

## DELAWARE

**David J. Soldo**

**MORRIS JAMES, LLP**

500 Delaware Ave., Suite 1500

P.O. Box 2306

Wilmington, DE 19899-2306

Phone: (302) 888-6950

Cell: (302) 415-0674

Fax: (302) 571-1750

E-Mail: [dsoldo@morrisjames.com](mailto:dsoldo@morrisjames.com)

1. What are the venues/areas in Delaware that are considered dangerous or liberal?

There are three (3) counties in Delaware: New Castle, Kent, and Sussex. Sussex County is more rural and politically more conservative, and Sussex County juries tend to be more conservative. New Castle County tends to be more liberal and Kent County can be a wildcard. Generally, all three counties are fairly conservative as far as jury pools are concerned.

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

No Delaware cases are directly on point for significant verdicts involving trucking companies during 2017-2018. Several jury verdicts covered fault for various other vehicular accidents:

*Estate of Deepak Chatani v. Delaware Authority for Regional Transit (DART)*, 2017 WL 4270082 (Del. Super. 2017): \$850,000 verdict for plaintiff decedent estate.

Defendant transit company bus driver struck decedent from behind, killing him. Jury found transit company 55% negligent for failing to give proper time and attention to the operation of the bus, operating the bus in a careless manner, and driving at a speed that was greater than reasonable and prudent.

*Ortiz-Collazo v. Sisofa*, 2017 WL 6373661 (Del. Super. 2017): No damages awarded. Medical transportation van rear ended by privately owned vehicle. Passenger of medical van sued privately owned vehicle driver for negligence in causing accident. Driver defended by denying negligence and asserting medical van driver stopped unexpectedly, causing accident. Jury returned a verdict in favor of defendant.

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

Yes. The use of applied physics by trained engineers aided by computer simulations does "create indicia of reliability" and may be trustworthy evidence depending on the circumstances of a given case. However, the trial judge will determine the admissibility of computer-generated demonstrative evidence on a case-by-case basis. The proponent of the evidence must establish its reliability by showing a connection between the demonstration's general scientific validity and its specific applicability to the facts in the case, including whether the forces depicted in the

demonstration would cause the specific victim to react in the same way as the computer model. See *Eskin v. Carden*, 842 A.2d 1222 (Del. 2004).

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.

No cases are directly on point for trucking industry in-cab videos during 2017-2018. However, several Delaware cases discuss video evidence admissibility, retention, and spoliation in general. At least one case admitted video evidence taken from the cabin of a parked, unidentified vehicle. *State v. Hill*, 2017 WL 1094369 (Del. Super. 2017) (admitting video evidence provided that it could be properly authenticated under Rule 901 of the Delaware Rules of Evidence).

In general, parties must retain evidence relevant to a legal dispute when the party knows or has reason to know of its relevance, or is otherwise under a legal duty to preserve the evidence. Delaware courts may grant an adverse inference jury instruction against any party that causes the spoliation of relevant evidence. To determine whether an adverse spoliation instruction is proper, Delaware courts apply a two prong test: (1) a finding that the culpable party either intentionally or recklessly caused the loss of the evidence, (2) a finding that the party knew the evidence was relevant for an existing or pending legal dispute. *Foreman v. Two Farms, Inc.*, 2018 WL 4846341, (Del. Super. 2018), citing *Sears, Roebuck & Co. v. Midcap*, 893 A.2d 542 (Del. 2006) (finding that an adverse inference jury instruction was proper after defendant Two Farms lost video of a slip-and-fall accident occurring in its convenience store in 2015).

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?

Delaware law governing telematics data is primarily limited to the technology's permissible use by insurance providers. Generally, the code concerns only private passenger vehicles and requires an insured's consent before the data may be used in an insurance policy.

18 Del. C. § 3918

“(a) An insurer seeking to install a data-reporting device in a private passenger vehicle, or seeking to use a previously installed device for the purposes of obtaining data, shall inform the policyholder of such installation or use, of the data that may be obtained by the insurer from such device, and how the installation or use and removal or discontinuation of such device can affect the cost of insurance coverage.”

(b) An insurer may not install or use a data reporting device in a private passenger vehicle unless an insured listed as the policyholder consents to such installation or use.

(c) The disclosure of any nonpublic personal information and any nonpublic confidential information collected by a vehicle data reporting device shall be governed by § 535 of this title and CDR 18-900-904-1.0 to 16.0.

(d) Any private passenger vehicle insurance rating plan that uses data obtained by a vehicle data-reporting device shall be subject to Chapter 25 of this title and CDR 18-1900-1902-1.0 to 6.0.

(e) This section applies to private passenger vehicle insurance issued to individual policyholders primarily for personal, family or household purposes. This section does not apply to policies issued to commercial entities or individuals who obtain insurance products or services for business, commercial or agricultural purposes.

(f) For purposes of this section, a “data reporting device” is any device that is capable of maintaining, transmitting, or storing, a vehicle’s telematics and driving data.

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

Yes, post-accident toxicology reports are admissible provided that the reports are supported by additional evidence, including expert testimony, showing the results of the report can be used to draw a causal connection between the accident and the relevant party’s level of intoxication. Toxicology reports not supported by additional evidence may be excluded on the basis that the results would be irrelevant, confusing, or unfairly prejudicial. See, e.g., *Robbins et al. v. William H. Porter, Inc.*, 2006 WL 2959483 (Del. Super. 2006) (excluding toxicology reports because “the bare toxicology reports are not admissible regarding causation” where proponents of the reports could not draw a causal relationship between the party’s level of intoxication and the accident itself); *Holland v. Allstate Ins. Co.*, 2008 WL 660330 (Del. Super. 2008) (excluding toxicology reports for lack of a causal connection to accident and finding non-intoxicated passenger’s claim against insurer would be unfairly prejudiced by evidence of driver’s intoxication).

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

Yes. Adverse counsel may request production of post-accident investigations, including surveillance videos, written reports, or internal memorandums if not privileged or otherwise protected from discovery. See, e.g., *Hunter v. Borgia*, 2015 WL 5050648 (Del. Super. 2015) (granting a motion to compel production of defendant’s surveillance videos of plaintiff after traffic accident and prior to the plaintiff’s deposition); *Naylor v. Martin*, 2015 WL 500703 (Del. Super. 2015) (noting in dicta that post-accident investigatory material is generally discoverable and sanctions could be proper for failing to update discovery responses with new investigatory findings); *Castellani v. Delaware State Police*, 1998 WL 449690 (Del. Super. 1998) (granting motion to compel production of non-party Delaware Dept. of Transportation reports concerning the accident site).

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

As of 2019, Delaware has not enacted legislation regulating autonomous vehicles. In 2017, Governor John Carney issued an executive order calling for legislative and executive action in the industry. Executive Order 14 (Sep. 5, 2017) (Gov. Carney): established Advisory Council on Connected and Autonomous Vehicles. Council “tasked with developing recommendations for innovative tools and strategies that can be used to prepare Delaware’s transportation network for connected and autonomous vehicles.”

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.

21 Del. C. §4176C prohibits the operation of motor vehicles while using an electronic communication device such as a cell phone. The statute provides that hands-free devices may be used if the hands free device allows for a person to use such device without holding the hands free device, except for the activation or deactivation of the device. If the driver of a motor vehicle uses a hands free device by holding the device in his or her hand, the driver will be subject to liability under 21 Del. C. §4176C. *Noel v. Rodriguez*, 2013 WL 6917135 (Del. Super. 2013).

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

Parties to litigation in Delaware courts are prohibited from appealing to the jury’s sympathies by using the “golden rule argument” during closing arguments. Counsel uses the golden rule argument “where counsel asks the jury to place themselves in the shoes of a party to the suit in arriving at a verdict, and to render such verdict as they would want rendered in case they were similarly situated.” *Fleetwood v. State*, 148 A.3d 1173 (Del. 2016).

No applicable case law was found on Reptile-style arguments by plaintiffs’ counsel.

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

Federal Court juries are pooled from all 3 counties, whereas in Superior Court juries are pooled from the county in which the court sits. In state court, litigants generally have more control over the litigation process. The USDC for the District of Delaware recently added two new Federal Judges, which should ease the burden on the Federal Court’s docket, which sees a particularly high volume of patent cases. In state Court, ADR/mediation can be by anyone agreed to by the parties, whereas in Federal Court is it before and scheduled by a Magistrate Judge.

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

In Delaware, guilty pleas are admissible evidence; pleas of nolo contendere/no contest are not.

In a civil case, Delaware courts allow the admission of a litigant's prior guilty plea for the charge of violating a motor-vehicle statute. Such evidence's use by the jury is governed by Delaware Superior Court Civil Pattern Jury Instruction 6.7:

“EFFECT OF PLEA OF GUILTY

The evidence shows that [plaintiff / defendant's name] pleaded guilty to a motor-vehicle charge. A guilty plea to a charge of violating a motor-vehicle statute is admissible in evidence as an admission against interest. Once admitted, it's up to you to draw any conclusions about the guilty plea. Remember to base your decision on all the facts and circumstances of the case, including [plaintiff / defendant's name]'s explanation for pleading guilty.

{Comment: See Jury Instr. No. 22.22 -- Plea of Nolo Contendere. Pleas of no contest are not admissible in evidence.}

Source: *Alexander v. Cahill*, Del. Supr., 2003 WL 1793514, \*3 (2003)(2003 Del. Lexis 199, \*7-10); *Laws v. Webb*, Del. Supr., 658 A.2d 1000, 1008-09 (1995); *Hamill v. Miller*, Del. Supr., 476 A.2d 161, 162-63 (1984); *Boyd v. Hammond*, Del. Supr., 187 A.2d 413, 416 (1963); *Ralston v. Ralston*, Del. Super., 72 A.2d 441 (1950). See also D.R.E. 801(d)(2), 803(8); *Robinson v. State*, Del. Supr., 291 A.2d 279, 281 (1972).”

Delaware trial courts will admit a plea of guilty to a traffic offense as an admission by the pleading party of the conduct underlying the charge, but the fact of the traffic charge itself is generally held to be inadmissible for fear that the jury may be unduly “influenced by the fact that the police found ... one of the parties to be ‘at fault’. Although it is generally the rule that an officer will not be permitted to explain why he did or did not issue a ticket, ...when a witness in a civil trial is confronted with his plea of guilty to a traffic charge, the witness will be afforded an opportunity to explain why he entered the plea of guilty and the jury will then be instructed to consider that explanation, along with all other circumstances of the case, when determining what weight to give to the evidence of the guilty plea. *Hawkins v. Schreiber*, 2000 WL 33113798, at \*2 (Del. Super. 2000).

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?

Generally, medical bills can be boarded as special damages at trial, except for Medicare and Medicaid write-offs. In Delaware, the collateral source rule holds that “a tortfeasor cannot reduce its damages because of payments or compensation received by the injured person from an independent source.” *Stayton v. Delaware Health Corp.*, 117 A.3d 521, 527 (Del. 2015) (citation omitted). Generally, Delaware courts will apply the collateral source rule to allow plaintiffs to recover amounts paid by provider write-offs and other third party payments. *Id.* at

529; see, e.g., *Mitchel v. Haldar*, 883 A.2d 32 (Del. 2005); *Onusko v. Kerr*, 880 A.2d 1022 (Del. 2005). However, this rule does not apply to Medicare write-off amounts. *Stayton*, 117 A.3d at 534. Similarly, the rule does not apply to Medicaid write-offs. *Smith v. Mahoney*, 150 A.3d 1200 (Del. 2016). Thus, a tortfeasor can reduce its damages for amounts paid by Medicare and Medicaid.

A plaintiff can also recover for future anticipated medical expenses. *Smith*, 150 A.3d at 1208. The Delaware Supreme Court held that the amount of future medical expenses will not be reduced for expected Medicaid/Medicare coverage because “Medicaid eligibility is purely speculative.” *Id.*

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

Delaware has no statutory caps on damage awards where government entities are not parties to the suit. *Judge Trucking Co., Inc. v. Estate of Cooper*, 1994 WL 680029, at \*5 (Del. Super. 1994).

Delaware has adopted caps on damages recoveries in enacting 2 Del. C. § 1329 and 10 Del. C. § 4013. These are caps on damages assessed against governmental entities.