ILLINOIS

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

   Cook County, Mclean County, Madison County, St. Clair County

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

   Kaderly v. Black Horse Carriers Inc. et al., 2013 L 200 (Winnebago County):

Plaintiff was stopped in traffic as a result of an earlier car accident caused Mexi Fiallos. Fiallos lost control of her car, crossed the highway and struck the guardrail. It was alleged that Fiallos was under the influence of alcohol when she crashed. About 12 minutes after said accident, Black Horse freight driver drove into the rear of Plaintiff's vehicle allegedly at 60 mph and plaintiff died as a result. Suit was brought against Fiallos, the truck driver and Black Horse Carriers. Plaintiff alleged that the truck driver was negligent in that he did not allow enough time or distance to safely stop, did not keep a proper lookout, drove too fast for conditions, operated his vehicle while fatigued, and did not apply his brakes. Dash cam footage facing the driver was admitted. Plaintiff argued the footage showed the driver was fatigued and possibly falling asleep. Defendants argued he was checking his gauges. After deliberating for 4.5 hours, the jury reached a $15 million verdict attributing 99% of fault to the truck driver and Black Horse and 1% of fault to Fiallos.

Denton v. Universal Am-Can, Ltd. et al. 2015 L 1727 (Cook County):

Plaintiff was driving southbound on an interstate in Indiana when an elderly driver approached driving the wrong way in traffic at 30 mph. Southbound traffic slowed or took cautionary measures, except for semi-truck driver employed by Universal Am-Can Ltd. The semi driver rear ended Plaintiff and Plaintiff's vehicle struck two others. Plaintiff sustained carious head, neck, and knee injuries. The jury awarded a total verdict of $54,155,900 against the driver and his employer (over $19,000,000 in compensatory damages and $35,000,000 in punitive damages).

Neuhengen v. Global Experience Specialists, Inc., 2018 IL App (1st) 160322:

Plaintiff was injured at a tradeshow at McCormick Place in Chicago when a 58,000-pound forklift ran over his foot. The forklift was driven by a GES employee who was not certified in using this particular lift, despite OSHA requirements and company policy that he be certified. Defendant employee was operating this lift on a two man crew according to company policy, though OSHA recommends a three man crew with a spotter. Plaintiff alleged negligence against the employee and GES, and willful and wanton conduct against GES based upon the employee's actions and GES GES's own conduct for failing to have a three person crew, failing to implement a procedure to check certifications of forklift operators, and failing to ensure that the employee was trained in the operation of the lift. Before trial, the employee admitted his negligence, and GES admitted negligence under the respondeat superior. GES further admitted that if the employee's conduct was found willful and wanton, then it admitted its respondeat superior liability hoping to extinguish those claims based on admission of agency. GES argued the willful and wanton conduct claims became duplicative and the admission of agency liability thereby eliminates all claims of corporate misconduct. After a jury trial, Plaintiff was awarded over $12 million in compensatory damages on the negligence claims and $3 million in punitive damages after finding GES's conduct to be willful and wanton in a special interrogatory.

On appeal, Defendant argued that the willful and wanton count should not have gone to the jury because once an employer admits respondeat superior, the employer's liability is no longer relevant to the case. See Neff v. Davenport Packing Co., 131 Ill. App. 2d 791 (1971). In Neff, the court held where the link between the tortfeasor and some other party is admitted, the liability of the third party is predicated upon the negligence of the tortfeasor. Id. at 792. In Neuhengen, the court allowed the willful and wanton claim to stand under the Lockett v. Bi-State Transit Authority rule. Id. at ¶ 89 (citing 94 Ill. 2d 66, 73 (1983) (recognizing instances where an employer cannot insulate itself from liability by admitting agency if its actions rise to the level of willful and wanton conduct)). The court recognized the general rule under Neff that "allegations of an employer's negligence should be dismissed when an employer admits an agency relationship because the allegations of direct negligence are duplicative of the admitted agency relationship." However, the court found no reason "for such a rule where a plaintiff has pled a viable claim for punitive damages based on allegations of willful and wanton conduct against an employer for its independent actions in hiring and retaining an employee or entrusting a vehicle to an unfit employee." Thus, under Neuhengen, admitting agency under respondeat superior is not a bar to a direct action against the principal where punitive damages are available to the plaintiff.

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

The decision whether to admit demonstrative evidence lies within the sound discretion of the trial court. . Discretion is properly exercised to exclude such evidence where no foundation has been laid to verify that the proffered evidence is an accurate portrayal of facts relevant to the instant case. *Barth v. International Harvester Co.,* 160 Ill.App.3d 1072, 513 N.E.2d 1088, 112 Ill.Dec. 479 (1st Dist. 1987). Generally, experiments are not competent evidence unless the essential conditions of the experiment are shown to be the same as those existing at the time of the accident. However, when an experiment is not represented to be a reenactment of the accident and it deals with one aspect or principle directly related to the cause or result of the occurrence, the exact conditions of the accident need not be duplicated. *Galindo v. Riddell, Inc.,*

107 Ill.App.3d 139 (3d Dist. 1982) (citations omitted). "Whether the experiment evidence meets the criteria for admission is a determination left to the sound discretion of the trial judge, whose decision will not be overturned absent a clear abuse of discretion." *Rios v. Navistar International Transportation Corp.,* 200 Ill.App.3d 526, 558 N.E.2d 252, 258 (1st Dist. 1990).

Illinois courts have applied these principles, as exemplified by the ruling in *Barth v. International Harvester Co.*, 160 Ill.App.3d 1072, 513 N.E.2d 1088, 112 Ill.Dec. 479 (1st Dist. 1987). The First District affirmed the trial court in admitting the defendant's videotape of a tractor identical in make, model, and design to the subject tractor in the occurrence. Plaintiff never objected to the demonstrative and cross-examined the driver of the tractor in the videotape. The *Barth* court held the videotape was not a reenactment, but rather a demonstration of the tractor's ability to turn to demonstrate that the tractor could safely turn a corner under normal speeds and conditions. The defendant was not required to make a showing of substantial similarity between the conditions in the videotape and those at the time of the occurrence. *See also, Bachman v. General Motors,* 332 Ill. App. 3d 760 (4th Dist. 2002) (permitting Event Data Recorder evidence to be introduced reasoning that the process of gathering and recording EDR data is not novel and the design and implementation of an EDR device adheres to the Frye standard).

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.

Illinois courts have not changed the trend regarding the retention and spoliation of in-cab videos. The analysis for animations or computer-generated data also applies to the admissibility of in-cab videos, courts are most critical of the relevance and probative value of the video.

Illinois does not recognize a separate, independent tort for spoliation of evidence. *Dardeen v. Kuehling*, 213 Ill. 2d 329, 821 N.E.2d 227 (2004); *Boyd v. Travelers Ins. Co.,* 166 Ill. 2d 188, 652 N.E.2d 267 (1995). Illinois recognizes a claim for negligent spoliation of evidence could be brought under existing negligence principles. *Boyd*, 166 Ill. 2d at 192-93, 652 N.E. 2d at 270.

To state a claim for negligent spoliation of evidence, a plaintiff must plead: (1) the existence of a duty to preserve evidence owed by the defendant to the plaintiff; (2) a breach of that duty; (3) an injury or damages proximately caused by the breach; and, (4) damages. *Boyd*, 116 Ill. 2d at 194-95, 652 N.E.2d at 270; Martin v. Keeley & Sons, Inc., 2012 IL 113270, ¶ 26, 979 N.E.2d 22; *Andersen v. Mack Trucks, Inc.*, 341 Ill. App. 3d 212, 215, 793 N.E.2d 962, 966 (2nd Dist. 2003). Illinois courts focus on duty and causation in deciding the sufficiency of a negligent spoliation of evidence claim.

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.

As a general rule in Illinois, there is no duty to preserve evidence. *Martin*, 2012 IL 113270, ¶ 27. However, a plaintiff can establish an exception to the general no-duty rule if it meets the two-prong test set forth in *Boyd v. Travelers Insurance Co*., 166 Ill. 2d 188, 652 N.E.2d 267, 209 Ill. Dec. 727 (1995). A plaintiff must show: (a) that an agreement, contract, statute, special circumstance, or voluntary undertaking has given rise to a duty to preserve evidence on the part of the defendant; and (b) that the duty extends to the specific evidence at issue by demonstrating that 'a reasonable person in the defendant's position should have foreseen that the evidence was material to a potential civil action.' *Boyd*, 166 Ill. 2d at 195. If the plaintiff fails to satisfy both prongs of the *Boyd* test, the defendant has no duty to preserve the evidence at issue. *Kilburg v. Munawar Mohiuddin, Zante Cab Co.*, 2013 IL App (1st) 113408, ¶ 22, 990 N.E.2d 292 (citing *Martin*, 2012 IL 113270, ¶ 27).

In *Kilburg v. Munawar Mohiuddin, Zante Cab Co*, Plaintiff was injured in a car accident when she was a passenger in a taxi cab that crashed into a tree. She filed a suit against the driver and the taxi companies, including Zante Cab Co. (the taxi owner), one week after the crash. Two days after the accident, Zante towed the taxi to a lot leased by a co-defendant taxi company, who also stored taxis there. Three days after the accident, plaintiff's counsel sent correspondence to the defendants demanding that the taxi be preserved and protected. Nine days after the accident, the court entered an order of protection on plaintiff's motion, ordering the driver, Zante, and Checker "shall preserve and protect the taxi in its current condition and shall make it available to plaintiff and her representatives. The vehicle shall not be driven, repaired, modified or moved without agreement of the plaintiff or prior order of Court." At some point in the month after the crash, Zante removed the electronic data recorder, which became lost or destroyed. Plaintiff amended her complaint to include a spoliation claim. The court found mere knowledge of the accident and of the possible causes of the accident, standing alone, to be insufficient to create a duty to preserve the evidence. However, the gap without notice to the defendants was so short that it was inconsequential; the court found that the defendants should have foreseen that the taxi was material evidence given that, within 3 days of the accident, the plaintiff demanded that the defendants preserve the taxi and the court entered a protective order requiring preservation shortly thereafter. Therefore, an exception to the general rule that the defendant had no duty to preserve evidence was set out and plaintiff's claim should have survived a motion to dismiss. 2013 IL App (1st) 113408, ¶ 36.

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

The mere existence of a positive post-accident toxicology result is not, on its own, *per se* admissible. Any assessment of drug or alcohol evidence begins with the understanding that such evidence is considered extremely prejudicial. *See Sandburg-Schiller v. Rosello,* 119 Ill.App.3d 318, 331, 74 Ill.Dec. 690, 456 N.E.2d (1983); Evidence of a plaintiff's intoxication can be relevant to the extent that it affects the care that the individual takes for their own safety and is admissible as a circumstance to be weighed by a jury in its determination of the issue of due care. *See Marshall v. Osborn,* 213 Ill.App.3d 134, 140, 156 Ill.Dec. 708, 571 N.E.2d 492 (1991). On the other hand, drug and alcohol consumption can of course be relevant to a defendant's negligence as well as a plaintiff's contributory negligence. *Petraski v. Thedos,* 382 Ill.App. 3d 22, 27-28 (1st Dist. 2008).

Although highly probative, *evidence of intoxication* must be established, indicating physical or mental capabilities, to justify its extremely prejudicial nature. *See Sandburg-Schiller,* 119 Ill.App.3d at 331 (emphasis added). Intoxication is a question of fact for the jury to determine. *Id.* Impairment can be shown through either direct or circumstantial evidence. *Skelton v. Chicago Transit Authority,* 214 Ill.App.3d 554, 575 (1st Dist., 1991). Where there is no evidence of intoxication, evidence of consumption of alcohol is considered irrelevant. *Bielaga v. Mozdzeniak,* 328 Ill.App.3d 291, 296, 262 Ill.Dec. 523, 765 N.E.2d 1131 (2002).

Expert testimony and blood alcohol tests are admissible to establish intoxication. *Sobczak v. General Motors Corp.,* 373 Ill.App.3d 910, 925. However, a test result revealing the presence of alcohol is insufficient, without more, to prove impairment. *See Petraski v. Thedos,* 2011 IL App. (1st) 103218, 357 Ill.Dec. 350, 963 N.E.2d 303 (2011). Lastly, an expert may utilize retrograde extrapolation to opine how a particular level of intoxication would affect a similar person under ordinary circumstances. *See Village of Bull Valley, Illinois v. Winterpacht,* 2012 IL App (2d) 101192, 360 Ill.Dec. 81, 968 N.E.2d 160 (2012) ("When there is a delay between when a defendant was driving and when blood is drawn, extrapolation evidence might be necessary when the blood alcohol level at the time of the test is below the statutory limit. In such a case, extrapolation evidence may be used to show that the BAC level was above the limit when the defendant was driving. But no such evidence is necessary when the tested level is above the statutory limit. In such a case, when a reasonable amount of time lapses between when the defendant was driving and the test, extrapolation evidence is permissible but is not a foundational requirement. Matters of delay between driving and testing go to the weight of the evidence. . .").

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

Evidence of post-accident remedial measures is not admissible to prove prior negligence. Several considerations support this general rule. First a strong public policy favors encouraging improvements to enhance public safety. *See Schaffner v. Chicago & North Western Transportation Co.,* (1989), 129 Ill.2d 1, 133 Ill.Dec. 432, 541 N.E.2d 643. Second, subsequent remedial measures are not considered sufficiently probative of prior negligence, because later carefulness may simply be an attempt to exercise the highest standard of care. Third, is a general concern that a jury may view such conduct as an admission of negligence. *Id., See also Herzog v. Lexington,* 167 Ill.2d 288, 212 Ill.Dec. 581, 657 N.E.2d 926 (1995).

Illinois <u>does not</u> recognize a self-critical analysis privilege like some other jurisdictions. *See Harris v. One Hope United, Inc.,* 2015 IL 117200, 390 Ill.Dec. 151, 28 N.E.3d 804 (2015).

Internal incident reports are often admissible under the "business record exception" to the hearsay rule or as an admission against a party interest, unless otherwise covered by privilege. For example, if a company creates an incident report every time one of its drivers occurs, the incident report would be admissible assuming the report is created in the ordinary course of business. However, depending on when contacting outside counsel or the insurance company, other privileges may apply. Once an attorney is involved, all statements are protected under the attorney-client privilege.

Likewise, the insurer-insured privilege extends the attorney client privilege between an insurer and insured where the insurer has a duty to defend. *People v. Ryan* (1964), 30 Ill. 2d 456, 197 N.E. 2d 15. The extension of the attorney-client privilege to this relationship occurs because the insured is most likely not yet represented by counsel when the insurer begins its preliminary investigation. The privilege applies when the party seeking to keep the communication confidential establishes the following: 1) the identity of the insured; 2) the identity of the insurance carrier; 3) the duty to defend the lawsuit; and 4) that a communication was made between the insured and an agent of the insurer. *Pietro v. Marriott Senior Living Services, Inc.,* 348 Ill.App. 3d 541 551 (1st Dist. 2004).

Additionally, Illinois recognizes a privilege that provides confidentiality to communications between counsel and the corporate "control group." The control group consists of final decision makers and top advisors whose opinions form the basis for a final decision. *Janousek v. Slotky,* 2012 IL App 113432, 980 N.E.2d 641, 650 (1st Dist. 2012). The 'control group' test likewise applies to the insurer-insured privilege. Thus, corporations who expect to face lawsuits should consider discussing with counsel if they should permit employees to provide recorded statements to insurers.

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

Governor Bruce Rauner signed Executive Order 2018-13 on October 25, 2018. The Order directs the Illinois Department of Transportation (IDOT)) to lead an "Autonomous Illinois" initiative to promote the development, testing and deployment of Commercial Autonomous Vehicle (CAV) technologies and related infrastructure and data needs within Illinois. The Order also establishes the Autonomous Illinois Testing Program, which IDOT will administer. The Program will facilitate legal testing and programs on public roads or highways in Illinois, where a licensed driver remains behind the wheel and able to take control of the vehicle at all times. IDOT will collect and maintain up-to-date information on the CAV landscape in Illinois. IDOT must create a registration system for entities wishing to conduct safe pilots or tests of CAV.

Illinois House Bill No. 4654 defines and allows for vehicle platooning. The law defines Vehicle Platoon as:

> A group of individual motor vehicles that travel in a unified manner at electronically coordinated speeds.

Illinois House Bill No. 4654 clarifies that vehicle platooning is exempt from the provisions of following too closely within 300 feet. Additionally, the bill lays out an approval system for vehicle platooning in the state, including requiring the person or organization to file a plan for general vehicle platoon operations with the transportation commissioner.

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.

Illinois allows drivers to use hands free devices to have conversations over a cell phone, but using a hand held phone while driving is strictly prohibited pursuant to 625 ILCS 5/12-610.2.

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

"Golden rule" style arguments are those which ask the jury to place itself in the position of either the plaintiff or defendant, and improperly elicit passion, prejudice, or sympathy from the jury. Similarly, the concept of "reptilian" trial tactics, which originates from a book entitled "Reptile: The Manual of the Plaintiff's Revolution" by David Ball and Don Keenan, appeals to jurors' most primitive instincts for safety.

While technically prohibited in Illinois, "Golden rule" style arguments are allowed if they are DEEMED not calculated to arouse the passions and prejudices of the jury, so it becomes a fact-based analysis. This past year, the court in *Sikora v. Parikh*, 2018 IL App (1st) 172473, affirmed the trial court's grant of a motion for a new trial where defense counsel asked the jury during closing arguments to "stand in [the defendant's] shoes that morning." The *Sikora* court distinguished the facts of *Sikora* from an earlier case of *Offutt v. Pennoyer Merchants Transfer Co.,* 36 Ill. App. 3d 194 (1976), in which the court affirmed an award of personal injury damages to an employee against a contractor, finding that statements made during closing arguments were technically improper, but the resulting prejudice was not significant.

"Reptilian tactics" are not prohibited by name in Illinois, but litigants should be aware of questioning during depositions and arguments during trial that imply a higher duty of care owed by defendants– specifically, questions and arguments that defendants owe a duty of not just reasonable care, but a higher duty of care owed to all citizens to keep them "safe." For example, the court in *Smith v. Menet,* 175 Ill. App. 3d 714 (2nd Dist. 1988) rejected the higher standard of care owed by a physician to his patients, finding instead only a duty of reasonable care.

There are many strategies to deal with reptilian tactics during depositions. At trial, these issues can be handled through motions *in limine*.

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

The most significant differences between Federal Court and State Court in Illinois are the jury pools and the formality of motion practice. Filing fees are comparable in state and federal courts.

With respect to the jury pool, federal juries will be drawn from a larger geographic region than state court juries. This can make a big difference in places like Chicago where the Northern District of Illinois draws from the northern third of the state which includes more rural and conservative counties, and Cook County state court which draws from a more urban, young and

diverse pool of potential jurors. The difference is not as dramatic in other counties or other federal districts within the state.

Motion practice varies between state and federal court -- federal court is more formal, organized and consistent than state court, and as a result, federal court deadlines are stricter and the docket is faster. State court motion calls are far busier and chaotic, and motions are often decided without briefing schedules, whereas federal motion practice is based almost wholly on written argument, often without any oral argument at all.

Case management procedures for state court vary among counties, and also among the three federal districts. In general, the larger counties such as Cook County are busier and have a more frequent case management system that sets deadlines on an ongoing basis, whereas Lake County sets an initial case schedule and trial date at the outset of the case and expects the parties to adhere to the schedule without the supervision of the court. Likewise, the Northern District of Illinois has implemented a mandatory initial discovery pilot project, which requires the parties to answer certain items of written discovery and make mandatory disclosures of documents, even while certain motions to dismiss are pending with the court. Thus, it is important to have counsel familiar with the local rules of each jurisdiction.

Madison County and St. Clair County have been labeled "judicial hellholes" by the American Tort Reform Association, based on their powerful plaintiff's bar, high volume of asbestos litigation and large verdicts. Cook County, where Chicago sits, has a reputation for high verdicts as well.

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

In general, Illinois courts allow guilty pleas to traffic offenses to be admitted in subsequent civil proceedings as admissions. *Hartigan v. Robertson,* 87 Ill.App.3d 732, 738, 42 Ill.Dec. 751, 409 N.E.2d 366, 371 (1980). When a person is involved in an automobile accident and is issued a traffic citation as a result, the person must realize that civil litigation is a very real possibility and that the guilty plea to the traffic charge could reflect adversely upon him in a subsequent legal proceeding. *Young v. Forgas,* 720 N.E. 2d 360, 368, 241 Ill.Dec. 905, 308 Ill.App.3d 553 (1999), citing *Wright v. Stokes,* 167 Ill.App.3d 887, 892, 118 Ill.Dec. 853, 522 N.E.2d 308, 3011 (1988). However, the individual may provide an explanation for pleading guilty that can be considered by the jury, i.e., unaware that pleading guilty would be considered an admission in a civil suit, plea of guilty when unrepresented by attorney, not being properly advised, etc… *Id.*

While pleas of *nolo cotendere* ("no contest") are not generally part of Illinois practice (see 725 ILCS 5/113-4.1 (West 2004)), they do act as a guilty plea although the defendant may still deny the facts underlying the plea in a subsequent proceeding. *Dukes v. Pneubo Abex Corporations,* 900 N.E.2d 1128, 1137 (4th Dist. 2008).

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?

Illinois is a collateral source rule state. Under the collateral source rule, benefits received by the injured party from a source wholly independent of, and collateral to, the tortfeasor will not diminish damages otherwise recoverable from the tortfeasor. *Wills v. Foster*, 229 Ill. 2d 393 (2008). The *Wills* court likewise held that write-offs – such as those made by Medicare -- are irrelevant, and the tortfeasor was liable for the full value of the medical expenses. Id. at 414-420. *See also Lewis v. Lead Indus. Ass'n,* 2018 IL App. (1st) 172894, ¶12 ("it matters little that the benefit bestowed upon the injured party is the result of a relationship with the government such as her entitlement to Medicaid benefits").

Plaintiffs in Illinois are entitled to recover for medical bills from an accident that have been paid and are reasonable amount for services of that nature. Illinois courts have ruled that hospital or physicians' bills are *prima facie* evidence that the amounts were reasonable. *Zook v. Norfolk & W. Ry. Co.,* 268 Ill. App. 3d 157 (4th Dist. 1994).

One statutory exception to the collateral source rule in Illinois is for medical malpractice actions, pursuant to 735 ILCS 5/2-1205.

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

Illinois does not have statutory caps on damages. Caps have repeatedly been found unconstitutional in Illinois, as violating the separation of powers. Statutory caps on noneconomic damages in medical malpractice cases, previously codified at 735 ILCS 5/2-1706.5, were found to be unconstitutional because they violated the separation of powers by removing the judiciary's inherent power to reduce verdicts. *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217 (2010).

The State of Illinois, does, however, cap damages against itself. It does so through the Court of Claims Act. However, the legislature recently raised that cap to $2,000,000 (from $100,000), largely in response to deaths from the outbreak of Legionnaire's Disease at a Veteran's Home. The act, codified at 705 ILCS 505/1, et seq. applies only to claims filed on or after July 1, 2015.