

NEW JERSEY

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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.

Event data recorder information admissibility has passed the *Frye* standard (or general acceptance test for scientific evidence) in New Jersey.

The law in New Jersey bars access to this data by anyone but the vehicle owner or owner's representative, except in certain situations, such as if the data is subpoenaed or needed for a legally proper discovery request or civil action. The restrictions exclude audio and video data, and the law doesn't apply to personal video cameras, dashboard cameras or cellphones with recording capabilities. The law also prohibits altering or deleting data for two (2) years after a crash that results in bodily injury or death. Violations of that provision carry a civil penalty of \$5,000 for each offense.

In New Jersey, computer-generated simulations, reconstruction, and animation have long been accepted as an appropriate means to communicate complex issues to a lay audience, so long as expert testimony explains that the processes and calculations underlying the reconstruction or simulation are reliable. *Ortiz v. Yale Materials Handling Corp.*, 2005 U.S. Dist. LEXIS 18424, at *28-29, (D. N.J. Aug. 24, 2005).

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 footage provides a similar evidentiary benefit in auto accident claims. Dash cams record video directly to an SD card. Some can even record sound, have night vision, and built-in GPS. These can be useful resources in evaluating a motor vehicle accident claim, on both the liability aspect as well as the damages. Use of these technologies may require expert opinion to establish a foundation, should the matter proceed into litigation.

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?

The New Jersey Appellate Division determined that a potential tortfeasor who was put on notice of the claim has a duty to preserve evidence when (1) litigation is pending or likely; (2) the alleged spoliator has knowledge of such litigation; (3) the evidence is relevant; and (4) the non-spoliating party is prejudiced. *Chapin v. Samaras*, 2014 N.J. Super. Unpub. LEXIS 620 (App. Div. 2014). Spoliation of evidence in a prospective civil action is deemed to have occurred when evidence relevant to the action is destroyed, causing interference with the action's proper administration and disposition. *Manorcare Health v. Osmose Wood*, 336 N.J. Super. 218, 226, 764 A.2d 475, 479 (N.J. App. Div. 2001).

In civil litigation, spoliation of evidence can result in a separate tort action for fraudulent concealment, discovery sanctions, or an adverse trial inference against the party that caused the loss of evidence. *Rosenblit v. Zimmerman*, 166 N.J. 391, 400-06, 766 A.2d 749 (N.J. 2001).

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?

New Jersey Courts follow that an employer that hires an independent contractor is not liable for the negligent acts of the contractor in the performance of the contract. *Bahrle v. Exxon Corp.*, 145 N.J. 144, 156, 678 A.2d 225 (1996). Generally, the principal is not vicariously liable for the torts of the independent contractor if the principal did not direct or participate in them. *Baldasarre v. Butler*, 132 N.J. 278, 291, 625 A.2d 458 (1993). The immunity of the principal who hires an independent contractor rests on the distinction between such a contractor and an employee. *Puckrein v. ATI Transp., Inc.*, 186 N.J. 563, 574 (2006). The important difference between an employee and an independent contractor is that one who hires an independent contractor has no right of control over the manner in which the work is to be done, it is to be regarded as the contractor's own enterprise, and he, rather than the employer is the proper party to be charged with the responsibility for preventing the risk, and administering and distributing it. *Baldasarre, supra*, 132 N.J. at 291, 625 A.2d 458 (quoting W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 71 (5th ed. 1984)).

There are, however, three exceptions to the general rule that principals are not liable for the actions of independent contractors: (1) where the principal retains control of the manner and means of doing the work subject to the contract; (2) where the principal engages an incompetent contractor; or (3) where the activity constitutes a nuisance per se. *Majestic Realty Assocs. v. Toti Contracting Co.*, 30 N.J. 425, 431, 153 A.2d 321 (1959).

To establish a master's liability for the acts of his servant, a New Jersey plaintiff must prove (1) that a master-servant relationship existed and (2) that the tortious act of the servant occurred within the scope of that employment." *Carter v. Reynolds*, 175 N.J. 402, 409 (2003). The focus of whether a master-servant relationship exists (employer-employee relationship), turns on the nature of the relationship between both parties. *Carter*, at 408-409 .

In determining whether agency exists, New Jersey applies the standard set forth in section 220 of the Restatement (Second) of Agency. *Carter*, at 409. Section 220 provides:

- I. A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.
- II. In determining whether one acting for another is a servant or an independent contractor, the following matters of facts, among others, are considered:
 - A. the extent of control which, by the agreement, the master may exercise over the details of the work;
 - B. whether or not the one employed is engaged in a distinct occupation or business;
 - C. the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
 - D. the skill required in the particular occupation;
 - E. whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
 - F. the length of time for which the person is employed;
 - G. the method of payment, whether by the time or by the job;
 - H. whether or not the work is a part of the regular business of the employer;
 - I. whether or not the parties believe they are creating the relation of master and servant; and
 - J. whether the principal is or is not in business.

Restatement (Second) of Agency 220 (1958).

Furthermore, New Jersey has provided an additional "catch-all" factor, stating that courts should consider "such other factors as may be reasonably considered in determining whether the entity for which the services are being performed controls, or has the right to control, the entity performing the services." *Model Jury Charges* (Civil) 5.10I(A)(11) +(2011); *see Carter, supra*, 175 N.J. at 410.

There are circumstances where two employers could potentially be subject to vicarious liability because both have exerted control over the employee. The status of employer is therefore not exclusive and where two employers exert some level of control over an employee, commonly both employers have a measure of control and the business of both is being done. In such cases, both would be subject to vicarious liability under the doctrine of respondeat superior.

There is a well-established, yet under-utilized doctrine of law which, under the right circumstances, provides the same immunity from liability to a contractor as that provided to the plaintiff's employer under the Workers Compensation Bar. The Special Employer Doctrine provides immunity under the Workers Compensation Bar for qualified parties,

regardless of who actually paid the employee's salary and Workers Compensation benefits. Case law known as the "Manpower cases" has established a test to determine whether the employee qualifies as a "special employee." This five-part test looks at 1) whether there was an express or implied contract between the employee and special employer, 2) whether the work the employee did was essentially that of the special employer, 3) whether the special employer had the right to control the employee's work, 4) who paid the employee's wages, and 5) who had the right to hire and fire the employee.

Circumstances in which the special employer defense arises are often on behalf of a business seeking to be granted special employer status to protect itself against a civil lawsuit by a temporary staffing employee injured while working on its premises. New Jersey consistently holds that a special employment relationship exists between an employee working on behalf of a temporary staffing agency and the special employer for whom he is actually performing services, thereby barring any claim that employee has against the special employer.

With respect to Additional Insured status under New Jersey law in the context of a driver for a motor carrier, New Jersey's Omnibus statute provides in relevant part:

"Every owner or registered owner of a motor vehicle registered or principally garaged in this State shall maintain motor vehicle liability insurance coverage ... insuring against loss resulting from liability imposed by law for bodily injury, death and property damage sustained by any person arising out of the ownership, maintenance, operation or use of a motor vehicle..."

N.J.S.A. 39:6B-1

Additional insured issues have arisen in various contexts including in loading and unloading claims and what constitutes "use" of the vehicle. See, *Kennedy v. Jefferson Smurfit Co.*, 688 A.2d 89 (N.J. 1997) (Stating that mandatory "use" coverage in New Jersey must be broadly construed in order to effectuate the overriding legislative policy of assuring financial protection for the innocent victims of motor vehicle accidents [citation omitted], and finding that selection of the pallet was an act in preparation of and integral to the loading process thereby extending additional insured coverage to shipper for driver's injury); *Greentree Associates v US Fidelity & Guar. Co.*, (N.J. Super 1992) (General contractor charged with failure to supervise a construction site was not an additional insured because it was not a "user" of a subcontractor's construction vehicles when an employee of the subcontractor was injured during the refueling of one of the vehicles by the other.)

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 legal standard in New Jersey for allowing expert testimony on mild traumatic brain injury claims is the same standard with respect to expert testimony on any other injury

claims. Although it did not expressly declare New Jersey to be a “*Daubert* jurisdiction,” the State’s Supreme Court issued a landmark decision buttressing the arduous nature of the trial court’s gatekeeping role when assessing the reliability and admissibility of scientific causation evidence under New Jersey Rules of Evidence 702 and 703. That decision, *In re Accutane Litig.*, 191 A.3d 560 (N.J. 2018), provided more direction on how the gatekeeping function should be properly performed and formally adopted the important factors recognized by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993), as guideposts for evaluating the reliability of scientific evidence.

The Court noted that both New Jersey law and the *Daubert* standard are aligned in their general approach to a methodology-based test for reliability. It was persuaded that the factors identified in *Daubert*, specifically the (1) testability, (2) peer review, (3) error rate, and (4) general acceptance, should be incorporated for use in New Jersey.

An important consideration is to manage the experts testimony based on the expert’s report, which will be disclosed prior to trial testimony. According to the Appellate Division, an expert’s testimony at trial may be confined to matters of opinion contained within the expert’s report. *Mauro v. Owens-Corning Fiberglas Corp.*, 225 N.J. Super. 196, 206, 542 A.2d 16 (App. Div. 1988), *aff’d*, 116 N.J. 126, 561 A.2d 257 (1989). The court is thus authorized to impose sanctions for such non-disclosure or opinions beyond the four corners of the expert’s report, including the exclusion of the expert’s undisclosed opinions at trial. *Id.* at 206-07, 542 A.2d 16.

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

New Jersey law is relatively silent on whether positive post-accident toxicology results are admissible. Evidence of intoxication is relevant to the issue of negligent driving, but in order to introduce evidence of prior substance use, supportive evidence must be presented “from which the trier of the fact may reasonably conclude that the drinking affected the safe operation of the vehicle.” *Black v. Seabrook Assoc., LTD.*, 298 N.J. Super. 630,637 (App. Div.), *certif. denied.*, 149 N.J. 409 (1997).

Such toxicology results, like all evidence in general, must pass the evidentiary standards in order to be admissible at trial. Expert opinions are sometimes required, particularly with scientific evidence when the subject matter at issue in the case cannot be readily understood by the average juror. The New Jersey Rules of Evidence provides that a party can present a qualified expert to offer opinion testimony if the expert’s scientific, technical, or other specialized knowledge will assist the judge or jury in understanding the evidence or determining a fact in issue. N.J.R.E. 702. The judge will exercise his or her sound discretion in determining whether to admit expert testimony, and the appellate court will only reverse if the decision is a clear abuse of discretion.

New Jersey is among the many states regulating the legal use of marijuana. The DOT’s Office of Drug and Alcohol Policy, however, conforms to federal law and expects that

CDL drivers keep THC out of their systems. Even though states are legalizing the drug for medical use, the trucking industries do not have a relaxed attitude towards driver's legal use because they are highly regulated at the federal level. Thus, this alleged DOT violation may be used by a plaintiff attorney in civil litigation as ammunition for negligence or, worse, recklessness claims against both the driver and its employer.

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

Considerations for federally-mandated testing will depend upon how the question resolves as to whether the a company would be considered an employer of the driver. Generally, all CDL drivers who operate commercial motor vehicles subject to the CDL requirements on public roads in the U.S. are performing safety-sensitive functions and are subject to DOT drug and alcohol testing. 49 CFR 382.103. This includes all full-time, part-time, intermittent, backup and international drivers.

Where required by federal mandate, such as the Federal Motor Carrier Safety Regulations, a failure to abide by the regulation's post-accident testing may result in employer liability for federal violations.

Carriers may allow their employee drivers subject to post-accident drug tests to continue driving while waiting for the results of the test, as long as no other restrictions have been placed on the driver by law enforcement and there is no reasonable suspicion of impaired driving.

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

In New Jersey, mediation is not mandatory. However, arbitration is mandatory for certain civil cases, including motor vehicle accidents, regardless of value.

There is no cap or limit on awardable damages for matters assigned to mandatory arbitration. However, such arbitration is non-binding, with a right to reject the arbitration panel's decision within thirty (30) days of the decision, at which time the case will be scheduled for trial.

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

Corporate deposition testimony can be used in support of a motion for summary judgment. In New Jersey, a party seeking summary judgment may refer to any evidence that would be admissible at trial, such as deposition transcripts, party admissions, affidavits of witnesses, documents received during discovery such as contracts, e-mails, letters and/or certified governmental documents. This type of evidence would also be accompanied by a declaration from the party submitting them that all copies of the documents are true and correct, including deposition excerpts. If discovery has not been

completed and there are additional facts that need to be obtained then a summary judgment Motion will often be considered pre-mature.

Specific to such motions premised on deposition testimony, the New Jersey Supreme Court determined that a motion for summary judgment should be denied where determination of material disputed facts depends primarily on credibility evaluations. *Parks v. Rodgers*, 176 N.J. 491, 502 (2003).

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

New Jersey law provides for contribution amongst joint tortfeasors under the Joint Tortfeasors Contribution Act.

Where injury or damage is suffered by any person as a result of the wrongful act, neglect of joint tortfeasors, and the person so suffering injury or damage recovers a money judgment or judgments for such injury or damage against one or more of the joint tortfeasors, either in one action or in separate actions, and any one of the joint tortfeasors pays such judgment in whole or in part, he shall be entitled to recover contribution from the other joint tortfeasor for the excess so paid over his pro rata share.

N.J. Stat. §2A:53A-3. The right to contribution is only enforceable after the tortfeasor seeking it has been legally compelled to pay more than his equitable share of the liability. *Polidori v. Kordys*, 526 A.2d 230, 232 (N.J. Super. Ct. App. Div. 1987). There must be a judgment against the tortfeasor in order for him to recover contribution.

In *Gangemi v. National Health Laboratories, Inc.*, 701 A.2d 965 (N.J. Sup. Ct. App. Div. 1997), the court held that a settling tortfeasor could maintain a contribution claim against a nonsettling tortfeasor where: there was a dismissal; the non-settling tortfeasor was not a party to the suit; and, the statute of limitations barred any subsequent claim against them by the injured party.

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

Some counties in New Jersey considered to be more liberal include (in no particular order): Essex County; Hudson County; Camden County; and, Union County. Geographically speaking, those counties in or around large metropolitan areas (such as New York City or Philadelphia) yield more liberal juries.

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

The New Jersey Punitive Damages Act limits punitive damages to five (5) times the amount of compensatory damages awarded or \$350,000, whichever is greater – except in specific cases involving public policy and social concerns. N.J.S.A. 2A:15-5.9.

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

Based upon the collateral source rule, medical bills paid by insurance may be introduced into evidence but then must be deducted from the verdict post-trial by the judge molding the verdict. N.J.S.A. 2A:15-97. The collateral source rule does not apply to Medicaid benefits because the plaintiff must reimburse Medicaid.

The Appellate Division in *Ribeiro v. Sintra* found that medical expenses “incurred” were equivalent to the amount accepted by the medical providers in full payment, rather than the actual amount billed. *Ribeiro v. Sintra*, A-0701-07T1, 2008 WL 2677536, at *1 (N.J. Super. Ct. App. Div. July 10, 2008)

The Court of *Wise v. Marienski* ruled that the medical expenses not paid by PIP are recoverable in a tort action. *Wise v. Marienski*, 425 N.J. Super. 110 (Law Div. 2011). The full amount of those bills, without any reduction per the PIP Fee Schedule, were admissible into evidence at trial. Thus, they are fully “boardable” to the extent they were not paid by PIP.