

ILLINOIS

David A. Warnick
Catherine P. Gorman
Stephanie M. Flowers
JOHNSON & BELL, LTD.

33 West Monroe Street, Suite 2700
Chicago, Illinois 60603
Phone: (312) 372-0770
Fax: (312) 372-9818

E-Mail: warnickd@jbltd.com

E-Mail: gormanc@jbltd.com

E-Mail: flowerss@jbltd.com

www.johnsonandbell.com

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

All modern vehicles, tractors and passenger cars alike, are equipped with black boxes capable of recording actions taken by the driver during the vehicle's operation. In fact, the National Highway Traffic Safety Administration's (NHTSA) rules now require light-passenger vehicles to be equipped with EDR capabilities. *See* 49 CFR § 563, *et seq.* These black box devices vary by title but may be referred to as event data recorders (EDR) or Electronic Control Modules (ECM) or Sensing Diagnostic Modules (SDM) or restraint control module (RCM). The specific information gathered varies by manufacturer and some companies make it easier to retrieve data than others. It is imperative to review and understand your manufacturer's instructions related to preserving and downloading black box data. To prevent lost data, do not turn the vehicle back on or move the vehicle until the data is downloaded or otherwise preserved.

Generally, EDR records a certain amount of data before and after a specific event, such as a crash or sudden slam on the brakes. It can retain information such as warning lights, seat belts, engine speed, RPM, whether brakes were applied, throttle position, the delta force, or change of speed, and the duration of the crash. Thus, it must be timely preserved.

In Illinois, officials investigating a reckless homicide – reckless use of a vehicle causing the death of another person – must “preserve, subject to a continuous chain of custody, any physical evidence in their possession or control that is reasonably likely to contain forensic evidence,” which may include black box data. *See* 725 ILCS § 5/116-4(a). Thus, do not move the vehicle or tamper with the black box data until law enforcement confirms they are done with their investigation in accidents involving a fatality.

Reviewing black box data early in the case is critical to understanding how the accident occurred and developing your theory of the case. Preservation of black box data is also important should you decide to retain an accident reconstruction or biomechanical expert, who will surely want to review EDR data. Take care in determining how to obtain the black box data to avoid

evidentiary issues related to the accuracy or reliability of the recorded data or reliability of the retrieval method.

In Illinois, like most states, EDR evidence may be introduced in either criminal or civil proceedings. *See Bachman v. General Motors*, 332 Ill. App. 3d 760 (4th Dist. 2002) (reasoning that the process of gathering and recording data through EDRs is not new or novel and holding that the design and implementation of an EDR device adheres to the *Frye* standard).

Still, as with any evidence, the trial court has discretion to determine admissibility of evidence at trial. The admission of an expert's testimony lies within the sound discretion of the trial court. *Hudson v. City of Chicago*, 378 Ill. App. 3d 373, 40 (1st Dist. 2007) (citation omitted). Whether to admit expert reconstruction testimony turns on the usual concerns of whether expert opinion is appropriate generally. *Zavala v. Powermatic, Inc.*, 167 Ill.2d 542, 546 (1995) (affirming decision to admit expert testimony where expert possessed expertise in 'human factors engineering,' a study of the relationship of man to machinery, including human motor coordination and reaction time). As such, for reconstruction testimony to be admissible, there must be sufficient data about the accident in evidence to provide a reasonable basis for the expert's opinion. *Kimble v. Earle M. Jorgenson Co.*, 358 Ill. App. 3d 400, 409, 830 N.E.2d 814, 823 (2005) (citing *Hiscott v. Peters*, 324 Ill.App.3d 114, 123 (2001)). Black box data may provide a reliable basis for opinions. *See Bachman*, 332 Ill. App. 3d 760. In fact, black box data can provide essential data to recreate the accident to determine causation and to create demonstratives, like computer simulations. *See Hudson*, 378 Ill. App. 3d at 402 (admitting expert's computer simulation where sufficient factual basis existed for expert to reach his conclusions).

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.

In litigation, technology can be your best friend or worst enemy. However, most practitioners would agree that it is *always* better to have more information than less when evaluating a loss. More and more industries have transitioned to electronic record-keeping. The transportation sector is no different.

It is quite common nowadays for transportation companies to maintain a variety of information electronically. Such materials include GPS location data, cell phone, handheld, and/or text messaging logs, electronic bills of lading, and time-stamped delivery logs. In 2016, Congress enacted the electronic logging device (ELD) rule in order to make it safer and easier for drivers to accurately track, manage, and share hours of service status.

Nevertheless, because many trucking collisions are the result of *other* passenger-vehicle conduct, many carriers now include in-cab, dash cams. Dash cams can be triggered at the time of a collision and then rewind backward a specific period of time to observe the entire event. The in-cab dash cams can face both into and outside of the cab. These dash cams are invaluable as they can provide an objective way to determine liability for a loss. Oftentimes, having such technology may provide a carrier with an advantage in having potentially damaging information – before having to disclose it in discovery – and thus being in a better position to resolve a case

on more favorable terms than if the opposing counsel had possession of the damaging information. There is also the added benefit of maintaining a safer fleet as the videos can be used for training and with other safety issues in mind.

Another strategy used by carriers is to train and instruct drivers how to document an accident scene after-the-fact. These photos are extremely valuable as opposed to those taken at the tow-yard and out of context. Some carriers even provide drivers with disposable cameras and mandate they be used following a collision. Other drivers might simply use their cell phone cameras. Driver handbooks can include instructions detailing how to take effective photographs, not only depicting property damage, but also providing the context of location as well.

Long before trial, accident reconstruction experts are retained by both the plaintiff and defense counsel to investigate and provide their interpretations of what happened during a collision based on available information. At trial, reconstruction experts can illustrate their conclusions via simulations to show the jury. A reconstruction expert's simulations are typically based on the photographs, measurements taken at the scene (either by law enforcement and/or the expert), any electronic data such as dash-cams, black-box or otherwise, and of course witness testimony. If there are competing experts, it is unsurprising that the simulations can reach different conclusions.

If there are faulty assumptions built into the simulations to favor one outcome or another, it is likely still going to be allowed to be shown to a jury, and subject to cross-examination. Whether to admit expert reconstruction testimony turns on the usual concerns of whether expert testimony is appropriate, that is, as long as the expert testimony offers "knowledge and application of principles of science beyond the ken over the average juror. *Plank v. Holman* (1970), 46 Ill.2d 465, 471, 264 N.E. 2d 12; *Augustein v. Pulley* (1989), 191 Ill. App. 3d 664, 676-77, 681, 138 Ill.Dec. 724, 547 N.E. 2d 1345. These considerations, however, are ultimately resolved by the gate-keeping function of the trial judge. To be sure, the outcome can never be certain as any efforts to bar an expert or limit opinions are made on a case by case basis. Only if there is a blatant misrepresentation of data, so misleading that it may confuse the jury, will a trial judge in Illinois be more likely to bar such a visual aid from being shown to a jury.

From the standpoint of a practitioner, the more information available, the better chance for defense counsel to properly advise a client. Sometimes, the data will be helpful, and sometimes it will not. It is important to extract and understand the data to create the most advantageous outcome for the client, whether it be resolving the case quickly, or presenting a vigorous defense. Once defense counsel obtains and digests the information available, it can control the timeline of the case, ideally working to resolve the case prior to litigation, or preparing defense strategy if litigation is the obvious eventuality.

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?

After an accident occurs, it is imperative to secure the scene and notify appropriate emergency personnel or transportation management. Many vehicles, tractors and passenger cars

alike, are now equipped with black box technology that can show acceleration, braking time, speed, etc. It is imperative to review and understand your fleet's manufacturer's instructions related to preservation of that data. To prevent the loss of data, do not turn the vehicle back on or move the vehicle until the data is downloaded or otherwise preserved.

Cooperate with law enforcement, but do not admit fault or liability. Instruct drivers not to speak with other third parties unless designated counsel is present. Document the scene to the best of your ability, either through the driver or by sending another authorized employee or consultant to the scene. *See infra* for discussion related to privilege in post-accident investigation. This may include photographing the roadway for skid marks, the vehicles involved, the area where the accident occurred, etc. Either on the day of the occurrence, or shortly thereafter, canvas the area where the accident occurred to document the speed limit, unique traffic patterns or conditions, neighboring businesses who may have video surveillance, etc.

Be sure to gather the names of responding and investigating officers and obtain a copy of the police report and any citations issued. If the occurrence is classified as a major accident or involves fatalities, identify a point of contact within the investigating unit who you can check in with for copies of any supplemental reports or investigative materials.

Additionally, designate an attorney and notify your insurance carrier or TPA to report the claim. Perform post-occurrence investigation, but keep in mind, post-accident investigation reports are likely discoverable. The carrier should take the equipment out of service until the respective internal Safety Department says otherwise. Do not repair or remove any parts from the equipment involved until your attorney gives clearance to do so. Also, if a carrier receives a letter from the claimant's counsel advising of representation, keep the vehicle out of service and in a safe location (i.e., covered and protected from the elements) and provide claimant's counsel a reasonable opportunity to inspect the vehicle before putting it back into service.

After a loss, it is also important to surf the internet for news articles, related social media postings, photographs, or videos. Save internet articles, videos, posts, etc. to your investigation file in the event these items are taken down from their respective platforms. Social media posts may lead to the discovery of occurrence witnesses. Track those witnesses down and interview them. To lock the witness in to one version of events, obtain a signed statement or affidavit from the witness.

A. Duty to Preserve Evidence

Generally, in Illinois, there is no duty to preserve evidence. *Martin v. Kelley & Sons, Inc.*, 2012 IL 113270, ¶ 27. However, a plaintiff can establish an exception to the general no-duty rule if it meets the two-prong test set forth in *Boyd v. Travelers Insurance Co.*, 166 Ill. 2d 188, 652 N.E.2d 267, 209 Ill. Dec. 727 (1995). A plaintiff must show: (a) that an agreement, contract, statute, special circumstance, or voluntary undertaking has given rise to a duty to preserve evidence on the part of the defendant; and (b) that the duty extends to the specific evidence at issue by demonstrating that 'a reasonable person in the defendant's position should have foreseen that the evidence was material to a potential civil action.' *Boyd*, 166 Ill. 2d at 195. If the plaintiff

fails to satisfy both prongs of the *Boyd* test, the defendant has no duty to preserve the evidence at issue. *Kilburg v. Munawar Mohiuddin, Zante Cab Co.*, 2013 IL App (1st) 113408, ¶ 22, 990 N.E.2d 292 (citing *Martin*, 2012 IL 113270, ¶ 27).

Illinois does not recognize a separate, independent tort for spoliation of evidence. *Dardeen v. Kuehling*, 213 Ill. 2d 329, 821 N.E.2d 227 (2004); *Boyd*, 166 Ill. 2d 188, 652 N.E.2d 267 (1995). Illinois recognizes that a claim for negligent spoliation of evidence could be brought under existing negligence principles. *Boyd*, 166 Ill. 2d at 192-93, 652 N.E. 2d at 270.

To state a claim for negligent spoliation of evidence, a plaintiff must plead: (1) the existence of a duty to preserve evidence owed by the defendant to the plaintiff; (2) a breach of that duty; (3) an injury or damages proximately caused by the breach; and, (4) damages. *Boyd*, 116 Ill. 2d at 194-95, 652 N.E.2d at 270; *Martin*, 2012 IL 113270, ¶ 26, 979 N.E.2d 22; *Andersen v. Mack Trucks, Inc.*, 341 Ill. App. 3d 212, 215, 793 N.E.2d 962, 966 (2nd Dist. 2003). Illinois courts focus on duty and causation in deciding the sufficiency of a negligent spoliation of evidence claim.

B. Privilege Concerns

Illinois **does not** recognize a self-critical analysis privilege like some other jurisdictions. *See Harris v. One Hope United, Inc.*, 2015 IL 117200, 390 Ill.Dec. 151, 28 N.E.3d 804 (2015). Internal incident reports are often admissible under the "business record exception" to the hearsay rule or as an admission against a party interest, unless otherwise covered by privilege. For example, if a company creates an incident report every time one of its drivers is involved in some type of incident, the incident report would be admissible assuming the report is created in the ordinary course of business. However, depending on when outside counsel or the insurance company have been contacted, other privileges may apply.

In Illinois, “[w]here legal advice of any kind is sought from a lawyer in his or her capacity as a lawyer, the communications relating to that purpose, made in confidence by the client, are protected from disclosure by the client or lawyer, unless the protection is waived.” *Ctr. Partners, Ltd. v. Growth Head GP, LLC*, 2012 IL 113107, ¶ 29 (citing *Fischel & Kahn, Ltd. v. van Straaten Gallery, Inc.*, 189 Ill.2d 579, 584 (2000)). Illinois recognizes “a strong policy of encouraging disclosure, with an eye toward ascertaining that truth which is essential to the proper disposition of a lawsuit.” *Waste Mgmt., Inc. v. Int’l Surplus Lines Ins. Co.*, 144 Ill. 2d 178, 190 (1991). Courts strictly confine the privilege within its narrowest limits and limit solely to those communications which the client either expressly made confidential or which he could reasonably believe under the circumstances would be understood by the attorney as such. *Id.*

Once an attorney is involved, statements made to and in the presence of counsel are generally protected under the attorney-client privilege. However, Illinois adheres to the control group test, which limits the application of the privilege to corporations. Illinois’ control group doctrine is different than the federal court’s standard for attorney-client privilege.¹ The control

¹ The Seventh Circuit does not follow the control group doctrine. “[A]n employee of a corporation, though not a member of its control group, is sufficiently identified with the corporation so that his communication to the

group test limits the application of the privilege and provides confidentiality to communications between counsel and the corporate "control group." The control group consists of final decision makers and top advisors whose opinions form the basis for a final decision. *Janousek v. Slotky*, 2012 IL App 113432, 980 N.E.2d 641, 650 (1st Dist. 2012). Often, top management communicates with other employees and relies on them for information. Under Illinois' control group test, such communications would likely not be privileged. To maintain attorney-client privilege, run correspondence through your attorney and limit recipients to members of the control group.

Likewise, Illinois recognizes the insurer-insured privilege, which extends the attorney-client privilege to include communications between an insurer and insured where the insurer has a duty to defend. *People v. Ryan*, 30 Ill. 2d 456 (1964). This extension occurs because the insured is most likely not yet represented by counsel when the insurer begins its preliminary investigation. The privilege applies when the party seeking to keep the communication confidential establishes the following: 1) the identity of the insured; 2) the identity of the insurance carrier; 3) the duty to defend the lawsuit; and 4) that a communication was made between the insured and an agent of the insurer. *Pietro v. Marriott Senior Living Services, Inc.*, 348 Ill.App. 3d 541 551 (1st Dist. 2004). The control group test likewise applies to the insurer-insured privilege. Thus, corporations who expect to face lawsuits should consider discussing with counsel if they should permit employees to provide recorded statements to insurers.

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?

As an initial matter, the FMCSR 49 C.F.R. § 390.5, defines *Employee* as "any individual, other than an employer, who is employed by an employer and who in the course of his or her employment directly affects commercial motor vehicle safety. Such term includes a driver of a commercial motor vehicle (including an independent contractor while in the course of operating a commercial motor vehicle..."

This is also referred to as "placard liability" – also called "logo liability" – operates to hold federally authorized carriers that are licensed by the United States Department of Transportation (USDOT) and display their USDOT certificate numbers on their trucks, vicariously liable for the negligence of drivers operating under a lease. *U.S. Bank v. Lindsey*, 397 Ill.App.3d 437, 335 Ill.Dec. 306, 920 N.E.2d 515, 525 (2009) The point of "placard liability" – and, indeed, of the Interstate Commerce Act – is to make a carrier under the Act liable for those injuries caused to the traveling public which arise out of the negligent operation of any vehicle leased to it and operated under its ICC permit." *Lindsey*, 336 Ill.Dec. 306, 920 N.E.2d at 525.

corporation's attorney is privileged where the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment." *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487, 491–92 (7th Cir. 1970), *aff'd*, 400 U.S. 348, 91 S. Ct. 479, 27 L. Ed. 2d 433 (1971).

Thus, under federal law, a carrier cannot avoid *respondeat superior* liability based on the driver's independent contractor (owner-operator) status.

A. Other Considerations – Broker Liability

A freight broker will typically contract with a carrier to arrange for the transportation of cargo belonging to the broker's customers, from one location to another. If the contractor is involved in an accident while transporting the freight, the freight broker will be included in the lawsuit. It is often the case that no direct employment relationship leaving the only viable avenue of recovery is through alternative causes of action such as, negligent hiring, negligent retention, or negligent supervision of an independent contractor.

The duty of care in selecting an independent contractor is that which a reasonable person would exercise under the circumstances. *Carney v. Union Pacific R. R. Co.*, 2016 IL 118984 ¶ 66, 412 Ill.Dec. 833, 77 N.E.3d 1. A "competent and careful contractor" is a contractor who "possesses the knowledge, skill, experience, and available equipment which a reasonable person would realize that a contractor must have in order to do the work which he is employed to do without creating unreasonable risk of injury to others, and who also possesses the personal characteristics which are equally necessary." Restatement (Second) of Torts § 411 cmt. a, at 377 (1965). The Illinois Supreme Court has adopted section 411 of the Restatement. *Carney*, 2016 IL 118984, ¶ 88, 412 Ill.Dec. 833, 77 N.E.3d 1; *Gomien v. Wear-Ever Aluminum, Inc.*, 50 Ill. 2d 19, 21, 276 N.E.2d 336 (1971).

In *Gomien*, the Illinois Supreme Court "strongly implied that to support a claim for negligent hiring or retention, the injury must have occurred *while* the independent contractor was directly involved in the performance of the contracted-for work, as opposed to an act collateral to the work for which the contractor was engaged." See *Brettman v. M&G Truck Brokerage, Inc.* 2019 IL App (2d) 180236, ¶ 46, 431 Ill.Dec. 347, 127 N.E.3d 880, 892 (2019). In other words, a plaintiff must synthesize a claim for negligent entrustment or hiring with the work being performed at the time. In *Brettman*, the occurrence took place after the contracted for shipment had been completed. "The difference is that, here, Vela was not operating his vehicle to perform the contracted-for work when the injury occurred. The work for which he had been engaged was completed. He was no longer hired or retained by M&G. He was 25 miles away from the pickle plant." *Id.* at ¶ 48.

The best practical advice for freight brokers that retain independent contractors is to follow an established framework of examining the independent contracting firm by having access to safety records, federal licensing and safety ratings going back several years. Other materials that should be examined are rechecking carrier's public record, relevant insurance information and DOT operating authority.

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 admissibility of expert testimony in Illinois is determined under the *Frye* test, which is far more relaxed than the requirements of *Daubert*. Accordingly, the *Frye* standard, commonly

called the “general acceptance” test, dictates that scientific evidence is only admissible at trial if the methodology or scientific principle upon which the opinion is based is “sufficiently established to have gained general acceptance in the particular field for which it belongs. *Donaldson v. Central Illinois Public Service*, 262 Ill.Dec. 854, 199 Ill.2d 63, 767 N.E. 2d 314, 324-25 (2002). In *Donaldson*, the court reasoned that when an expert relies upon scientific literature when discussing similar, but not identical, cause and effect relationships, the fact that the expert must extrapolate affects the weight of the testimony rather than its admissibility. *Id.* 767 N.E. 2d at 328. The *Donaldson* court continued that the fact that an expert would need to extrapolate “by nature admits” fallibility – the lack of specific support to establish the existence of a known cause and effect relationship. The jury is left to determine the veracity of such testimony. *Id.* at 329.

Because of the relaxed expert opinion standards allowed in Illinois, courts are seldom going to strike experts altogether. For practitioners at trial, it is always worthwhile to attempt barring opposing experts for flimsy opinions. If those efforts are unsuccessful, a practitioner may still score points with a jury for a doctor providing junk opinions through rigorous cross-examination.

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

The mere existence of a positive post-accident toxicology result is not, on its own, *per se* admissible. Any assessment of drug or alcohol evidence begins with the understanding that such evidence is considered extremely prejudicial. *See Sandburg-Schiller v. Rosello*, 119 Ill.App.3d 318, 331(1983). Evidence of a plaintiff's intoxication can be relevant to the extent that it affects the care that the individual takes for their own safety and is admissible as a circumstance to be weighed by a jury in its determination of the issue of due care. *See Marshall v. Osborn*, 213 Ill.App.3d 134, 140 (1991). On the other hand, drug and alcohol consumption can of course be relevant to a defendant's negligence as well as a plaintiff's contributory negligence. *Petraski v. Thedos*, 382 Ill. App. 3d 22, 27-28 (1st Dist. 2008).

Although drug or alcohol consumption may be highly probative, *evidence of actual intoxication*, indicating physical or mental capabilities, must be established to justify its extremely prejudicial nature. *See Sandburg-Schiller*, 119 Ill.App.3d at 331 (emphasis added). Intoxication is a question of fact for the jury to determine. *Id.* Impairment can be shown through either direct or circumstantial evidence. *Skelton v. Chicago Transit Authority*, 214 Ill.App.3d 554, 575 (1st Dist., 1991). Where there is no evidence of intoxication, evidence of consumption of alcohol is considered irrelevant. *Bielaga v. Mozdzeniak*, 328 Ill.App.3d 291, 296 (2002).

Expert testimony and blood-alcohol tests are admissible to establish intoxication. *Sobczak v. General Motors Corp.*, 373 Ill.App.3d 910, 925. However, a test result revealing the presence of alcohol is insufficient, without more, to prove impairment. *See Petraski v. Thedos*, 2011 IL App. (1st) 103218, 357 Ill.Dec. 350, 963 N.E.2d 303 (2011). Lastly, an expert may utilize retrograde extrapolation to opine how a particular level of intoxication would affect a similar person under ordinary circumstances. *See Village of Bull Valley, Illinois v. Winterpacht*, 2012 IL App (2d) 101192, 360 Ill.Dec. 81, 968 N.E.2d 160 (2012) (“When there is a delay between when a defendant was driving and when blood is drawn, extrapolation evidence might be necessary when the blood alcohol level at the time of the test is below the statutory limit. In such a case,

extrapolation evidence may be used to show that the BAC level was above the limit when the defendant was driving. But no such evidence is necessary when the tested level is above the statutory limit. In such a case, when a reasonable amount of time lapses between when the defendant was driving and the test, extrapolation evidence is permissible but is not a foundational requirement. Matters of delay between driving and testing go to the weight of the evidence. . .").

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

Any person operating a commercial motor vehicle requiring a CDL in intrastate or interstate commerce is required to participate in a DOT Drug & Alcohol Testing Program. Owner-operators must register with a Consortium and participate in the Consortium's random testing pool. A Consortium/Third-Party Administrator is an entity that manages all, or part, of an employer's DOT drug and alcohol testing program. All drug testing whether it be pre-employment, random, or post-accident, owner-operators must comply with all requirements of their respective Consortium.

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

Yes, the Illinois Supreme Court implemented mandatory arbitration with Supreme Court Rules 86 through 95, wherein a civil action shall be subject to mandatory arbitration if each claim therein is exclusively for money in an amount or of a value not in excess of the monetary limit authorized by the Supreme Court for that circuit or county within that circuit, exclusive of interest and costs. Ill. Sup. Ct. R. 86(a). In Cook County, for example, civil cases for money damages seeking less than \$30,000.00 are subject to mandatory arbitration. Additionally, cases not assigned to an arbitration calendar may be ordered to arbitration at a status call or pretrial conference when it appears to the court that no claim in the action has a value in excess of the monetary limit authorized by the Supreme Court for that circuit or county within that circuit, irrespective of defenses. *Id.* at R. 86(d). In Cook County, a judge will assign the case to the arbitration calendar when all parties to the action have appeared before the court, but no more than 280 days from the filing date.

Illinois' mandatory arbitration is non-binding. Thus, all parties who participate in good faith have the right to reject the arbitrator's award within 30 days after the award is entered with the Clerk of the Circuit Court. Ill. Sup. Ct. R. 93(a). There is a fee associated with the rejection of the award: \$200 for awards of \$30,000 or less or \$500 for awards greater than \$30,000. *Id.* Almost all trucking accident personal injury cases involve claims greater than \$30,000.00. Thus, in practice, mandatory arbitration is rarely a consideration.

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

Yes. A motion for summary judgment seeks a judgment based on the pleadings, depositions and admissions, together with affidavits filed in support of or against summary

judgment. 735 ILCS 5/2-1005(c). The trial court can consider evidence that would be admissible at trial. Evidence which would be inadmissible at trial cannot be considered by the court in support of or opposition to a motion for summary judgment. *Watkins v. Schmitt*, 172 Ill. 2d 193, 203–04, 665 N.E.2d 1379, 1385 (1996) (citations omitted). Any deposition used in support of or against a summary judgment motion must be filed with the court.

In general, the rule against hearsay would prevent out of court statements contained in a discovery deposition from being admissible. An ordinary witness's discovery deposition testimony may not be admissible evidence as it contains hearsay testimony. Corporate discovery deposition testimony is still an out of court statement subject to the rule against hearsay. However, a plaintiff may use the defendant's corporate representative's discovery deposition testimony in support of his motion for summary judgment because, under Rule 801(d)(2), a Rule 206(a) corporate representative discovery deposition of a named party is not hearsay. In contrast, unless an exception applies, the same testimony cannot be offered by the defendant corporation in support of its own motion for summary judgment because it is inadmissible hearsay. Ill. R. Evid. 801(d)(2).

Instead, a defendant corporation may argue that one of the other hearsay exceptions (*see i.e.*, Ill. R. Evid. 803) applies such that the deposition testimony is excluded by the hearsay rule and may be considered in support of or opposition to a motion for summary judgment. Additionally, a defendant corporation may use its corporate representative's discovery deposition testimony in support of a motion for summary judgment to the extent the testimony constitutes a judicial admission. A party's testimony in deposition may constitute judicial admission if statement is clear, unequivocal, and within party's personal knowledge and deliberate testimony relating to concrete fact and not an inference or uncertain summary. *Arnold v. Consolidated Railroad*, 169 Ill.Dec. 738, 592 N.E.2d 225 (1st Dist. 1992). A judicial admission can support a grant of summary judgment. However, the witness must be in a position to know the fact about which he is testifying. *Eidson v. Audrey's CTL, Inc.*, 621 N.E.2d 921 (5th Dist. 1993). The trial court ultimately has discretion whether to consider corporate deposition testimony when deciding a motion for summary judgment.

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

Illinois defendants are jointly and severally liable for damages. 735 ILCS 5/ 2-1117 (1995); *Miller v. Rosenberg*, 749 N.E.2d 946 (Ill. 2001). The exception to this rule is for defendants who bear less than a quarter of the fault for plaintiff's claimed damages. With some exclusions (such as for medical malpractice cases), these defendants remain liable jointly and severally for plaintiff's medical and related expenses but are only severally liable for the remainder of the plaintiff's damages. 735 ILCS 5/ 2-1117 (1995); *Unzicker v. Kraft Food Ingredients Corp.*, 783 N.E.2d 1024 (Ill. 2002).

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

Cook County, McLean County, Madison County, St. Clair County, and Winnebago County.

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

There is no cap on punitive damages in Illinois, although the Illinois Supreme Court has found a ratio of 75 to 1 to be unconstitutionally excessive.

In *Mathias v. Accor Economy Lodging, Inc.*, the Seventh Circuit held that a jury verdict, in which punitive damages exceeded compensatory damages by more than four times a single-digit ratio, was not unconstitutionally excessive in violation of due process. 347 F.3d 672 (7th Cir. 2003). *Mathias* was the first case in the Seventh Circuit to apply the United States Supreme Court case, *State Farm Mutual Automobile Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1524 (2003), in which the Supreme Court stated that "few awards [of punitive damages] exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."

In *Mathias*, plaintiffs brought a diversity suit against defendants who owned and operated a 191-room hotel in downtown Chicago that was entirely infested with "bedbugs." For four years, hotel management failed to fumigate for insects, despite numerous patron complaints. A jury verdict awarded the plaintiffs \$5,000 in compensatory damages, and \$186,000 in punitive damages (a ratio of 37.2-to-1). Applying Illinois substantive law, the Seventh Circuit held that the evidence adduced at trial justified the jury's verdict as to both the compensatory and punitive damages award. The defendants, citing *State Farm*, argued that due process required that the punitive damages award be capped at \$20,000 because *Campbell* stated that a punitive damages award that is "four times the amount of compensatory damages might be close to the line of constitutional impropriety." *Id.* at 676. Judge Posner, writing for the court, noted that *Campbell* did not establish a prophylactic rule that always barred punitive damages where the ratio between punitive and compensatory exceeded 4-to-1. Instead, the Supreme Court only held that "there is a presumption against an award that has a 145-to-1 ratio" and that any punitive damages award that exceeded this ratio was presumptively prohibited. *Id.* (citing *State Farm*, 123 S.Ct. at 1524).

However, the Illinois Supreme Court has placed some limitations to the amount of punitive damages. In *Int'l Union of Operating Engineers, Local 150 v. Lowe Excavating Co.*, a case spanning 18 years of litigation, the plaintiff filed a multicount complaint in the Circuit Court of McHenry County, generally alleging that the Union picketed a Lowe work site with placards containing false information. After a bench trial, the trial court ruled in favor of the Union. The appellate court reversed, concluding that Lowe proved a cause of action for trade libel because the evidence showed that the Union made false statements and the statements were made with actual malice. On remand, the trial court awarded Lowe \$4,680 in compensatory damages and \$525,000 in punitive damages. The appellate court reduced the punitive damages award to \$325,000.

Looking to the purpose of punitive damages as discussed by Judge Posner in *Mathias*, namely deterrence, the Supreme Court held that a punitive damages award of \$325,000, at a ratio of approximately 75 to 1, is unconstitutionally excessive in light of the Union's conduct. Instead, the Court found an award of punitive damages against the Union in the amount of \$50,000, for a double-digit ratio of approximately 11 to 1, was reasonable and constitutional. *Int'l Union of Operating Engineers, Local 150 v. Lowe Excavating Co.*, 225 Ill. 2d 456, 490 (2006).

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

Under Illinois' "reasonable value approach", a plaintiff may recover the *entire* amount billed, provided the plaintiff establishes the proper foundational requirements to show the bill's reasonableness. *Wills v. Foster*, 229 Ill. 2d 393 (2008). The leading and most difficult case for defense attorneys in Illinois is the *Wills* case, which holds that Plaintiffs can collect the full amount of a bill even if only partially paid. The Court held that the Collateral Source Rule prohibits Defendants from informing the jury that the medical care provider settled for less than the full amount of the bills. The reasoning includes a comment that Defendant should not get the benefit of the reduced charges because of the Collateral Source Rule. Thus, a Plaintiff may recover sums of money which he or she is not obligated to pay.

The decision of *Perkey v. Portes-Jarol*, a Second District Case, provides some hope that a Defendant will be entitled to a set-off in cases where the injured Plaintiff had insurance which paid a portion of the bills. 2013 IL App (2d) 120470. The court held that Section 2-1205 of the Code of Civil Procedure modifies the Collateral Source Rule such that a Defendant is entitled to a set-off for medical bills which have been paid by an insurer or fund, at a reduced level, to the extent of that reduction. In other words, if the total bill is \$100,000.00 and the health insurer pays \$40,000.00 to fully satisfy the charges, the remaining \$60,000.00 should be set-off from the judgment. The trial court in that case, like most judges in Cook County in the past, refused any set-off finding that no set-off was allowed because the health insurer had a right to recoupment, i.e., a subrogation right. As virtually every health insurance policy has a subrogation clause, the right to a set-off was pretty much non-existent. The *Perkey* decision puts some teeth back into the statute. However, a more recent decision from the Fourth District Appellate Court rejects the *Perkey* analysis and holds that no set-off is allowed even where the bills have been written off and Plaintiff does not have to pay the written off amounts. *See Miller v. Sara Bush Lincoln Health Ctr.*, 2016 IL App. (4th) 150728. Whether our liberal Supreme Court will allow this interpretation to prevail, especially since it contradicts *Wills* and *Miller*, remains to be seen.