

IOWA

Matthew D. Jacobson
Kimberly S. Bartosh
Jennifer B. Chavez-Rivera
WHITFIELD & EDDY, PLC

699 Walnut Street, Suite 2000

Des Moines, Iowa 50309

Phone: (515) 288-6041

Fax: (515) 246-1474

E-Mail: jacobson@whitfieldlaw.com

E-Mail: bartosh@whitfieldlaw.com

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

The following Iowa counties are considered to be liberal: Polk, Warren, Dallas, Johnson, Washington, Muscatine and Scott. *State Judicial Profiles by County*, US Law Network, <https://www.uslaw.org/files/JuryProfiles/2017-18%20USLAW%20NETWORK%20State%20Judicial%20Profiles%20by%20County.pdf>.

The following counties may be dangerous as they have had substantial plaintiff's verdicts within the last several years: Black Hawk, Cerro Gordo, Jefferson, Muscatine, Linn, Johnson, and Polk. *Iowa Civil Jury Verdict Reporter*, <https://www.iowabar.org/page/JuryVerdictReporter>.

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

There have been no significant trucking verdicts in Iowa between 2017 and 2018; however, there have been several multi-million dollar verdicts in other areas of civil law these past two years bringing somewhat into question the generally held perception and belief that Iowa juries are conservative.

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

Accident animations and computer generated evidence are admissible evidence in Iowa. *See State v. Sayles*, 662 N.W.2d 1, 7 (Iowa 2003) (holding animations are admissible as long as the animations present a fair and accurate description of the evidence and the proper factual foundation has been laid).

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 of in-cab video has not yet been specifically addressed by Iowa courts. Generally, however, a spoliation inference requires a finding that: "(1) the evidence was "in existence"; (2) the evidence was "in the possession of or under control of the party" charged

with its destruction; (3) the evidence “would have been admissible at trial”; and (4) “the party responsible for its destruction did so intentionally.” Before instructing the jury on the inference, the trial court must make a threshold determination that the foundation for the inference is sufficient, in other words, that “a jury could appropriately deduce from the underlying circumstances the adverse fact sought to be inferred.” *State v. Hartsfield*, 681 N.W.2d 626, 630 (Iowa 2004) (quoting *State v. Langlet*, 283 N.W.2d 330 (Iowa 1979)).

Similarly, the admissibility of in-cab video has not yet been specifically addressed by Iowa courts. Generally, however, in order for “[a] motion picture (or a videotape) to be admitted into evidence it must first be authenticated. The witness purporting to authenticate the same “need only know about the facts represented or the scene or objects photographed, and once this knowledge is shown he can say whether the photograph correctly and adequately portrays these facts.” *Hutchison v. Am. Family Mut. Ins. Co.*, 514 N.W.2d 882, 890 (Iowa 1994) (internal citations and quotations omitted).

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.

Neither the Iowa Code nor Iowa case law has specifically addressed the retention of telematics data. Iowa law does, however, allow for a spoliation inference if there is sufficient proof evidence has been intentionally destroyed, and not simply destroyed due to negligence or as a result of routine procedure. *Lynch v. Saddler*, 656 N.W.2d 104, 111. Third party vendors in possession of relevant evidence should, thus, be placed on notice of any spoliation/retention letters when received.

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

A positive post-accident toxicology result may be admissible in a civil action in Iowa if the proper foundation is laid and if the evidence is relevant. Iowa law provides that “evidence of the alcohol concentration or the presence of a controlled substance or other drugs in the person's body at the time of the act alleged as shown by a chemical analysis of the person's blood, breath, or urine is admissible”, in both criminal and civil proceedings *as long as the proceedings “arose out of acts alleged to have been committed by a person while operating a motor vehicle in violation of section 321J.2 or 321J.2A.”*

The statute further states that if, at trial, it is established that “an analysis of a breath specimen was performed by a *certified operator* using a *device intended to determine alcohol concentration* and *methods approved by the commissioner of public safety*, no further foundation is necessary for introduction of the evidence.” Iowa Code § 321J.15 (emphasis added).

The foundation for admitting a positive blood test includes proof (1) the specimen was taken by an authorized person, (2) that person used sterile equipment, (3) the specimen was properly labeled and preserved, (4) the specimen was properly transported and stored, and (5) the identity of the person processing the blood sample.” *Duncan v. City of Cedar Rapids*, 560 N.W.2d

320, 322 (Iowa 1997). “An adequate foundation is laid when the proponent of the evidence shows it is reasonably probable no tampering, contamination or substitution occurred.” *Id.* at 323.

Once the appropriate foundation has been laid, the evidence must be proven relevant. Iowa courts may exclude a positive toxicology test under Iowa Rule of Evidence 5.403 if the positive test is not corroborated with additional evidence of either (A) an extensive history of substance use, or (B) a direct causal relation between the substance use and the auto accident at issue.

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

Under the work-product rule, if the post-accident investigation is prepared in anticipation of litigation by a party or their representative, the investigation is not discoverable. *See Ashmead v. Harris*, 336 N.W.2d 197, 201 (Iowa 1983)(holding a post-accident investigation conducted by the liability insurer non-discoverable work-product as the primary purpose for the investigation was to *aid in possible future litigation*.)

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

Iowa Code § 321.308 prohibits a motor truck “traveling upon a roadway, outside a business or residence district”, from being within 300 feet from another motor truck. A motor truck is defined as “every motor vehicle designed primarily for carrying livestock, merchandise, freight of any kind, or over nine persons as passengers.” Iowa Code § 321.1. The Iowa statute is broad enough to include a pickup truck, regardless of its gross weight. *Thompson Wholesale Co. v. Frink*, 131 N.W.2d 779, 781 (1964). The Competitive Enterprise Institute has found that laws such as Iowa Code § 321.308 are a common barrier to platooning. Marc Scribner, *Authorizing Automated Vehicle Platooning*, July 2018, https://cei.org/sites/default/files/Marc_Scribner_-_Authorizing_Automated_Vehicle_Platooning_2018%20%281%29.pdf.

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.

Iowa law does not prohibit the use of hands free devices. Iowa Code § 321.449B, effective July 1st, 2018, does, however, prohibit drivers of commercial motor vehicles from texting or using hand-held mobile phones while driving.

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

In a recent case, *Tibodeau v. CDI, LLC*, plaintiffs’ counsel used the golden rule argument in closing. No. 06-0560, 2017 WL 2665107 (Iowa Ct. App. June 21, 2017). The trial court sustained defense counsel’s objection to the argument. *Id.* at *4. The trial court also took curative measures by reminding the jury to rely only on their recollection of the evidence and not on statements made during closing arguments which are not evidence. *Id.* The appellate court affirmed the trial court’s ruling. *Id.* at *7.

In *State v. Musser*, the prosecutor made reptile style arguments, asking the jury to, “do the right thing” by holding the defendant responsible. 721 N.W.2d 734, 755 (Iowa 2006). The Court held this statement objectionable as it improperly urged the jury to make their ultimate decision based on something other than the evidence. *Id.* at 755-756. See also Kevin M. Reynolds and Zachary J. Hermsen, *Defense Techniques for Combating Plaintiff’s Reptile Strategy*, Winter 2018, https://www.whitfieldlaw.com/media/publication/31_2018%20IDCA%20Defense%20Update%20-%20Winter.pdf (discussing a common reptile strategy: arguing that the jury serves as a “conscious of the community” and “is answerable to the public for its verdict”) (quoting *State v. Musser*).

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

If trying a case in which an expert witness will be utilized, removal to Federal Court is advantageous when possible as Iowa Federal Courts follow the Daubert Rule when determining the admissibility of expert testimony, whereas State Courts follow the Frye Rule.

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

A guilty plea to a traffic violation generally is admissible as evidence. See *Book v. Datema*, 131 N.W.2d 479 (Iowa 1964). However, Iowa Code § 321.489 states that no record regarding a traffic violation conviction is admissible as evidence “in any court in any civil action.”

Neither Iowa law nor case law specifically addresses the effect of a no contest plea on subsequent civil litigation.

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?

Under Iowa law, a plaintiff is allowed to recovery a reasonable amount for the medical care obtained. *Pexa v. Auto Owners Ins Co.*, 686 N.W.2d 150, 156 (Iowa 2004). The amount paid for the medical care is generally held to have been reasonable, even absent expert testimony, and is admissible. *Id.* Iowa Code § 668.14 (1)(In an action brought pursuant to this chapter seeking damages for personal injury, the court shall permit evidence and argument at to the previous payment or future right of payment of actual economic losses incurred or to be incurred as a result of the personal injury for necessary medical care, rehabilitation services, and custodial care except to the extent that the previous payment or future right of payment is pursuant to a state or federal program or from assets of the claimant or the members of the claimant’s immediate family). A plaintiff, however, may seek to recover the full amount charged, even if not paid, for the medical care, but will need to provide expert testimony that the

full amount charged for the medical care was reasonable, whereas the amount actually paid was not. *Pexa v. Auto Owners Ins Co.*, 686 N.W.2d 150, 156 (Iowa 2004).

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

Iowa recently passed a law creating a statutory cap on damages for medical malpractice suits. Before this, Iowa did not have any statutory caps on damages.

Effective July 1, 2018, noneconomic damages in such cases will be limited to \$250,000, “unless the jury determines that there is a substantial or permanent loss or impairment of a bodily function, substantial disfigurement, or death, which warrants a finding that imposition of such a limitation would deprive the plaintiff of just compensation for the injuries sustained.” Iowa Code Ann. § 147.136A. This cap does not apply if the defendant acted with actual malice. *Id.*