

## WEST VIRGINIA

**Stephen F. Gandee**  
**E. Ryan Kennedy**  
**ROBINSON & MCELWEE PLLC**  
P.O. Box 128  
Clarksburg, WV 26302-0128  
Phone: (304) 622-5022  
Fax: (304) 622-5065  
E-Mail: [sfg@ramlaw.com](mailto:sfg@ramlaw.com)  
E-Mail: [erk@ramlaw.com](mailto:erk@ramlaw.com)

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

Although all of West Virginia tends to favor plaintiffs, some counties tend to favor plaintiffs more than others. Defendants should use caution when litigating in the state courts of any of the following counties: Boone, Lincoln, Logan, Marshall, McDowell, Mingo, Ohio, and Wyoming. The state courts of the following counties tend to be less plaintiff-oriented than the remainder of the state: Berkeley, Grant, Hampshire, Hardy, Jefferson, Mineral, Morgan, Pendleton, and Pocahontas.

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

In *Deitz v. Patton Trucking Co., Inc.*, 2:15-CV-0827 (S.D. W.Va. 2017), a jury awarded plaintiff \$162,500.00 in a trucking accident.

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

A trial court has discretion to admit accident animations and/or computer-generated evidence and an expert qualified in accident reconstruction may testify if such testimony will assist the trier of fact to understand the evidence or to determine a fact in issue.

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.

Although there does not appear to be any case law in West Virginia which specifically addresses the retention and spoliation of in-cab videos, in West Virginia, a party who reasonably anticipates litigation has an affirmative duty to preserve relative evidence. *Hannah v. Heeter*, 584 S.E.2d 560, 566–67 (W.Va. 2003) (quoting *Tracey v. Cottrell ex rel. Cottrell*, 524 S.E.2d 879 (W.Va. 1999)). Intentional spoliation of evidence is recognized as a cause of action against parties to a civil action. *Id.* at 571. A party to a suit that causes spoliation of evidence may be subject to Rule 37 sanctions or an adverse jury instruction. *See* Syl. Pt. 2, *Tracey v. Cottrell ex rel. Cottrell*, 524 S.E.2d 879 (W.Va. 1999).

With respect to third parties, “there is no general duty to preserve evidence.” *Id.* at 568 (quoting *Smith v. Atkinson*, 771 So.2d 429, 433 (Ala. 2000)). However, intentional spoliation of evidence is recognized as a cause of action against third parties, and negligent spoliation of evidence is recognized as a cause of action against third parties having a special duty to preserve evidence. *Id.* at Syl. Pts. 5 and 9.

There also does not appear to be any case law in West Virginia which specifically addresses the admissibility of in-cab videos. Therefore, as with other evidence, a trial court would likely apply the balancing test of Rule 403 of the West Virginia Rules of Civil Procedure to determine whether or not the probative value of the evidence is substantially outweighed by a danger of unfair prejudice.

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.

It does not appear that West Virginia has law or regulation which directly addresses the retention of telematics data. Therefore, the law of spoliation, as discussed above, would likely apply generally to these circumstances.

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

In the context of an administrative revocation of a driver’s license, a positive post-accident toxicology result is admissible. *Lowe v. Cicchirillo*, 672 S.E.2d 311, 316 (W.Va. 2008). There does not appear to be any case law in West Virginia which specifically addresses the admissibility of a positive post-accident toxicology result in other civil actions. Therefore, as with other evidence, a trial court would likely apply the balancing test of Rule 403 of the West Virginia Rules of Civil Procedure to determine whether or not the probative value of the evidence is substantially outweighed by a danger of unfair prejudice.

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

A post-accident investigation that was generated prior to litigation is generally discoverable. *State ex rel. Allstate Ins. Co. v. Gaughan*, 508 S.E.2d 75, 90 (W.Va. 1998). *See, also, State ex. rel. State Farm Mut. Auto. Ins. Co v. Bedell*, 697 S.E.2d 730 (W.Va. 2010).

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

West Virginia has not yet adopted laws which regulate automated driving systems or platooning. The general traffic laws of West Virginia would presumably apply equally to such 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.

W.Va. Code § 17C-14-15 prohibits driving or operating a motor vehicle on a public street or highway while using a cell phone or other electronic communications device, but specifically excludes the use of hands-free equipment. Therefore, it appears that it would be lawful for a commercial driver to have a conversation over a cell phone in West Virginia so long as he or she is using a hands-free device.

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

One hundred years ago, the West Virginia Supreme Court of Appeals found the following argument to be "manifestly improper":

"You gentlemen of the jury, put yourselves in the place of the plaintiff, in estimating damages; take into consideration what amount, under such circumstances, would compensate you if you were a young man in the bloom of health, with your wife, about to start on the sea of life." *Keathley v. Chesapeake & O. Ry. Co.*, 102 S.E. 244, 249 (1919).

More recently, the Court has recognized that "[t]he so-called 'golden rule argument' to a jury has been widely condemned as improper." *Ellison v. Wood & Bush Co.*, 170 S.E.2d 321, 327 (W.Va. 1969). There do not appear to be any no cases on point addressing the Reptile Theory in West Virginia.

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

Generally speaking, state courts in West Virginia tend to be more plaintiff oriented than the state courts of most states. West Virginia also lacks an intermediate appellate court which limits the opportunity for appellate review of decisions. The federal courts are generally a better forum for defendants, especially legal entities from out of state. Although all of West Virginia tends to favor plaintiffs, some counties tend to favor plaintiffs more than others. Defendants should use caution when litigating in the state courts of any of the following counties: Boone, Lincoln, Logan, Marshall, McDowell, Mingo, Ohio, and Wyoming. The state courts of the following counties tend to be less plaintiff-oriented than the remainder of the state: Berkeley, Grant, Hampshire, Hardy, Jefferson, Mineral, Morgan, Pendleton, and Pocahontas.

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

Pursuant to Rule 410 of the West Virginia Rules of Evidence, evidence of a nolo contendere plea in an adjudicated citation is not admissible in subsequent civil or criminal proceedings to prove that the defendant committed the offense to which he entered the plea. *See State v. Evans*, 508 S.E.2d 606, 610 (W. Va. 1998). Evidence of a guilty plea, on the other hand, may be admissible as an admission against interest. *See White v. Lock*, 332 S.E.2d 240, 243 (W. Va. 1985) (citing *Moore v. Skyline Cab, Inc.*, 59 S.E.2d 437 (1950); *Thornsbury v. Thornsbury*, 131 S.E.2d 713 (W. Va. 1963); *Groves v. Compton*, 280 S.E.2d 708 (W. Va. 1981)). There is no

specific verdict impact regarding damages in civil litigation occurs as a result of a guilty plea in a criminal matter.

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?

A plaintiff can recover the full amount charged by medical providers regardless of whether the plaintiff actually paid the bills himself or herself or whether some or all of such bills were paid by insurance under the “collateral source rule.” *Kenney v. Listen*, 760 S.E.2d 434 (W. Va. 2014). A plaintiff may also recover the value of services which were gratuitously provided or later written off by the medical provider. *Id.* A Court may reduce or off-set medical bills if it determines they are not “reasonable and necessary.” *Id.*

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

Punitive damages are limited to acts of actual malice or a conscious, reckless and outrageous indifference to the health, safety and welfare of others, must be proven by clear and convincing evidence, and are capped at no more than four (4) times compensatory damages or Five Hundred Thousand Dollars (\$500,000.00); whichever is greater. W.Va. Code § 55-7-29. There is also bodily damage award limit of Two Hundred Fifty Thousand Dollars (\$250,000.00) per occurrence, but it only applies to medical malpractice actions.