

**AMERICAN TRUCKING ASSOCIATION MINI COMPENDIUM -
TRANSPORTATION LAW 2013**

MONTANA

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I. Montana Laws on Texting and Hand Held Phones

There are no statewide laws prohibiting cell phone use or texting while driving. In 2011, the Montana Legislature rejected a bill which would have created a statewide ban on handheld cell phone use while driving. And there is no proposed legislation to create such a ban pending in the current legislative session. However, several municipalities have implemented their own bans. The following Montana cities currently have laws which prohibit the use of handheld phones: Billings, Bozeman, Butte, Columbia Falls, Great Falls, Hamilton, Havre, Helena, Missoula, and Whitefish.

According to the Governors Highway Safety Association, Montana does include a category for cell phone/electronic equipment distraction on police accident report forms. Proposed federal legislation would require states to collect this data in accordance with Model Minimum Uniform Crash Criteria guidelines to qualify for certain federal funding.

II. Admissibility of preventable/non-preventable reviews and decisions

There are no Montana cases regarding the specific issue of admissibility of preventable/non-preventable reviews or decisions. However, the Montana Supreme Court has addressed the discoverability of internal investigation materials. *Lindberg v. Leatham Bros., Inc.*, 215 Mont. 11, 19, 693 P.2d 1234, 1240 (1985), *State ex rel. Burlington N. R. Co. v. Dist. Ct. of Eighth Jud. Dist. of State of Mont. In and For County of Cascade*, 239 Mont. 207, 217, 779 P.2d 885, 892, (1989). In *Lindberg*, the Court held the internal accident reports prepared by the insurer on behalf of the insured defendant were prepared in anticipate of litigation and therefore not discoverable. *Lindberg*, 215 Mont. 11, 19, 693 P.2d 1234, 1240. On the other hand, in *State ex rel. Burlington N.R.Co.*, the Court determined witness statements taken as part of an internal investigation were statements taken “in the ordinary course of business” because the railroad had a regular practice of conducting post-accident internal investigations. *State ex rel. Burlington N.R.Co.*, 239 Mont. 207, 217, 779 P.2d 885, 892. There, the Court held that those portions of the

internal investigation report which did not contain reflections of attorney thought processes were discoverable. *Id.*

Montana law formerly prohibited law enforcement accident reports and supplemental reports which were prepared under the Uniform Accident Reporting Act to be used in civil or criminal trials. See *McAlpine v. Midland Elec. Co.*, 194 Mont. 154, 159, 634 P.2d 1166, 1169 (1981) (citing Mont. Code Ann. § 61-7-114). The law has since been amended however, to remove that prohibition. Mont. Code Ann. § 61-7-114 (2011). Further, the Montana Attorney General has issued a formal opinion to clarify that while such accident reports and supplemental reports are generally confidential and not to be disclosed except as provided by the statute, insurers of individuals involved in the accident are entitled to the reports. 51 Mont. Op. Atty. Gen. No. 8, 2005 WL 2003053 (Mont. A.G. Aug. 17, 2005)

III. Admissibility of BASICs Information

The Motor Carrier Safety Assistance Program within the Montana Department of Transportation has been using the Compliance, Safety, Accountability Program (CSA) since the Spring of 2009. CSA replaced the motor carrier safety rating program in 2010. CSA uses the federal Safety Measurement System (SMS). The CSA also uses the SMS BASIC's standards as adopted by the Federal Motor Carrier Safety Administration (FMCSA) to identify motor carriers with safety issues and schedule to compliance reviews or investigations. The FMCSA standards have been adopted pursuant to Rules 18.8.1501, 1502 and 1507, A.R.M. Research indicates, and the Department affirmed that to their knowledge no Montana case has addressed specifically the admissibility of the BASIC's standards.

Although Montana does not have a specific case dealing with the admissibility of BASIC's information at trial, the admissibility of compliance and non-compliance with federal regulations has been addressed generally. The Montana Supreme Court has discussed the admissibility of federal regulations and articulated a two-tiered approach: 1) a code or standard may be used to conclusively show a standard of care for a defendant if a state agency has adopted the standard so that it has the force of law; and 2) even if the federal standard has not been adopted, it may nevertheless be admitted as substantive evidence of negligence if it is coupled with a showing of general acceptance in the industry. *Lynch v. Reed*, 284 Mont. 321, 944 P.2d 218 (1997). Applying this approach to the guidelines in the Manual of Uniform Traffic Control Devices (MUTCD), the Montana Court held that because MUTCD had been adopted by the State Highway Commission, the guidelines had the force of law and may be considered to establish the industry standard or norm. *Schmidt v. Washington Contractors Group, Inc.*, 290 Mont. 276, 964 P.2d 34 (1998). Notably, however, the inquiry does not end there; such a national standard sets only a minimum standard, and if circumstances show a danger beyond the minimum which the general standard was designed to meet, then a jury may be informed that a

defendant is negligent for not doing more. *Id.*, (citing *Martel v. Montana Power Co.*, 231 Mont. 96, 104, 752 P.2d 140, 145 (1988)).

FMCSA rules have also been rejected as a basis for a jury instruction on negligence per se. *Mann v. Redman Van & Storage Co., Inc.*, 2012 US Dist Lexis 51911 (D. Mont. 2012). In *Mann*, the plaintiff sought an instruction that failure to put out warning signals for a truck pulled off the road constituted negligence per se. *Id.* The Court rejected the instruction stating that although violation of a federal regulation was evidence of negligence, it was not evidence of negligence per se. *Id.* (citing *Parrick ex rel Parrick v. FedEx Ground Package System, Inc.*, 2010 U.S. Dist. LEXIS 93232, 2010 WL 3614119 (D. Mont. 2010)). The court held that only a statutory violation may be used as a basis for a negligence per se instruction. *Id.*

IV. Standards for Spoliation of Evidence

Montana has two standards with respect to spoliation of evidence: one dealing with spoliation of evidence by a party and the other dealing with spoliation of evidence by a third party. *Oliver v. Stimson Lumber Company*, 1999 Mont. 328, 297 Mont. 336, 993 P.2d 11. With respect to a party who fails to preserve evidence, and such a failure is attributable to willfulness or bad faith, the court may use a broad array of sanctions including an essential entry of default judgment against a defendant who fails to properly preserve evidence. *Id.* In *Peschel v. City of Missoula*, the court addressed the failure of the city police to preserve a videotape of an arrest of a doctor who had been trying to help a person threatening suicide. *Peschel*, 664 F. Supp. 2d 1137 (2009). The doctor was charged and acquitted of obstructing a police officer and then sued the officers and the City. *Id.* The court analyzed the various sanctions available to the court for failure to preserve the videotape and sanctioned defendants by holding as a matter of law that the officers used unreasonable force, essentially granting summary judgment to plaintiffs on that issue. *Id.*

With respect to the failure of a third-party to preserve evidence, the Montana Supreme Court has recognized the torts of intentional and negligent spoliation of evidence. *Oliver*, 1999 Mont. 328, 297 Mont. 336, 993 P.2d 11. The Court set out a seven-part test for negligent spoliation, and a six-part test for intentional spoliation of evidence. *Id.* The U.S. District Court for the District of Montana applied the *Oliver* standard and denied summary judgment to a third-party insurer on a claim of negligent spoliation. *Coleman Construction Inc., v. Diamond State Insurance Co.*, 2008 U.S. Dist. LEXIS 44735 (D. Mont. 2008). In *Coleman*, a fire destroyed a fifth-wheel trailer parked next to a mobile home and the issue was whether the insurer had a duty to preserve the fire scene when it was aware of potential claims against the owner of the mobile home. *Id.* The court used the seven-part test for negligent spoliation and held the third-party insurer had a foreseeable duty to preserve the evidence and denied summary judgment for the insurer. *Id.*

