VERMONT

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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.

Vermont has no cases on point regarding black box technology. However, guidance can be found in New York cases, including *Gitman v. Martinez*, 139 A.D.3d 1175, in which a motion for discovery sanctions to punish the spoliation of evidence was upheld when black box data from one tractor trailer was preserved but data from the other tractor trailer's black box was destroyed. Black box data will be subject to the "traditional approach" of discovery sanctions to punish a spoliator of evidence, as detailed in Question 3.

Simulations will be scrutinized by the court for similarity of conditions and will use its discretion to determine whether the probative value of such evidence is outweighed by its potential for unfair prejudice and its likelihood to confuse and mislead the jury under V.R.E. 403. *State v. Martin*, 2007 VT 96 ¶ 28 & 29. In conducting a Rule 403 balancing, the trial court has broad discretion, and the Vermont Supreme Court will not overturn its decision unless the court completely withheld its discretion or exercised it on clearly untenable or unreasonable grounds. *State v. Shippee*, 2003 VT 106, ¶ 13. As simulation technology continues to advance, the simulations will come to more closely resemble the incident itself, and as such are likely to be of greater probative value and lesser unfair prejudice. An increasingly technologically educated jury pool will likewise limit the likelihood of confusion for the jury. These trends should lead to more favorable 403 balancing analysis for simulations in the future.

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.

While there are not yet cases on point in Vermont, defense preparation should include searching for seatbelt "witness marks," attempting to interrogate the vehicles' computers to determine their speed at the time of the accident, and obtaining videos of the accident from traffic lights, bridges, nearby businesses, or the truck's DriveCam, if applicable. Destruction of those pieces of evidence that are within a party's control could bring a

charge of spoliation of evidence, and introduction of any of this evidence will be subject to a balancing test under Vermont Rule of Evidence 403, in which the probative value of such evidence will be weighed against its potential for unfair prejudice and its likelihood to confuse and mislead the jury.

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?

The Vermont Supreme Court has used the "traditional approach" of discovery sanctions to punish a spoliator of evidence. See *Naylor v. Rotech Healthcare, Inc.*, 679 F. Supp. 2d 505, 511 (D. Vt. 2009) collecting the following cases: *Lavalette v. Noyes*, 124 Vt. 353 (1964) (considering whether to apply a presumption of falsity, as a sanction for destruction of evidence); *In re Campbell's Will*, 102 Vt. 294, (1929) (applying sanctions for spoliating evidence); *Ellis J. Gomez & Co. v. Hartwell*, 97 Vt. 147 (1923) (noting the rule that willful destruction of evidence gives rise to rise to an inference that the contents would be injurious to the one who destroys it); *Judevine v. Weaks*, 57 Vt. 278 (1884) (noting a deposition is presumed to contain evidence against a party who suppresses it).

One federal court decided that no separate cause of action exists under Vermont law for spoliation of evidence. *Naylor v. Rotech Healthcare, Inc.*, 679 F. Supp. 2d 505, 511 (D. Vt. 2009).

Social media has transformed claims handling across a wide variety of legal fields. It is especially important to preserve evidence found on social media, because should a party opponent, for example, change their privacy settings of Facebook or otherwise attempt to destroy evidence, proper documentation of the existence of such evidence will be critical in a discovery motion requesting account access.

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?

The primary legal consideration to determine is whether the driver qualifies as an independent contractor for purposes of Vermont law. The Vermont Statutes do not specifically define "independent contractors;" however, the case law imposes liability on business owners who utilize the services of independent contractors "to carry out some phase of their business." *Frazier v. Preferred Operators Inc.*, 2004 VT 95 (2004). To determine whether an independent contractor is also deemed an employee for the purpose of workers' compensation benefits the Court evaluates "whether the type of work being carried out by the independent contractor is the type of work that could have been carried out by the owner's employees as part of the regular course of business." *Edson v. State*, 2003 VT 32, ¶ 6 (2003).

The Vermont Supreme Court has addressed whether an independent contractor is subject to negligence actions when an employee of a hiring company is injured or whether the

workers' compensation statute protects the independent contractor by limiting the employee's redress. Specifically the Court was presented with the issue of whether a company contracted to perform cleaning services for an electrical company was the co-employer of an employee of the electric company for the purpose of workers' compensation benefits. *Smedburg v. Detlef's Custodial Services, Inc.*, 2007 VT 99, at ¶ 25 (2007). In that case, the employee of the electric company slipped and fell and sued the cleaning company for negligence. *Id*. at ¶ 3. The Court found that the cleaning company was an independent contractor and not protected by the workers' compensation laws, which would have limited Claimant's redress to that set forth in 21 V.S.A. § 601 et. seq. Ultimately, the Court denied a motion to dismiss as a matter of law and permitted an action of negligence against the cleaning company.

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?

Vermont has no state cases on point specifically for mild traumatic brain injuries, and there is no indication that it would treat expert testimony on a mild traumatic brain injury differently from TBIs in general. Vermont has adopted the *Daubert* standard for expert testimony and has, as the Vermont Supreme Court has noted, "essentially codified" *Daubert* in the Vermont Rule of Rule 702. Any proposed expert testimony on mild traumatic brain injury would therefore be subject to analysis under V.R.E. 702.

There is a Federal case from the District of Vermont that may prove an indicator toward concussion-specific decisions. In *Sanders v. Nike*, 2004 WL 5504981, Plaintiff was received a concussion while playing college hockey and brought suit for products liability and negligence against the manufacturer of the helmet he had been wearing.

Plaintiff proffered his two treating neuropsychologists to prove a causal link between the concussion he received while wearing Defendants' helmet and his reported symptoms in the years following. Defendants, one of whom we represented, challenged one doctor on the grounds his tests could not produce a reliable opinion on the causation of Plaintiff's alleged present-day injuries and another on the basis that his methodology rendered his opinions inherently unreliable. The court did not accept either argument and allowed both doctors to testify.

Defendants proffered a helmet expert who opined as to the relative safety in design and manufacturing of the hockey helmet in question and whether the helmet caused Plaintiff's injury. Plaintiff moved to exclude his testimony on two grounds: 1) that the expert did not possess adequate qualifications to offer an opinion as to the cause of Plaintiff's injury because he had not had medical training; and 2) that the data on which he relied to form his opinions were too disconnected from the facts of the case to be reliable. Again, the court did not accept these arguments and allowed the expert to testify. Taken together, the decisions on Plaintiff and Defendants' *Daubert* motions would indicate that a court will usually allow testimony if there is a well-articulated argument for the value of the

testimony, with cross-examination being the preferred method of bringing out flaws in in an expert's methodology and qualifications.

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

Yes, in Vermont the results of a post-accident toxicology result are admissible in a civil action, assuming they meet the scrutiny of the general rule against unduly prejudicial evidence (V.R.E. 403) and regardless of whether the results are above or below the criminal threshold for statutory intoxication (.08%) and for what purpose the toxicology result was taken. *Quensel v. Raleigh*, 128 Vt. 95, 100 (1969) (toxicology of blood taken from deceased driver for purposes of an autopsy admissible in civil action to recover for personal injuries sustained by a passenger).

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

Vermont has no special considerations for federally-mandated testing when drivers are independent contractors. Drivers who are independent contractors must abide by all federally mandated testing rules and procedures in the same manner as if they were employees, though it should be noted that if a company is controlling the testing procedures rather than the driver, that is a factor that would be noted when determining whether the driver qualifies as an independent contractor.

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

Yes, Vermont has a mandatory ADR requirement. Vermont Rule of Civil Procedure 16.3 sets out that, except in small claims actions, appeals, actions to renew a judgment or where the parties jointly certify that they have already engaged in good faith mediation, parties must participate in mediation. V.R.C.P. 16.3. This Rule is statewide, and there are no local jurisdictions mandating cases to arbitration.

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

Yes, corporate deposition testimony may be used in support of a dispositive motion, but an organization may correct, explain, or supplement statements made at a corporate deposition.

Vermont Rule of Civil Procedure 30(b)(6) reflects the Federal rule. The Second Circuit has determined that, "An organization's corporate deposition testimony is "binding" in the sense that whatever its deponent says can be used against the organization. However, Rule 30(b)(6) testimony is not 'binding' in the sense that it precludes the deponent from correcting, explaining, or supplementing its statements."

Likewise, the Rule 30(b)(6) deponent may also amend and expand its legal conclusions. Courts have held repeatedly that a party is "entitled to produce contrary evidence" that contradicts legal interpretations offered during a deposition.

While the Vermont Supreme Court has not directly addressed the issue, it has likewise upheld a lower court decision accepting corporate deposition testimony in support of a motion for summary judgment while striking down attempts to use the deposition testimony to pin down the deponent to specific legal conclusions. *State v. Howe Cleaners*, 2010 VT 70.

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

There is no right of contribution among joint tortfeasors in Vermont. Murray v. J & B Int'l Trucks, 146 Vt. 458, 468 (1986). In Vermont, joint tortfeaseors are jointly and severally liable. *Levine v. Wyeth,* 2006 VT 107 (*citing Zaleskie v. Joyce*, 133 Vt. 150, 158 (1975) ("[T]he law of this state … permits a plaintiff to pursue all, or any part, of his recovery from either joint tortfeasor.")

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

There are fourteen counties in Vermont. The most dangerous/plaintiff-friendly counties in Vermont are Chittenden and Windham. However, it should be noted that even those counties labeled "plaintiff-friendly" would likely be moderate/conservative on a national scale, with large punitive awards and "runaway juries" being rare in Vermont.

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

No, there are no statutory caps in dealing with damage awards in Vermont. However, as mentioned in Question 11, "runaway juries" and large punitive awards are rare.

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

Vermont trial courts generally allow recovery for the full, undiscounted medical services, rather than the amount actually "paid" to satisfy the medical bills. See *Buker v. King*, Docket No. 523-11-05 Wrcv (Vt. Super. Ct. Jun. 23, 2008)(Morris, J.)(refusing to limit the reasonable value of plaintiff's medical services to the amounts plaintiff's medical providers agreed to accept as a recipient of Medicaid funds); See also *Beaudin v. Kupersmith*, Docket No. S 0803-07 CnC, (Vt. Super. Ct. Oct. 26, 2010) (Skoglund, J.) ("To the extent that Defendant's argument is that reasonable value of medical services can most accurately be proven through market transaction, i.e. the amount of payment the providers accepted, it is unavailing.")

No off-sets are available, other than for the percentage of plaintiff's own comparative negligence. Vermont's collateral source rule bars evidence of the amount received by an

insured party from a collateral source (e.g., plaintiff's health insurer) not connected with the tortfeasor from being introduced at trial. *Sherman v. Ducharme*, Docket No. 334-5-08 Wrcv (Vt. Super. Ct. Nov. 10, 2009)(Eaton, J.) (citing *Hall v. Miller*, 143 Vt. 135, (1983)).