

MICHIGAN

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

In Michigan, the most dangerous venue is Wayne County, which encompasses the City of Detroit. In 2018, a Wayne County jury awarded a \$135 million dollar verdict on a medical malpractice case. The verdict is believed to be the largest single medical malpractice verdict in the country.

In 2015, a Wayne County jury awarded a \$22.6 million verdict in a trucking negligence case.

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

Comparative Negligence (Wayne County - 2018)

Fatal accident when 51 year-old man drives into the rear of a disabled tractor on roadway. Jury assessed Plaintiff only 15% negligent. The truck driver was found to be 60% negligent for failure to follow DOT regulations by placing warning triangles on the roadway prior to the accident. The trucking company was found to be 25% negligent for the maintenance of the tractor. The parties had entered into a high/low agreement prior to trial, capping the award at \$1 million.

Jury Verdict. \$4.45 million

Stevenson v. Simpson Group, Inc., et al

Failure to Yield

Fatal accident involving a 79-year old the passenger of a motor vehicle. The passenger vehicle and a commercial motor vehicle collided in an intersection. Plaintiff, alleged both the driver of the passenger vehicle and the driver of the commercial motor vehicle were negligent for failure to yield and/or running a red light. Both drivers contend that they had a green light. Jury found the driver of the commercial motor vehicle 90% at fault.

Jury Verdict. \$700,000

Diegel v. Stuart and Consumers Energy

Multi-Vehicle Accident (2017)

Defendant, driver of tractor-trailer lost control while driving in a snow storm. Plaintiff was forced off the road because of the Defendant lost control of his vehicle. Defendant never contacted Plaintiff's vehicle. While Plaintiff was stopped on the side of the road, he was struck

by subsequent vehicles approaching the scene. Plaintiff suffered injuries to the cervical and lumbar spine.

Settled first day of trial. \$1.63 million

Rear-End Collision – Distracted Driving (2017)

Plaintiffs (driver and her mother) were stopped in the roadway due to construction. Defendant, driver of tractor trailer, was distracted by his cell phone and was taking prescription Oxy Contin. Distracted, Defendant rear-ended Plaintiffs' vehicle. Driver of passenger vehicle suffered TBI, spinal fractures and 16 fractured ribs. The passenger suffered fatal injuries. Defendant was convicted of criminal charges associated with the accident.

Settled prior to trial. \$8,650,000

Rear-End Collision - Damages (2017)

Plaintiff and his passenger wife had slowed due to a traffic tie up. Defendant, driver of tractor trailer, rear-ended Plaintiff's vehicle. Plaintiff suffered severe spinal injuries including Central Cord Syndrome (CCS). Plaintiff, a retired man in his mid-70's had only non-economic loss.

Prior to the accident, Plaintiff had experienced a serious unrelated medical condition affecting his spinal cord. Plaintiff's counsel was able to show that prior to the accident, Plaintiff had achieved a virtually complete recovery and was able to return to living a very active and vigorous life for a man his age.

Settled prior to trial. \$4,525,000

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

Yes. However, it must meet all of the criteria of admissibility under the Michigan Rules of Evidence. At a minimum, the animation must be accurate, have probative value, and help the jury understand a material issue. *McMiddleton v Otis Elevator Co*, 139 Mich App 418, 362 NW2d 812 (1984).

Michigan courts have distinguished between evidence offered to recreate an event and that was not offered as a re-creation, but to illustrate an expert's opinion. For both uses, the evidence must aid the fact finder, be relevant, and be probative.

In *People v. Unger*, 278 Mich. App. 210, 749 NW 2d 272, 299 (2008), the court permitted certain computer animations of a victim's fall, which were based on the expert's calculations, but disallowed others that were based on calculations and the expert's speculation. The court reasoned that the basis of the expert's opinion for the latter set of animations was not evidence as required by Michigan Rule of Evidence 702, and the animation was irrelevant to the trial.

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.

There have been no significant decisions reported on this issue. However, in a recent case, the defendant trucking company preserved just a screen shot of the in-cab video involved in an accident. Approximately one year after the accident, defendant received a letter of representation. Several months later, a complaint was filed. During discovery, Plaintiff sought all videos and photographs relating to the accident. After producing the screen shot, Plaintiff requested the entire video. The defendant was unable to produce the video as the date of the lawsuit was beyond the defendant's retention period and beyond the one-year retention period of the vendor. Despite the tardiness of the request, the Court entertained plaintiff's motion for an adverse jury instruction against Defendant for spoliation. After a hearing on the issue, the Judge deferred his ruling until trial. Case settled prior to this issue being finalized.

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.

The rule in Michigan is that a party has a duty to preserve evidence "[e]ven when an action has not been commenced and there is only a potential for litigation... This duty to preserve evidence includes all evidence "that [a party] knows or reasonably should know is relevant to the [anticipated] action." *Brenner v. Kolk*, 226 Mich.App 149, 162; 573 NW2d 65 (1997).

In regard to electronic data, MCR 2.302(B)(5) provides:

A party has the same obligation to preserve electronically stored information as it does for all other types of information. Absent extraordinary circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

Michigan does not allow direct causes of action against parties responsible for spoliation. Michigan does not recognize as "a valid cause of action spoliation of evidence that interferes with a prospective civil action against a third party," and declined the opportunity to recognize such a claim. *Teel v. Meredith*, 284 Mich.App 660, 661, 663–664; 774 NW2d 527 (2009). The *Teel* Court explained that the decision to impose new duties and recognize an independent tort claim for spoliation of evidence should be left to the Legislature. *Id.* at 663–665

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

Yes.

MCL 257.625a(6)(a).

The following provisions apply to chemical tests and analysis of a person's blood, urine, or breath, other than a preliminary chemical breath analysis:

(a) The amount of alcohol or presence of a controlled substance or other intoxicating substance in a driver's blood or urine or the amount of alcohol in a person's breath at the time alleged as shown by chemical analysis of the person's blood, urine, or breath is admissible into evidence in any civil or criminal proceeding and is presumed to be the same as at the time the person operated the vehicle.

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

Yes, subject to limited exceptions.

Michigan has a strong historical commitment to a far-reaching, open and effective discovery practice. Michigan's Supreme Court has repeatedly emphasized that discovery rules are to be liberally construed in order to further the ends of justice. *Hallett v. Michigan Consolidated Gas Co.*, 298 Mich. 582, 586, 299 N.W. 723 (1941); *Scarney v. Clarke*, 276 Mich. 295, 303, 267 N.W. 841 (1936); *Vincent v. VanBlooy*s, 263 Mich. 312, 314—315, 248 N.W. 633 (1933).

MCR 2.302(B)(1) states, Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party, including the existence, description, nature, custody, condition, and location of books, documents, or other tangible things, or electronically stored information and the identity and location of persons having knowledge of a discoverable matter. It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

However, work-product doctrine protects documents and tangible things prepared in anticipation of litigation by or for a liability insurer of a party. MCR 2.302(B)(3)(a).

MCR 2.302 states, a party may obtain discovery of documents and tangible things otherwise discoverable under subrule (B)(1) and prepared in anticipation of litigation or for trial by or for another party or another party's representative (including an attorney, consultant, surety, indemnitor, insurer, or agent) only on a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

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

Michigan is one of 29 states which have enacted legislation regulating autonomous vehicles. Michigan's legislature initially introduced a bill in 2014, prohibiting the use of

autonomous vehicles. Today, Michigan permits the use of autonomous vehicles, but limits its use for research and testing. Michigan's laws regarding autonomous vehicles and platooning are encompassed in MCLA 257.665.

MCLA 257.665 (2) sets forth the following restrictions regarding the use of an autonomous vehicle: A manufacturer of automated driving systems or upfitter shall ensure that all of the following circumstances exist when researching or testing the operation, including operation without a human operator, of an automated motor vehicle or any automated technology or automated driving system installed in a motor vehicle upon a highway or street:

- (a) The vehicle is operated only by an employee, contractor, or other person designated or otherwise authorized by that manufacturer of automated driving systems or upfitter. This subdivision does not apply to a university researcher or an employee of the state transportation department or the department described in subsection (3).
- (b) An individual described in subdivision (a) has the ability to monitor the vehicle's performance while it is being operated on a highway or street in this state and, if necessary, promptly take control of the vehicle's movements. If the individual does not, or is unable to, take control of the vehicle, the vehicle shall be capable of achieving a minimal risk condition.
- (c) The individual operating the vehicle under subdivision (a) and the individual who is monitoring the vehicle for purposes of subdivision (b) may lawfully operate a motor vehicle in the United States.

Platooning is addressed in MCLA 257.665(9)-(10):

(9) A person may operate a platoon on a street or highway of this state if the person files a plan for general platoon operations with the department of state police and the state transportation department before starting platoon operations. If the plan is not rejected by either the department of state police or the state transportation department within 30 days after receipt of the plan, the person shall be allowed to operate the platoon.

(10) All of the following apply to a platoon:

- (a) Vehicles in a platoon shall not be considered a combination of vehicles for purposes of this act.
- (b) The lead vehicle in a platoon shall not be considered to draw the other vehicles.
- (c) If the platoon includes a commercial motor vehicle, an appropriately endorsed driver who holds a valid commercial driver license shall be present behind the wheel of each commercial motor vehicle in the platoon.

Michigan also has enacted legislation providing manufacturers of autonomous vehicles immunity against liability for any modification to the automated system.

Sec. 665a. A manufacturer of automated driving technology, an automated driving system, or a motor vehicle is immune from liability that arises out of any modification made to a motor vehicle, an automated motor vehicle, an automated driving system, or automated driving

technology by another person without the manufacturer's consent, as provided in section 2949b of the revised judicature act of 1961, 1961 PA 236, MCL 600.2949b. Nothing in this section supersedes or otherwise affects the contractual obligations, if any, between a motor vehicle manufacturer and a manufacturer of automated driving systems or a manufacturer of automated driving technology.

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 reported court decisions precluding a commercial driver from using a hands-free device.

Michigan prohibits drivers of commercial vehicles from using hand held telephones, unless the vehicle is properly parked. The specific statute is MCLA 257.602b, which states in pertinent part:

(3) Except as otherwise provided in this section, a person shall not use a hand-held mobile telephone to conduct a voice communication while operating a commercial motor vehicle or a school bus on a highway, including while temporarily stationary due to traffic, a traffic control device, or other momentary delays. This subsection does not apply if the operator of the commercial vehicle or school bus has moved the vehicle to the side of, or off, a highway and has stopped in a location where the vehicle can safely remain stationary. As used in this subsection, "mobile telephone" does not include a 2-way radio service or citizens band radio service.

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

A "golden rule" argument is an argument wherein the plaintiff's counsel asks the jury to assess damages on the basis of what they would be willing to accept for the wrongs alleged to have been suffered. *May v. Parke, Davis & Co*, 142 Mich.App 404, 423; 370 NW2d 371 (1985). A "golden rule" argument is proper so long as it does not inflame or prejudice a jury. See *People v Graham*, Docket No. 297830, 2011 WL 4810883 (Mich. App).

A "golden rule" argument is improper if plaintiff counsel ask the jury to assess damages upon the basis of the amount they would be willing to accept for the wrongs alleged to have been suffered.

The Michigan Court of Appeals found a "golden rule" argument improper because plaintiff's counsel essentially asked the jury to assess damages in a certain amount based on whether they would be willing to trade places with Komajda's children. The argument specifically caused the jurors to at least consider what amount of money they would be willing to accept if they were the decedent's children.

Komajda ex rel Komajda v Wackenhut Corp., No. 219204, 2002 WL 181765, at *8 (Mich. Ct App, February 1, 2002)

The reptile strategy is “to frame each case in a way to shift each juror’s brain into survival mode when he or she decides a case.” Michigan courts have recognized that it is improper to suggest that jurors “send a message” to a party through its verdict. *Hunt v CHAD Enterprises, Inc.*, 183 Mich App 59 (1990). Likewise, jury arguments that suggest a “civic duty” are improper as they inject into trial issues unrelated to the merits of the case. See *People v Biondo*, 76 Mich App 155 (1977) (noting the prosecutor asked the jury to help make Detroit a great city again and to keep the crime rates lower by convicting the defendant).

Recently the Michigan Court of Appeals held the use of the reptile theory was improper, but a “harmless” error. In their opinion, the court held, “We agree that any argument by plaintiff that the Genesys residents did not act in the “safest” manner possible was improper because the standard of care applicable to specialists like the residents practicing obstetrics/gynecology at Genesys was not whether they acted in the “safest” manner possible, but whether they acted with a level of care that was below what a reasonable specialist in the nation would do in light of present day scientific knowledge. Therefore, to the extent plaintiff’s counsel elicited testimonial evidence suggesting a more stringent standard of care, the evidence was irrelevant to the issues the jury needed to decide at trial. See MRE 401;MRE 402. The erroneous admission of evidence is subject to harmless error analysis; an error is harmless if it did not prejudice the opposing party. We conclude that any error regarding plaintiff’s use of “reptile theory” was harmless.” *Bryson v Genesys Regl Med Ctr*, No. 333135, 2018 WL 1611438, at *17–19 (Mich Ct App, April 3, 2018)

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

State Court judges handle more personal injury cases and are more familiar with the common issues associated with them. State Court judges are also discouraged to extend the length of a case beyond one year from filing and therefore are hesitant to extend discovery.

The overall quality of judges is generally better in Federal Court. Federal Courts have more resources, including staffing, magistrates, and law clerks. Federal Courts have a much smaller docket and more time to spend on a particular case. Federal Courts jury pools are drawn from a much larger geographic area than state court jury pools. Federal Rules of Civil Procedure limit the number of interrogatories, which in State Court is often abused by plaintiff’s bar.

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

Pursuant to MCLA 257.731, evidence of a conviction or the civil infraction determination of a person for a violation of the use of motor vehicles shall not be admissible in a court in a civil action.

In *Kirby v. Larson*, 400 Mich. 585, 256 N.W.2d 400, (1977), the Michigan Supreme Court held, “Evidence of issuance of a traffic summons is not admissible as substantive evidence of conduct at issue in a civil case arising out of the same occurrence.”

In Michigan, a person who pleads guilty or receives a guilty verdict in a criminal trial is estopped from denying the acts for which he was found guilty in a civil trial. A guilty plea or verdict evidence of violation of a penal statute may be introduced in a negligence action to create a rebuttable presumption of negligence. See *Klanseck v. Anderson Sales & Service, Inc*, 426 Mich. 78, 86; 393 NW2d 356 (1986); (holding that for a guilty plea or verdict to be admissible, the relevance of the evidence of the statutory violation must be specifically established. The factors necessary to such a determination of relevance are (1) whether the statute was intended to protect against the result of the violation, (2) whether the plaintiff was within the class intended to be protected, and (3) whether the evidence would support a finding that the violation was a proximate contributing cause of the event in the negligence case. If these factors are met, the evidence of statutory violation may be introduced, and the presumption of negligence created may thereafter be rebutted by evidence of a legally sufficient excuse for the violation. The determination of whether the violation of the statute was a proximate cause of the event in the negligence case is then left to the jury to decide.)

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?

Medical expenses are not admissible in Michigan in a motor vehicle accident case because the PIP carrier is responsible to pay all reasonable and necessary medical expenses.

There is a basis for post-verdict reductions. Section 3116 of Michigan's No Fault statute requires that personal injury protection no-fault benefits be reduced to the extent the insured has received equivalent compensation from tort judgments arising from accidents outside of the state, from accidents with uninsured motorists, and from intentionally caused harm. This is consistent with Michigan's adoption of the collateral source rule set forth in MCLA 600.6303.

MCL 600.6303 provides for a post-verdict reduction of damages for medical expenses that were paid by a collateral source. Subsection 4 of the statute defines "collateral source" as:

(4) As used in this section, "collateral source" means benefits received or receivable from an insurance policy; benefits payable pursuant to a contract with a health care corporation, dental care corporation, or health maintenance organization; employee benefits; social security benefits; worker's compensation benefits; or Medicare benefits. Collateral source does not include life insurance benefits or benefits paid by a person, partnership, association, corporation, or other legal entity entitled by law to a lien against the proceeds of a recovery by a plaintiff in a civil action for damages. Collateral source does not include benefits paid or payable by a person, partnership, association, corporation, or other legal entity entitled by contract to a lien against the proceeds of a recovery by a plaintiff in a civil action for damages, if the contractual lien has been exercised pursuant to subsection (3).

Thus, for present purposes, MCL 600.6303 provides that benefits paid by insurance are subtracted from the verdict unless the insurance provider has exercised a lien against the plaintiff's recovery.

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

There are damage caps only under Michigan no-fault statutes. MCL 500.3107(1)(b) provides that an injured person may recover lost wages he or she would have earned from employment during the first three years after the accident. In addition to the three-year cap on work loss benefits under MCL 500.3107(1)(b), there is a monthly maximum on recoverable wages, the amount of which is revised yearly. Furthermore, the benefits payable for lost wages are reduced by 15 percent for taxes, unless the claimant can show that he or she was in a lower tax bracket at the time of the accident. MCL 500.3107(1)(c) entitles an injured claimant to recover up to \$20 per day in benefits during the first three years after the date of the accident for what are known as replacement services.

If an insurer of an out-of-state resident is required to provide benefits to that out-of-state resident for accidental bodily injury for an accident in which the out-of-state resident was not an occupant of a motor vehicle registered in Michigan, the insurer is only liable for the amount of ultimate loss sustained up to \$500,000.00. MCL 500.3163. Moreover, to the extent damages are not covered by insurance, there is a \$1,000.00 cap on damages to a motor vehicle. MCL 500.3135.