PENNSYLVANIA

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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.

A. Pennsylvania applies the Frye test to determine whether black box technology, data and expert interpretation of black box data are admissible. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). Engine Control Modules ("ECM") and Event Data Recorders ("EDR") are commonly referred to as "black boxes" which record and temporarily store various data that is recorded during the operation of a motor vehicle.

1. The Frye test provides that "novel scientific evidence is admissible if the methodology that underlies the evidence has general acceptance in the relevant scientific community." *Grady v. Frito-Lay, Inc.*, 839 A.2d 1038, 1043-1044 (Pa. 2003).

2. The Pennsylvania Superior Court, followed by the Pennsylvania Supreme Court, upheld the trial court's determination that estimating a vehicle's speed based on data recovered from an EDR is not novel scientific evidence and, thus, does not violate the *Frye* test. *Com v. Safka*, 141 A.3d 1239 (Pa. 2016).

3. When determining issues concerning the admissibility of EDR data, the Pennsylvania Superior Court commented that the National Highway Traffic Safety Administration had studied the use of EDRs, currently employs the EDR technology in their crash investigations, recognizes the utility of the data collected through EDRs, and found significance in the fact that the National Transportation Safety Board in 1991 recommended that EDRs be installed in all newly manufactured automobiles. *Com v. Safka*, 95 A.3d 304, 308 (Pa.Super. 2016). ("EDR technology has existed for almost 40 years, has been adopted by the major automobile manufacturers, and has been recognized as an acceptable tool used by accident reconstruction experts to determine a vehicle's speed prior to an impact. It is not novel science; it is an accepted technology.")

B. 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 the expert's testimony indicates that the processes and calculations underlying the reconstruction or simulation are reliable." *Ortiz v. Yale Materials Handling Corp.*, 2005 WL 2044923 *9 (D.N.J. Aug 24, 2005).

C. Some district courts have expressed a preference for computer-generated simulation and reconstruction evidence where it helps a jury understand and visualize the facts at issue in the case before them.

    1. For example, in *Altman v. Bobcat Co.*, 349 Fed.Appx. 758, 2009 WL 3387857, at *4-*5, (W.D.Pa. July 14, 2008), the plaintiffs offered an animation to show how a person seated in the backhoe at issue could come within contact of the controls that operated the machine's swing arm. *Id.* The defendant objected to the animation, arguing that it was improperly authenticated, not scientifically reliable, and that the judge improperly failed to consider the animation's possible prejudicial effect. *Id.*

    2. The *Altman* court noted that the First Circuit had cautioned that computer-generated recreations "could easily seem to resemble the actual occurrence" and therefore mislead jury members "because they do not fully appreciate how variations in the surrounding conditions, as between the original occurrence and the staged event, can alter the outcome," but concluded that the evidence offered by plaintiffs was allowable because they "did not offer the computer-generated evidence as a reconstruction of the accident, but rather, offered it to help the jury visualize the testimony proffered by their witnesses." Id., at *4-*5, (internal citations omitted).

    3. On appeal, the Third Circuit affirmed, holding that the "depiction evidence" offered by the plaintiffs "was not 'sufficiently close in appearance to the original accident to create the risk of misunderstanding by the jury' or prejudice to Bobcat." *Altman v. Bobcat Co.*, 349 Fed.

Appx. 758, 764 (3rd Cir. 2009)(*quoting Fusco v. General Motors Corp.*, 11 F.3d 259, 264 (1st Cir. 1993)).

4. *Commonwealth v. Serge*, 896 A.2d 1170 (Pa. 2006) allowed the use of a computer-generated animation illustrating the expert's theory of how the defendant shot his wife and rebutting self-defense theory where the expert testified that the animation fairly and accurately depicted his theory of the incident and the animation rested on evidence in the record and also helped the jury.

5. The Commonwealth Court allowed computer generated animation ("CGA") to be used as an illustrative supplement to the testimony of two expert witnesses in a motor vehicle accident case in *Harsh v. Petroll*, 840 A.2d 404, 423-24 (Pa.Cmwlth.2003), allowance of appeal granted, 580 Pa. 546, 862 A.2d 581 (2004) (allowance of appeal granted on other grounds). The Commonwealth Court affirmed the trial court's admission of CGA which depicted the combined testimony of a mechanical engineer and an accident reconstructionist and which showed: (1) the vehicle's fuel tank and anti-spit back valves; (2) the underside of the car; and (3) the accident sequence. *Id.*

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.

A. Besides black box data, other uses of technological evidence include computer simulations, computer reenactments, on-board cameras, 3-dimensional computer scans of vehicles and roadways, use of location-tracking and GPS apps on smart phones including Waze and Garmin devices, device history, acceleration and accelerometer data stored in smart phones. The potential also exists to utilize "safe driving information" and telematics collected by insurance companies such as Progressive, Nationwide and State Farm, and vehicle telematics systems such as OnStar, Lexus Link BMW's assist, etc.

B. Pennsylvania Courts apply the Frye test and the analysis set forth above concerning black box technology, data, and other sources of technological evidence to determine whether such demonstrative evidence is relevant.

1. Relevant evidence is defined as evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable." Pa.R.E. 401.

2. However, relevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice arising from its presentation to the fact-finder. Pa.R.E. 403.

C. The law has been flexible enough to accommodate scientific progress and technological advances in all fields, and should continue evolve along with technology.

D. Pa.R.E. 702 permits expert testimony if it "will assist the trier of fact to understand the evidence or to determine a fact in issue," such expert testimony also includes pertinent illustrative adjuncts that help explain the testimony of one or more expert witnesses. *Commonwealth v. Serge*, 896 A.2d 1170, 1178 (Pa. 2006).

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. Spoliation of evidence

1. Spoliation of evidence is the failure to preserve evidence or the significant alteration of evidence for pending or future litigation. *Pyeritz v. Commonwealth*, 32 A.3d 687, 692 (Pa. 2011). "When a party to a suit has been charged with spoliating evidence in that suit (sometimes called 'first-party spoliation'), we have allowed trial courts to exercise their discretion to impose a range of sanctions against the spoliator." *Id. (citing Schroeder v. Com., Dept. of Transp.*, 710 A.2d 23, 27 (Pa. 1998)) (footnotes omitted).

2. As soon as a potential claim is identified, litigants have a duty to preserve evidence which they know or reasonably should know is relevant to the action. *Baliotis v. McNeil*, 870 F.Supp. 1285 (M.D.Pa. 1994) (*citing Fire Ins. Exch. v. Zenith Radio Corp.*, 103 Nev. 648, 747 P.2d 911 (1987)). Moreover, mere knowledge of a potential claim is deemed sufficient to impose a duty to preserve evidence. *Id.*

3. A duty to preserve evidence, independent from a court order to preserve evidence, arises when there is "(1) pending or probable litigation involving the defendant; (2) knowledge of the existence or likelihood of litigation, (3) foreseeable prejudice to the other party if the evidence were to be discarded and (4) evidence relevant to the litigation." *Winters v. Textron, Inc.,* 187 F.R.D. 518, 520 (M.D.Pa. 1999) (*quoting Baliotis v. McNeil, supra.*).

4. If a party spoliates evidence where it was "foreseeable that discarding the evidence would be prejudicial to the [adverse party]," spoliation sanctions may be imposed. *Mt. Olivet Tabernacle Church v. Edwin L. Wiegand Div.,* 781 A.2d 1263, 1271 (Pa.Super. 2001).

5. Spoliation sanctions arise out of "the common sense observation that a party who has notice that [evidence] is relevant to litigation and who proceeds to

destroy [evidence] is more likely to have been threatened by [that evidence] than is a party in the same position who does not destroy the document." *Mount Olivet*, 781 A.2d at 1269 (*quoting Nation–Wide Check Corp. v. Forest Hills Distributors, Inc.,* 692 F.2d 214, 218 (1st Cir.1982)).

6. Pennsylvania courts have recognized that one potential remedy for the loss or destruction of evidence it is to allow the jury to apply its common sense and draw an "adverse inference" against that party. *Schroeder v. Commonwealth of Pa., Dep't of Transp.,* 551 Pa. 243, 710 A.2d 23, 28 (1998); *Schmid v. Milwaukee Electric Tool Co.,* 13 F.3d 76 (3rd Cir. 1994); *Parr v. Ford Motor Co.,* 109 A.3d 682, 703 (Pa.Super. 2014). Although awarding summary judgment against the offending party remains an option in some cases, the severity of entering summary judgment makes it an appropriate remedy only for the most egregious conduct. See *Tenaglia v. Proctor & Gamble, Inc.,* 737 A.2d 306, 308 (Pa.Super.1999).

B. Claims documents

1. Pennsylvania Rule of Civil Procedure 4003.3 provides:

> Subject to the provisions of Rules 4003.4 and 4003.5, a party may obtain discovery of any matter discoverable under Rule 4003.1 even though prepared in anticipation of litigation or trial by or for another party or by or for that other party's representative, including his or her attorney [ ] insurer or agent. The discovery shall not include disclosure of the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories. With respect to the representative of a party other than the party's attorney, discovery shall not include disclosure of his or her mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics.

2. Pa.R.Civ.P. 4003.4, requires the production of statements by a party or witness and, where a statement is made in the presence of a third-party such as a stenographer or videographer, a court may find that the party giving the statement did not have a reasonable expectation that the statement was confidential. For purposes of rule 4003.4, a statement previously made is: (1) a written statement signed or otherwise adopted or approved by the person making it, or (2) a stenographic, mechanical, electrical or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded. Pa.R.Civ.P. 4003.4.

3. Claims documents and claims notes are generally discoverable in Pennsylvania and will need to be produced if requested in discovery.

However, counsel should carefully review the notes and documents and to redact all mental impressions, conclusions, opinions, memoranda, notes, summaries, legal research and legal theories of the attorney, as well as the mental impressions, conclusions, and opinions of the defendants' representatives with respect to the merit of claims, defenses, strategies or tactics, and all attorney-client material. *Brown v. Greyhound Lines, Inc.*, 142 A.3d 1 (Pa. Super. 2016)

C. Dealing with law enforcement

1. Generally, it is suggested that direct contact between a driver and law enforcement should be kept to a minimum following an accident. However, it may be advantageous for counsel to speak with the police officer in an effort to determine law enforcement's opinions concerning liability and whether any criminal culpability exists.

2. Depending upon the circumstances of the accident, it may be advantageous to have the driver speak with the investigating officer, with the caveat that it must be first made clear to the driver that any and all information provided by the driver to law enforcement is likely appear in the police report. Other than the general circumstances of the accident with a driver who is obviously not at fault, the possibility that information provided by the driver may be misconstrued or misinterpreted generally outweighs any advantage which may be gained by speaking with law enforcement immediately following an accident. Depending upon the circumstances of the accident, post-accident testing may be mandatory and dealing with law enforcement may be unavoidable.

D. Social media

1. Social media usage is discoverable and, if relevant and authenticated, can be introduced into evidence at trial. It is recommended that the insured drivers and other witnesses be reminded early in the litigation that anything placed onto social media and sent via email or text can potentially have an adverse impact upon the defense of the case and it is strongly suggested that drivers be counseled immediately following the accident against the use of social media.

2. Obtaining social media passwords and information may be possible if a motion for the service provider to disclose and produce subscriber information, pursuant to 18 U.S.C. § 2307(c) and 18 Pa.C.S.A. § 5743(c) and (d) is presented and granted.

3. Before social media may be introduced into evidence Pa.R.E 901 requires authentication by the proponent of the evidence that the matter is what it purports to be. Due to difficulties confirming that a particular user was in fact the author of an electronic communication being proposed for

introduction into evidence, "authentication of electronic communications, like documents, requires more than mere confirmation that the number or address belonged to a particular person. Circumstantial evidence, which tends to corroborate the identity of the sender, is required." *Commonwealth v. Koch,* 39 A.3d 996, 1005 (Pa. Super. 2011), aff'd 630 Pa. 374 (2014); see also *Commonweath v. Mangel*, 181 A.3d 1154 (Pa. Super. 2018).

4. In an unpublished Monroe County trial court opinion granting a motion to compel social media log-in information, the plaintiff in a personal injury suit had to provide the defendant with access to the photographs in her Instagram account, in *Kelter v. Flanagan,* 286 CV 2017 (Monroe C.C.P, February 19, 2018). The *Kelter* court held that the photographs were discoverable and relevant to the question of the extent of the plaintiff's injuries and noted that there is no expectation of privacy on social media. *Id.*

5. A suggested practice is to conduct social media searches on claimants as early as possible, and it is further suggested that broad social media searches should be performed again before significant events in the litigation, such as depositions, mediations, and trial to determine whether any social media posts exist which may rebut some or all of the plaintiff's claims.

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?

A. In Pennsylvania, truck drivers are generally considered to be employees and not independent contractors or borrowed servants. *American Road Lines v. W.C.A.B. (Royal)*, 39 A.3d 603 (Pa.Cmwlth. 2012)

B. To determine whether the driver is an employee or an independent contractor, courts consider many factors, including :

> (1) control of manner the work is done; (2) responsibility for result only; (3) terms of agreement between the parties; (4) nature of the work/occupation; (5) skill required for performance; (6) whether one is engaged in a distinct occupation or business; (7) which party supplies the tools/equipment; (8) whether payment is by time or by the job; (9) whether work is part of the regular business of employer; and, (10) the right to terminate employment.

American Road Lines v. W.C.A.B. (Royal), 39 A.3d 603, 611 (Pa.Cmwlth. 2012) (*citing Baum v. Workers' Comp. Appeal Bd. (Hitchcock),* 721 A.2d 402 (Pa.Cmwlth. 1998) and *Hammermill Paper v. Rust Eng'g Co.,* 243 A.2d 389 (Pa. 1968).

C. Because the most relevant criteria are control of the manner of the work to be done, the manner in which it is performed, responsibility for the result, and the nature of the

occupation or business, most often truck drivers are considered to be employees, even with a signed agreement stating that the driver is an independent contractor. *American Road Lines v. W.C.A.B. (Royal)*, 39 A.3d 603 (Pa.Cmwlth. 2012); see also *Universal Am-Can, Ltd., v. W.C.A.B. (Minteer)*, 762 A.2d 328 (Pa. 2000).

D. Employee, as defined by the Code of Federal Regulations, includes

> 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.

49 C.F.R. § 390.5

E. Some discovery requests concerning the driver qualification file, driver training, HR documents, and potentially driver discipline documentation can be objected to as irrelevant where it is admitted that the driver was acting in the course and scope of his employment and where there is no negligent hiring, negligent entrustment, or failure to train claims being made against the employer. *Holben v. Midwest Emery Freight Systems,* 525 F. Supp. 1224 (W.D. Pa. 1981).

F. The driver's employer is often found to be vicariously liable for the driver's actions assuming the driver was in the course and scope of his employment through the doctrine of respondeat superior.

1. The law is well established in Pennsylvania that "Under the doctrine of respondeat superior recovery is sought on the basis of vicarious liability. An employer is vicariously liable for the wrongful acts of an employee if that act was committed during the course of and within the scope of employment." *Phillips v. Lock*, 86 A.3d 906, 913 (Pa.Super. 2014); (*quoting Brezenski v. World Truck Transfer, Inc.*, 755 A.2d 36, 39 (Pa.Super. 2000) (citation omitted)).
2. An employer may potentially be found negligent where the employer knew or should have known that an employee was lacked the requisite skill, or was dangerous, careless or incompetent, and the employee had reason to believe that the employee's continued employment might create a situation where the employee's conduct would harm a third person. *Brezenski v. World Truck Transfer, Inc.*, 755 A.2d 36, 42 (Pa.Super. 2000) (*citing Dempsey v. Walso Bureau, Inc.*, 246 A.2d 418 (Pa. 1968).

G. When punitive damage claims are asserted, "under Pennsylvania law, a principal may be held vicariously liable for punitive damages if the actions of its agent (1) were clearly outrageous, (2) were committed during and within the scope of the agent's duties, and (3) were done with the intent to further the principal's interests." *Achey v. Crete Carrier Corp.*, 2009 WL 9083282, at *10 (E.D.Pa. 2009); (*citing Loughman v. Consol–Pennsylvania Coal Co.*, 6 F.3d 88, 101 (3rd Cir. 1993); *Delahanty v. First Pennsylvania Bank, N.A.*, 464 A.2d 1243, 1264 (Pa.Super. 1983); *Skeels v. Universal C.I.T. Credit Corp.*, 335 F.2d 846, 852 (3rd Cir. 1964).

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?

A. Pennsylvania State Courts

Pennsylvania Rule of Evidence 702 provides the standard for the admission of expert testimony, as follows:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge is beyond that possessed by the average layperson; (b) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; and (c) the expert's methodology is generally accepted in the relevant field. Pa.R.E. 702.

Pennsylvania state courts apply the test set forth in *Frye v. United States,* 293 F. 1013 (D.C. Cir. 1923) as the general evidentiary standard for admitting expert scientific testimony. *See Grady v. Frito-Lay, Inc.*, 939 A.2d 1038 (Pa. 2003). When applying the *Frye* test, the Pennsylvania Supreme Court considers the following factors:

(1) Consistent with the court's traditional adherence to the general evidentiary tenet that the proponent of a proposition bears the burden of proving it, the court emphasizes that the proponent of expert scientific evidence bears the burden of establishing all of the elements for its admission under Pa.R.E. 702, which includes showing that the *Frye* rule is satisfied;

(2) The court requires that the proponent of the evidence prove that the methodology an expert used is generally accepted by scientists in the relevant field as a method for arriving at the conclusion the expert will testify to at trial. This does not mean, however, that the proponent must prove that the scientific community has also generally accepted the expert's conclusion. This imposes appropriate restrictions on the admission of scientific evidence, without stifling creativity and innovative thought;

(3) Under Pa.R.E. 702, the *Frye* requirement is one of several criteria. By its terms, the Rule also mandates that scientific testimony be given by a witness who is qualified as an expert by knowledge, skill, experience, training or education. Whether a witness is qualified to render opinions and whether his testimony passes the *Frye* test are two distinct inquiries that must be raised and developed separately by the parties, and ruled upon separately by the trial courts; and

(4) As to the standard of appellate review that applies to the *Frye* issue, the admission of expert scientific testimony is an evidentiary matter for the trial court's discretion and should not be disturbed on appeal unless the trial court abuses its discretion, which requires a result of manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support so as to be clearly erroneous.

See Grady, 939 A.2d at 1045-46 (internal citations omitted).

B. Pennsylvania Federal Courts

The admissibility of "expert" testimony in Pennsylvania federal courts is governed by F.R.E. 702 and *Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579, 113 S.Ct. 2786 (1993). Rule 702 provides:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

The Third Circuit Court holds that Rule 702 includes "three distinct substantive restrictions on the admission of expert testimony: qualifications, reliability and fit." *United States v. Mathis,* 264 F.3d 321 (3d Cir. 2001); *Elcock v. Kmart Corp.,* 233 F.3d 734 (3d Cir. 2000). When applying the *Daubert* test, Pennsylvania federal courts consider the following factors:

(1) The proffered witness must be a qualified expert, meaning that the witness must possess specialized expertise;

(2) The testimony must be reliable. This requirement has been interpreted to mean that an expert's opinion must be based on the "methods and procedures" rather than on "subjective belief or unsupported speculation." The expert must have "good grounds" for his or her belief. The focus is not upon the expert's conclusions, but rather upon his or her methodology; the issue is whether the evidence should be excluded because the flaw is large enough that the expert lacks good grounds for his or her conclusion. Furthermore, an expert's testimony must be accompanied by a sufficient factual foundation before it can be submitted

to the jury. Under *Daubert,* the factors that a district court should take into account in evaluating whether a particular scientific methodology is reliable, so that expert testimony based on methodology is admissible, include: (a) whether a method consists of a testable hypothesis; (b) whether a method has been subject to peer review; (c) known or potential rate of error; (d) existence and maintenance of standards controlling technique's operation; (e) whether a method is generally accepted; (f) relationship of technique to methods which have been established to be reliable; (g) qualifications of expert witness testifying based on methodology; and (h) non-judicial use to which method has been put. However, this list is non-exclusive, and each factor need not be applied in every case; and

(3) The expert's testimony must "fit," meaning that the testimony "must be relevant for the purposes of the case and must assist the trier of fact."

See In re Paoli R.R. Yard PCB Litigation, 35 F.3d 717, 742 (3d Cir. 1994); *see also Calhoun v. Yamaha Motor Corp., U.S.A.,* 350 F.3d 316, 321 (3d Cir. 2003); *Lynn v. Yamaha Golf-Car Co.*, 894 F.Supp.2d 606 (W.D. Pa. 2012).

In *Amadio v. Glenn*, 2011 WL 336721 (E.D. Pa. February 1, 2001), defendants filed a motion to preclude the testimony of plaintiff's expert witness with respect to determining if plaintiff suffered a traumatic brain injury as a result of an automobile accident. The court held that the expert was qualified to offer an expert opinion regarding a traumatic brain injury based upon the expert's curriculum vitae, which showed his formal qualifications, and based upon the expert's curriculum vitae showing his expertise in neurology and brain injury as well as general expertise as a licensed physician. In regard to the expert's methodology, which included a review of other physicians' examinations of plaintiff, the expert's own examination, and a review of plaintiff's medical records, the court held these were a reliable means of forming an expert opinion.

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

A. Pennsylvania State Courts

In Pennsylvania, the factors courts consider when assessing the admissibility of evidence of intoxication in a civil action are set forth in the Pennsylvania Supreme Court's decision in *Coughlin v. Massaquoi*, 170 A.3d 399 (Pa. 2017). The *Coughlin* decision addresses toxicology evidence in the context of a pedestrian's toxicology after being struck by a car while crossing a roadway. However, *Coughlin* examines Pennsylvania case law regarding evidence of intoxication in motor vehicle and trucking accidents.

In *Coughlin*, the Pennsylvania Supreme Court rejected the Superior Court's holding in *Ackerman v. Delcomico*, 486 A.2d 410 (Pa. Super. 1984), which required independent and corroborating evidence of an actor's conduct which suggests intoxication for evidence of blood alcohol level to be admissible to prove intoxication. Rather, the *Coughlin* decision provides that the admissibility of blood alcohol content evidence is within the discretion of the trial court when determining unfitness to drive and based

upon considerations of relevancy, probative value and potential for unfair prejudice pursuant to Pennsylvania Rules of Evidence 401 and 403. *See Livingston v. Greyhound Lines Inc.*, 208 A.3d 1122 (Pa. Super. 2019) (holding that because of its prejudicial effect, evidence of alcohol or drug consumption by a person involved in an accident is admissible in a civil negligence action only when there is evidence that reasonably shows intoxication and unfitness to engage in the activity at issue at the time of the accident); *Rohe v. Vinson*, 158 A.3d 88 (Pa. Super. 2016) (addressing admissibility of evidence of blood alcohol level and expert toxicologist testimony to determine unfitness to drive); *Partlow v. Gray*, 165 A.3d 1013 (Pa. Super. 2017) (holding estate of decedent-motorist presented not only BAC evidence supported by expert testimony, but also a police officer's observations of defendant-motorist's physical condition shortly after the accident, which was ample evidence of defendant-motorist's unfitness to drive).

B. Pennsylvania Federal Courts

Pennsylvania federal courts apply Pennsylvania law to determine whether or not evidence of intoxication is admissible at trial. *See Rovegno v. Geppert Bros., Inc.*, 677 F.2d 327, 329, fn. 3 (3d Cir. 1982); *see also Knecht v. Balanescu*, 2017 WL 4883198 (M.D. Pa. October 30, 2017) (when addressing a motion in limine to preclude evidence of plaintiff's alcohol level, the court provided a recitation of Pennsylvania case law addressing whether evidence of intoxication is admissible at trial and, citing *Coughlin*, held that the consideration becomes whether or not the testimony of an expert witness thoroughly describes the effects a given BAC would have on behavioral and mental processes, and specifically opines that a particular BAC would render an individual unfit to drive); *Pennington v. King*, 2009 WL 415718 (E.D. Pa. February 19, 2009) (pre-*Coughlin* decision discussing admissibility of evidence of marijuana intoxication).

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

There is no case law in Pennsylvania directly addressing potential liability arising out of employment or post-accident drug testing when the driver is an independent contractor, borrowed servant or has an additional insured status. However, Pennsylvania has adopted the Federal Motor Carrier Safety Regulations relating to driver drug testing, set forth in 49 C.F.R. § 382.303.

49 C.F.R. § 390.5 (FMCSR, General) provides the following general definitions, in part:

"Driver" means any person who operates any commercial motor vehicle;

"Employee" means 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; and

"Employer" means any person engaged in a business affecting interstate commerce who owns or leases a commercial motor vehicle in connection with that business, or assigns employees to operate it.

In addition, 49 C.F.R. § 382.107 (FMCSR, Controlled Substances and Alcohol Use and Testing) provides the following definitions:

"Driver" means any person who operates a commercial motor vehicle. This includes, but is not limited to: Full time, regularly employed drivers; casual, intermittent or occasional drivers; leased drivers and independent owner-operator contractors; and

"Employer" means a person or entity employing one or more employees (including an individual who is self-employed) that is subject to DOT agency regulations requiring compliance with this part. The term, as used in this part, means the entity responsible for overall implementation of DOT drug and alcohol program requirements, including individuals employed by the entity who take personnel actions resulting from violations of this part and any applicable DOT agency regulations. Service agents are not employers for the purposes of this part.

The Federal Motor Carrier Safety Regulations provide that the employer shall conduct drug and alcohol testing of a driver involved in an accident "[a]s soon as practicable." 49 C.F.R. § 382.303(a). This testing is mandatory in cases where the accident involves a fatality, or if the commercial driver receives a citation and another person requires immediate medical attention away from the scene of the accident or any vehicle involved in the accident is disabled as a result. 49 C.F.R. § 382.303(a). This citation must be received within eight hours of the accident in order to mandate alcohol testing, or thirty-two hours for drug testing. 49 C.F.R. § 382.303(a)-(b). Further, if a test required by this section is not administered within two hours following the accident, the employer shall prepare and maintain on file a record stating the reasons the test was not promptly administered. If a test required by this section is not administered within eight hours following the accident, the employer shall cease attempts to administer an alcohol test and shall prepare and maintain the same record. 49 C.F.R. § 382.303(d)(1). If a test required by this section is not administered within 32 hours following the accident, the employer shall cease attempts to administer a controlled substances test, and prepare and maintain on file a record stating the reasons the test was not promptly administered. 49 C.F.R. § 382.303(d)(2).

Employers should be aware of the federal regulations noted above and the considerations relating to a potentially broad application of the FMCSRs in the employer/driver context when implementing driver drug/alcohol testing and records keeping practices and procedures.

For a discussion regarding testing responsibilities between a motor carrier and a commercial driver staffing agency, please see:

https://www.federalregister.gov/documents/2016/12/23/2016-30991/controlled-substances-and-alcohol-testing-responsibilities-of-commercial-driver-staffing-agencies

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

There is no mandatory state-wide ADR requirement in Pennsylvania. However, the Pennsylvania Judicial Code authorizes each Judicial District in the Commonwealth to adopt rules calling for the compulsory arbitration of civil cases where the amount in controversy, exclusive of interest and costs, does not exceed $50,000. 42 Pa.C.S. § 7361. The Judicial Code indicates that, where prescribed by general rule or rule of court, "civil matters or issues therein as shall be specified by rule shall first be submitted to and heard by a board of three members of the bar of the court". The jurisdictional limits for arbitration vary among the Commonwealth counties, but cannot exceed $50,000. The decision or award of the arbitrators is non-binding, and can be appealed within thirty (30) days of the decision, at which time it will be placed on track for trial by judge or jury.

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

Corporate deposition testimony may be used in support of a motion for summary judgment. However, it alone may not suffice for entry of summary judgment. The "Nanty-Glo Rule", created by the Pennsylvania Supreme Court in the landmark case Borough of Nanty-Glo v. American Surety Co. of New York, 163 A. 523 (Pa. 1932), holds: "[t]estimonial affidavits of the moving party or his witnesses, not documentary, even if uncontradicted, will not afford sufficient basis for the entry of summary judgment, since the credibility of the testimony is still a matter for the jury."

In determining the existence or non-existence of a genuine issue of a material fact, courts are bound to adhere to the Nanty-Glo Rule.

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

Contribution claims are permitted in Pennsylvania among joint tortfeasors. Any defendant who pays more than its fair share may seek contribution either in the underlying action or in a separate action. 42 P.S. § 7102; McMeekin v. Harry M. Stevens, Inc., 530 A.2d 462 (Pa. Super. 1987); see also § 8324. If there is a settlement, the party seeking contribution must extinguish the liability of the party from whom contribution is sought.

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

For many years, Philadelphia County has been considered one of the most dangerous / plaintiff-friendly venues, not only in Pennsylvania but nationwide. Other venues considered plaintiff–friendly are Lackawanna and Luzerne Counties in Northeastern Pennsylvania. Next in line would be Allegheny County (Pittsburgh). The more rural counties in the middle of the Commonwealth are traditionally more conservative venues.

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

There is no statutory cap on punitive damages in Pennsylvania. The Pennsylvania Superior Court has upheld a punitive damages award of $2.8 million which represented a 10 to 1 ratio over the compensatory award which was limited to attorney's fees, costs and interest, stating "the United States Supreme Court has expressly rejected the assertion that a punitive damages award must bear a certain proportionality to the amount of compensatory damages." . The Superior Court considered "[the defendant's] reprehensible conduct, its significant wealth, and the limited compensatory award." Hollock v. Erie Ins. Exchange, 842 A.2d 409 (Pa. Super. 2004). On a case by case basis, the court may entertain a motion for remitter when a punitive damages award can arguably be said to shock the court's sense of conscience. The Third Circuit Court of Appeals applying Pennsylvania law has taken into account the United States Supreme Court's admonition that few awards exceeding the single-digit threshold will satisfy due process. See, CGB Occupational Therapy, Inc. v. RHA Health Services, Inc., 499 F. 3d 184 (3d Cir. 2007)(Reducing punitive award from 18:1 ration to less than 7:1 ratio)

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

A plaintiff is entitled to "reasonable value of medical expenses." Only the amount actually paid by provider (or amount found by jury to be reasonable) is recoverable in a personal injury action. Moorhead v. Crozer Chester Medical Center, 765 A.2d 786 (Pa. 2001). Pennsylvania makes no distinction between private insurance and Medicare/Medicaid.

In Pennsylvania, pursuant to Sections 1722 and 1719 of the Motor Vehicle Financial Responsibility Law (MVFRL), plaintiffs are permitted to present evidence of all excess/outstanding medical bills not paid or payable by a private health insurance and/or HMO. Where a Plaintiff exhausts all first party benefits under their PIP coverage, submits excess medical bills to any private health insurance, and has those bills rejected, those bills become "unpaid and not payable" under the MVFRL. The right of the plaintiff to recover excess and/or outstanding medical bills is governed by Act VI (75 Pa.C.S.A. Section 1797) of MVFRL, which sets forth the proper reimbursable amounts permitted for medical treatment arising out of a motor vehicle accident at 110% of what Medicare would pay a provider for the same service.

With respect to future medical expenses, the Pennsylvania Superior Court in Farese v. Robinson, 2019 Pa. Super. 336 (Nov. 8, 2019) recently held that a claim for future medical expenses in an automobile accident case need not be reduced in accordance with the cost containment provisions under Act VI.