

## Nebraska

### Are preventability determinations and internal accident reports discoverable or admissible in your state? What factors determine discoverability or admissibility?

Nebraska courts have not yet addressed whether preventability determinations are discoverable or admissible. As Nebraska courts have not adopted a self-critical analysis privilege, these documents are likely discoverable or admissible if they otherwise satisfy the requirements of the Nebraska Rules of Discovery and Evidence. *See Carlson v. Freightliner LLC*, 226 F.R.D. 343 (D. Neb. 2004).

Documents created through post-accident investigations—such as internal accident reports—are generally protected by the attorney work-product provisions in Nebraska. Thus, for such information to be discoverable, opposing counsel must demonstrate a substantial need for the documents and that they are unable without undue hardship to obtain the substantial equivalent of the materials by other means. *See NEB. CT. R. Disc. § 6–326(b)(3); Podraza v. New Century Physicians of Nebraska, LLC*, 280 Neb. 678, 692 (2010).

### Does your state permit discovery of 3rd party litigation funding files and, if so, what are the rules and regulations governing 3rd party litigation funding?

Nebraska courts have not specifically addressed whether third party litigation funding files are discoverable, and Nebraska’s Legislature has not passed any laws mandating or prohibiting disclosure of those files. We would therefore expect our courts to look to federal decisions for guidance on this issue. *See, e.g., Nunes v. Lizza*, No. 20-CV-4003-CJW, 2021 WL 7186264, at \*3 –\*6 (N.D. Iowa Oct. 26, 2021) (noting that “[a]s a general matter, courts across the country that have addressed the issue have held that litigation funding information is generally irrelevant to proving the claims and defenses in a case[]” but stating that “there is no bright-line prohibition on such discovery”); *Morley v. Square, Inc.*, No. 4:10CV2243 SNLJ, 2015 WL 7273318, at \*3 (E.D. Mo. Nov. 18, 2015).

The Nonrecourse Civil Litigation Act regulates third party litigation funding. *See NEB. REV. STAT. § 25-3301, et seq.* Section 25-3303 provides that “[a]ll contracts for nonrecourse civil litigation funding” must comply with numerous “requirements,” such as disclosure and acknowledgement provisions as well as actual terms themselves. *See id.* § 25-3303(1)(a)–(v), (b). And § 25-3304 sets forth several “prohibited acts” for civil litigation funding companies.

### What is the procedure for the resolution of a claim for injuries to a minor in your state? Does the minor’s age affect the statute of limitations for a personal injury claim?

A minor—in Nebraska, an individual that is under the age of nineteen and unmarried—

lacks the capacity to sue unless they have been emancipated. See NEB. REV. STAT. § 43-2101; NEB. REV. STAT. § 43-4810(1). A guardian or next friend must bring and prosecute an action for the minor. See NEB. REV. STAT. § 25-307. “The term ‘guardian’ means either a guardian appointed pursuant to the Probate Code or a guardian ad litem appointed pursuant to the court’s inherent powers.” 5 John P. Lenich, *Nebraska Civil Procedure* § 6:15 (2023 ed.). “The term ‘next friend’ means a person who acts for the benefit of the minor,” and “must have a significant relationship with the [minor], such that the next friend is an appropriate alter ego for the [minor] who is not able to litigate in his or her own right.” The next friend is typically a parent—though they can be someone else. See *id.* And a minor’s failure to sue through a next friend or guardian is generally considered a procedural defect. See *Carlos H. v. Lindsay M.*, 283 Neb. 1004 (2012).

In resolving injuries to minor’s through settlement, Nebraska courts routinely order the establishment of a conservatorship over the minor to accept, hold, and manage the settlement funds. Generally, the court appoints the appropriate person as conservator, approves the settlement as being in the best interest of the minor, and orders how said funds are to be distributed (liens, attorney’s fees, etc...) with the net amount of the settlement funds being deposited or invested for the benefit of the minor until they reach the age of majority.

The minor’s age does affect the statute of limitations for a personal injury claim. The statute of limitations is tolled for plaintiffs “within the age of twenty years,” and claims that accrue before a minor’s twenty-first birthday must be brought “within the respective times limited by this chapter after [the minor’s twenty-first birthday].” See NEB. REV. STAT. § 25-213.

### **What are the advantages or disadvantages in your State of admitting that a motor carrier is vicariously liable for the fault of its driver in the context of direct negligence claims?**

It has been our experience in the trial courts that when we admit a motor carrier is vicariously liable for the fault of its driver in the context of direct negligence claims, judges generally do not allow evidence on the issue of negligent hiring/supervision/training.

### **What is the standard applied for spoliation of physical and/or documentary evidence in your state?**

Nebraska courts apply an intent-based standard in analyzing spoliation issues. To receive an adverse inference or instruction that the evidence would have been unfavorable to the case of the spoliator, 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. *McNeel v. Union Pac. R. Co.*, 276 Neb. 143, 156 (2008). Thus, the adverse inference drawn from the destruction of evidence is predicated on bad conduct. *Id.*

### **Is the amount of medical expenses actually paid by insurance or others (as opposed to the amounts billed) discoverable or admissible in your State?**

Nebraska has adopted the collateral source rule, making evidence of medical expenses paid by independent sources, such as health insurance, inadmissible. See 1 *Nebraska Jury Instructions—Civil* 6 (2022 ed.) (“The general rule in negligence actions is that evidence of any source of collateral compensation available to the party seeking damages is inadmissible to the issue of the measure of damages.”). 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. In some cases, plaintiffs have elected not to introduce medical expenses as evidence. In these situations, defendants may seek to offer the medical expenses. There have been mixed results in the courts, though in our experience, courts have deemed a defendant's offer of plaintiff's medical expenses relevant evidence to the issues at hand, and therefore allowed for the evidence to be introduced.

### **What is the legal standard in your state for obtaining event data recorder (“EDR”) data from a vehicle not owned by your client?**

Nebraska courts have not specifically addressed the legal standard for obtaining EDR data from a vehicle not owned by our clients. But our courts *have* discussed EDR data in other contexts. In *State v. Williams*, 26 Neb. App. 459 (2018), for example, the Court of Appeals affirmed the trial court's admission of expert testimony based on EDR data. *See id.* at 480–81. Given the current lack of guidance on this particular issue, we would expect our courts to consult decisions from other jurisdictions. *See, e.g.,* Marjorie A. Shields, Annotation, *Admissibility of Evidence Taken from Vehicular Event Data Recorders (EDR), Sensing Diagnostic Modules (SDM), or “Black Boxes”*, 40 A.L.R.6th 595 (originally published in 2008).

### **What is your state's current standard to prove punitive or exemplary damages against a motor carrier or broker and is there any cap on same?**

Nebraska does not permit any awards for 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 (2017); *Miller v. Kingsley, Sr.*, 194 Neb. 123, 124 (1975); *Gorji v. C.R. Bard, Inc.*, No. 4:21CV3134, 2022 WL 597334, at \*5 (D. Neb. Feb. 28, 2022).

### **Has your state had any noteworthy recent punitive damages verdicts? If so, what evidence was admitted supporting issuance of a punitive damages instruction? Finally, are any such verdicts currently on appeal?**

Nebraska has not had any noteworthy recent punitive damages verdicts, as punitive damages are not allowed in our jurisdiction.

### **Does your state permit an expert to testify as to content of the FMCSRs or the applicability of the FMCSRs to a certain set of facts?**

Nebraska state courts have not addressed whether experts may testify as to the content of the FMCSRs or their applicability to a certain set of facts. But our federal district court has barred proffered expert testimony that the FMCSRs were violated in a particular set of facts based on the “general rule” that “expert testimony on legal matters is not admissible.” *Kabasinskas v. Haskin*, No. 8:10CV111, 2011 WL 2118641, \*5 –\*8 (D. Neb. May 27, 2011). Given the similarity between the federal and Nebraska standards for expert testimony admissibility, we would expect our state courts to follow suit. *See Schafersman v. Agland Coop*, 262 Neb. 215 (2001) (adopting the federal *Daubert* standards).

### **Does your state consider a broker or shipper to be in a “joint venture” or similar agency relationship with a motor carrier for purposes of personal injury or wrongful death claims?**

Nebraska courts have not specifically addressed whether a broker or shipper is considered to be in a joint venture

with a motor carrier for purposes of personal injury or wrongful death claims. Under Nebraska law generally, “the elements essential to a joint enterprise are (1) an agreement, express or implied, among the members of the group; (2) a common purpose to be carried out by the group; (3) a community of pecuniary interest in that purpose, among the members; and (4) an equal right to a voice in the direction of the enterprise, which gives an equal right of control.” *Est. of Donahue ex rel. Brown v. WEL-Life At Papillion, Inc.*, 19 Neb. App. 158, 163 (2011). The analysis on this issue would therefore focus on the four factors above and the particular facts of the case.

### **Provide your state’s comparative/contributory/pure negligence rule.**

Nebraska employs a modified comparative negligence scheme. The plaintiff’s own negligence proportionately diminishes their recovery, and the plaintiff is barred from recovering any amount if they are found to be 50% or more at fault. NEB. REV. STAT. § 25-21,185.09.

### **Provide your state’s statute of limitations for personal injury and wrongful death claims.**

The statute of limitations for personal injury claims is four years. NEB. REV. STAT. § 25-207. The statute of limitations for wrongful death claims is two years from the decedent’s death. NEB. REV. STAT. § 30-810. And any survivorship claims would be “subject to the statute of limitations that normally applies to such claims.” 5 John P. Lenich, *Nebraska Civil Procedure* § 5:12 (2023 ed.) (citing *Corona de Camargo v. Schon*, 278 Neb. 1045 (2009)).

### **In your state, who has the authority to file, negotiate, and settle a wrongful death claim and what must that person’s relationship to the decedent be?**

Under Nebraska law, a wrongful death claim “shall be brought by and in the name of the person’s personal representative for the exclusive benefit of the widow or widower and next of kin.” NEB. REV. STAT. § 30-810. The personal representative also has the authority to settle a wrongful death claim, but cannot do so without consent and approval of the settlement terms from the court that appointed the personal representative. *See id.*

### **Is a plaintiff’s failure to wear a seatbelt admissible at trial?**

Evidence that a plaintiff was not wearing a seatbelt “at the time he or she was injured shall not be admissible in regard to the issue of liability or proximate cause[.]” NEB. REV. STAT. § 60-6,273. Such evidence may, however, “be admissible as evidence concerning mitigation of damages, except that it shall not reduce recovery for damages by more than five percent.” *Id.*; *see Christensen v. Broken Bow Pub. Sch.*, 312 Neb. 814, 825 (2022) (“[E]vidence of seatbelt nonuse is admissible only for mitigation of damages.”).

### **In your state, are there any limitations on damages recoverable for plaintiffs who do not have insurance coverage on the vehicle they were operating at the time of the accident? If so, describe the limitation.**

Nebraska does not have any limitations on damages recoverable for plaintiffs who do not have insurance coverage on the vehicle they were operating at the time of the accident.

### **How does your state determine applicable law/choice of law questions in motor vehicle accident cases?**

To resolve choice-of-law questions “involving tort liability,” the Nebraska Supreme Court “consistently has applied the Restatement (Second) of Conflict of Laws § 146, which sets out the general rule that ‘[i]n an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship . . .’”

*O'Brien v. Cessna Aircraft Co.*, 298 Neb. 109, 140 (2017). In applying the most significant relationship test, Nebraska courts “take into account the following contacts: (a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered.” *Id.* (citing Restatement, *supra* § 145(2)).