

RHODE ISLAND

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1. Update on current black box technology and simulations in Rhode Island and the legal issues surrounding these advancements.

The Rhode Island Supreme Court has yet to address the admissibility of data generated by automobile black box technology and the expert testimony with respect thereto. Likewise, there have been no court cases that have addressed the black box device, or the interpretation of the data taken therefrom. Further, the court has not recognized whether the black box data is considered scientifically reliable.

2. What other sources of technological evidence can be used in evaluating accidents and describe the legal issues in Rhode Island involving the use of such evidence.

According to the State of Rhode Island Highway Safety Plan for the Federal Fiscal Year 2018, the Rhode Island State Police utilize a Leica Total Station for the forensic mapping of all fatal and serious motor vehicle crashes throughout the State of Rhode Island. The Leica Gs14 GPS system allows for immediate point acquisition without timely instrument setup and base station movements. The admissibility of the forensic mapping from the Leica Gs14 GPS has yet to be addressed by the Rhode Island Supreme Court.

The Rhode Island Department of Transportation introduced the advanced wrong-way driving detection systems in 24 locations across the state. The systems alert the driver who is traveling in the wrong direction as well as the police and other motorists in the area of a potential wrong-way driver. The system takes a picture of the vehicle traveling the wrong direction. The admissibility of evidence gathered during a wrong-way accident had not been addressed by the Rhode Island Supreme Court.

Further, Rhode Island has not addressed the issue of the use of computer-generated animations or simulations during trial. Accident reconstruction data however is admissible. *Frias v. Jurczyk*, 633 A.2d 679, 683 (R.I. 1993) (holding that a trial justice had not abused his discretion to admit the testimony of an accident reconstructionist where he believed such evidence would be helpful to the jury).

Federal district courts within the First Circuit have allowed the admission of computer animations if “authenticated by testimony of a witness with personal knowledge of their content of the animation, upon a showing that it fairly and adequately portrays the facts and that it will help to illustrate the testimony given in the case.” *Insight Tech., Inc. v. Surefire, LLC*, 2007 U.S. Dist. LEXIS 83632, at *7 (D.N.H. Nov. 01, 2007) (quoting

Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534, 559 (D. Md. 2007)). Computer animations must be authenticated by independent evidence or be self-authenticated to be admissible. *Insight Tech., Inc.*, 2007 U.S. Dist. LEXIS 83632, at *3.

3. Describe the legal issues in Rhode Island 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

Spoliation of evidence occurs when a party to litigation deliberately or negligently destroys relevant evidence. *Tancretelle v. Friendly Ice Cream Shop*, 756 A.2d 744, 748 (R.I. 2000). There is no independent tort for spoliation. Instead, Rhode Island recognizes that an adverse inference may be given as a spoliation of evidence instruction. *Mead v. Papa Razzi Restaurant*, 840 A.2d 1103, 1108 (R.I. 2004). A showing of bad faith or intentional conduct is not required, but may strengthen the spoliation inference. *Kurczy v. St. Joseph's Veterans Ass'n, Inc.*, 820 A.2d 929, 946 (R.I. 2003).

In Rhode Island, even if evidence is lost or destroyed by an agent, the negligence of the agent is imputed to the principal when a third party sues the principal. *Mitchell v. Repucci*, 514 A.2d 1028, 1029 (R.I. 1986). "A party to litigation may be sanctioned for destruction of evidence caused by a non-party when the nonparty is acting as the party's agent." *Berrios, et al v. Jevic Transportation, Inc., et. al*, No. PC-04-2390, 2013 R.I. Super. LEXIS 18, at *10 (R.I. Super. Ct. Jan. 18, 2013).

b. Claim documents

Rhode Island courts recognize that disclosure of claims documents while an underlying claim is pending would prejudice the defense of the underlying claim. *Bartlett v. John Hancock Mut. Life Ins. Co.*, 538 A.2d 997 (R.I. 1988), abrogated by *Skaling v. Aetna Ins. Co.*, 799 A.2d 997 (R.I. 2002). Likewise, the Rhode Island Supreme Court held that "statements taken by a claim agent immediately after an accident are taken in anticipation of litigation." *Fireman's Fund Insurance Co. v. McAlpine*, 391 A.2d 84, 89 (R.I. 1978). Since those statements are taken in anticipation of litigation, they are entitled to a "qualified privilege" under Rule 26(b)(2).

This privilege is qualified because the opposing party who seeks production may obtain the materials only upon a showing that "a denial of production or inspection will result in an injustice or undue hardship." *Id.* at 90.

c. Dealing with law enforcement

If a subpoena is served on law enforcement, the government may withhold the information claiming a law enforcement privilege. Rhode Island recognizes the law enforcement privilege. If this privilege is claimed, then a court may allow the government to withhold information to protect "the public interest in law enforcement." *Commonwealth of Puerto Rico v. U.S.*, 490 F.3d 50, 63-64 (1st Cir. 2007). "The purpose of the law enforcement privilege is to prevent the disclosure of law enforcement techniques and procedures, to preserve the confidentiality of sources, to protect witnesses

and law enforcement personnel, to safeguard the privacy of individuals involved in an investigation, and to prevent interference with an investigation.” *Woodland Manor III Assoc. v. Keeny*, 1995 WL 941473, at *3 (R.I. Super. Ct. 1995).

d. Social Media

Rhode Island courts have allowed insurance companies in personal injury cases, parties to criminal actions, family law actions, and employers or employees in employment actions to use social media posts for evidentiary purposes. The party looking to introduce the evidence must follow the standard evidentiary hurdles: relevance, authentication, hearsay, and the best evidence rule.

Rhode Island specifically addressed authentication of a social media post by listing the required elements: “To authenticate a printout of a web page, the proponent must offer evidence that: (1) the printout accurately reflects the computer image of the web page as of a specified date; (2) the website where the posting appears is owned or controlled by a particular person or entity; and (3) the authorship of the web posting is reasonably attributable to that person or entity.” *O’Connor v. Newport Hosp.*, 111 A.3d 317, 324 (R.I. 2015).

Admissibility of social media is not overly difficult to achieve as all that is involved is the application of traditional evidentiary rules.

4. Describe the legal considerations in Rhode Island when defending an action involving truck drivers who may be considered Independent Contractors, Borrowed Servants or Additional Insureds?

a. Independent Contractors

In general, one who employs an independent contractor is not liable for the negligent acts of that contractor. *Cayer v. Cox Rhode Island Telecom, LLC*, 85 A.3d 1140 (R.I. 2014). “The test [as to] whether a person is an independent contractor is based on the employer’s right or power to exercise control over the method and means of performing the work and not merely the exercise of actual control. *Absi v. State Department of Administration*, 785 A.2d 554, 556 (R.I. 2001). The determination of whether a relationship between parties constitutes an employer-employee relationship is a mixed question of fact and law. *Di Orio v. R.L. Platter, Inc.*, 211 A.2d 642, 645 (R.I. 1965).

b. Borrowed Servants

Rhode Island has not yet addressed the legal considerations when defending an action involving truck drivers who may be considered a Borrowed Servant. However, according to Rhode Island case law, “the right of control over a borrowed servant is determinative of the question of whether he is the servant of the lending employer or of the borrowing employer.” *Agostini v. W.J. Halloran Co.*, 111 A.2d 537, 539 (R.I. 1955). The question of control is subject to factual inquiries into the scope and nature of the alleged control. The court in *Agostini* stated:

Whether the lent servant is to continue in the general employment of the lending master is ordinarily a question of fact the determination of may be aided by the consideration of several factors. But in absence of evidence to the contrary there is an inference that such general employment continues so long as the service rendered by the servant to the business entrusted to him by his general employer.

Id. In Rhode Island, “the borrowed employer assumes liability for the employees’ conduct, even though the original lending employer pays the employee his salary.” *Mainella v. Staff Builders Indus. Servs. Inc.*, 608 A.2d 1141, 1144 (R.I. 1992).

c. Additional Insureds

If there is an action defending a truck driver who may be considered an additional insured, a party must first prove that under the insurance policy language, the terms are unambiguous and that the driver is in fact considered an additional insured.

In Rhode Island, the definition of an “additional insured” depends on the language of the insurance policy. In *State v. Medical Malpractice Joint Underwriters Association* (C.A. 03-0743; *Decision*, June 7, 2005) (unpublished opinion), the Court held that it must look to the provisions of the insurance policy itself to determine the definition of an “insured.” Unless the terms are ambiguous, the Court must look to the provisions of the insurance policy itself. *Textron, Inc. v. Aetna Casualty & Surety Company*, 638 A.2d 537, 539 (R.I. 1982).

5. What is the legal standard in Rhode Island for allowing expert testimony on mild traumatic brain injury (mTBI) claims and in what instances have you had success striking experts or claims?

Rhode Island has not specifically addressed the legal standard for allowing an expert to testify on mild traumatic brain injury claims. Before admitting expert testimony, the “trial justice must evaluate whether the testimony that a party seeks to present to the jury is relevant within the witness’ expertise, and based on an adequate factual foundation.” *Kurczy v. St. Joseph Veterans Assoc.*, 820 A.2d 929, 940 (R.I. 2003). The admission of expert testimony in Rhode Island is governed by Rule 702 of the Rhode Island Rules of Evidence, which provide that:

[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of fact or opinion.

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

There is no bright line test for the admission of post-accident toxicology results in a civil matter. During evidentiary hearings, the trial justice will consider whether the probative value of the report will be outweighed by prejudice. *State v. Griffin*, 567 A.2d 796, 801 (R.I. 1989).

The admissibility of results of toxicology tests in criminal prosecutions for driving under the influence of alcohol or drugs rests on compliance with regulations established by the director of the Department of Health of the State of Rhode Island pursuant to §§ 31-27-2(c)(4) and 31-27-2(g) of the Rhode Island General Laws.

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

Rhode Island has not addressed separate considerations for independent contractors, borrowed servants, or additional insureds with respect to federally-mandated testing. Rather, the State of Rhode Island's departments and agencies, in compliance with the US DOT and Federal Motor Carriers Safety Administration requirements of the Omnibus Transportation Employee Testing Act of 19991, instituted a Policy to provide an Alcohol and Drug Testing Program for employees within state service who are required to possess a Commercial Drivers License (CDL) as a job requirement. The USDOT'S Rule, 49 CFR Part 40 – Procedures for Transportation Workplace Drug and Alcohol Testing Programs describes required procedures for conducting workplace drug and alcohol testing for the federally regulated transportation industry. Federal regulation 49 CFR Part 382 administered by the Federal Motor Carrier Safety Administration (FMCSA) provides drug and alcohol testing requirements for CDL holders.

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

Yes. Every motor vehicle liability insurance policy must contain certain arbitration provisions set forth by statute. R.I.G.L. § 27-10.3-1. Any insurance policy written in the State of Rhode Island must include a provision for arbitration if the case is valued under \$50,000.00. *Id.* There are no local jurisdictions that mandate cases be submitted to binding or non-binding arbitration, but there is a non-binding arbitration program in the Rhode Island Superior Court that any party to a lawsuit can elect to participate in.

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

Rhode Island allows deposition testimony to be used in support of a motion for summary judgment and/or other dispositive motions. Under Rhode Island Superior Court Rules of Civil Procedure, Rule 56, “the judgment sought shall be rendered forthwith if the pleadings, depositions, documents, electronically stored information, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as matter of law.”

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

Rhode Island imposes pure joint and several liability on joint tortfeasors. R.I. Gen. Laws § 10-6-2. The Uniform Contribution Among Joint Tortfeasors Act, codified at R.I. Gen.

Laws §§ 10-6-1 *et seq.*, defines “joint tortfeasors” as “two (2) or more persons jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them; provided, however, that a master and servant or principal and agent shall be considered a single tortfeasor.” R.I.G.L. § 10-6-2.

The act provides that “[t]he right of contribution exists among joint tortfeasors; provided however, that when there is a disproportion of fault among joint tortfeasors, the relative degree of fault of the joint tortfeasors shall be considered in determining their pro rata shares.” To encourage settlement and not prejudice the rights of non-settling defendants, the Court allows a remaining joint tortfeasor “to assert the settling joint tortfeasors’ liability in their absence.” R.I.G.L. § 10-6-3; *Cooney v. Mollis*, 640 A.2d 527, 530 (R.I. 1994).

The Uniform Contribution Among Joint Tortfeasors Act recognizes a right of contribution between joint tortfeasors if they are both liable in tort to the original plaintiff and their respective wrongful conduct caused the same injury to the original plaintiff. “Liable in tort” as used in the Uniform Contribution Among Joint Tortfeasors Act defines joint tortfeasors to mean “two or more persons jointly or severally liable in tort for the same injury to person” *Wampanoag Group, LLC. V. Iacoi*, 68 A.3d 519 (R.I. 2013); *Zarella v. Miller*, 217 A.2d 673, 675 (R.I. 1966).

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

Rhode Island has four counties: Providence and Bristol County (“Providence County”), Kent County, Newport County, and Washington County. Providence County and Newport County tend to be moderate, while Kent County and Washington County tend to be moderate-to-conservative. Rhode Island Superior Court has exclusive jurisdiction of matters greater than \$10,000.00. All counties also have a District Court with exclusive jurisdiction up to \$5,000.00 and concurrent jurisdiction with Superior Court from \$5,000.00 - \$10,000.00.

- I. **United States District Court:** The United States District Court for the District of Rhode Island encompasses the entire state and draws its jury from all four counties. The venue is moderate-to-conservative.
- II. **Providence County:** The venue is moderate. Providence County Superior Court juries are made up of residents from both Providence and Bristol counties. Providence county residents have a median household income of \$50,637 and 83.2% have a high school degree or higher. Bristol County has a median household income of \$73,096 and 46.4% of residents have a Bachelor’s degree or higher.
- III. **Kent County:** The venue is moderate-to-conservative. Kent County has a population of 163,760. The median household income is \$65,592. 91.4% of the population has a high school degree or higher, and 31.8% have a bachelor’s degree or higher.
- IV. **Washington County:** The venue is moderate-to-conservative. The median household income is \$77,862 and 94% have a high school degree or higher.

V. **Newport County:** The venue is moderate. The median household income is \$75,463 and 93.3% have a high school education or higher.

12. Is there a cap on punitive damages in Rhode Island?

Rhode Island does not cap noneconomic damages, including pain and suffering and punitive damages. *See Asbury v. A.W. Chesterton Co.*, 2010 WL 1280470, at *10 n.4 (R.I. Super. Mar. 29, 2010) (Gibney, P.J.). The standard for punitive damages is willful and wanton conduct amounting to criminality.

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

A Plaintiff can seek to recover the amount charged by the medical providers. Reductions based on actual payment are not allowed under the collateral source rule in Rhode Island. The rule requires a “tortfeasor to pay in full the damages suffered by the injured person without credit for any amounts received by the injured person from sources independent of the defendant.” *Colvin v. Goldenberg*, 272 A.2d 663, 666 (R.I. 1971). Rhode Island courts have consistently employed the collateral source rule to exclude evidence of the amount actually paid for medical expenses or the fact that expenses were reduced. *Votolato v. Merandi*, 747 A.2d 455 (R.I. 2000).