OREGON

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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.

With respect to the admissibility of black box technology or simulations at trial, no decisional law exists. Thus, admissibility is governed by the Oregon Rules of Evidence and the Oregon equivalent of the *Daubert* standard.

Oregon did however, recently enact privacy laws surrounding event data recorders. Codified at ORS 105.925-948, the new law establishes that the owner of the data is exclusively the owner of the motor vehicle. ORS 105.928. Should the owner not consent in writing to a download of the data, law enforcement and insurers can only obtain the data via court order in accordance with ORS 105.932-935 (and insurers cannot condition settlement or providing a copy of a policy on the owner providing consent). Otherwise, ORS 105.942 provides that the only other non-consensual use of the data is by certain EMS providers in providing medical care, for qualifying medical research, and/or to service/repair the vehicle.

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.

Aside from any general admissibility restrictions imposed by application of the Oregon Rules of Evidence or Oregon's equivalent of the *Daubert* standard, Oregon has no statutory or decisional law restricting the use of this type of evidence.

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?

Currently, the sole remedy for spoliation in Oregon is an evidentiary presumption that "evidence willfully suppressed would be adverse to the party suppressing it." ORS 40.135(1)(c). Spoliation is not a basis for a stand-alone cause of action, or a basis upon which to seek money damages. *Classen v. Arete NW, LLC*, 254 Or. App. 216, 218 (2012). Whether an Oregon trial court has the inherent authority to issue a discovery

sanction for spoliation is currently an open question. *Markstrom v. Guard Publishing Co.*, 294 Or. App. 338 (2018).

Oregon permits an insurance company to claim work product immunity for investigative file materials prepared in anticipation of litigation. *United Pac. Ins. Co. v. Trachsel,* 83 Or. App. 401, 404, *rev. den.*, 303 Or. 332 (1987).

Oregon does not have any statutory or decisional law with respect to dealing with law enforcement early in a vehicle accident case, or collection of social media data.

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 general, a principal is liable for all torts committed by its employees while acting within the scope of their employment[, but the] principal ordinarily is not liable in tort for physical injuries caused by the actions of its agents who are [independent contractors]." *Vaughn v. First Transit, Inc*., 346 Or. 128, 137 (2009) (internal citations omitted). "A principal is vicariously liable for an act of its [independent contractor] only if the principal 'intended' or 'authorized the result * * * or the manner of performance' of that act." *Id*. (citing RESTATEMENT (SECOND) OF AGENCY § 250). In other words, "for a principal to be vicariously liable for the negligence of its [independent contractors], there ordinarily must be a connection between the principal's 'right to control' the agent's actions and the specific conduct giving rise to the tort claim." *Id*. at 138.

In the commercial driving context specifically, this means that the principal "has the right to control the physical manner in which [the independent contractor] carried out their driving duties." *Vaughn*, 346 Or. at 142; *see also Knapp v. Standard Oil Co. of California*, 156 Or. 564, 572 (1937) ("Under the evidence offered in the instant case, the defendant company had the right to control the operation of the automobile by Hampton. It had the right to say: 'You will return to John Day by way of Baker and not by way of Long Creek,' and how and when the automobile should be operated by him when transacting its business.").

An agreement between the parties that an individual will work as an independent contractor is relevant, but not dispositive. *See Kaiel v. Cultural Homestay Institute,* 129 Or. App. 471, 476 (1994) ("Finally, the contract between NCE and claimant stated that claimant performed work under the contract as an independent contractor. While the parties' understanding of their relationship is not controlling, in a close case, it may swing the balance toward status as an independent contractor."). Ultimately, the factfinder makes the employee versus independent contractor assessment under the "common law right to control" test, which includes: "(1) direct evidence of the right to, or exercise of, control; (2) the method of payment; (3) the furnishing of equipment; and (4) the right to fire." *Id*. at 475.

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?**

Oregon has not developed a specific body of law with respect to the admissibility of expert testimony on mTBI claims, and as a result, admissibility is governed by the Oregon equivalent of the *Daubert* standard first set forth in *State v. O'Key*, 321 Or. 285 (1995).

Oregon state courts employ a unique trial-by-ambush approach that does not permit any form of pre-trial expert discovery. As a result, the defense will not find out who plaintiff intends to call as an mTBI expert witness until the first day of trial, and the defense will not learn of the specific methodology employed by that expert in formulating any mTBI opinions – the focal point of any *Daubert*-style analysis – until the expert describes that methodology on direct examination. As a result, pre-trial *Daubert*-style motions in civil cases in Oregon are extremely limited, and typically reserved only for highly controversial subject matters of expert testimony where no qualified expert could render any admissible opinion, regardless of the specific methodology employed (which excludes mTBI claims, given their general recognition in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition).

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

While there is no *per se* prohibition of this type of evidence in Oregon, to be admissible, the evidence would need to satisfy all foundational and substantive requirements under the Oregon Evidence Code. For example, if the test result shows only presence of an intoxicating substance, as distinguished from impairment, it may be appropriately challenged as irrelevant or unduly prejudicial. *See generally State v. Moody*, 201 Or. App. 58, 64 (2005), *rev. den.*, 339 Or 609 (2005) (discussing the difference between presence of a controlled substance and impairment due to a controlled substance). Moreover, due to the wide-ranging circumstances surrounding the collection and processing of toxicology samples, such evidence may also be attackable on any number of *Daubert*-style grounds.

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

Civil cases where the only relief claimed is money damages of $50,000 or less, must participate in mandatory non-binding arbitration before proceeding to a jury trial. *See* ORS 36.400-425 (setting forth Oregon's mandatory non-binding arbitration program).

For cases filed in Portland, Oregon (Multnomah County), whenever a civil case remains pending for over one year, the parties are required to file a certificate of participation stating that they engaged in an approved form of ADR. Multnomah County Supplementary Local Rule 7.016(2).

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

ORS 45.250(1)(b) provides that corporate deposition testimony may be used by an adverse party for any purpose, so long as the specific questions and answers are otherwise admissible under the rules of evidence.

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

In Oregon, when "two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them." ORS 31.800(1). There is no right of contribution from a person who is not liable in tort to the claimant, and only those who have paid more than their proportional share of the common liability, based on their relative degree of fault, have a right to seek contribution. ORS 31.800(1); ORS 31.805(1). To seek contribution for a settlement payment, the settling party must extinguish the liability of the party against whom contribution is sought, and the total settlement payment must also be reasonable. ORS 31.800(3). The right to contribution may always be enforced by separate action, and any such action must be commenced within two years from the date the underlying judgment becomes final by virtue of the conclusion of appellate review, or lapse of time for an appeal. ORS 31.810(1), (3).

"[I]n any civil action arising out of bodily injury, death or property damage, including claims for emotional injury or distress, loss of care, comfort, companionship and society, and loss of consortium, the liability of each defendant for damages awarded to plaintiff shall be several only and shall not be joint." ORS 31.610(1). The only exception to this rule occurs when part of a plaintiff's several liability judgment becomes uncollectable; in that circumstance, there is a special statutory reallocation procedure applicable to any defendant who was found both more than 25% at fault and more culpable than the plaintiff. ORS 31.610(3)-(4).

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

Multnomah County (Portland) and Lane County (Eugene), are the most dangerous/plaintiff friendly venues in Oregon.

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

Oregon has no statutory cap on punitive damages in Oregon, but Oregon Courts do follow the United States Supreme Court's mandate to review punitive damages awards for excessiveness under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *See, e.g., Schwarz v. Philip-Morris-USA, Inc.,* 272 Or. App. 268 (2015), *rev. den.* 358 Or. 248 (2015), *cert. den.* 136 S. Ct. 2012 (2016) (reducing $125 million punitive damages award to $25 million, even though the jury had awarded

only $168,514 in compensatory damages); *Bocci v. Key-Pharmaceuticals, Inc.*, 189 Or. App. 349 (2003) (reducing $22.5 million punitive damage award to $3.5 million, based on a 7:1 ratio from the jury's award of $500,000 in compensatory damages).

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

A plaintiff is entitled the recover the full amount charged, so long as it is reasonable, and irrespective of whether the actual amount paid was less for any reason. *White v. Jubitz*, 347 Or. 212, 243 (2009).