UTAH

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1. Provide an update on current black box technology and simulations in Utah and the legal issues surrounding these advancements?

In *Green v. Louder*, 2001 UT 62, 29 P.3d 638, the Utah Supreme Court held that testimony regarding computer generated evidence, which would include black box data, is admissible to the extent that it is relied upon by an accident reconstruction expert. The court reasoned that, once an expert renders his opinion, "he must be allowed to explain the foundation of that opinion." *Id*., ¶ 29.

A search on Westlaw did not reveal any Utah cases directly addressing whether the underlying black box information relied on by an expert can itself be admitted into evidence.

2. Besides black box data, what other sources of technological evidence can be used in evaluating accidents and describe the legal issues in Utah involving the use of such evidence?

Utah does not have any specific law addressing other sources of technological evidence that may be used in evaluating accidents. All technological evidence used in evaluating an accident is analyzed under the same test. This test is whether the technological evidence is "of a type reasonably relied upon by experts in that particular field. The opposing party may challenge the suitability or reliability of such materials on cross-examination, but such challenge goes to the weight to be given the testimony, not the admissibility." *Green*, 2001 UT 62, ¶ 28.

3. Describe the legal considerations in Utah 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. Preservation/spoliation issues concerning post-accident claims

Utah has not recognized a first-party or third-party cause of action for spoliation. *Hills v. United Parcel Serv., Inc.*, 2010 UT 39, 232 P.3d 1049. Utah Rule of Civil Procedure

37(e) sets forth a court's inherent power to impose sanctions on a party who fails to preserve evidence. It states:

> (e) Failure to preserve evidence. Nothing in this rule limits the inherent power of the court to take any action authorized by paragraph (b) if a party destroys, conceals, alters, tampers with or fails to preserve a document, tangible item, electronic data or other evidence in violation of a duty. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

Utah R. Civ. P. 37(e).

Rule 37(e) requires preservation when there is a duty to preserve. Such a duty arises when a party is on "notice of the pendency of [an individual's] legal claims." *Burns v. Cannondale Bicycle Co*., 876 P.2d 415 (Utah Ct. App. 1994). Utah courts have stated, in the product liability context, that where an action is not pending and where there is no notice of the impending filing of such an action, "we are not aware of any general duty requiring defendants to retain the allegedly discarded part." *Burns*, 876 P.2d at 419.

Utah federal courts likewise will impose sanctions where a party has a duty to preserve. Such a duty arises when the party knew or should have known, that litigation was imminent. *Turner v. Public Serv. Co.*, 563 F.3d 1136, 1149 (10th Cir. 2009).

Utah state courts have a safe harbor provision for electronic data that provides that "[a]bsent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." Utah R. Civ. P. 37(e).

As relates to post-accident claims, it would be advisable to adopt a risk-avoidance policy, i.e., a company should assume that all but the most minor accidents may result in litigation and take measures to preserve whatever evidence can reasonably be preserved from each accident. Having to later deal with spoliation problems because of a failure to take certain precautions shortly after the accident can be costly to defend at best and litigation-ending at worst.

Such preservation should include an internal written litigation hold. *See Philips Elec. N. Am. Corp. v. BC Technical*, 773 F.Supp.2d 1149, 1127 (D. Utah 2011). The failure of a company to issue an internal written litigation hold can constitute gross negligence if it is likely to result in destruction of relevant information.

B. Legal considerations regarding claims documents

Claims documents that are prepared "primarily for use in pending or imminent litigation" are considered work product and are privileged. *Schroeder v. Utah Attorney Gen.'s*

Office, 2015 UT 77, ¶ 39, 358 P.3d 1075. The work-product privilege only applies if the claims material "would not have been generated but for the pendency or imminence of litigation." *Id*. By contrast, documents "produced in the ordinary course of business" or "created pursuant to routine procedures or public requirements unrelated to litigation" do not qualify as attorney work product. *Id*. Additionally, the Utah Supreme Court noted that discoverability of case file documents depends on the circumstances of the case and may be treated differently when obtained by an insurer in a first-party claim versus when obtained by an insurer in a third-party claim. *Askew v. Hardman*, 918 P.2d 469 (Utah 1996).

To ensure that there is not a waiver of the privilege, properly label claims documents or other materials created in anticipation of litigation as "work product" or "prepared in anticipation of litigation." If work product is going to be shared with third-parties, confidentiality agreements or other agreements designed to protect the confidentiality of the communication should be in place. Claims documents should also be preserved, and a litigation hold be in place.

C. Dealing with law enforcement early

When dealing with law enforcement early, concerns may arise regarding the admissibility of law enforcement investigative reports. Under Utah R. Evid. 803(6), police reports are admissible to the extent that the record was made at or near the time of the accident, with someone with knowledge. However, statements made from accident scene witnesses would likely be considered hearsay since the officer would not have personal knowledge of the information contained in those statements.

Statements made by an opposing party are considered non-hearsay under Utah R. Evid. 801(d)(2). It is therefore important to instruct employees not to admit fault or liability as relates to the accident.

D. Social media

Social media is subject to the same spoliation analysis as other electronic media. Spoliation sanctions are proper when (1) a party has a duty to preserve evidence because it knew or should have known litigation was imminent, and (2) the adverse party was prejudiced by the destruction of the evidence. *Nunes v. Rushton*, 2018 WL 2208301 (D. Utah May 14, 2018). Litigation holds should encompass relevant social media.

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. Independent Contractor

An employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants. *Harry L. Young & Sons,*

Inc. v. Ashton, 538 P.2d 316 (Utah 1975). The Utah Supreme Court distinguishes between an employee and an independent contractor as follows:

> [a]n employee is one who is hired and paid a salary, a wage, or at a fixed rate, to perform the employer's work as directed by the employer and who is subject to a comparatively high degree of control in performing those duties. In contrast, an independent contractor is one who is engaged to do some particular project or piece of work, usually for a set total sum, who may do the job in his own way, subject to only minimal restrictions or controls and is responsible only for its satisfactory completion.

Id., *see also Jaeger v. Western Rivers Fly Fisher*, 855 F.Supp. 1217 (D. Utah 1994). Factors relevant in determining the relationship include:

> (1) whatever covenants or agreements exist concerning the right of direction and control over the employee, whether express or implied; (2) the right to hire and fire; (3) the method of payment, i.e., whether in wages or fees, as compared to payment for a complete job or project; and (4) the furnishing of the equipment.

Ashton, 538 P.2d at 318. It is the right to control, not the actual assertion of control, that is essential. *Pinter Constr. Co. v. Frisby*, 678 P.2d 305, 309 (Utah 1984).

In *Ashton*, 538 P.2d 316, the Utah Supreme Court affirmed a district court's ruling that an employee-employer, and not an independent contractor, relationship existed with a truck driver when, among other things, the lease agreement with the driver gave him "no choice" in the manner and method in which he operated the truck, the truck driven by the driver was owned by the company and displayed the company's name. Before the truck driver could take a load, he was obligated to clear it with the company's supervisor, he was not free to refuse to haul a load or an over-sized load. He had to check in with dispatch among various points along the route as to his travel and time of travel. He was advised the number of miles the truck should operate each month, and the company set a speed limit of five miles per hour less than the lawful posted speed limit.

B. Borrowed Servants

"In the loaned employee context, where a general employer loans one of its employees to another employer, a new, albeit temporary, employment relationship is formed. The employer of the loaned employee, or special employer, is liable to a third party for torts committed by the loaned employee within the scope of his or her employment with the special employer." *Kunz v. Beneficial Temporaries*, 921 P.2d 456 (Utah 1996). If the general employer relinquishes control over the loaned employee, the general employer's vicarious liability is suspended and is transferred to the special employer. When determining whether liability is transferred, Utah courts analyze two standards (1) the right of control test, and (2) the whose business test. The right of control test analyzes the degree of supervisory responsibility held by the employer. This test looks at whether the employer had the right to control details such as "where, when and how the work is to

be performed, and also whether the employer could discharge the employee for unsatisfactory performance." *Hardman v. Specialty Services*, 177 F.3d 921 (10th Cir. 1999), applying Utah law.

The second test seeks to determine whose business was being furthered by the employee's activities or in other words "which enterprise is most closely connected to the employee's work. Both tests must be satisfied for liability to transferred to the temporary employer.

C. Additional Insured

If a party contractually agrees to list another party as an additional insured, the agreement is construed under general contract principles, and if the additional insured endorsement is not obtained, the party is liable for breach of contract. The measure of damages is typically the amount the policy would have paid had it been obtained. *Pickhover v. Smith's Management* Corp. 77 P.2d 664 (Utah Ct. App. 1989)

Unlike indemnification provisions, agreements to procure insurance are not subject to the strict construction rule and do not require that the agreement expressly provide that the insurance must protect against the contracting parties' own negligence. *Pickhover*, 77 P.2d 664; *Utah Transit Authority v. Greyhound Lines, Inc.*, 2015 UT 53, ¶ 48, 355 P.3d 947, 960.

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?

There is no specific standard for allowing expert testimony on mild traumatic brain injuries. This question would be analyzed, as with all expert testimony, under Utah R. Evid. 702.

Instead of using the *Daubert* approach used by the Federal Courts in analyzing Rule 702, Utah Courts employ a standard known as the *Rimmasch* approach for determining the admissibility of expert testimony. *Compare Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) *with State v. Rimmasch*, 775 P.2d 388 (Utah 1989); *Eskelson v. Davis Hospital and Medical Center*, 2010 UT 59, ¶ 11, 242 P.3d 762 (Utah 2010).

The *Rimmasch* approach first requires the court to determine "whether the initial qualification thresholds in terms of "knowledge, skill, experience, training, or education" are met under Utah R. Evid. 702(a). Second, the court must determine under Utah R. Evid. 702(b) "whether a party has met its threshold burden to show the reliability of the principles that form the basis for the expert's testimony and the reliability of applying those principles to the facts of the case." *Eskelson*, 2010 UT 59. This approach also allows the court to take judicial notice of principles that have been accepted by the relevant expert community.

Under Utah law, the threshold reliability determination under 702(b) is met in the context of a medical determination if the physician has had experience in "a nearly identical situation" and that situation forms the basis for his opinion. *Eskelson*, 2010 UT 59. For instance, in *Eskelson*, the Utah Supreme Court held that a physician expert testimony that defendant's removal of a bead from plaintiff's eardrum caused a perforation in the plaintiff's eardrum was reliable because the physician had experience removing foreign objects from eardrums. The same analysis will likely apply in the context of a mild TBI determination. Expert testimony will likely be considered reliable under Utah law if the expert has experience diagnosing and making causation determinations regarding mild TBIs.

We have had success striking claims in instances when a plaintiff has failed to designate an expert to testify as to causation or where an expert has admitted at his deposition that his determinations are not made with a reasonable degree of medical probability.

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

The Utah appellate courts have not addressed this issue. However, if this question were to come before the court, the results would need to be presented through an expert witness and meet the requirements of Utah or Federal Rule of Evidence 702.

An expert may also be needed to demonstrate that the results are relevant, i.e., that the information contained in the post-accident toxicology reports indicates that defendant was actually impaired at the time of the accident.

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

Utah courts have not directly addressed this issue. These questions and Utah tort liability associated with federally mandated testing are likely analyzed under the same tests described in question 8 for independent contractors, borrowed servants, and additional insureds. For independent contractors and borrowed servants, the question will be whether there is sufficient control over the manner and method that the work is performed to result in an employer/employee relationship. Simply complying with federal mandated testing requirements or requiring that an independent contractor comply with federal-mandated testing is unlikely (on its own) to trigger the control required under Utah law to result in vicarious liability.

As related to additional insured, the coverage afforded or required will depend on the language of the parties' agreement and the specific policy procured. It is advisable to review the policy procured to determine if it complies with the parties' expectations.

8. Is there mandatory ADR requirements in Utah and are any local jurisdictions mandating cases to binding or non-binding arbitration?

No. There is no mandatory ADR requirement in Utah.

In 1994, Utah enacted the Alternative Dispute Resolution Act, currently codified at Utah Code § 78B-6-201 et seq. The Act includes minimum procedures for arbitration, mediation, and ADR in general. In addition, the Judicial Council has promulgated rules for the referral of civil cases to ADR procedures. The court may refer an action to the ADR program on its own or at a party's request. The court may also excuse a party from the ADR program upon a showing of good cause. Utah Code Judic. Admin. R4- 510.05.

The Utah Court of Appeals (but not the Utah Supreme Court) has created an Appellate Mediation Office which requires the parties to participate in mediation efforts in some cases. The system is designed to function much like the Tenth Circuit mediation process.

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

Yes. In both federal and state courts, 30(b)(6) deposition testimony may be used in support of a motion for summary judgment or other dispositive motions.

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

Joint and several liability have been abolished in Utah. Other than the exceptions discussed below for parties immune from suit, each defendant's liability is limited to its proportionate share of fault. Utah Code § 78B-5-820(1); *S.H. by and through Robinson v. Bistryski*, 923 P.2d 1376, 1380 (Utah 1996).

Fault may be attributed to persons immune from suit (e.g., employers and governmental entities), but only for the purpose of determining the proportionate fault of the non-immune defendants. Utah Code § 78B-5-818(4). If the immune party's fault is equal to or greater than 40%, the plaintiff's recovery is reduced by the proportion of fault attributable to the immune party. Utah Code § 78B-5-819. However, if the immune party's fault is less than 40%, that fault is redistributed proportionately to the non-immune parties, and the plaintiff's recovery is not reduced. *Id.*; *Field v. Boyer Co.*, 952 P.2d 1078, 1081-82 (Utah 1998).

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

Utah as a whole is conservative, but the Third District, which includes Salt Lake, Summit, and Tooele Counties, is more liberal and considered more "plaintiff-friendly" than other venues in this State. With respect to the Federal District Court, the Southern Region of Utah is considered more conservative than the Central/Northern Divisions of Utah.

This, however, does not mean that the Third District is "dangerous." The Third District Judges and the Federal District Judges are highly competent. In cases involving complex

issues and significant motion practice, the Third District or, if possible, the Central/Northern Divisions of the Utah Federal District Court may be the preferred venue.

12. Is there a cap on punitive damages in Utah?

No. There is no specific cap on punitive damages in Utah. But Utah caps non-economic or "pain and suffering" damages in medical malpractice cases. *See* Utah Code 78B-3-410.

Although not a statutory cap, Utah R. Civ. P. 26 requires plaintiffs to plead one of three tiers based on expected damages. In turn, this tier designation restrains discovery schedules, document production, and general costs associated with litigation. A plaintiff cannot recover damages above the designated tier at trial unless the plaintiff seeks to amend his complaint pursuant to Utah R. Civ. P. 15(a).

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

Utah courts have not resolved this issue, although the strong trend in the district courts is to allow the amount billed into evidence, and to exclude evidence of the amount paid on the basis of the collateral source rule.

Collateral source evidence is generally not appropriate for jury consideration. *Wilson v. IHC Hospitals, Inc.*, 2012 UT 43, 289 P.3d 369.