

## WYOMING

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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.**

There are no published cases in Wyoming specific to the question of admissibility of “black box” data (i.e. electronic control module (ECM) data, event data recorder (ECR) data, accident data recorder (ADR) data, etc.) Generally, this evidence will likely be admissible if it is relevant (W.R.E. 401-403) and showed to be authentic (W.R.E. 901). In practice, expert testimony will probably be necessary to establish proper foundation.

**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.**

Computer-generated animations are generally admissible in Wyoming so long as it “does not offend the rules of evidence.” *Mintun v. State*, 966 P.2d 954, 959 (Wyo. 1998). Such evidence must be authenticated, relevant, and not subject to an exclusionary rule. *Id.*

**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 investigation of every accident in Wyoming that results in bodily injury or substantial property is subject to a statutorily mandated “Investigator’s Traffic Accident Report.” The report is submitted by the investigating agency (i.e. the Wyoming Highway Patrol for most accident occurring on an Interstate) to the Wyoming Department of Transportation (WYDOT). Post-accident claim handlers and attorneys should contact both the investigating agency and WYDOT to procure copies of all investigative documents. The “Wyoming Investigator’s Traffic Accident Report” contains a wealth of information, and although it is inadmissible at trial it can be used to refresh the recollection of the investigating law enforcement officer.

Other data that should be preserved by the claims handler or attorneys includes ECM/ECR/ACA data, data from the driver’s cellphone, etc. If there is a reasonable possibility that a future claim could be asserted because of an accident, a failure to preserve evidence may

result in a claim of spoliation. *See, e.g., Abraham v. Great Western Energy, LLC*, 101 P.3d 446, 455-56, 2004 WY 145, ¶ 20 (Wyo. 2004). “It is well settled that a party’s bad-faith in withholding, destruction, or alteration of a document or other physical evidence relevant to proof of an issue at trial gives rise to a presumption or inference that the evidence would have been unfavorable to the party responsible for its nonproduction, destruction, or alteration. *Id.*; *see also* Wyoming Civil Pattern Jury Instruction 2.09.

Drivers involved in an accident should be instructed immediately to refrain from commenting about the incident on social media. In addition, efforts should be made to capture and preserve social media statements made by other individuals involved in an accident. It is likely that such statements, if authenticated, will not be considered hearsay and admissible as prior statements by a witness or an admission by a party opponent. *See* W.R.E. 801(d).

**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?**

An employer is generally not liable for the harm caused to another by an act or omission of an independent contractor. *Merit Energy Co., LLC v. Horr*, 2016 WY 3, ¶ 14, 366 P.3d 489, 494 (Wyo. 2016). The only two exceptions are when the employer owed independent duties to the plaintiff, or when the employer exercised such a degree of control over the independent contractor that the relationship is more akin to that of a master and servant. *Id.* at ¶¶ 15-19, p. 494-96. For example, Wyoming has long recognized a cause of action for negligent hiring, training, supervision and retention of an independent contractor. *See, e.g., Basic Energy Servs., L.P. v. Petro. Res. Mgmt., Corp.*, 2015 WY 22, ¶¶ 21-25, 343 P.3d 783, 789-91 (Wyo. 2015).

Nevertheless, where a motor carrier admits that it is vicariously liable for a driver, but otherwise denies that the driver was negligent, independent claims against the motor carrier for negligent hiring, training or supervision are superfluous and cannot be maintained. *See, e.g., Bogdanski v. Budzik*, 2018 WY 7, 408 P.3d 1156 (Wyo. 2018). An exception to this rule may exist if the motor carrier’s alleged misconduct was willful and wanton to the extent that independent claims against it might justify the imposition of punitive damages. *Id.*

**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?**

Wyoming trial courts have been reluctant to prohibit evidence that a plaintiff suffered from a mild traumatic brain injury. Such claims must be supported by medical evidence, but otherwise the bar seems to be set relatively low. Numerous attempts to exclude testimony by an expert have been lodged pursuant to W.R.E. 702 and *Daubert*, but to these author’s knowledge none have been successful in completing barring an mTBI claim.

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

Wyoming has no specific rules or law regarding the admissibility of post-accident toxicology results. Therefore, the general rules of evidence apply. Questions of admissibility of evidence are within the sound discretion of the trial court. *Buckles v. State*, 830 P.2d 702, 705 (Wyo. 1992). Generally, Wyoming trial courts may be reluctant to admit evidence of post-accident toxicology reports unless there is sufficient evidence to establish: 1) that a driver's ability to operate a motor vehicle was impaired, and 2) the impairment was a substantial factor in causing the accident.

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

No Wyoming court has specifically addressed this issue in a transportation matter. In the context of a personal injury case on an oil rig, the Wyoming Supreme Court stated "While we agree that an applicable statute or regulation may confirm a duty of care based upon the relevant common law governing employer/independent contractor relationships, it cannot impose a duty beyond it. Without a showing of pervasive control or an assumption of safety duties, the regulations do not create a duty of care. *Franks v. Independent Production Company, Inc.*, 96 P.3d 484 (Wyo. 2004).

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

A trial court may, on its own, order the parties to engage in alternative dispute resolution. *See* W.R.C.P. 40. The court must (shall) order the parties to engage in alternative dispute resolution at the request of any party. *Id.* Most Wyoming courts include an ADR deadline in the case management order.

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

Yes, as well as supplemental affidavits, so long as they do not contradict the prior deposition testimony of a party's 30(b)(6) designee. *See* W.R.C.P. 56(c)(4).

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

Wyoming abolished joint and several liability when it adopted a modified comparative fault statute. *See* Wyo. Stat. §1-1-109. Under the statute each defendant is liable only to the extent of that defendant's proportion of the total fault. *See* Wyo. Stat. §1-1-109(e).

Wyoming does allow for claims of equitable implied indemnity under limited circumstances, where a party may be held liable for the acts, errors, or omissions of another party. The indemnitee must establish 1) an independent legal relationship with the proposed indemnitor, beyond the joint duty owed to the injured party; 2) the negligent breach by the proposed indemnitor; 3) under circumstances falling within the situations addressed in Restatement 2d of Torts §886B(2); and 4) that the breach of the duty to the proposed indemnitee contributed

to cause the injury and damage to the injured party. *Habco v. L&B Oilfield Serv.*, 2006 Wyo. LEXIS 97, \*5; *Diamond Surface, Inc. v. Cleveland*, 963 P.2d 996, 1003 (Wyo. 1998); *Schneider Nat., Inc. v. Holland Hitch Co.*, 843 P.2d 561, 575-579 (Wyo. 1992).

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

There have been reports of a District Court Judge in the 3<sup>rd</sup> Judicial District in Sweetwater County, Wyoming making inappropriate negative comments about a defendant (health care provider) in front of a jury. Recently, a \$10.2 million-dollar jury verdict was awarded in this this judicial district. The court house sits in Green River, Wyoming, which is along Interstate 80. The community deals with a large volume of commercial traffic every day and will have preformed opinions about the transportation industry.

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

The only damage caps in Wyoming are for actions against governmental entities. The Governmental Claims Act provides caps of \$250,000.00 for any one claimant or \$500,000.00 for multiple claimants recovering for certain acts of negligence committed by a governmental entity and/or its public employees while acting within the scope of their employment. *See Wyo. Stat. §1-39-101 et seq.*

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

The question of whether plaintiffs can recover the medical expenses billed versus the medical expenses paid by a third-party insurer has not been addressed by the Wyoming Supreme Court. However, Wyoming trial courts have generally held that the only the amount billed can be presented to the jury (i.e. the defense has generally been prohibited from introducing evidence of the amount paid). The 10<sup>th</sup> Circuit Court of Appeals held that payments made by Workers' Compensation to the Plaintiff's medical-care providers fall under the collateral-source rule, and excluded evidence of discounted workers compensation payments. *See Prager v. Campbell County Mem. Hosp.*, 2013 U.S. App. LEXIS 17806, 28-29 (10th Cir. 2013). Recent attempts to introduce legislation that would allow for introduction of the amount paid to the medical provider, backed by the Defense Lawyers Association of Wyoming, were unsuccessful.