INDIANA

Lynsey F. David
Katherine L. English
LEWIS WAGNER, LLP
501 Indiana Avenue, Suite 200
Indianapolis, IN 46202
Phone: (317) 237-0500
Fax: (317) 630-2790
E-Mail: ldavid@lewiswagner.com
E-Mail: kenglish@lewiswagner.com

Edward W. Hearn
Jennifer M. Carpenter
JOHNSON & BELL, P.C.
11051 Broadway
Crown Point, Indiana, 46307
Phone: (219) 791-1900
Fax: (219) 791-1901
E-Mail: hearne@jbltd.com
E-Mail: carpenterj@Jbltd.com

1. Identify the venues/areas in your State that are considered dangerous or liberal.

The following counties are commonly considered more plaintiff friendly: Monroe, Lake, Porter, Madison, Delaware, Marion, and Vigo.

2. Identify any significant trucking verdicts in your state during 2017-2018, both favorable and unfavorable from the trucking company's perspective.

Robbins v. Werner Enterprises, Inc. and Hampton (Hampton County, IN; 2017):

A 46-year-old man, sustained significant brain injuries and will require lifelong medical care as a result of a collision with a semi-truck. His father brought the lawsuit against the company and the driver. A 7 day jury trial occurred which found the driver 100% liable. The jury returned a Plaintiff's verdict of $18,500,000.

Leeth v. Guntenstein, et al; (LaPorte County, IN; 2017):

Plaintiff helped a motorist who had been driving erratically and had stopped in the right lane of traffic. As Plaintiff got out of his truck, he noticed Defendant's semi approaching and Plaintiff attempted to re-enter his truck. Plaintiff's truck was struck by the semi-tanker. The driver of the semi-tanker died in the crash. Plaintiff sustained a fractured left hip, ankle fracture, left knee contusion, torn foot ligaments, and post-traumatic stress disorder. Plaintiff claimed lost wages of $283,000 and future lost wages of $688,497. Plaintiff's verdict for $2,327,000.

Johnson v. Chahal Express, et al. (Marion County, IN; 2017):

Plaintiff stopped vehicle was rear-ended by Defendant's tractor-trailer. There was a total of seven vehicles in the multivehicle collision, including Plaintiff and Defendant's. Indications are that Plaintiff sustained a brain injury. Defendants admitted fault for the crash but disputed the nature and extent of Plaintiffs' damages. Plaintiff's verdict for $1,100,000.

Binkowski v. Grand Island Express, et al. (Porter County, IN; 2018):

This suit was filed as the result of a rear-end collision between Plaintiff's vehicle and Defendant's semi-tractor and trailer. Plaintiff was severely injured and reportedly spent 10 days in a coma following the collision. Plaintiff claimed approximately $405,000 in past medical damages and $4,200,000 in lost wages. Plaintiff's primary allegations were as follows: (1) that the Defendant's driver did not apply his brakes prior to the impact and that the impact speed was estimated to be 65 MPH; (2) that the Defendant's driver was engaging in text messaging with his employer (the Defendant) at the time of the collision; and (3) that the trucking company failed to have a policy prohibiting unlawful cell phone usage by its drivers. Additionally, Plaintiff alleged and sought jury instructions regarding claimed spoliation by the Defendants of the driver's personal cell phone information and dash camera footage. Following a trial, the jury returned a verdict of $16.5 million for the Plaintiff, $7 million of which was punitive damages.

King v. Price, et al. (Tippecanoe County, IN; 2017):

Plaintiff stopped his semi-tractor and trailer on the shoulder of an interstate on-ramp due to road and weather conditions. Plaintiff's truck was at least three to four feet away from the white line that established the shoulder of the on-ramp. Plaintiff said he then ensured his vehicle's lights were on before going to sleep in his semi-tractor's sleeper. Defendant was driving a tow truck and towing a semi-tractor by the rear axle. As Defendant made a left turn onto the on-ramp, the truck he was towing collided with Plaintiff's stopped semi. Plaintiff, then sleeping, was thrown to the floor of his vehicle and sustained personal injuries. Plaintiff filed a lawsuit against Defendant and Defendant's employer. Defendants denied any negligence or liability. Defendants claimed that the Plaintiff's negligent and unsafe decision to park his semi-tractor and trailer on the interstate on-ramp shoulder had contributed to causing the subject collision. The jury returned a verdict of $1.6 million, but the verdict was reduced to $1.12 million after accounting for the 30% fault attributed to Plaintiff.

Spinnenweber v. Red River Supply et al. (United States District Court, Northern District of IN; 2018):

Plaintiff reportedly suffered severe injuries, including brain damage, as a result of rear-end collision between Plaintiff and Defendant-driver, who was driving a semi-truck. Defendants (driver and driver's employer), while admitting negligence and liability, disputed Plaintiff's claimed injuries based on several factors. Plaintiff denied medical care at the scene, and then went to a hardware store to fix an issue with his vehicle before continuing his long-distance drive to a go-kart race event. Furthermore, a few days after the accident, Plaintiff drove his vehicle over 1,000 miles back to Florida. Defendants further alleged that the Plaintiff did not mention

any tinnitus type symptoms to his medical providers until several months after the accident and concluded that the Plaintiff had numerous other confirmed head injuries prior to the subject accident. Nonetheless, the jury returned a verdict for the Plaintiff for $1 million.

Fitzgerald v. Foreman, et al. (Marion County, IN; 2018):

Plaintiff reportedly was riding his motorcycle when two empty flatbed semitrailers operated by the Defendants allegedly turned into his path, causing a collision. Plaintiff claimed personal injuries and asserted the Defendants were negligent in the operation of their vehicles. The jury found Plaintiff 90% at fault for the accident, which barred his claim under the Indiana Modified Comparative Fault Act.

Collins v. ABF Freight Systems, et. al. (United States District Court, Northern District of IN; 2017):

Plaintiff reportedly suffered injuries as a result of a collision between the Plaintiff's pickup truck and Defendant's semi-truck and trailer. The semi allegedly moved into Plaintiff's lane of travel causing a side-swipe collision. The impact caused Plaintiff's pickup to strike the interstate's concrete barriers and roll multiple times. The Defendants denied any negligence or liability, asserting that the semi-truck never left its lane of travel and suggesting that Plaintiff was trying to pass the Defendant's truck at the last minute because Plaintiff's lane was ending. The jury agreed and returned a defense verdict.

Drinkwine v. Richard (Elkhart County, IN; 2017):

Plaintiff claimed she was stopped while waiting to make a left turn when Defendant's tractor-trailer semi rear-ended her, resulting in injuries. Plaintiff claimed that the Defendant's negligent and careless driving (specifically allowing himself to be distracted by a horse and buggy, failing to keep a proper lookout, and failing to maintain necessary vehicle control) caused the subject collision and her resulting damages. Defendant denied that he was the sole cause of the subject collision. Defendant also disputed the nature and extent of Plaintiff's injuries, arguing that the Plaintiff did not inform her family physician of over 18 years of her claimed headache issues despite multiple health appointments with him in the first few years following the subject collision. The jury returned a defense verdict.

3. Are accident animations and/or computer-generated evidence admissible in your State?

The trial court has broad discretion in ruling on the admissibility of evidence and in determining its relevance. *Wilson v. State*, 754 N.E.2d 950, 954 (Ind. Ct. App. 2001). Demonstrative evidence is evidence offered for purposes of illustration and clarification, and it may be admissible if it sufficiently explains or illustrates relevant testimony as to be a potential help to the trier of fact. *Dunlap v. State*, 761 N.E.2d 837 (Ind. 2002). The admissibility of demonstrative evidence must also meet the requirements of Rule 403, which balances probative value against prejudicial effects, which trial courts are given wide latitude in weighing probative value against the danger of unfair prejudice. *Houston v. State*, 730 N.E.2d 1247, 1251 (Ind. 2000). In order to present the results of experiment to the jury, plaintiffs must show that the

conditions surrounding experiment were substantially similar to those surrounding the actual accident. *United States v. Jackson*, 479 F.3d 484, 489 (7th Cir. 2007).

Animation prepared to illustrate the opinions of an expert witness will be considered inadmissible if the expert witness is not present at trial. *Stamper v. Hyundai Motor Co.*, 699 N.E.2d 678, 684 (Ind. Ct. App. 1998). The Indiana Court of Appeals held that because the animation lacked the foundation of expert testimony at trial and because the defendant had no opportunity to cross-examine the expert the evidence was properly excluded. *Id*. The admissibility of expert testimony is governed by Federal Rule of Evidence 702 and the standards set forth by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). *See Ervin v. Johnson & Johnson, Inc*., 492 F.3d 901, 904 (7th Cir.2007). Rule 702 provides:

> If 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 an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The district court is a 'gatekeeper' under Rule 702 who determines whether proffered expert testimony is reliable and relevant before accepting a witness as an expert. *Winters v. Fru–Con Inc*., 498 F.3d 734, 741–52 (7th Cir. 2007). The trial court is limited to determining whether expert testimony is pertinent to an issue in the case and whether the methodology underlying that testimony is sound. *Smith v. Ford Motor Co*., 215 F.3d 713, 719 (7th Cir. 2000). This standard applies to expert testimony whether it relates to areas of traditional scientific competence or whether it is founded on engineering principles or other technical or specialized expertise. *Id*. An expert witness is permitted to use assistants in formulating his expert opinion, and normally they need not themselves testify. *Dura Auto. Sys. of Ind., Inc. v. CTS Corp.,* 285 F.3d 609, 612 (7th Cir. 2002). Additionally, Rule 703 allows experts to rely "on facts or data in the case that the expert has been made aware of or personally observed." F.R.E. 703. A court will use a Daubert analysis to test the admissibility of expert opinion and computer simulation that sought to be introduced along with the opinion. *U.S. v. Jackson*, 479 F.3d 485, 489 (7th Cir. 2007).

4. Identify any significant decisions or trends in your State in the past two (2) years regarding (a) retention and spoliation of in-cab videos and (b) admissibility of in-cab videos.

Retention and Spoliation: There have been no decisions specifically related to the retention and spoliation of in-cab videos. However, under Indiana law, spoliation is defined as "the intentional destruction, mutilation, alteration, or concealment of evidence." *ArcelorMittal Indiana Harbor LLC v. Amex Nooter, LLC*, 2018 WL 509890, at *2 (N.D. Ind. 2018). Where a party has exclusive possession of evidence, the intentional spoliation of that evidence may be used to establish an inference that the spoliated evidence was unfavorable to the party

responsible." *Direct Enterprises, Inc. v. Sensient Colors LLC*, 2017 WL 2985623, at *4 (S.D. Ind. 2017).

Electronic discovery relates to the discovery of electronically stored information. Ind. R. Trial P. 34(A) allows discovery of electronically stored information including "writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations from which information can be obtained, translated, if necessary, by the respondent into reasonably usable form." *See also* Ind. R. Trial P. 26(A.1). The form(s) of production can be specified when requesting electronically stored information. Ind. R. Trial P. 34(B). A party can object to the request if served with a request for electronically stored information under Ind. R. Trial P. 34(B), however, they must provide reasons for the objection. *Id*. If a request for electronically stored information does not specify the form(s) of production, a responding party must produce the information in a form(s) in which it is ordinarily maintained or in a form(s) that are reasonably usable. *Id.*

Spoliation involves the intentional destruction, mutilation, alteration, or concealment of evidence. *Glotzbach v. Froman*, 854 N.E.2d 337, 338 (Ind. 2006) (quoting *Cahoon v. Cummings*, 734 N.E.2d 535, 545 (Ind. 2000)); *see also J.S. Sweet Co., Inc. v. Sika Chem. Corp*., 400 F.3d 1028, 1032 (7th Cir. 2005); *WESCO Distrib., Inc. v. ArcelorMittal Ind. Harbor LLC*, 23 N.E.3d 682, 702 (Ind. Ct. App. 2014). If proved, spoliation may be used to establish that the evidence was unfavorable to the party responsible." *Cahoon,* 734 N.E.2d at 545. For the spoliation of evidence doctrine to apply, the evidence must be exclusively possessed and must be made unavailable, destroyed, or altered. *Loomis v. Ameritech Corp*., 764 N.E.2d 658, 663 (Ind. Ct. App. 2002). Spoliation of evidence permits a jury to infer that the missing evidence is unfavorable to the party who intentionally destroyed evidence. *Flaherty & Collins, Inc. v. BBR-Vision I, L.P*., 990 N.E.2d 958 (Ind. Ct. App. 2013).

Indiana does not recognize the independent tort of first-party spoliation of evidence for negligently or intentionally destroying or discarding evidence that is relevant to a tort action committed by a party to the principle litigation. *Dawson v. Thornton's Inc*., 19 N.E.3d 337, 341 (Ind. Ct. App. 2014) (quoting *Gribben v. Wal–Mart Stores, Inc*., 824 N.E.2d 349, 355 (Ind. 2005)). An independent tort is sufficient to establish a duty in first party actions, which are actions where the parties are engaged in litigation separate and distinct from the spoliation claim. B*urton v. Estate of Davis*, 730 N.E.2d 800, 805 (Ind. Ct. App. 2000) *transfer granted, opinion vacated*, 741 N.E.2d 1259 (Ind. 2000).

A party raising a claim of spoliation must prove that (1) there was a duty to preserve the evidence, and (2) the alleged spoliator either negligently or intentionally destroyed, mutilated, altered, or concealed the evidence. *Northern Indiana Public Service Company v. Aqua Environmental Container Corp.*, 102 N.E.3d 290 (Ind. Ct. App. 2018).Indiana courts analyze three factors in determining whether a duty to preserve evidence exists:

a. the relationship between the parties;
b. the reasonable foreseeability of the type of harm to the type of plaintiff at issue; and
c. the public policy promoted by recognizing an enforceable duty.

Am. Nat. Prop. & Cas. Co. v. Wilmoth, 893 N.E.2d 1068, 1070-71 (Ind. Ct. App. 2008).

Indiana state law governs the spoliation for cases brought in Indiana federal court based on diversity jurisdiction. *Arcelormittal Ind. Harbor LLC v. Amex Nooter, LLC*, 2018 U.S. Dist. LEXIS 10141 (N.D. Ind.). Indiana federal spoliation law is nearly identical to Indiana state law on spoliation, however, Indiana federal case law requires the complaining party to establish not only that the evidence was intentionally destroyed but *also* that the destruction was done in bad faith. Parties have an affirmative duty to preserve evidence that it knows or should reasonably know is relevant to litigation or potential litigation. *Trask-Morton v. Motel 6 Operating L.P.*, 534 F.3d 672, 682 (7th Cir. 2008). If this duty is not satisfy, it is known as spoliation, which is the destruction of relevant evidence by a party or his agent. *J.S. Sweet Co., Inc. v. Sika Chem. Corp.*, 400 F.3d 1028, 1032 (7th Cir. 2005) (citing *Cahoon v. Cummings*, 734 N.E.2d 535, 545 (Ind. 2000)). A party has a duty to preserve evidence when it knows, or should have known, that litigation is imminent. *Trask-Morton v. Motel 6 Operating L.P.*, 534 F.3d 672, 681 (7th Cir. 2008). Thus, prior to the commencement of the lawsuit, a party who knew or should have known that litigation was imminent may not lose, destroy or suppress material facts or evidence that a party or insured knew or should know that litigation was imminent it must preserve certain evidence. *Id*. See also *Large v. Mobile Tool Int'l, Inc.*, No. 1:02-CV-177, 2008 WL 89897, *7 (N.D. Ind. Jan. 7, 2008) (quotations omitted).

Admissibility: There have been no decisions specifically related to the admissibility of in-cab videos in commercial vehicles. Nevertheless, this issue does arise in the context of dashboard cameras located in police vehicles. Such videos are typically admissible, subject to the Indiana Rules of Evidence.

5. What is your State's applicable law and/or regulation regarding the retention of telematics data, including but not limited to, any identification of the time frames and/or scope for retention of telematics data and any requirement that third party vendors be placed on notice of spoliation/retention letters.

Indiana has not addressed this specific legal question. However, existing case law would suggest that a transportation company should have and follow a written retention policy regarding this potential evidence. If the company follows a written retention policy the chances of sanctions are mitigated.

Even where the court finds an intentional spoliation, it is not mandatory that sanctions be imposed. Rather, the trial court should implement an approach by which it balances the nature of the offense against the harm suffered by the non-offending party because lost evidence is not available. Factors the court may consider include the culpability of the spoliating party; the prejudice to the non-offending party; the degree of interference with the judicial process; whether lesser sanctions are available to remedy any harm and deter future acts of spoliation; the amount of time lapsing from the date the spoliating party took possession of the evidence and the date of its loss or destruction; *protocols adopted and followed by the spoliating party to prevent the loss of evidence, such as a document retention policy*; whether evidence has been irretrievably lost and, if so, the circumstances of that loss; the existence of available alternatives that would allow the non-offending party to prove its case without the lost evidence; and whether

sanctions will unfairly punish a party for the misconduct or mistake of his attorney or expert. *§27.9.Spoliation of evidence; sanctions, 22 Ind. Prac., Civil Trial Practice § 27.9 (2d ed.)*

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

Yes. *Reeves v. Boyd & Sons, Inc.*, 654 N.E.2d 864 (Ind. Ct. App. 1995), a personal injury case, addressed the issue of whether the trial court committed reversible error by admitting Plaintiff's medical records containing a blood alcohol test result. Plaintiff argued that Defendant failed to show the chain of custody of the sample of blood. *Id.* at 868. Plaintiff, relying on two criminal cases, asserted that a chain of custody foundation has four requirements: 1) integrity of the blood sample; 2) continuous identity of the sample; 3) qualification of the testing analyst; and 4) accuracy of the test. *Id.* (relying on criminal cases *Orr v. State*, 472 N.E.2d 627 (Ind. Ct. App. 1984) and *Pollard v. State*, 439 N.E.2d 177 (Ind. Ct. App. 1982)). The *Reeves* court did not find Plaintiff's argument for this four-pronged foundation requirement persuasive "[b]ecause this is not a criminal prosecution but a civil personal injury claim". *Id.* at 869. The *Reeves* court ultimately held that "error—if any—in the admission of the medical record containing the blood alcohol content test result was harmless." *Id.* at 871.

It is also important to note that the results of toxicology tests are admissible only if the scientific principles upon which the tests depend are reliable and the evidence is of the type reasonably relied upon by experts in the field, as required by Ind. R. Ev. 702. The proponent of this type of scientific evidence has the burden to prove the reliability of the scientific test. These principles were affirmed *in Hagerman Const., Inc. v. Copeland*, 697 N.E.2d 948 (Ind. Ct. App. 1998).

7. Is post-accident investigation discoverable by adverse counsel?

The Indiana Court of Appeals has held that post-accident investigations are admissible, and evidence of post-accident investigations are not automatically excluded as subsequent remedial measures. *J.B. Hunt Transport, Inc. v. Guardianship of Zak*, 58 N.E.3d 956, 967 (Ind. App. 2016). However, if the information sought was prepared in anticipation of litigation by the Defendant, Defendant's counsel or agents for the Defendant, it is protected by work product and/or attorney-client privilege. *Richey v. Chappell*, 594 N.E.2d 443, 445 (Ind. 1992); Ind. Code § 34-46-3-1(1).

8. Describe any laws in your State which regulate automated driving systems (autonomous vehicles) or platooning.

Indiana House Bill No. 1290 defines and allows for vehicle platooning. The law defines Vehicle Platoon as:

> A group of motor vehicles that are traveling in a unified manner under electronic coordination at speeds and following distances that are faster and closer than would be reasonable and prudent without electronic coordination.

Indiana House Bill No. 1290 clarifies that vehicle platooning is exempt from the provisions of following too closely within 300 feet. Additionally, the bill lays out an approval system for vehicle platooning in the state, including requiring the person or organization to file a plan for general vehicle platoon operations with the transportation commissioner.

9. Describe any laws or Court decisions in your State which would preclude a commercial driver from using a hands-free device to have a conversation over a cell phone.

There are no Indiana laws that would preclude a commercial driver from using a hands-free device to have a conversation over a cell phone. In fact, there are no laws against having a conversation over a cell phone without a hands-free device. IC 9-21-8-59 only prohibits a person from using a telecommunications device to type, transmit, or read a text message or an electronic mail message while operating a motor vehicle unless the device is used in conjunction with hands free or voice operated technology, or unless the device is used to call 911 to report a bona fide emergency.

I.C. § 9-21-8-59, in relevant part, states:

(a) A person may not use a telecommunications device to:
    1) type a text message or an electronic mail message;
    2) transmit a text message or an electronic mail message; or
    3) read a text message or an electronic mail message;
    while operating a moving motor vehicle unless the device is used in conjunction with hands free or voice operated technology, or unless the device is used to call 911 to report a bona fide emergency.

10. Identify any Court decisions in your State precluding Golden Rule and/or Reptile style arguments by Plaintiffs' counsel.

In Indiana, a "Golden Rule" appeal in which the jury is asked to put itself in the plaintiff's position "is universally recognized as improper because it encourages the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence." *Spray-Rite Service Corp. v. Monsanto Co.*, 684 F.2d 1226, 1246 (7th Cir. 1982)); *United States v. Teslim*, 869 F.2d 316, 327 (7th Cir. 1989).

Remarks based upon the Golden Rule are designed to appeal to jury's prejudice and passion and drive an "us v. them" wedge between jurors and defendants, and such references are highly improper and prejudicial. *Montgomery-Ward & Co. v. Wooley*, 94 N.E. 2d 677 (Ind. App. 1950); *Kikomo Steel and Wire Co. v. Ramseyer*, 128 N.E. 844 (Ind. 1921). This type of argument has been universally condemned by the courts. *Joan W. v. City of Chicago*, 771 F.2d 1020, 1022 (7th Cir. 1985). The general argument against the introduction of such arguments under Indiana Evidence Rules 401-403 are also made. I.e., the introduction or reference to such a Golden Rule argument would be unfairly prejudicial, irrelevant and immaterial and would therefore, confuse or prejudice the jury.

While there are no decisions directly addressing the arguments based on the Reptile Theory, the argument is that the presentation of arguments by plaintiffs regarding "personal safety" or "community safety" has the same intent and mischief of the Golden Rule arguments—that is to have jurors base their verdict not on the evidence of the case, but rather on the fear that they or other members of their family or community could be injured and to have them view compensating the Plaintiffs as diminishing that danger to themselves and the community. Therefore, these arguments should be excluded.

11. Compare and contrast the advantage and disadvantages of Federal Court versus State Court in your State.

Indiana court filing fees are less expensive than Federal court filing fees. While Indiana Federal court has e-filing, many Indiana state courts are still in the process of implementing mandatory e-filing. Federal court rules are generally more regimented, structured, organized, and clearer than in state court. However, Indiana state court has fewer deadlines and is less formal. The Federal court case management process is more consistent and has been implemented in both the Northern and Southern Districts of Indiana. While some state court judges use a similar case management process, it depends on the judge, however, many judges do not set an initial conference unless a party requests one be set. Additionally, depending on the judge, different case management tools and pretrial orders are used. Indiana's Rule 26 (unlike its federal counterpart) allows a party to initiate discovery with the filing of its complaint. Further, many Indiana courts set multiple trials for the same date and have a priority system where you may not be the first party for trial on the specific date.

Indiana courts have not adopted the heightened federal pleading standard, which requires a complaint to state facts sufficient to give rise to a claim that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)). Further, Indiana court judges typically avoid entering summary judgment and Federal judges can be overzealous using summary judgment. Further, Indiana court and Indiana federal court have different summary judgment standards. The Ind. R. Trial Procure state a court shall grant summary judgment if the movant shows "that there is no genuine *issue* as to any material fact and that the *moving party* is entitled to a judgment as a matter of law." Ind. R. Tr. P. 56(C) (emphasis added). The F.R.C.P state that a court shall grant summary judgment if the movant shows "there is no genuine *dispute* as to any material fact and the *movant* is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a) (emphasis added). In Indiana state court, the burden is on the movant and is heightened for those requesting summary judgment. *Hughley v. State,* 15 N.E.3d 1000, 1003-04 (Ind. 2014).

12. How does your State handle the admissibility of traffic citations (guilty plea, pleas of no contest, etc.) in subsequent civil litigation?

The admissibility of a traffic citation is dependent on how the cited party responds to the citation. However, this does not prevent a party from arguing for or against the admission of the citation. The starting point in seeking to exclude evidence of a traffic citation is following the principle of law:

> In actions to recover for injuries sustained allegedly as a result of the negligent operation of a motor vehicle, evidence of prior criminal convictions for the same acts is generally excluded, either because of the often perfunctory nature of the 'criminal' proceedings in such cases …, or because of traditional reasons as to variations in parties, procedures, and the like.

Lepucki v. Lake County Sheriff's Dept., 801 N.E.2d 636 (Ind. Ct. App. 2003). The *Lepucki* court based its decision on the evidentiary principles of hearsay and undue prejudice. The *Lepucki* court found the traffic infraction was not within the scope of IC § 34-39-3-1 regarding hearsay, or Ind. Evid. Rule 803(22), which provides exceptions to the hearsay rule for felony convictions. Furthermore, the court found that the prejudicial effect of the citation outweighed its probative value, in violation of Ind. R. Evid. 403. In seeking to admit a citation, one must be ready to offer evidence against hearsay, Rule 403, and impermissible opinion testimony arguments.

1. A citation is not hearsay, and can be admissible if the party pled guilty as a statement by a party-opponent. Ind. Evid. R. 801(d)(2). *Lepucki*, 801 N.E.2d at 640, n.3.
2. The court's application of Rule 403 is a discretionary call, thus a court could find that the probative value of admitting the ticket into evidence is outweighed by the prejudicial effect it will have on the Defendant.
3. Finally, even if the citation is *not* admissible, a police officer's opinion on who was at fault can come into evidence if he/she is qualified as an expert. *Witte v. Mundy ex rel. Mundy*, 820 N.E.2d 128, 135 (Ind. 2005). Depending upon the experience and training of the officer, a judge may be inclined to let his/her opinion on fault come into evidence.
    a. If the officer does qualify as an expert, he/she can provide opinions as to the ultimate issue of fact before the jury. Testimony in the form of an opinion or inference otherwise admissible is not objectionable merely because it embraces an ultimate issue to be decided by the trier of fact. Rule 704(a)

Additionally, one could pursue excluding a traffic citation from trial pertaining to evidence of impermissible opinion testimony. The following principle pertaining a police officer's opinion testimony contained in police reports is as follows:

> Statements contained in a report compiled by a police officer concerning the cause of or responsibility for an injury to the person or property are properly excluded from evidence on the basis that it constitutes an opinion or conclusion as distinguished from a statement of fact and/or that it represents statements made by someone else which were given to the investigating officer rather than the reporting officer's own personal observations.

Lee v. Dickerson, 183 N.E.2d 615 (Ind. Ct. App. 1962).

<u>Guilty Pleas/verdicts</u>

Records in criminal cases are generally *not* admissible in civil actions as evidence of facts upon which the conviction was had, especially where the civil action is for damages caused by

offenses of which party stands convicted. However, where a Defendant in a criminal case pleads guilty, the record showing such plea may be admitted if the criminal Defendant were a later party to a civil case growing out of the same offense, not as judgment establishing facts upon which it is based, but as a deliberate declaration or admission against interest. Like any other admission, its probative value may be destroyed by circumstances under which it was given or by satisfactory explanation. *Sigo v. Prudential Prop. & Cas. Ins. Co.*, 946 N.E.2d 1248, 1251 (Ind. Ct. App. 2011).

Moreover, I.C. § 34-39-3-1 governs guilty pleas or convictions for felony crimes, which states:

> (a) Evidence of a final judgment that:
> (1) is entered after a trial or upon a plea of guilty; and
> (2) adjudges a person guilty of a crime punishable by death or imprisonment of more than one (1) year; shall be admissible in a civil action to prove any fact essential to sustaining the judgment, and is not excluded from admission as hearsay regardless of whether the declarant is available as a witness.
> (b) The pendency of an appeal may be shown but does not affect the admissibility of evidence under this section

Pleas of No Contest

A plea of nolo contendere "is an admission of guilt" in the case in which it is pleaded, cannot be used as such admission in civil cases for the same act, and the Defendant is not estopped from denying facts on which prosecution was based in subsequent civil proceedings. *Hightower v. State*, 866 N.E.2d 356, 372 (Ind. Ct. App. 2007)(quoting *Esarey v. Buhner Fertilizer Co.*, 117 Ind. App. 291, 69 N.E.2d 755 (1946); *see also Gomez v. Berge*, 434 F.3d 940, 942–43 (7th Cir.2005) (like a guilty plea, a no contest plea admits the allegations in the charging information or indictment), *cert. denied*. Testimony concerning the issuance or nonissuance of a traffic citation is admissible as it is merely a fact, and not an opinion, which the officer is entitled to testify. *McQuiston v. Helms*, No. 1:06-CV-1668-LJM-DML, 2009 WL 554101, at *5 (S.D. Ind. Mar. 4, 2009). If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences, which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue. *Id*.

13. Describe the laws in your State which regulate whether medical bills stemming from an accident are recoupable. In other words, can a plaintiff seek to recover the amount charged by the medical provider or the amount paid to the medical provider? Is there a basis for post-verdict reductions or offsets?

In Indiana, a Plaintiff can see both the amount charged by the medical provider or the amount paid to the medical provider. An injured plaintiff is entitled to recover damages for medical expenses that were both necessary and reasonable. *See Cook v. Whitsell-Sherman*, 796 N.E.2d 271, 277 (Ind. 2003). Statements of charges for medical, hospital, or other health care expenses for diagnosis or treatment are admissible into evidence and are prima facie evidence that the charges are reasonable. Ind. R. Evid. 413. However, the opposing party may produce

contradictory evidence to challenge this prima facie showing of reasonableness of the proffered medical bills. *Cook*, at 277. The actual amount charged to the plaintiff or the amount actually paid by him may tend to prove the reasonable and fair value of the services rendered to the plaintiff but are not conclusive on the issue. *Chemco Transp., Inc. v. Conn*, 506 N.E.2d 1111, 1115 (Ind. Ct. App. 1987) (quoting *Herrick v. Slayer*, 160 F. Supp 25, 29 (N.D. Ind. 1958)).

The Indiana Supreme Court decision in *Stanley v. Walker* held that amounts paid by private health insurance providers in full satisfaction of medical services are admissible to determine the reasonable value of the medical services that were performed. *Stanley v. Walker*, 906 N.E.2d 8852, 855 (Ind. 2009). The court noted that an injured plaintiff is entitled to recover damages for medical expenses that were both necessary and reasonable. *Id*. at 855 (citing *Cook v. Whitsell-Sherman*, 796 N.E.2d 271, 277 (Ind. 2003)). It found that this measure of damages cannot be read as permitting only full recovery of medical expenses billed to the plaintiff nor can it be the amounts actually paid. *Id*. at 856. The Court reasoned that the focus is on the reasonable value, not the actual charge. *Id*. at 856-57. As a result, the Court held that the collateral source statute does not bar evidence of discounted amounts in order to determine the reasonable value of medical services. *Id*. at 858.

In 2016, the Indiana Supreme Court reaffirmed its holding in *Stanley* and expressly held that the principles set forth in *Stanley*, which permit the admission of both the amounts billed and those accepted by medical providers, apply with equal force to government benefits such as Medicare and Medicaid. *Patchett v. Lee*, 60 N.E.3d 1025, 1032 (Ind. 2016). The Court further stated that its decision solidified Indiana's desire to "chart a middle course by admitting billed charges and accepted amounts." *Id*. at 1032.

With respect to post-judgment reductions or off-sets, evidence of an advance payment is not admissible until there is a final judgment in favor of the plaintiff. In this case, the court shall reduce the judgment to the plaintiff to the extent of the advance payment. The advance payment inures to the exclusive benefit of the defendant or the defendant's insurer making the payment. Ind. Code § 34-18-16-2. If the advance payment exceeds the liability of the defendant or the insurer making the advance payment, the court shall order any adjustment necessary to equalize the amount that each defendant is obligated to pay, exclusive of costs. An advance payment in excess of an award is not repayable by the person receiving the advance payment. *Id*.

14. Describe any statutory caps in your State dealing with damage awards.

Indiana subscribes to the general principle of tort law that all damages directly attributable to the wrong done are recoverable. However, there are some notable statutory damage limitations placed on punitive damages and certain causes of action.

The most applicable statutory cap is in certain wrongful death lawsuits. Indiana does not cap damage awards for the wrongful deaths of persons under twenty (20) years of age or persons between the ages of twenty (20) and twenty-three (23) who are enrolled as students or for a wrongful death lawsuit on behalf of a victim who is survived by a spouse or a dependent child. However, when an unmarried adult (age 23 or above) with no dependents is the victim of a wrongful death, that person's estate cannot obtain more than $300,000 for emotional distress,

including loss of the adult persons' love and companionship, through a wrongful death lawsuit. Ind. Code § 34-23-1-2. However, reasonable attorney's fees, reasonable medical, hospital, funeral and burial expenses are recoverable over and above the $300,000 cap.

In Indiana, a punitive damage award may not be more than the greater of three times the amount of compensatory damages awarded in the action, or $50,000. Ind. Code § 34-51-3-4. If the trier of fact awards punitive damages that exceed the statutory limits, the court is required to reduce the punitive damage award with regard to the statutory limits. Ind. Code § 34-51-3-5.

The Indiana Tort Claims Act limits the combined aggregate liability of all government entities and of all public employees, acting within the scope of their employment and not excluded from liability under one of the statutory immunity provisions, to $700,000 for injury to or the death of one person in any one occurrence occurring on or after January 1, 2008, and $5 million for injury to or death of all persons in that occurrence. Ind. Code § 34-13-3-4. The court applies these statutory limitations of liability at the time of entry of a final judgment. *Indiana State Highway Com'n v. Morris*, 528 N.E.2d 468 (Ind. 1988). In applying these limitations to a case involving multiple plaintiffs, the key is not whether each plaintiff is a "person" under the Act but rather, whether each plaintiff's claim is separate from the claims of other plaintiffs in the action. *Elkhart Community Schools v. Yoder*, 696 N.E.2d 409 (Ind. Ct. App. 1998).

In addition to limiting the liability of a government entity, the Indiana Tort Claims Act prohibits any award of punitive damages against a government entity. Ind. Code § 34-13-3-4. An award of punitive damages against a governmental entity generally violates public policy. *Marion Community School Corp. v. Marion Teachers Ass'n*, 873 N.E.2d 605 (Ind. Ct. App. 2007).