NORTH DAKOTA

Robert B. Stock
VOGEL LAW FIRM
218 NP Ave
Fargo, ND 58102
Phone: (701) 237-6983
Fax: (701) 356-6395
E-Mail: rstock@vogellaw.com
www.vogellaw.com

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

Although North Dakota does not have any case law specifically addressing black box technology, it is routinely allowed as evidence as long as the evidence is supported by proper foundation and expert testimony. Simulations are similarly allowed with the proper foundation.

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.

North Dakota has not specifically addressed sources of technological evidence, it is routinely allowed as evidence as long as the evidence is supported by proper foundation and expert testimony. For example, in *Nodak Mut. Ins. Co. v. Steffes*, 2019 ND 130, ¶ 3, 927 N.W.2d 81, 82, the insurer used DNA test results, combined with inconsistent statements, to argue that its insured was not driving the vehicle at the time of the subject accident.

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?

North Dakota courts have taken a strict approach on spoliation of evidence where appropriate. "Sanctions for spoliation of evidence require a case-by-case analysis of the facts and circumstances present in each case." *Ihli v. Lazzaretto*, 2015 ND 151, ¶ 9, 864 N.W.2d 483, 486. In spoliation cases, courts consider the following factors: 1) the culpability, or state of mind, of the party against whom sanctions are being imposed; 2) a finding of prejudice against the moving party, and the degree of this prejudice, including the impact it has on presenting or defending the case; and 3) the availability of less severe alternative sanctions. *Id.* Dismissal can result when spoliation is willful or "merely neglectful." *Id.*

The North Dakota Supreme Court has not decided any civil cases where social media posts have created an evidentiary issue. In the criminal context, the North Dakota Supreme Court has held that social media posts provided evidence of a defendant's state

of mind from which the jury could conclude he intended to kill someone. *State v. Wangstad*, 2018 ND 217, ¶ 25, 917 N.W.2d 515, 523.

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?

Independent Contractors

"Under North Dakota law, an employer of an independent contractor generally is not liable for the acts or omissions of the independent contractor." *Devore v. Am. Eagle Energy Corp.*, 2020 ND 23, ¶ 13 (quoting *Grewal v. N.D. Ass'n of Counties*, 2003 ND 156, ¶ 10, 670 N.W.2d 336). However, the North Dakota Supreme Court has adopted the Restatement (Second) of Torts § 414 (1965), which provides that an employer may be liable for an independent contractor's work if the employer retains control over the independent contractor. *Id.* The North Dakota Supreme Court explained the degree of retained control necessary to impose a duty on an employer of an independent contractor in *Fleck v. ANG Coal Gasification Co.*, 522 N.W.2d 445, 448 (N.D. 1994). Liability arises only when the employer retains the right to control the method, manner, and operative detail of the work; it is not enough that the employer merely retains the right to inspect the work or to make suggestions which need not be followed. *Id.*

In *Crocker v. Morales-Santana*, 2014 ND 182, 854 N.W.2d 663, Crocker was injured when a semi-tractor and trailer driven by Morales-Santana hit his patrol car parked on the side of the interstate. *Id.* at ¶ 2. Morales-Santana owned the semi-tractor, which he leased to Sergio Tire. *Id.* According to Morales-Santana, he was driving the semi-tractor as an independent contractor of Sergio Tire and was transporting freight in a trailer owned by Werner. *Id.* Werner denied liability, claiming it was a freight broker for the cargo being hauled by Morales–Santana and Sergio Tire was an independent contractor and not Werner's employee or agent. *Id.* at ¶ 8. The court determined Werner was not Morales–Santana's employer merely because Werner let Sergio Tire use Werner's semi-trailer under a trailer-interchange agreement as part of its brokerage business and Morales–Santana was acting under an independent contractor agreement with Sergio Tire and his actions were controlled by Sergio Tire. *Id.* The court also concluded Werner did not have the requisite control over Morales–Santana to be responsible for his actions and Werner was not involved in a joint venture with Sergio Tire and Morales–Santana. *Id.*

Borrowed Servants

The North Dakota Supreme Court has not formally adopted the "Borrowed Servants" doctrine. The Court has noted that other jurisdictions have recognized liability under a borrowed employee doctrine in some contexts. *Pechtl v. Conoco, Inc.*, 1997 ND 161, ¶ 25, 567 N.W.2d 813, 819. The Court noted that, "the applicability of the doctrine depends on whether there is authoritative control over the manner and details in which the claimed borrowed or dual employee performs work." *Id.* However, the court did not state whether it would apply the doctrine because it found that even if it did the plaintiffs did not

produce enough evidence that defendant exercised sufficient authoritative control over the manner and details in which the employee performed his work. *Id.* at ¶ 26.

Additional Insureds

An entity not named as an insured in an insurance policy is considered an additional insured when, under the circumstances, the insurer is attempting to recover from the insured on the risk the insurer had agreed to take upon payment of premiums. *Am. Nat. Fire Ins. Co. v. Hughes*, 2003 ND 43, ¶ 8, 658 N.W.2d 330, 334. An insurer is not entitled to subrogation from entities named as insureds in the insurance policy, or entities deemed to be additional insureds under the policy. *Id.*

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?

The North Dakota Supreme Court has not delineated a standard for an expert to opine on mTBI. As such, admissibility of such testimony is governed by the general rule on expert testimony. *See* N.D. R. Ev. 702. "Rule 702 envisions generous allowance of the use of expert testimony if the witnesses are shown to have some degree of expertise in the field in which they are to testify. The rule does not require an expert to have a formal title or be licensed in any particular field, but recognizes it is the witness's actual qualifications that count by providing that an expert can be qualified by knowledge, skill, experience, training, or education." *City of Jamestown v. Hanson*, 2015 ND 249, ¶ 13, 870 N.W.2d 195, 199

In *Siewert v. N. Dakota Workers Comp. Bureau*, 2000 ND 33, 606 N.W.2d 501, the court permitted an expert opinion by a doctor concluding the plaintiff's neuropsychological status was clearly incompatible with the known consequences of mild traumatic brain injury. The doctor had performed several tests on the plaintiff on behalf of the defendant.

In the predecessor to the above decision, *Siewert v. N. Dakota Workers Comp. Bureau*, 554 N.W.2d 465, 468 (N.D. 1996), the court permitted a licensed psychologist to offer an opinion about the difficulty in predicting mild traumatic brain injury.

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

The North Dakota Supreme Court has not ruled on this issue, although one should expect such results to be admissible as evidence of negligence.

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

See Answer No. 4.

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

No.

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

Yes.

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

In North Dakota, when two or more parties are found to have contributed to the injury, the liability of each party is several only, and is not joint, and each party is liable only for the amount of damages attributable to the percentage of fault of that party, except that any persons who act in concert in committing a tortious act or aid or encourage the act, or ratifies or adopts the act for their benefit, are jointly liable for all damages attributable to their combined percentage of fault. N.D. Cent. Code § 32-03.2-02.

If two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them. N.D. Cent. Code § 32-38-01(1). The right of contribution exists only in favor of a tortfeasor who has paid more than that tortfeasor's pro rata share of the common liability, and that tortfeasor's total recovery is limited to the amount paid by that tortfeasor in excess of that tortfeasor's pro rata share. No tortfeasor is compelled to make contribution beyond that tortfeasor's own pro rata share of the entire liability. N.D. Cent. Code Ann. § 32-38-01(2). There is no right of contribution in favor of any tortfeasor who has intentionally (willfully or wantonly) caused or contributed to the injury or wrongful death. N.D. Cent. Code § 32-38-01(3). A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury or wrongful death is not extinguished by the settlement nor in respect to any amount paid in a settlement which is in excess of what was reasonable. N.D. Cent. Code § 32-38-01(4).

A liability insurer, who by payment has discharged in full or in part the liability of a tortfeasor and has thereby discharged in full its obligation as insurer, is subrogated to the tortfeasor's right of contribution to the extent of the amount it has paid in excess of the tortfeasor's pro rata share of the common liability. This provision does not limit or impair any right of subrogation arising from any other relationship. N.D. Cent. Code § 32-38-01.

Enforcement of a party’s right to contribution is governed by N.D. Cent. Code § 32-38-03.

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

The western part of the state tends to be the most dangerous venues. There have recently been several multi-million dollar plaintiff's verdicts in McKenzie and Williams County, which are both in the heart of the North Dakota oil fields.

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

Yes. If the trier of fact determines that exemplary damages are to be awarded, the amount of exemplary damages may not exceed two times the amount of compensatory damages or two hundred fifty thousand dollars, whichever is greater; provided, however, that no award of exemplary damages may be made if the claimant is not entitled to compensatory damages. N.D. Cent. Code § 32-03.2-11(4).

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

North Dakota's insurance statute for auto accident damages defines "Medical expenses" as "usual and customary *charges incurred* for reasonable and necessary medical, surgical, diagnostic, x-ray, dental, prosthetic, ambulance, hospital, or professional nursing services or services for remedial treatment and care." N.D. Cent. Code § 26.1-41-01 (emphasis added). While the North Dakota Supreme Court has not directly ruled on this issue, the statutory language would suggest that a plaintiff can seek to recover the amount charged. Some trial courts have allowed evidence of both the amount charged and the amount paid to go to the jury, but the general rule is that plaintiffs are allowed to seek the amount billed as medical damages.