# OHIO

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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.**

Electronic control module data may be admissible if a qualified expert can testify about the data and how it formed the basis for the expert's opinion. *L.S. v. Scarano*, S.D. Ohio No. 2:10-cv-51, 2011 U.S. Dist. LEXIS 120258, at *21 (Oct. 18, 2011). Further, it may also be admissible for impeachment purposes. *L.S. v. Scarano*, S.D. Ohio No. 2:10-cv-51, 2011 U.S. Dist. LEXIS 120457, at *6-7 (Oct. 18, 2011) (holding that ECM data is admissible if there are inconsistencies between the driver's logs and the data).

Accident animations and/or computer-generated evidence are generally admissible in Ohio. *Deffinbaugh v. Ohio Turnpike Com.*, 67 Ohio App.3d 692, 700, 588 N.E.2d 189 (8th Dist. 1990) (court allowed computer simulation as to how accident involving tractor/trailer occurred).

**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.**

Other potential sources of technological evidence used in evaluating accidents other than the electronic control module are GPS systems, electronic logging devices, traffic cameras at or near where the accident occurred, mobile phone/tablet data, data from onboard systems such as video recorders, weather data, records that support log books such as weight tickets and delivery receipts, maintenance/inspection records of the truck, and wearable technology. These other forms of technological evidence may be admissible evidence so long as they are properly authenticated and fall under one of the exceptions to the hearsay rule, such as the business record exception. *See, e.g., Mahan v. Bethesda Hosp., Inc.*, 84 Ohio App.3d 520, 529, 617 N.E.2d 714 (1st Dist. 1992) (phone log maintained by doctor's secretary in ordinary course of business kept under his custody and control is admissible under the business record exception to the hearsay evidence rule); *Tuggle v. Smith*, No. 3:11 CV 467, 2013 U.S. Dist. LEXIS 127421, at *36-37 (N.D. Ohio Aug. 14, 2013). Further, such evidence may also be used for impeachment purposes. *L.S. v. Scarano*, No. 2:10-cv-51, 2011 U.S. Dist. LEXIS 120457, at *6-7 (S.D. Ohio Oct. 18, 2011).

**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?**

Ohio recognizes a cause of action in tort for interference with or destruction of evidence. The elements are:

I. pending or probable litigation involving plaintiff;
II. knowledge on the part of defendant that litigation exists or is probable;
III. willful destruction of evidence by defendant designed to disrupt the plaintiff's case;
IV. disruption of the plaintiff's case; and
V. damages proximately cause by the defendant's acts.

*See Smith v. Howard Johnson Co.*, 1993-Ohio-229, 67 Ohio St. 3d 28, 29, 615 N.E.2d 1037, 1038. A defendant is under a duty to preserve evidence that it knows or reasonably should know is relevant to an action. *Foradis v. Marc Glassman, Inc.*, 2016 Ohio App. LEXIS 3119, 2016-Ohio-5235, ¶ 29 (8th Dist.). Destroying evidence after receiving a preservation of evidence letter could potentially lead to punitive damages. *Baker v. Swift Transp. Co. of Arizona, LLC*, No. 2:17-cv-909, 2018 U.S. Dist. LEXIS 75961, at *18 (S.D. Ohio May 4, 2018).

Post-accident claim documents are under the purview of the work-product doctrine. In Ohio, the work-product doctrine has been codified at Civil Rule 26(B)(3):

> Subject to the provisions of subdivision (B)(5) of this rule [relating to retained experts], a party may obtain discovery of documents, electronically stored information and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing of good cause therefor.

This requires a fact-intensive inquiry and depends on whether the investigation occurred after there was a "real and substantial possibility of litigation." *Perfection Corp. v. Travelers Cas. & Sur.*, 153 Ohio App.3d 28, 2003-Ohio-3358, 790 N.E.2d 817, ¶ 27 (8th Dist.) (holding that a general belief that there may be litigation is not enough to justify this standard). A court will look at when the activities shift from the "ordinary course of business to anticipating litigation." *Nationwide Agribusiness Ins. Co. v. Heidler*, 12th Dist. Clinton No. CA2015-07-013, 2016-Ohio-455, ¶ 16; *Roggelin v. Auto-Owners Ins.*, 6th Dist. Lucas No. L-02-1038, 2002-Ohio-7310, ¶ 16.

As for dealing with law enforcement early, there is no prohibition. Under Ohio's Public Records Act, Ohio Rev. Code § 149.43, unless the law enforcement agency argues that records are protected under the confidential law enforcement investigatory exception, records related to the accident will be produced pursuant to a public records request to the relevant agency. Moreover, traffic citations for a motor vehicle accident are not admissible in the resulting civil litigation. *Mccutcheon v. Yudasz*, 7th Dist. Belmont No. 82-B-32, 1983 WL 6702, *2; *O'Toole v. Lemmerman*, 8th Dist. Cuyahoga No. 80730, 2002-Ohio-5469, ¶ 32; *Waller v. Phipps*, Hamilton App. No. C–000758, 2001 WL 1077942 (Sept. 14, 2001); *Bishop v. Munson Transp., Inc.*, 7th Dist. Belmont No. 97 BA 62, 2000 WL 309398 (Mar. 27, 2000). However, "portions of a police report which contain matters observed pursuant to a duty imposed by law as to which matters there was a duty to report are admissible in evidence," so long as the observations are firsthand observations or those of one with a duty to report to a public official. *Petti v. Perna*, 86 Ohio App.3d 508, 513, 621 N.E.2d 580 (3d Dist. 1993); Evid.R. 803(8)

A guilty plea to a traffic violation which resulted in a motor vehicle accident is admissible in a subsequent civil action as an admission against interest. *Wilcox v. Gregory*, 112 Ohio App. 516, 518, 176 N.E.2d 523 (9th Dist. 1960). However, a guilty verdict following a plea of not guilty is not admissible. *Id.* at 521, 176 N.E.2d 523 (9th Dist. 1960). Further, a guilty plea that is later withdrawn is also not admissible. Ohio Evidence Rule 410(A)(1). A plea of no contest resulting from a motor vehicle accident "is not admissible in any civil or criminal proceeding against the defendant who made the plea." Ohio Evidence Rule 410(A)(2); *Edwards v. Bolden*, 8th Dist. Cuyahoga No. 97390, 2012-Ohio-2501, ¶ 10.

Lastly, social media investigations and surveillance constitute work product, but they may be disclosed upon a showing of good cause that it is compelling to Plaintiff's cause of action or damages and could not be obtained elsewhere. *Sutton v. Stevens Painton Corp.*, 193 Ohio App.3d 68, 2011-Ohio-841, 951 N.E.2d 91, ¶¶ 26-30 (8th Dist.); *Smith v. Chen*, 10th Dist. Franklin No. 12AP-1027, 2013-Ohio-4931, ¶¶ 17, 24-31 (overruled in *Smith v. Chen*, 142 Ohio St.3d 411, 2015-Ohio-1480, 31 N.E.3d 633 because Appellate Court did not have jurisdiction to take an appeal of a discovery issue before a final judgment had been entered).

**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?**

Ohio follows federal law as to whether a truck driver is considered an employee pursuant to 49 C.F.R. § 390.5. *United Fin. Cas. Co. v. Abe Hershberger & Sons Trucking Ltd.*, 10th Dist. Franklin No. 11AP-629, 2012-Ohio-561, ¶ 17 ("an individual's status as a common-law independent contractor is not fatal to qualifying as an 'employee' under the regulatory definition"); *see also Basha v. Abdi Jama Ghalib*, 10th Dist. Franklin Nos. 07AP-963, 07AP-964, 2008-Ohio-3999, ¶ 15. 49 C.F.R § 390.5 defines an employee as:

> any individual, other than an employer, who is employed by an employer and who in the course of his or her employment directly affects commercial motor vehicle safety. Such term includes a driver of a commercial motor vehicle (including an independent contractor while in the course of operating a commercial motor vehicle), a mechanic, and a freight handler. Such term does not include an employee of the United States, any State, any political subdivision of a State, or any agency established under a compact between States and approved by the Congress of the United States who is acting within the course of such employment.

Therefore, there is no common law distinction between an employee and independent contractor with respect to truck drivers.

**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?**

Ohio law does not have any special standards for expert testimony on mild traumatic brain injuries. Ohio Evidence Rule 702 permits an expert to testify if the following apply:

I. The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;
II. The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;
III. The witness' testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:
    A. The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;
    B. The design of the procedure, test, or experiment reliably implements the theory;

C. The particular procedure, test, or experiment was conducted in a way that will yield an accurate result.

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

A toxicology report is only admissible in a civil action with accompanying expert testimony to explain the significance of the percentage of the substance found in the person's body. *Clark v. Curnutte*, 9th Dist. Lorain No. 05CA008732, 2006-Ohio-1545, ¶ 7; *Am. Select Ins. Co. v. Sunnycalb*, 12th Dist. Warren No. CA2005-02-018, 2005-Ohio-6275, ¶ 7; *Parton v. Weilnau*, 169 Ohio St. 145, 151, 158 N.E.2d 719 (1959). This rule affirms the requirements that a toxicology report must be properly authenticated and not violate the rule against hearsay. *In re H.D.D.*, 10th Dist. Franklin Nos. 12AP-134, 12AP-135, 12AP-136, 12AP-137, 12AP-146, 12AP-147, 12AP-148, 12AP-149, 2012-Ohio-6160, ¶ 37; *Belcher v. Ohio State Racing Comm.*, 10th Dist. Franklin No. 03AP-786, 2004-Ohio-1278, ¶ 12.

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

There is conflicting authority on this issue between state and federal courts. The Ohio Supreme Court decision in *Wycoff Trucking, Inc. v. Marsh Bros. Trucking Service, Inc.* controls this issue. The Court held in tort causes of action involving leased vehicles of interstate motor carriers, primary liability shall be determined with regard to Interstate Commerce Commission regulations, rather than the common-law doctrines of respondeat superior, master-servant, independent contractor and the like. *Wycoff Trucking Inc. v. Marsh Bros. Trucking Service, Inc.*, 58 Ohio St. 3d 261, 266, 569 N.E.2d 1049 (1991). Then, the United States District Court for the Southern District of Ohio held in *UPS Ground Freight, Inc. v. Farran*, 990 F.Supp.2d 848, 860 (S.D.Ohio 2014) that the Ohio Supreme Court in *Wyckoff* misinterpreted the ICC regulation to hold that there was "logo" or "placard" liability. Therefore, although *Wyckoff* still remains the law in Ohio, trial and appellate courts have the *Farran* decision to support a holding that "logo" or "placard" liability is no longer good law in Ohio.

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

No. There is not a jurisdictional mandate for parties to enter into arbitration or mediation. Both arbitration and mediation are voluntary processes. *Henderson v. Lawyers Title Ins. Corp*., 108 Ohio St.3d 265, 2006-Ohio-906, 843 N.E.2d 152, ¶ 28. However, arbitration and mediation can be mandated by statute or court order.

Court-ordered arbitration is mandatory and non-binding. See *Dispute Resolution FAQs*, *The Supreme Court of Ohio*. Arbitration is also mandatory, under ORC §2711.01, when a written agreement calls for arbitration instead of trial (some exceptions apply). A provision in any written contract to settle a controversy by arbitration is "valid, irrevocable, and enforceable." ORC §2711.01(A). Ohio has also enacted the Uniform

Mediation Act. ORC §2710. Mediation parties are required to mediate if required by statute, a court or administrative agency rule, or referred to mediation by a court, administrative agency, or arbitrator. ORC §2710.02(A)(1).

All of Ohio's local jurisdictions can mandate court-ordered arbitration. Some local jurisdictions have mandated cases to arbitration in recent years. Those jurisdictions include Hamilton County, Cuyahoga County, Mahoning County and Trumbull County. *State v. Walker*, 1st Dist. Hamilton, No.C-170321, 2018-Ohio-3918, ¶ 17; *Citibank v. White*, 8th Dist. Cuyahoga, No. 99868, 2014-Ohio-304, ¶ 4; *Finish Line, Inc. v. Patrone*, 7th Dist. Mahoning, No. 12 MA 92, 2013-Ohio-5527, ¶ 17; *Bacon v. Romo*, 11th Dist. Trumbull, No. 2011-T-0026, 2012-Ohio-3034, ¶ 13 (local rule states that a court-ordered arbitration is not considered binding unless both parties execute a form in which the right of de novo review before the court is expressly waived).

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

Yes. Ohio Rule of Civil Procedure 30(B)(5) provides, "A party, in the party's notice, may name as the deponent a public or private corporation, a partnership, or an association and designate with reasonable particularity the matters on which examination is requested. The organization so named shall choose one or more of its proper employees, officers, agents, or other persons duly authorized to testify on its behalf. The persons so designated shall testify as to matters known or available to the organization. Division (B)(5) does not preclude taking a deposition by any other procedure authorized in these rules."

Rule 32(A)(2) provides that "[t]he deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(B)(5) or Rule 31(A) to testify on behalf of a public or private corporation, partnership or association which is a party may be used by an adverse party for any purpose."

Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Ohio Civ. R. 56(C). In Ohio, trial courts have discretion when considering which evidence is appropriate for a summary judgment determination.

Under Ohio Civ. R. 56(E), parties are permitted to submit affidavits in support or opposition of summary judgment. If corporate deposition testimony was referred to in the affidavit, a sworn or certified copy of the deposition must be attached or served with the affidavit. Uncertified and unsworn depositions are not permitted as evidence. *Tri-State Group, Inc. v. Ohio Edison Co.,* 151 Ohio App.3d 1, 2002-Ohio-7297, 782 N.E.2d 1240, ¶ 24 (7th Dist.).

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

If one or more persons are jointly and severally liable in tort for the same injury or loss to person or property or for the same wrongful death, there may be a right of contribution even though judgment has not been recovered against all or any of them. Ohio Rev. Code § 2307.25(A). The right to contribution exists only in favor of the party who paid more than their proportionate share of the common liability. The total recovery is limited to the amount paid by that party in excess of their proportionate share. There is no right to contribution if a party's payment in excess of their proportionate share was willingly made. 18 Ohio Jurisprudence 3d, Contribution, Indemnity, Etc. Section 11 (2019). There is no right of contribution in favor of any tortfeasor against whom an intentional tort claim has been alleged and established. Ohio Rev. Code § 2307.25(A).

Ohio follows a modified joint and several liability doctrine. When there are multiple defendants, any defendant who is found to be more than 50% at fault is subject to the doctrine of joint and several liability for economic damages. Ohio Rev. Code § 2307.22(A)(1). Defendants who are less than 50% at fault are not subject to the doctrine of joint and several liability and, but instead are proportionally liable with their fault for economic damages. Ohio Rev. Code § 2307.22(A)(2). For non- economic damages, all defendants who are found to be at-fault are proportionally liable to the plaintiff. Ohio Rev. Code § 2307.22(C). If no defendant is more than 50% at fault, then all defendants are proportionally liable for economic and non-economic damages. Ohio Rev. Code § 2307.22(B). However, if any defendant acted intentionally, he is still subject to the doctrine of joint and several liability for economic damages. Ohio Rev. Code § 2307.22(A)(3).

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

The following counties are considered to be the most dangerous/plaintiff-friendly venues in Ohio: Cuyahoga County, Erie County, Franklin County, Jefferson County, Lorain County, Lucas County, and Mahoning County. https://www.uslaw.org/files/JuryProfiles/2019-2020%20USLAW%20Judicial%20Profiles.pdf.

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

Ohio Rev. Code § 2315.21(D) limits the amount of punitive damages that can be awarded in civil lawsuits. Punitive damages cannot exceed twice the amount of compensatory damages awarded to the plaintiff from the defendant. However, if the defendant is a small employer of individual, the punitive damages cannot exceed the lesser of twice the amount of compensatory damages awarded or 10% of the defendant's net worth up to a maximum of $350,000. *Id.*

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

In Ohio, plaintiffs can seek to recover the total amount of medical expenses charged. Under the collateral-source rule, a plaintiff's recovery of the reasonable value of their medical treatment is not limited to the amount paid by the insurance. *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362, 857 N.E.2d 1195, ¶ 9. ("R.C. 2317.421 makes...bills prima facie evidence of the reasonable value of charges for medical services."). In the context of medical-expense damages, the collateral-source rule allows plaintiffs to recover the reasonable value of medical services without consideration of payments made on their behalf by insurance. *Jaques v. Manton*, 125 Ohio St.3d 342, 2010-Ohio-1838, 928 N.E.2d 434, ¶ 11 (holding that Robinson applies regardless of the collateral-source rule because that evidence is still inadmissible); *Moretz v. Muakkassa*, 137 Ohio St.3d 171, 2013-Ohio-4656, 998 N.E.2d 479, ¶ 92 (holding that expert testimony is not necessary for the admission of evidence of write-offs from medical bills).

Ohio courts have held that defendants should be liable for the full amount of damages caused by their wrongdoing, independent of the financial situation of their victims. *Gustin v. Chaney*, 4th Dist. Highland No. 05CA7, 2006-Ohio-1049, ¶ 14., citing *Robinson*, at ¶ 83. Additionally, medical expenses are admissible as evidence in cases regarding possible medical damages. *Id*.