

## NEBRASKA

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- 1. Provide an update on current black box technology and simulations in your State and the legal issues surrounding these advancements.**

Nebraska currently has no statute relating to event data recorders and privacy. Most trucking manufacturers have increased the inclusion and capability of electronic control modules, which will likely create discovery and evidentiary issues going forward. This evidence is also likely subject to Nebraska spoliation of evidence rules.

- 2. Besides black box data, what other sources of technological evidence can be used in evaluating accidents and describe the legal issues in your State involving the use of such evidence.**

Accident animations and/or computer generated evidence is admissible in Nebraska. Nebraska courts treat computer-generated models or simulations like other scientific tests and condition admissibility on a sufficient showing that: (1) the computer is functioning properly; (2) the input and underlying equations are sufficiently complete and accurate (and disclosed to the opposing party, so that they may challenge them); and (3) the program is generally accepted by the appropriate community of scientists. *Kudlacek v. Fiat S.P.A.*, 244 Neb. 822, 843, 509 N.W.2d 603, 617 (1994).

- 3. Describe the legal issues in your State involving the handling of post-accident claims with an emphasis on preservation / spoliation of evidence, claims documents, dealing with law enforcement early and social media?**

Nebraska has held that where a party proves spoliation of evidence relevant to a case, the proper remedy is an adverse inference or instruction that the evidence would have been unfavorable to the case of the spoliator. *McNeel v. Union Pac. R. Co.*, 276 Neb. 143, 753 N.W.2d 321 (2008). Additionally, in extreme cases, a court may grant a motion for

judgment as a matter of law if the claim depends upon the reliability of inferences drawn from evidence that has been spoiled in bad faith or fraudulently. *See* NEB. REV. STAT. § 27-403; Exclusion of Relevant Evidence; Reasons, 3 NEB. PRAC.; MANGRUM NEB. EVID. SECTION 27-403 (2017 ed.).

However, Nebraska courts have stated that in order to receive an adverse inference or instruction arising out of spoliation, the party seeking the instruction must prove “that the [spoliator’s] actions indicated fraud and a desire to suppress the truth.” *Richter v. City of Omaha*, 273 Neb. 281, 287, 729 N.W.2d 67, 72 (2007) (citing *State v. Davlin*, 263 Neb. 283, 302 (2002)). Since the rationale of the rule is that the intentional destruction amounts to an admission by conduct of the weakness of one’s own case, the inference does not arise where destruction was a matter of routine with no fraudulent intent; that is predicated on bad conduct. *McNeel*, 276 Neb. at 156, 753 N.W.2d at 332.

Additionally, our experience is that in-cab videos are clearly discoverable information and are admissible with proper foundation. It is imperative that these videos be preserved following an accident and made known to counsel.

**4. Describe the legal considerations in your State when defending an action involving truck drivers who may be considered Independent Contractors, Borrowed Servants or Additional Insureds?**

Nebraska courts strongly adhere to the vicarious liability principles and agency theories. As such, consideration must be given to the fact that a court is likely to impute the negligence of a driver to contracting companies under agency and/or respondeat superior theories. Thus, regardless of whether a driver is determined to be an independent contractor, borrowed servant, or an additional insured, it is important to consider the implications these doctrines might have on liability and potential coverages. Further, consideration must be given to the implication that contractual language regarding additional insureds might have on available coverages.

**5. What is the legal standard in your state for allowing expert testimony on mild traumatic brain injury (mTBI) claims and in what instances have you had success striking experts or claims?**

Nebraska has no specific standard for expert testimony on mild traumatic brain injury (mTBI), beyond standard expert testimony rules. “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” NEB. REV. STAT. § 27-702; *see also Schafersman v. Agland Coop*, 262 Neb. 215, 232, 631 N.W.2d 862, 876 (2001) (holding that the admissibility of expert opinion testimony under Nebraska rules of evidence should be determined based upon the standards first set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)).

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

Nebraska courts have held that the percentage of alcohol content of body fluids is relevant in a civil case when accompanied by expert opinion evidence of the effect thereof. *Sandberg v. Hoogensen*, 201 Neb. 190, 195, 266 N.W.2d 745, 748 (1978); *see also Raskey v. Hulewicz*, 185 Neb. 608, 177 N.W.2d 744 (1970). A Nebraska court has also stated that: “[w]e realize that the significance of a blood test in a driving under the influence of alcohol (DUI) case is so common that people generally assume a person is intoxicated when that person's blood alcohol content exceeds the limit for DUI” *Tafoya v. Chapin*, No. A-01-1042, 2003 WL 1205181, at 4 (Neb. Ct. App. Mar. 18, 2003). Despite this, the court referenced the above-cited cases which “clearly hold that in a civil case, expert testimony is required.” *Id.*

**7. What are some considerations for federally-mandated testing when drivers are Independent Contractors, Borrowed Servants, or Additional Insureds?**

Consideration should be given to federally mandated-testing when drafting or entering into contractual agreements with drivers. Such consideration should include contractual requirements that mandated testing, and other applicable regulations, are complied with both before and during the parties’ contractual relationship. As noted in question 4 above, Nebraska courts adhere strongly to the agency and respondeat superior doctrines, and thus it is imperative that drivers comply with federally-mandated testing, and other applicable regulations, as the failure to do so can result in the imputing of negligence upon the principle as well as the driver.

With that said, Nebraska’s general bar to the recovery of punitive damages often reduces the effect of noncompliance with the above-mentioned testing. It has been our experience that evidence of noncompliance is often a critical element in consideration of punitive damages and Nebraska’s denial of those damages reduces the effect of regulatory noncompliance to some extent.

**8. Is there a mandatory ADR requirement in your State and are any local jurisdictions mandating cases to binding or non-binding arbitration?**

Nebraska currently has no mandatory alternative dispute resolution provisions. However, courts are given the authority to recommend mediation and parties are free to request mediation be ordered by a court. *See* NEB. REV. STAT. § 25-2943. It has been our experience that there is a significant trend for local courts to order mediation prior to trial and will likely do so if requested by one of the parties.

There are no local jurisdictions currently mandating cases to binding or non-binding arbitration. Nebraska courts do find that contractual arbitration provisions are “valid, enforceable, and irrevocable except upon such grounds as exist at law or in equity for the revocation of any contract” NEB. REV. STAT. § 25-2602.01.

Notably, Nebraska law requires that the following statement shall appear in capitalized, underlined type adjoining the signature block of any standardized agreement in which

binding arbitration is the sole remedy for dispute resolution: THIS CONTRACT CONTAINS AN ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES. NEB. REV. STAT. § 25-2602.02; *See also Kramer v. Eagle Eye Home Inspections*, 14 Neb. App. 691, 716 N.W.2d 749 (2006) (holding that when a contract which attempts to establish binding arbitration as the sole remedy fails to strictly comply with this section, the arbitration clause is voidable and unenforceable.)

**9. Can corporate deposition testimony be used in support of a motion for summary judgment or other dispositive motion?**

Yes. Nebraska allows for deposition testimony to be used in support of dispositive motions. In Nebraska, depositions “may be used to support or oppose a motion, including a motion for a summary judgment.” § 25:24. Evidentiary use of depositions, 5 NEB. PRAC., CIVIL PROCEDURE § 25:24. There are no limitations with regards to the use of corporate depositions on summary judgment motions.

**10. What are the rules in your State for contribution claims and does the doctrine of joint and several liability apply?**

Nebraska is a “modified comparative fault” state, which limits an injured party’s damage recovery in proportion to their degree of fault —if a party is 50 percent or more at fault, they cannot recover at all. Nebraska applies the doctrine of joint and several liability. Nebraska makes parties jointly and severally liable for actions with more than one defendant as a part of a common enterprise and severally liable for any other action involving more than one defendant. NEB. REV. STAT. § 25-21,185.10.

Joint tortfeasors have a right to contribution. The contribution plaintiff is required to extinguish the liability of the joint tortfeasor from whom contribution is sought. The right to contribution becomes enforceable when one tortfeasor discharges more than his proportionate share of the judgment. *Royal Indem. Co. v. Aetna Cas. & Surety Co.*, 229 N.W.2d 183 (Neb. 1975); *Cepel v. Smallcomb*, 261 Neb. 934, 940, 628 N.W.2d 654, 660 (2001). Further, the statute of limitations for contribution claims of joint tortfeasors has been held to be four (4) years. *See Cepel*, at 941, 628. N.W.2d at 660 (holding that the appropriate statute of limitations among joint tortfeasors is NEB. REV. STAT. § 25–206, which states that “[a]n action upon a contract, not in writing, expressed or implied ... can only be brought within four years.”).

Before the contribution plaintiff can recover against the contribution defendant(s), the contribution plaintiff must prove by the greater weight of the evidence the following elements: (1) Both that plaintiff and defendant had a common liability to the third party, and the amount of that common liability; (2) Both that plaintiff paid more than its pro-rata share of the common liability, and the amount of money that it paid over and above its pro-rata share; (3) The part of the common liability that is owed by defendant, and (4) That plaintiff has extinguished defendant’s liability to third party. *Estate of Powell ex rel. Powell v. Montange*, 277 Neb. 846, 856, 765 N.W.2d 496, 504 (2009).

**11. What are the most dangerous/plaintiff-friendly venues in your State?**

Nebraska is a conservative state. To a large extent, Nebraska's conservatism is reflected in the state's jury pools as well. However, recent trends suggest that Lancaster County (Lincoln), Douglas County (Omaha) and Scotts Bluff County have tended to be more liberal in their jury verdicts. Despite these tendencies, Nebraska is a state with strong conservative principles and the jury verdicts reflect that.

**12. Is there a cap on punitive damages in your State?**

Nebraska does not permit punitive damages. Under Nebraska law, "punitive, vindictive, or exemplary damages contravene NEB. CONST. ART. VII, § 5, and thus are not allowed in this jurisdiction." *O'Brien v. Cessna Aircraft Co.*, 298 Neb. 109, 139, 903 N.W.2d 432, 458 (2017). Notably, there remains some ambiguity in Nebraska's denial of punitive damages as NEB. CONST. ART. VII, § 5 also provides that "[a]ll fines, penalties . . . shall be appropriated exclusively to the use and support of the common schools." *See Abel v. Conover*, 170 Neb. 926, 104 N.W.2d 684 (1960). The *Abel* court, while finding that penalties paid for the benefit of a private person were unconstitutional, stated that punitive damages are available in Nebraska if such damages are paid into the school fund. As a practical matter, Nebraska courts have not awarded punitive damages despite this language.

**13. Admissible evidence regarding medical damages – can the plaintiff seek to recover the amount charged or the amount paid?**

Nebraska has adopted the collateral source rule, making evidence of any discounts to medical bills by independent sources, such as health insurance, inadmissible. As such, plaintiffs put on evidence of the retail value of their medical expenses. *Strasburg v. Union Pac. R.R. Co.*, 286 Neb. 743, 839 N.W.2d 273 (2013). Thus, plaintiffs in Nebraska may seek to recover the amount charged for medical damages.

By statute, Nebraska law holds that the measure of damages for medical expenses in personal injury claims is the private party rate, not the discounted amount. *See* NEB. REV. STAT. § 52-401. As such, the full billed amount is both admissible and recoverable. However, it should be noted that Section 52-401 does not eliminate the requirement that medical expenses be fair and reasonable. *See* N.J.I2d Civ. § 4.01. Thus, even though the amount actually paid is not admissible to prove the plaintiff's measure of damages, it may be admissible to prove that the amount charged was not the fair and reasonable value of the medical services provided.