

SOUTH DAKOTA

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

Overall, South Dakota is consistently ranked in the top 5 states for judicial impartiality, judicial competency, and jury fairness. *See* HarrisPoll, “2017 Lawsuit Climate Survey: Ranking the States.” No particular venues in the State are considered especially dangerous or liberal.

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

None.

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

Yes. In South Dakota, the party offering a computer-generated animation or re-creation must “describe the system and show that the program produced an accurate result.” *Sommervold v. Grevlos*, 518 N.W.2d 733, 738 (S.D. 1994). Animations and images should be “relevant, probative, and nearly identical” to the events of the incident. *Id.* The animation must fairly and accurately reflect the testimony of the witness whose testimony it supports. *Id.* An animation inconsistent with the oral testimony should be excluded. *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.

No recent South Dakota court cases specifically address the admissibility, spoliation, or retention of in-cab videos. South Dakota does not have a specific rule for the spoliation of electronic data. The general rule is that the intentional spoliation or destruction of electronic evidence relevant to a case raises an adverse inference that this evidence would have been unfavorable to the case of the spoliator. *See Thyen v. Hubbard Feeds, Inc.*, 2011 S.D. 61, 804 N.W.2d 435, 439 (S.D. 2011); *State v. Mulligan*, 2007 S.D. 67, 736 N.W.2d 808, 822 (S.D. 2007). The presumption only arises where the spoliation or destruction was intentional and indicates fraud or intentional misrepresentation – it does not arise where data destruction is routine, with no fraudulent intent. *State v. Engesser*, 2003 S.D. 47, 661 N.W.2d 739, 755 (S.D. 2003); *Thyen*, 804 N.W.2d at 439.

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.

South Dakota currently does not have any statutes or regulations specifically governing the retention of telematics data.

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

Yes. Toxicology test results may be admissible as exceptions to the rule against hearsay, through Rule 803, either as a business record, or a public record if kept by a county coroner or other public health agency. *Wangsness v. Aldinger*, 598 N.W.2d 221, 1999 S.D. 103; S.D.C.L. § 19-19-803; 34-25-22.1.

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

In general, parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. S.D.C.L. § 15-6-26(b)(1). In certain circumstances, a party may also obtain discovery of documents and tangible things prepared in anticipation of litigation (e.g. work product) or for trial by, or for, another party or by or for that other party's representative. This includes the other party's attorney, consultant, surety, indemnitor, insurer, or agent, as noted in the rule. *See Id.* However, the party seeking discovery must show substantial need of the materials in the preparation of the party's case, and that the party is unable without undue hardship to obtain a substantial equivalent of the materials by other means. *Id*; *see also Tebben v. Gil Haugen Const., Inc.*, 2007 S.D. 18, ¶ 29, 729 N.W.2d 166, 175.

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

South Dakota has not yet passed any laws regarding autonomous vehicles (AVs). Introduced in 2014, Senate Bill No. 139 defined "operator" as "Any individual seated in the driver's seat, or, alternately, *the person who causes the technology of an autonomous motor vehicle to engage.*" SB 139 proposed fees and application requirements for manufactures wishing to test AVs, and operational requirements for AV testing. The bill did not become law.

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.

Commercial drivers are not specifically prohibited from using hands-free devices. The South Dakota Department of Public Safety discourages the use of hands-free devices by commercial drivers, and notes that "hands-free devices are no less likely than hand-held cell phones to cause you to become distracted." *See* SDDPS CDL Manual for 2017, § 2.9.4.

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

No appellate court decision has ever explicitly held the Golden Rule or Reptile style arguments to be precluded. One appellate case, *Rogers v. Black Hills Speedway, Inc.*, mentions the Golden Rule in dicta, but notes that South Dakota trial courts are given wide discretion in determining whether an argument is improper. 88 S.D. 169, 180, 217 N.W.2d 14, 20 (1974). In *Rogers*, the Supreme Court declined to find an attorney argument, alleged to be based on the Golden Rule, improper. The Court noted the record was incomplete as to what the attorney actually said, and the trial court instructed jurors to disregard arguments not supported by the record. *Id.* An appellate court will intercede on regulation of attorney conduct only when it is convinced that there has been a miscarriage of justice. *Fredrick v. Dreyer*, 257 N.W.2d 835, 839 (S.D. 1977).

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

Aside from rule-based differences and jurisdictional issues, the major difference between Federal Court and State Court in South Dakota are the dockets. Due to smaller staff sizes, fewer judges, and ongoing Federal jurisdiction of criminal offenses committed on Indian Reservations, Federal Court dockets are disproportionately busier than state dockets. South Dakota State courts, by contrast, have larger numbers of judges and support staff, as well as specialty courts. The full lifespan of a case in State court is significantly shorter than in Federal court.

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 may be admitted as substantive evidence in civil litigation involving the same occurrence, but it is not conclusive and may be explained. *Berlin v. Berlin*, 80 N.W.2d 79, 83 (S.D. 1956). Pleading guilty to such a violation constitutes an admission against interest. *Dartt v. Berghorst*, 484 N.W.2d 891, 894 n.3 (S.D. 1992). A plea of *nolo contendere* is not admissible against the defendant who made the plea in a subsequent civil or criminal case. S.D.C.L. § 19-19-410.

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?

South Dakota courts apply the Collateral Source Rule. Total or partial compensation received by the injured party, independent of the defendant, does not operate to reduce damages recoverable from the defendant. *Papke v. Harbert*, 2007 S.D. 87, ¶ 68, 738 N.W.2d 510, 532 (S.D. 2007). South Dakota courts continue to apply the common law collateral source rule even though in some instances it may result in a windfall to an injured plaintiff, absent Legislative action. *Id.* at ¶ 79. The determination of the reasonable value of medical services begins with the amount billed by the medical providers. *Id.*

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

South Dakota has no damage caps on general tort or personal injuries awards, or products liability awards. In South Dakota, noneconomic damages in medical malpractice cases are capped at \$500,000. S.D.C.L. § 21-3-11. South Dakota does not cap economic damages or punitive damages in medical malpractice cases. *Id.* Any party held jointly or severally liable, who allocated less than 50% of the total fault allocated to all the parties, may not be jointly liable for more than twice the percentage of fault allocated to that party. S.D.C.L. § 15-8-15.1.