

NORTH CAROLINA

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

The following counties are considered liberal venues in North Carolina: Buncombe, Watauga, Wilkes, Stanly, Orange, Durham, Halifax, Edgecombe, Bertie, Wilson, Pitt, Wayne, Hyde, Scotland, Hoke, Cumberland, Robeson, Columbus.

2. Identify any significant trucking verdicts in your State during 2017-2018, both favorable and unfavorable from the trucking company's perspective.
 - In *Emily Bonnabel Windmiller, Administratrix of the Estate of John Van Bonnabel v. Harry B. Crow, Jr, Public Administrator of the Estate of Wilbert Lemar Tillman, and Darling Ingredients, Inc., d/b/a Dar Pro Solutions*, a Robeson County jury awarded \$13 million in a wrongful death action. Decedent was a mechanic traveling down I-74, following a malfunctioning bobtail trailer to a repair shop. Both vehicles were operating between 20 miles per hour and 30 miles per hour with their flashers on. Defendant tractor trailer driver rear-ended Decedent's vehicle at a speed of approximately 69 miles per hour, sending it off of the interstate, down an embankment, and into a tree. There was no explanation as to why the defendant tractor trailer driver failed to slow down or take evasive action. The decedent reportedly died immediately and was survived by his wife and three adult children. The driver of the bobtail trailer also suffered a traumatic brain injury and was awarded \$4,000,000.00 in a bifurcated damages trial.
 - In *Estate of Baines v. D&D Mechanical Services, LLC*, plaintiff filed a wrongful death action arising out of an accident where defendant's employee crossed the centerline and hit the decedent's vehicle head-on. After admitting negligence, a jury awarded the plaintiff's minor daughter \$2 million. The parties later reached a settlement in the total amount of \$2,118,910.97.
 - A jury declined to hold a truck driver and his employer liable for a crash that led to the death of a 68-year-old woman. The truck driver was traveling on the interstate at night when he encountered decedent's vehicle stopped in the main travel portion of the highway. Though the physical evidence suggested that one tail light may have been lit,

the truck driver stated that he never saw any lights on the vehicle and did not have enough time to avoid the accident. It was unknown why decedent's vehicle was stopped in the road. Plaintiff claimed that the company was negligent in hiring the driver due to two tickets for driving without a license when the driver was a teenager. The driver also received two speeding tickets and was in another accident in the year before he began working for the company. The Mecklenburg County jury deliberated for 40 minutes before reaching a verdict for the truck driver and company. Plaintiff demanded \$5 million prior to trial and the defense had offered \$100,000.

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

North Carolina courts have not addressed the issue of the admissibility of accident animations and/or computer-generated evidence specifically.

However, The Court of Appeals for the Fourth Circuit has ruled that computer-generated animations are admissible. The Court has been careful, however, to distinguish between animation that purports to recreate events at issue in a trial and those merely intended to illustrate a party's or witnesses' version of events. In *Hinkle v. City of Clarksburg, W.Va.*, the Fourth Circuit Court noted that "[a]lthough there is a fine line between a recreation and an illustration, the practical distinction is the difference between a jury believing that they are seeing a repeat of the actual event and the jury understanding that they are seeing an illustration of someone else's opinion of what happened." 81 F.3d 416, 425 (internal citations omitted). In that case, the Fourth Circuit affirmed the lower court's allowance of computer animation, finding no undue prejudice resulted where the jury understood the illustrative nature of the animation and were properly cautioned by the lower court. *Id.*

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 not been any significant decisions or trends with respect to in-cab video, specifically.

(a) With respect to retention and spoliation, North Carolina courts have not addressed the issue of spoliation of electronic data generally. However, one case out of the Western District of North Carolina suggests that courts would treat the spoliation of electronic data in the same manner as courts treat spoliation of other types of evidence. In that case, the Defendant alleged that the Plaintiff engaged in spoliation of electronic evidence, and the court applied the already-established standard for determining whether spoliation occurred. *See Teague v. Target Corp.*, 2007 WL 1041191, at *1 (W.D.N.C. Apr. 4, 2007).

As a general rule, in North Carolina, the duty to preserve evidence arises prior to the filing of a complaint where the opposing party is on notice that litigation is likely to be commenced. *See McLain v. Taco Bell Corp.*, 137 N.C. App. 179, 187 (2000). The obligation to preserve evidence appears to apply to any onboard equipment and related data to the extent such equipment and data may be relevant to the claims and defenses. There is no separate claim of

spoliation of evidence in North Carolina. Instead, a party may request an adverse inference instruction at trial with respect to the spoliation of evidence, if alleged.

(b) As a general matter, in North Carolina courts, the admissibility of video evidence is governed by the same statutory mandates applicable to still photographs, which are governed by N.C. Gen. Stat. § 8-97. Factors the court considers regarding the applicability of video include: (1) whether the camera and taping system in question were properly maintained and were properly operating when the tape was made, (2) whether the videotape accurately presents the events depicted, and (3) whether there is an unbroken chain of custody. In addition, it appears that courts in North Carolina regularly admit video, including dash cam video, provided the proper foundation is laid.

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.

North Carolina courts have not addressed the issue of spoliation of telematics data specifically, nor electronic data generally. However, one case out of the Western District of North Carolina suggests that courts would treat the spoliation of electronic data in the same manner as courts treat spoliation of other types of evidence. In that case, the Defendant alleged that the Plaintiff engaged in spoliation of electronic evidence, and the court applied the already-established standard for determining whether spoliation occurred. *See Teague v. Target Corp.*, 2007 WL 1041191, at *1 (W.D.N.C. Apr. 4, 2007).

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

North Carolina does not have a statute expressly governing the admissibility of post-accident toxicology results, nor have North Carolina courts specifically addressed the issue. Therefore, the general rules of evidence apply in terms of relevance. *See, e.g., Cloaninger v. Wheeler*, No. 5:05CV286, 2006 WL 3782702, at *2,4 (W.D.N.C. Dec. 22, 2006) (on a motion for summary judgment, noting that positive post-accident drug test results created a genuine issue of material fact as to a driver's negligence).

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

North Carolina recognizes a broad right to discovery of material that is not privileged. Materials prepared in the ordinary course of business are not protected by the work product/trial preparation provision of the North Carolina Rules of Civil Procedure.

The United States District Court for the Eastern District of North Carolina has ruled that under Rule 26(b)(3) of the Federal Rules of Civil Procedure, a party may discover some documents prepared by or for a trucking company involved in accident litigation. The court held that an "Accident Prevention Report" (a letter from the trucking company safety supervisor to the company driver and a written report by the driver) was discoverable. *Ennis By and Through McMillan v. Anderson Trucking Service, Inc.*, 141 F.R.D. 258 (1991). The court found that the discoverability of such items turned upon whether the material was prepared "in anticipation of litigation." The documents at issue did not meet the requirement because they were created for safety purposes, for the driver's information, and as standard business practice. A report sent by the trucking company to its insurance company, however, was protected from discovery in that case.

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

Pursuant to N.C. Gen. Stat. § 20-401, fully autonomous vehicles are permitted on North Carolina roadways, provided the vehicles meet the statutorily mandated minimum requirements. For instance, the vehicle must comply with federal laws and regulations, be certificated as in compliance with federal motor vehicle safety standards, be covered by a liability policy, and be registered. In addition, the operator of a fully autonomous vehicle is not required to be licensed to operate a motor vehicle. It is unlawful for any parent or legal guardian of a person less than 12 years of age to knowingly permit that person to occupy a fully autonomous vehicle in motion or which has the engine running unless the person is under the supervision of a person 18 years of age or older. The person to whom an autonomous vehicle is registered is liable for any moving violation that involves the fully autonomous vehicle. The statute also provides a duty to stop in the event of a crash and mandates other duties, including remaining at the scene of the accident and requesting medical assistance if appropriate.

N.C. Gen. Stat. § 20-152 expressly permits autonomous platooning. The statute, which prohibits following too closely, exempts from its application "the driver of any non-leading commercial motor vehicle traveling in a platoon on any roadway where the Department of Transportation has by traffic ordinance authorized travel by platoon." The statute defines "platoon" as "a group of individual commercial motor vehicles traveling at close distances in a unified manner through the use of an electronically interconnected braking system."

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.

N.C. Gen. Stat. § 20-137.4A provides for the use of mobile phones on the public highways in North Carolina. Drivers are allowed to talk on their cellular phones while driving, without the use of a hands free device. Drivers are not, however, permitted to text or use email while driving. This law specifically provides that it should not be construed to prohibit the use of hands free technology. Also according to the law, drivers of commercial motor vehicles must follow the provisions of Part 390 and Part 392 of Title 49 of the CFR with respect to use of mobile devices.

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

- *Turner, v. Salem*, No. 3:14cv289, 2016 WL 4083225, at *2 (W.D.N.C. July 29, 2016) (Without analysis, the Court prohibited Golden Rule arguments and discouraged Reptile Theory arguments, stating that it would “handle objections to statements purported to be Reptile Theory arguments as the need [arose]”).
- *Pracht v. Saga Freight Logistics, LLC*, No. 3:13cv529, 2015 WL 6622877, at *1 (W.D.N.C. Oct. 30, 2015) (granting motion in limine and, without analysis, prohibiting Golden Rule argument and/or Reptile Theory questions and argument).

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

From a defense perspective, litigating in federal court is advantageous due to the increased burden on the plaintiff who must consider the more stringent requirements and costs associated with the same. In addition, the multiple counties from which federal courts pull prospective jurors provide for a more diverse jury pool. Further, federal courts utilize a single judge system, whereas North Carolina's lower courts generally do not assign a single judge to any given case. However, due to North Carolina's evidentiary rules, which provide that only the amount actually paid or necessary to satisfy medical bills is admissible in a civil action, it may be more favorable to remain in state court. Plaintiff attorneys have argued, and certain federal judges agreed, that the evidentiary rule is procedural and, therefore, does not apply in North Carolina federal actions.

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 or verdict in a criminal action is admissible in a subsequent civil action, however, it is not a binding admission of negligence; it is only some evidence of negligence which the jury may consider and the defendant may explain. *See Grant v. Shadrick*, 260 N.C. 674 (1963) (holding that a State Highway Patrolman may testify that he charged the defendant with failing to yield to the right of way and defendant pleaded guilty, stating that “evidence of a plea of guilty to a criminal charge arising out of an automobile accident is generally admissible, but it is not conclusive, and may be explained”); see also *Camalier v. Jeffries*, 340 N.C. 699 (1995).

The case law in North Carolina is less clear as to whether a “no contest” plea is admissible in a subsequent civil action. It is likely that, in North Carolina state court, a “no contest” (or *Alford*) plea would be treated the same as a guilty plea for the purposes of future admissibility and effect (admissible, but not binding admission of negligence). In *Davis v. Hiatt*, the North Carolina Supreme Court held that a defendant's plea of no contest to a DWI charge was admissible in the subsequent civil hearing related to the revocation of his driver's license. *See Davis v. Hiatt*, 326 N.C. 462 (1990).

However, a North Carolina federal court has called this state court precedent with respect to the effect of a “no contest” plea into doubt. In an unpublished opinion from 2013, the United States District Court for the Eastern District of North Carolina held that “some limitation must exist on how [the *Alford*/ no contest plea] can be used in subsequent proceedings. Otherwise, the defendant derives no benefit from an *Alford* plea and he should simply plead guilty.” *United States v. Bress*, 2013 WL 1730145 (E.D.N.C. 2013).

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?

Pursuant to Rule 414 of the North Carolina Rules of Evidence, which applies to causes of action arising on or after October 1, 2011, a party may only introduce evidence of the actual amount of medical expenses that have been paid or are necessary to satisfy outstanding bills, rather than the amount billed. Specifically, Rule 414 provides:

Evidence offered to prove past medical expenses shall be limited to evidence of the amounts actually paid to satisfy the bills that have been satisfied, regardless of the source of payment, and evidence of the amounts actually necessary to satisfy the bills that have been incurred but not yet satisfied. This rule does not impose upon any party an affirmative duty to seek a reduction in billed charges to which the party is not contractually entitled.

As the North Carolina Rules of Evidence specifically provide for the admissible amount of medical damages, there is no explicit procedure for post-verdict reductions or off-sets.

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

Punitive Damages Cap: Three times the amount of compensatory damages or \$250,000, whichever is greater (Exception: DWI cases, where there is no cap on punitive damages). *See* N.C. Gen. Stat. §§ 1D-25, 1D-26.

Medical Malpractice Cap: Liability for noneconomic damages is capped at \$500,000. *See* N.C. Gen. Stat. § 90-21.19 (as amended by An Act to Reform the Laws Relating to Money Judgment Appeal Bonds, Bifurcation of Trials in Civil Cases, and Medical Liability, S.L. 2011-400).