TEXAS

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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 black box is also known as an electronic control module (ECM) or event data recorder (EDR). Truck manufacturers originally began using EDRs to defeat warranty claims, and

most trucks manufactured since the 1990s will have a black box integrated into their engine components. These devices store data about the physical properties of the truck that is involved in an "event", which includes an accident or near accident.

Weight of Blackbox Evidence

As yet, no Court has excluded data downloaded from an EDR however it is clear that, to date, no court has held that EDR data is "conclusive proof." There are several cases where courts have reversed the granting of summary judgment based on EDR or similar data. The earliest case is *Sipes v. General Motors Corporation*, 947 W.W.2d 143 (Tx.App. 1997). Sipes was an airbag failure to deploy case. There were two arguments made by GM. First, was that the impact was not the type of collision where the air bag should deploy (side impact verse frontal) and that, based on the data downloaded from the "diagnostic energy reserve module" (DERM), the forces experienced by the vehicle were not enough to require deployment of the bag. The Texas Appellate Court made two points:

"Certainly this is strong evidence, if it is shown that the DERM itself is functioning properly, but it is not irrefutable evidence that conclusively establishes a fact as a matter of law in the face of other contradictory evidence. Our judicial system has never accepted computers or DERMs to decide ultimate issues in lieu of courts and juries." *Id.* at 153.

Ownership of Blackbox Evidence

There has been no case which has specifically addressed ownership of the data, but the clear consensus is that whoever owns the vehicle owns the EDR and the data in it.

"Privacy in the private sector: Use of the automotive industry's 'Event Data Recorder' and Cable industry's 'Interactive Television' in Collecting personal Data." 29 *Rutgers Computer & Tech. L.J.* 163 (2003) addresses potential privacy concerns and the National Highway Traffic Safety Administration's position on ownership of the data. It establishes that the owner of the subject vehicle owns the data from the EDR. In order to gain access to the data NHTSA must obtain a release for the data from the owner of the vehicle. Any information derived from the crash investigation, including an EDR, that would lead to personal identifiable information may not be disclosed pursuant to the Privacy Act. *Id*. at 172.

The Federal Highway Administration (FHWA), the Federal Motor carrier Safety Administration (FMCSA), the Department of Transportation (DOT) and the American Trucking Association (ATA) all take similar positions on ownership. *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.

- DERM - "Diagnostic Energy Reserve Module"

- SDM – "Sensing and Diagnostic Module"
- Advanced anti-lock brakes incorporating stability control capability
- GPS – based fleet monitoring systems
- Advances collision migrations systems such as forward crash warning and lane departure warning and on-board video systems
- EDR – "Event Data Recorder"
- ECM – "Electronic Control Module"

All of the above listed technologies are used in evaluating accidents and are used in similar ways to the traditional Blackbox technology that was discussed in response to the first questions. The legal issues surrounding the use of these technologies are very similar to the ones discussed above. there are debates on how reliable the information is and how much weight to put of such evidence as well as disputes on who can access the information contained on these devices.

We recently had a mutli-fatality collision case in which Plaintiff's expert criticized our trucking company for not equipping their fleet with a technology named Bendix Wingman. This technology is supposed to sense when the vehicle is approaching an object and alert the driver ahead of time so they begin stopping or performing an evasive maneuver. Plaintiff's counsel attempted to make the argument that this technology would have prevented the accident from happening. However, because this particular technology was not industry standard, we were able to refute that it was negligent for the company to not have the technology and our expert did not agree that this technology would have been able to prevent the accident.

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?

<u>Spoliation</u>

Business records are often used in lawsuit against trucking companies as evidence to demonstrate the trucking company's compliance, or lack therefore, with industry standards and federal law.

Texas at one time dealt with spoliation by creating a presumption that evidence would have been unfavorable to the party that destroyed or failed to preserve it. However, The Texas Supreme Court in *Brookshire Brothers, Ltd. V. Aldridge*, No. 10-0846, S.W. 3d (2014) changed the approach regarding a spoliation jury instruction by holding that: 1) a party must intentionally spoliate evidence in order for a spoliation instruction to constitute an appropriate remedy, and 2) A party's negligent spoliation of evidence is no longer sufficient grounds for a jury instruction on spoliation except in the limited situation where the non-spoliating party has been irreparably deprived of any meaningful ability to present a claim or defense.

<u>Social Media</u>

Social media can be a powerful tool to use in settlement negotiations or to show the jury when discussing Plaintiff's alleged injuries related to the subject incident and alleged limitations. However, assuming the social media evidence is relevant, the primary concern of Texas courts is authentication. Thus, ensuring the evidence (1) was actually on the social media site, (2) accurately reflects the proposition for which it's offered, and (3) is attributable to the owners of the social media account.

In *Tienda v. State*, 358 S.W.3d 633, 638 (Tex. Crim. App. 2012) the State introduced at trial printouts of a MySpace profile allegedly belonging to the defendant and implicating him in a shooting. The issue was whether the MySpace pages were sufficiently authenticated by circumstantial evidence. This court noted that electronic evidence should be evaluated consistent with the rules that apply to other types of evidence. Other court have noted that the standard of authentication are higher for evidence from social media that emanates from a source other than the party against which it is offered. *Dering v. State*, 465 S.W.3d 668, 672 (Tex. App. – Eastland 2015, no pet.).

However, the general rule in Texas is that unaltered photographs and videos will be admissible if they are relevant to any issue in the case and are verified by a witness as being a correct representation of the facts. *Kroger Co. v. Milanes*, 474 S.W.3d 321, 342 (Tex. App.–Houston [14th Dist.] 2015, no pet.) (citing *Huckaby v. A.G. Perry & Sons, Inc.,* 20 S.W.3d 194, 209 (Tex. App.–Texarkana 2000, pet. denied)).

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.

With regard to independent contractors/owner-operators, Texas courts recognize the "statutory employee" principle based on 49 C.F.R. § 1057.12(c). Owner-operators are deemed employees of trucking companies when 1) the trucking company doesn't own the vehicle; 2) the trucking company operates the vehicle under an "arrangement with the owner to provide transportation subject to ICC jurisdiction"; and 3) the trucking company doesn't literally employ the driver. *Mata v. Andres Transport, Inc.*, 900 S.W.2d 363, 366 (Tex. App.—Houston [1st Dist.] 1995, no writ). The "statutory employee" principle opens the door to vicarious liability, but only as to members of the public. Co-workers are not within the class that the "statutory employee" principle regulates. *White v. Excalibur Ins. Co.*, 599 F.2d 50, 55 (5th Cir. 1979); *de Tamez v. Southwestern Motor Transp., Inc.*, 155 S.W. 564,573 (Tex. App.—San Antonio 2004, no pet.).
Trucking companies may raise any defense available to an employer under state law. *Mata*, 900 S.W.2d at 366.

Assuming that the "statutory employee" principle doesn't apply, an independent contractor/owner-operator may still be deemed to be the employee of another. This is a fact-specific inquiry that focuses on whether the employer has the right to control the progress, details and methods of operation of the work. *Thompson v. Traveler's Indem. Co. of Rhode Island*, 789 S.W.2d 277, 278 (Tex. 1990). Courts analyze several factors to

determine the amount of control retained by an employer, including 1) the independent nature of the workman's business;
2) the obligation to furnish the tools and materials to perform the job; 3) the right to control the progress of the work except as to final results; 4) the time for which the individual is employed; and 5) whether payment is at a set rate or based on the completion of each job. *Hoechst Celanese Corp. v. Compton*, 899 S.W.2d 215, 220 (Tex. App.—Houston [14th Dist.] 1994, writ denied).
Texas also observes the Borrowed Servant Doctrine, which is based on the same analysis. *See St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 537 (Tex. 2002).

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 standard for allowing expert testimony on mild traumatic brain injury (mTBI) claims is the same as the standard for all other expert testimony. A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify if the expert's scientific, technical, or other specialized knowledge will help the jury understand the evidence or to determine a fact issue. Tex. R. Evid. 702. There are few Texas Supreme Court or appellate cases, if any, in which the exclusion of an mTBI expert was success.

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

Generally, yes. First, the method of the testing must be deemed reliable as a matter of law. *Gammill v. Jack Williams Chevrolet, Inc*., 972 S.W.2d 713, 726, 41 Tex. Sup. Ct. J. 1117 (Tex. 1998). To determine whether a scientific method is reliable, Texas courts analyze the method in question under the *Daubert* factors: (1) whether the theory or technique in question can be and has been tested; (2) whether it has been subjected to peer review and publication; (3) its known or potential error rate; (4) the existence and maintenance of standards controlling its operation; and (5) whether it has attracted widespread acceptance within a relevant scientific community. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993)

Then, generally an expert will testify about the method to help the jury understand the evidence. "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 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." Tex. R. Evid. 702. The trial court, in discharging its duty as gatekeeper, must determine how to assess the reliability of particular testimony. *Gammill*, 972 S.W.2d 716. There must be some basis to show the reliability of the opinion offered. *Id.* The criteria for assessing reliability will vary depending on the type of expert and the nature of the evidence. *Id*. at 726-27. In some cases, an expert's experience alone may provide a sufficient basis for such testimony. *Id.* at 726.

If the above analysis is satisfied, then the evidence of the post-accident toxicology text will be admitted into evidence.

7. What are some considerations for federally-mandated testing when drivers are independent contractors, borrowed servants, or additional insureds.

Under the Federal Motor Carrier Act, mandatory drug testing applies to drivers. All *drivers* that operate a commercial motor vehicle, as defined in 49 C.F.R. § 382.107, which requires a driver holding a commercial driver's license, are subject to the Drug and Alcohol testing requirements in 49 CFR Parts 40 and 382. *See* 49 C.F.R. § 383.3. Driver means any person who operates a commercial motor vehicle. *Id* at § 382.107. This includes, but is not limited to: Full time, regularly employed drivers; casual, intermittent or occasional drivers; leased drivers and independent owner-operator contractors *Id.* Therefore, the considerations are the same regardless of whether the driver is an employee, independent contractor, borrowed servant, or additional insured.

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

Yes, corporate deposition testimony can be used in support of a motion for summary judgment or other dispositive motion. When a corporate representative testifies during deposition, they are testifying as to the knowledge of the company itself and that testimony becomes binding on the company. Tex. R. Civ. P. 199.5(b)(1).

Under the Texas Rules of Civil Procedure, summary judgment evidence may consist of "deposition transcripts, interrogatory answers, and other discovery responses referenced or set forth in the motion or response," "admissions, affidavits, stipulations of the parties, and authenticated or certified public records…" Tex. R. Civ. P. 166a(c)(i) & (ii). Evidence offered either in support or in opposition to a motion for summary judgment must be in admissible form to constitute competent summary judgment evidence. Tex. R. Civ. P. 166a(f).

Corporate deposition transcripts offered as evidence do not need to be authenticated in order to be in admissible form. Instead, transcripts that are not on file with the clerk may be used as summary judgment evidence if " copies of the material, appendices containing the evidence, or a notice containing specific references to the discovery or specific references to other instruments, are filed and served on all parties together with a statement of intent to use the specified discovery as summary judgment proofs." Tex. R. Civ. P. 166a(d). If the deposition is to be used in support of a motion for summary judgment, it must be served on all parties at least twenty-one days before the hearing. *Id.* If the deposition is to be used to oppose summary judgment, it must be served at least seven days before the hearing. *Id.* The court in *McConathy vs. McConathy* reasoned that because all parties readily have access to the depositions taken in a matter, the deposition excerpts submitted with a motion for summary judgment may be easily verified as to their accuracy and do not need to be authenticated. *McConathy v. McConathy*, 869 S.W.2d 341, 342 (Tex. 1994).

However, exhibits used in a corporate representative deposition must be separately authenticated. Mere use of the exhibits at the deposition do not make them admissible. If a party wants to use the exhibits for summary judgment purposes, they must establish the exhibit's admissibility either at the deposition, through discovery requests or otherwise. *James v. Hudgins*, 876 S.W.2d 418, 422 (Tex. App. - El Paso 1994, writ denied).

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

Texas' ADR statute can be found in Section 154 of the Texas Civil Practice and Remedies Code. While there is no mandatory ADR requirement in the state, there is language which allows Courts to Order mediation. Specifically, Section 154.021 titled "Referral of Pending Disputes for Alternative Dispute Resolution Procedure" states:

154.021(a) A court may, on its own motion or the motion of a party, refer a pending dispute for resolution by an alternative dispute resolution procedure including:

(1) an alternative dispute resolution system established under Chapter 26, Acts of the 68th Legislature, Regular Session, 1983 (Article 2372aa, Vernon's Texas Civil Statutes);

(2) a dispute resolution organization; or

(3) a nonjudicial and informally conducted forum for the voluntary settlement of citizens' disputes through the intervention of an impartial third party, including those alternative dispute resolution procedures described under this subchapter.

(b) The court shall confer with the parties in the determination of the most appropriate alternative dispute resolution procedure.

(c) Except as provided by agreement of the parties, a court may not order mediation in an action that is subject to the Federal Arbitration Act (9 U.S.C. Sections 1-16).

Most judges require that cases are mediated before proceeding to trial. This is becoming increasingly common in District Courts for major cities such as Houston, Dallas, San Antonio, Ft. Worth, and Austin. When a Court does order ADR or mediation, Section 154.022 allows for an objection by either party within 10 days of the Order, so long as a written objection with a reasonable basis is filed. The Court ultimately gets to decide whether the party's objection is "reasonable."

Finally, Section 154.023 allows for mediation as an additional method to ADR.

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

Texas applies joint and several liability based on the concept that a tort is a single and indivisible event. However, Texas follows a modified comparative liability scheme, where each party is responsible for its own negligence, and a Plaintiff will not recover if found to be more than 50% responsible. Further, joint and several liability only attaches to a defendant if that defendant is found to be greater than 50% liable under the comparative scheme. Consequently, in Texas, if the Plaintiff is not barred by his/her own negligence, a tortfeasor who is more than 50% liable can be held responsible for plaintiff's entire injury.

It is then the responsibility of the defendants to apportion the damages among themselves, using the mechanisms of contribution and indemnity to ensure that the plaintiff only recover once. Contribution and indemnity claims are governed by Texas' Proportionate Responsibility statute, Tex. Civ. Prac. & Rem. Code § 33. Under § 33.015(a), if a defendant who is jointly and severally liable pays a percentage of damages greater than his responsibility, that defendant has a right of contribution for the overpayment against each other liable defendant to the extent that the other liable defendant has not paid the percentage of the damages found by the trier of fact equal to that other defendant's percentage of responsibility.

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

Based on a brief survey of the Texas ALFA firms, the most dangerous/plaintiff-friendly venues in Texas include, in alphabetical order with the county seat in parenthesis:

1. Brooks County (Falfurrias, TX)
2. Cameron County (Brownsville, TX)
3. Duval County (San Diego, TX)
4. Hidalgo County (Edinburg, TX)
5. Jefferson County (Beaumont, TX)
6. Jim Wells County (Alice, TX)
7. Johnson County (Cleburne, TX)
8. Maverick County (Eagle Pass, TX)
9. Reeves County (Pecos, TX)
10. Starr County (Rio Grande City, TX)
11. Upshur County (Gilmer, TX)
12. Ward County (Monahans, TX)
13. Webb County (Laredo, TX)
14. Winkler County (Kermit, TX)
15. Wise County (Decatur, TX)
16. Zapata County (Zapata, TX)

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

Yes, punitive damages, i.e. exemplary damages, are capped at the larger of $200,000 or two times the amount of economic damages plus an equal amount of non-economic damages up to a maximum of $750,000. *See* Tex. Civ. Prac. & Rem. Code § 41.008(b); *see also* Tex. Civ. Prac. & Rem. Code § 41.001(5) (defining exemplary damages as any

damages awarded as a penalty or by way of punishment but not for compensatory purposes, and noting exemplary damages includes punitive damages). There are limited exceptions to this rule that allow a damages award to exceed the limitations provided in § 41.008(b) if the defendant committed certain felonies knowingly or intentionally. *See* Tex. Civ. Prac. & Rem. Code § 41.008(c).

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

Pursuant to Texas Civil Practice and Remedies Code Section 41.0105, a plaintiff seeking to recover medical damages may recover only the amount of medical or health care expenses actually paid or incurred by or on behalf of the claimant. *See* Tex. Civ. Prac. & Rem. Code § 41.0105; *see also Haygood v. Escabedo*, 356 S.W.3d 390, 391 (Tex. 2011). The amount "actually paid and incurred" is defined as expenses that have been or will be paid and excluding the difference between such amount and charges the service provider bills but has no right to be paid. *Haygood*, 356 S.W.3d at 397. In other words, a plaintiff cannot recover for write-offs or adjustments to his or her medical bills.