is no obstacle to joining the third-party defendant.

Additionally, if the party's negligence is determined to be 50% or less, that party is severally liable only and only responsible for the percentage of negligence attributable to that party; the remaining parties are jointly and severally liable for the remaining percentage. Mont. Code Ann. § 27-1-703(2). A party is jointly liable for all damages caused by the negligence of another if both acted in concert in contributing to the claimant's damages or if one party acted as an agent of the other. Mont. Code Ann. § 27-1-703(3).

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

State court is generally regarded as riskier for defendants that federal court. Although rare, cases required to be litigated in tribal courts are also very risky for defendants. The state court judicial districts known for being most plaintiff-friendly are the following:

- Second Judicial District Court, Silverbow County
- Eighth Judicial District Court, Cascade County
- Fourth Judicial District Court, Missoula County

12. Is there a cap on punitive damages in Montana?

Montana statutory law caps punitive damages at $10 million or 3 percent of a defendant's net worth, whichever is less; class action lawsuits are exempt from this cap. Mont. Code Ann. § 27-1-220(3). Three Montana state district courts have found this statutory cap unconstitutional. *See Butte Local Dev. Corp. v. Masters Grp. Int'l, Inc.*, No. DV-11-372, 2014 WL 2895577 (Mont. Dist. March 25, 2014); *Olson v. Hyundai Motor Co.*, No. DV-11-304, 2014 WL 5040001 (Mont. Dist. Sept. 19, 2014); *Kelly Logging, Inc., v. First Interstate Bank*, No. DV-12-928, 2015 Mont. Dist. LEXIS 82 (Mont. Dist. Apr. 21, 2015). However, the Montana Supreme Court has not ruled definitively on the issue, rendering no opinion when given the chance in *Masters Group International, Inc. v.*

Comerica Bank, 352 P.3d 1101, 1118 (Mont. 2015). The Montana Supreme Court was again given the chance to rule on the constitutionality in *Nunez v. Watchtower Bible*, but decided a dispositive issue before reaching the punitive damages question. 2020 WL 90744 (Mont. 2020). Therefore, the constitutionality of the statutory cap on punitive damages depends upon which Montana state district court the case is filed in.

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

A plaintiff may introduce evidence of the amount billed for medical damages; the reasonableness of the amount billed is a matter for the jury to determine. *Meek v. Mont. Eight Judicial Dist. Court*, 349 P.3d 493, 496 (Mont. 2015). Montana law requires a jury to determine its award without consideration of any collateral sources. Mont. Code Ann. § 27-1-308(3). Montana law also requires damages be reasonable. Mont. Code Ann. § 27-1-302. Evidence of the amount billed is relevant to the issue of damages, and defendants may contest the reasonableness of those damages after the evidence has been considered. *Meek*, 349 P.3d at 497.

Insurers are obligated to pay medical expenses prior to final settlement when liability for such expenses is reasonably clear. *Ridley v. Guaranty Nat. Ins. Co.*, 951 P.2d 987, 992 (Mont. 1997). Liability is reasonably clear "when a reasonable person, with knowledge of the relevant facts and law, would conclude, for good reason, that the defendant is liable to the plaintiff." *Teeter v. Mid-Century Ins. Co.*, 406 P.3d 464, 468 (Mont. 2017) (*quoting Peterson v. St. Paul Fire and Marine Ins. Co.*, 239 P.3d 904, 913 (Mont. 2010)).