

## NORTH CAROLINA

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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.**

Black box data (also known as Event Data Recorder (EDR) or Electronic Control Module (ECM) data) continuously captures a range of information related to a vehicle's movements, and is programmed to retain that data immediately before and during a major event, such as a crash, hard brake, or air bag deployment. Typically, black boxes record data pertaining to the vehicle's speed, braking, seatbelt usage, steering, and other information.

Data contained in the black box can be overwritten if it is not downloaded quickly following an accident by an accident reconstruction or other qualified expert. Permission from the vehicle owner to obtain the data is required by federal law.

North Carolina applies traditional evidentiary principles to electronic data and simulations used for illustrative purposes. State courts will admit a simulation if it fairly and accurately illustrates the events depicted without editing and if there is proper supporting testimony as to the chain of evidence and the operation of the equipment. *See State v. Jones*, 172 N.C.App. 308, 313, 616 S.E.2d 15, 19 (2005).

The Court of Appeals for the Fourth Circuit has ruled that computer-generated animations or simulations are admissible so long as they are "substantially similar to the actual events." *See Hinkle v. City of Clarksburg, W.Va.*, 81 F.3d 416, 425 (4<sup>th</sup> Cir. 1996).

**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.**

Several sources of technological evidence may be used in evaluating accidents, including EDRs, dash cam video, collision mitigation systems, personal GPS systems, watches/tablets, and cellular phones. Evidence obtained from such sources is generally admissible in North Carolina so long as it is authenticated, relevant, and otherwise admissible. Issues relating to such evidence that are specific to North Carolina include:

**Dash Cam Video:** As a general matter, in North Carolina courts, the admissibility of video evidence such as dash cam video is governed by the same statutory mandates applicable to still photographs, which are governed by N.C. Gen. Stat. § 8-97. The statute requires a party to lay the proper foundation and to meet other evidentiary requirements. It loosens these requirements when the evidence is intended as demonstrative evidence to illustrate witness testimony.

**Police Video:** A special rule applies to dash camera video evidence recorded by North Carolina police officers and other video evidence the police collects, including body camera footage. Under N.C. Gen. Stat. § 132-1.4A, such video evidence is only obtainable via a court order, issued pursuant to the court's discretion.

**Google Maps Data:** In *Pope v. Bridge Broom, Inc.*, 240 N.C.App. 365, 770 S.E.2d 702 (2015), the North Carolina Court of Appeals affirmed a trial court ruling allowing an expert to testify that a driver had 800 feet of driving space "to see and react" to any perceived danger when the expert used Google Maps data to form his opinion. *Id.* at 711-12.

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.**

**Spoliation in North Carolina State Courts:** North Carolina state courts do not recognize an independent claim for spoliation of evidence. In North Carolina, "...a party's intentional destruction of evidence in its control before it is made available to the adverse party can give rise to an inference that the evidence destroyed would injure its (the party who destroyed the evidence) case." *Red Hill Hosiery Mill, Inc. v. MagneTek, Inc.*, 138 N.C. App. 70, 530 S.E.2d 321 (2000). The obligation to preserve evidence may arise prior to the filing of a complaint where the opposing party is on notice that litigation is likely to be commenced. Spoliation of evidence gives rise to an adverse permissive inference as opposed to a presumption. *McLain v. Taco Bell Corp.*, 137 N.C. App. 179, 527 S.E.2d 712, disc. rev. denied, 352 N.C. 357, 544 S.E.2d 563 (2000).

**Spoliation in North Carolina Federal Courts:** Although federal courts in North Carolina do not allow independent spoliation of evidence claims, they have the discretion to impose more severe sanctions than state courts. The "applicable sanction should be molded to serve the prophylactic, punitive, and remedial rationales underlying the spoliation doctrine." *Silvestri v. General Motors Corp.*, 271 F.3d 583, 590 (4<sup>th</sup> Cir. 2001). Sanctions can range up to the dismissal of a lawsuit, when a party was "highly prejudiced" by having to rely on evidence collected by the other side's experts. *Id.* at

595. “Another available sanction for spoliation is the issuance of jury instructions permitting the jurors to draw an adverse inference from a party’s destruction of evidence.” *Teague v. Target Corp.*, No. 3:06CV191, 2007 WL 1041191, at \*2 (W.D.N.C. Apr. 4, 2007).

**Claims Documents:** Claim documents prepared before an insurance company denies a claim and before outside counsel is retained generally will not be afforded work product protection, but an insurer may produce evidence of circumstances that support the conclusion that it reasonably anticipated litigation prior to denial of the claim. *Evans v. United Services Auto Ass’n*, 142 N.C.App. 18, 31, 541 S.E.2d 782, 790 (2001).

**Dealing with Law Enforcement Early:** Police accident reports are publicly available, usually within 5 to 7 business days following an accident. Other than the police report, North Carolina State Highway Patrol Troopers are directed to withhold investigation materials such as statements and photographs. Local police agencies vary by jurisdiction but generally are much more forthcoming than the Highway Patrol. Early contact with law enforcement may allow attorneys to obtain these materials despite the internal directives. No case or statutory law prohibits such contact.

**Social Media:** Social media evidence is generally admissible in North Carolina, so long as it is authenticated, relevant, and otherwise admissible. Generally, courts require pre-trial disclosure of social media investigations. However, before disclosure, the defendant must be afforded an opportunity to depose the plaintiff. *See Blount v. Wake Elec. Membership Corp.*, 162 F.R.D. 102 (M.D.N.C. 1993). In the criminal law context, the North Carolina Court of Appeals held that the trial court did not abuse its discretion by refusing to admit social media evidence of the defendant “throwing up signs that appear to be gang signs.” *State v. Townsend*, 208 N.C. App. 571, 706 S.E.2d 841 (table case), 2010 WL 5421427, at \*9 (N.C. App. 2010).

**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?**

Most commonly, independent contractor truck drivers will be considered as operating in the course and scope of their employment with carriers because they are generally under the carrier’s dispatch and are subject to the carrier’s rules. The North Carolina Court of Appeals, applying this analysis, found that an independent contractor truck driver who was paid weekly, treated as an “employee” by the employer for tax purposes, provided a handbook, requiring conformance to a “particular schedule”, and operating company trucks was in the course and scope of his employment with the trucking company. *Barber v. Going West Transp., Inc.*, 134 N.C.App. 428, 431-32, 517 S.E.2d 914, 918 (1999).

A borrowed servant becomes an employee of the party to whom he is loaned if that party has the right to control the manner of the performance, regardless of whether that control is exercised or not. *Harris v. Miller*, 335 N.C. 379, 387, 438 S.E.2d 731, 735 (1994). In the truck driving context, so long as borrowed servant drivers are under dispatch and

required to follow rules the carrier's rules, they will most likely be found to be in the course and scope of their employment.

The case of *Fidelity & Cas. Co. of New York v. North Carolina Farm Bureau Mut. Ins. Co.*, 16 N.C.App. 194, 192 S.E.2d 113 (1972) found that "all persons actively engaged in the loading and unloading with the permission of the named insured are additional insureds under policy omnibus clauses." *Id.* at 199. This reasoning applies to truck drivers actually transporting the loads, because the insurance provisions cover the "use of the truck" including loading, transporting, and unloading. *Id.* at 202-03.

**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?**

North Carolina applies the principles of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), in determining admissibility of expert testimony, including that of medical experts. *See State v. McGrady*, 368 N.C. 880, 787 S.E.2d 1 (2016).

The North Carolina Court of Appeals has rejected challenges to expert neuropsychologist testimony in support of traumatic brain injury claims. *See Floyd v. McGill*, 156 N.C.App. 29, 575 S.E.2d 789 (2003); *Curry v. Baker*, 130 N.C.App. 182, 502 S.E.2d 667 (1998).

If a physician testifies on behalf of the plaintiff in support of a mild traumatic brain injury, including a neuropsychologist, then it will be difficult in North Carolina to strike the expert or the claim. More success is likely if the diagnosis came from a non-physician medical provider such as a nurse under the principles of *Daubert*.

To date, under these standards, we have had limited success striking experts or claims for mild traumatic brain injuries in North Carolina.

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

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). However, the proper foundation must be laid as well, and investigation into the chain of custody of such testing may be required.

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

Per the above analysis, truck driver independent contractors, borrowed servants, and additional insureds are likely to be determined to be within the course and scope of their

employment in North Carolina. Because of this, there are no separate rules or considerations for federally-mandated testing in North Carolina for these drivers, who must undergo all federally-mandated testing.

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

Yes. Mediated settlement conferences are required in superior court civil actions pursuant to N.C. Gen. Stat. § 7A-38.1 and the North Carolina Supreme Court's Rules Implementing Mediated Settlement Conferences (MSC Rules). The U.S. District Courts for the Eastern, Middle, and Western Districts of North Carolina also mandate mediated settlement conferences by Local Rule.

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

There is no case law in North Carolina prohibiting the use of corporate deposition testimony in support of a motion for summary judgment, and North Carolina courts have considered such testimony in their rulings on dispositive motions.

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

Contribution claims in North Carolina are governed by N.C. Gen. Stat. § 1B-1, which establishes the right of contribution “only in favor of a tort-feasor who has paid more than his pro rata share of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share. No tort-feasor is compelled to make contribution beyond his own pro rata share of the entire liability.” N.C. Gen. Stat. § 1B-1(b). This rule does not apply to a tort-feasor who committed an intentional tort. N.C. Gen. Stat. § 1B-1(c).

Pursuant to N.C. Gen. Stat. § 1B-2, North Carolina is also a pure joint and several liability state. A plaintiff can recover for the full extent of his or her damages from any tort-feasor. “Their relative degree of fault shall not be considered.” N.C. Gen. Stat. § 1B-2(1).

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

The following counties are considered the most liberal venues in North Carolina, in terms of litigation exposure: Stanly, Durham, Halifax, Edgecombe, Bertie, Wilson, Pitt, Wayne, Hyde, Scotland, Hoke, Cumberland, Robeson, and Columbus.

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

Punitive damages are capped at three times the amount of compensatory damages or \$250,000, whichever is greater. One exception is for DWI cases, where there is no cap on punitive damages. *See* N.C. Gen. Stat. §§ 1D-25, 1D-26.

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

Pursuant to Rule 414 of the North Carolina Rules of Evidence, 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.

It should be noted that it is an open question as to whether this rule applies to federal courts sitting in diversity, as one North Carolina district court indicated in a footnote that the “application of Rule 414 may affect the outcome of litigation and is substantive North Carolina law.” *Sigmon v. State Farm Mutual Automobile Insurance Company*, No. 5:17-CV-00225, 2019 WL 7940194, at \*1, (W.D.N.C. Nov. 14, 2019).