FOR MORE INFORMATION

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North Carolina

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

Currently, North Carolina state courts have not dealt with the issue of whether preventability determinations and internal accident reports fall within the "self-critical analysis privilege" or a similar privilege.

In 2005, the United States District Court for the Eastern District of North Carolina specifically addressed the self-critical analysis privilege and found that Courts within the Fourth Circuit have been mixed in their application of the privilege. *McDougal-Wilson v. Goodyear Tire & Rubber Co.*, 232 F.R.D. 246, 250 (E.D.N.C. 2005) ("Courts in this Circuit have made clear that this particular privilege is of recent origin and one that is narrowly applied even in those jurisdictions where it is recognized."). The McDougal-Wilson Court declined to apply the privilege to affirmative action plans. *Id.* This ruling is consistent with other North Carolina federal court opinions in finding the application of the self-critical analysis privilege questionable at best. *See Warren v. Legg Mason Wood Walker, Inc.*, 896 F. Supp. 540, 543 (E.D.N.C. 1995). We believe these rulings would be informative to North Carolina state courts if specifically faced with the application of this privilege.

As a result, we expect that information that may fall within the self-critical analysis privilege would be more likely to find protection under North Carolina's rules related to material prepared in anticipation of litigation and/or North Carolina Rule of Evidence 407 (protecting evidence of subsequent remedial measures from admission into evidence). *See Hall v. Cumberland Cnty. Hosp. Sys., Inc.*, 121 N.C. App. 425, 431, 466 S.E.2d 317, 320 (1996) (where self-critical analysis privilege was asserted by counsel, but protection was analyzed under anticipation of litigation, attorney-client privilege, and work product).

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?

North Carolina maintains the common law prohibition on champerty and maintenance. *See Wright v. Commercial Union Ins. Co.*, 63 N.C. App., 465, 469, 305 S.E.2d 190, 192, *disc. review denied*, 309 N.C. 634, 308 S.E.2d 719 (1983). In turn, many litigation funding agreements are seen to be void and against public policy in North Carolina. *See e.g., Charlotte-Mecklenburg Hospital Auth. V. First of Ga. Ins. Co.* 340 N.C. 88, 91, 455 S.E.2d 655, 657, *reh'g denied*, 340 N.C. 364m 458 S.E.2d 186 (1995). In 2008, the North Carolina Court of Appeals in *Odell v. Legal Bucks, LLC*, found a third-party

funding agreement to be unenforceable because the terms violated the North Carolina Consumer Finance Act. 192 N.C. App. 298, 301, 665 S.E.2d 767, 770 (2008), *disc. rev. denied*, 363 N.C. 258, 676 S.E.2d 905 (2009). However, the Court did not find the agreement to be champertous or maintenance. *Id.* 192 N.C. App. at 308-309, 665 S.E.2d at 774-75 (relying on the contract language stating that the outside party had "no control input, influence, right or involvement of any kind regarding any claim, right, or interest of Plaintiff in the litigation."). The Court noted that North Carolina courts will not find an outsider involved in a lawsuit to constitute champerty or maintenance merely because that outsider provides financial assistance to a litigation and shares in the recovery; instead, "a contract or agreement will not be held within the condemnation of the principles unless the interference is clearly officious and for the purpose of stirring up strife and continuing litigation." *Id.* 192 N.C. App. at 309, 665 S.E.2d at 775 (internal quotations and citation omitted) (the court noted that the key inquiry into whether the outsider's involved is "for the purpose of stirring up strife and continuing litigation" is whether that party exercises control over the claim). A North Carolina Federal Bankruptcy court examined the *Odell* decision and also refused to enforce a similar agreement after finding that it violated public policy. *In re DesignLine Corp.*, 565 B.R. 341, 348 (Bankr. W.D.N.C. 2017). Yet, neither of these Courts found that third-party funding agreements were unenforceable as a whole, but rather engaged in a fact specific inquiry of the lender's involvement in the litigation.

Further complicating a third-party lender's willingness to become involved in North Carolina cases is this state's continued adherence to the doctrine of contributory negligence. This doctrine increases the risk involved for a potential lender. Accordingly, third-party funding arrangements in North Carolina are somewhat rare. We are not aware of any specific rules related to discovery of these agreements in this state.

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?

When a claim is settled and one of the parties is a minor, the settlement amount must be approved by the court to be binding. N.C. Gen. Stat. 1A-1, 17; N.C. Gen. Stat. § 1-402. The minor appears by and through an appointed Guardian ad Litem in an action or special proceeding filed with the court. *See* N.C.G.S. 1A-1, 17. Typically, this is through a special proceeding in the form of a petition where all parties join in the proceeding and seek the same relief—that the settlement be approved. N.C.G.S. § 1-400.

Generally, the statute of limitations does not begin to run against a minor until the minor reaches the age of majority or until the appointment of a general guardian, next friend, or Guardian ad Litem. N.C.G.S. § 1-17(a)(1); *see Simmons v. Just.*, 87 F. Supp. 2d 524, 529 (W.D.N.C. 2000).

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?

North Carolina courts have consistently ruled that independent negligence claims are prejudicial if an agency relationship has been admitted and punitive damages are not at issue. However, independent negligence claims such as negligent hiring, retention, training, supervision, and/or entrustment are permissible to support punitive damages if claimed by the plaintiff. Thus, when plaintiffs do not allege punitive damages, the admission of agency may be made in an effort to avoid direct claims for negligent hiring, retention, training, supervision and/or entrustment and thereby minimize exposure and the scope of discovery.

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

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. *See McLain v. Taco Bell Corp.*, 137 N.C. App. 179, 187, 527 S.E.2d 712, 718, *disc. rev. denied*, 352 N.C. 357, 544 S.E.2d 563 (2000). There is no separate claim of spoliation of evidence in North Carolina. Instead, a party may request an adverse inference jury instruction at trial with respect to the spoliation of evidence, if alleged. The requesting party would have to show that the "spoliator was on notice of the claim or potential claim at the time of the destruction." *Arndt v. First Union National Bank*, 170 N.C. App. 518, 527-28, 613 S.E.2d 274, 281 (2005). The adverse inference is permissive rather than mandatory. Federal courts in North Carolina have the discretion to impose more severe sanctions than state courts. *See Silvestri v. General Motors Corp*, 271. F.3d 583, 590 (4th Cir. 2001) (the "applicable sanction should be molded to serve the prophylactic, punitive, and remedial rationales underlying the spoliation doctrine"). 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).

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

Under Rule 414 of the North Carolina Rules of Evidence, the admissible medical expenses are the amounts actually paid to satisfy the bill, regardless of the source of payment, and/or the amounts actually necessary to satisfy the bills that have not been paid. This rule deviates from the common law collateral source rule followed by a majority of states which prohibits the admission of evidence that a plaintiff received compensation from some other source other than the damages sought against the defendant. The rule's applicability in federal court is questionable, but it is arguable that a federal court would apply the rule as in *Sigmon v. State Farm*, where a federal court in North Carolina prohibited the admission of evidence of billed medical expenses, mentioning in a footnote that "[t]he application of Rule 414 may affect the outcome of litigation and is substantive North Carolina law." 2019 WL 7940194 (W.D.N.C. 2019).

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

North Carolina follows the principles set forth in the Driver Privacy Act of 2015, which establishes that EDR data, also known as black box data, is owned by the vehicle's owner or if the vehicle is leased, the lessee of the motor vehicle in which the EDR is installed. PL 114-94, 2015 HR 22, PL 114-94, December 4, 2015, 129 Stat 1312. Section 24302 part (b) provides that the data recorded or transmitted cannot be accessed by a person other than the owner or lessee of the motor vehicle unless:

(1) a court or other judicial or administrative authority having jurisdiction—

(A) authorizes the retrieval of the data; and

(B) to the extent that there is retrieved data, the data is subject to the standards for admission into evidence required by that court or other administrative authority;

(2) an owner or a lessee of the motor vehicle provides written, electronic, or recorded audio consent to the

retrieval of the data for any purpose, including the purpose of diagnosing, servicing, or repairing the motor vehicle, or by agreeing to a subscription that describe how data will be retrieved and used;
(3) the data is retrieved pursuant to an investigation or inspection under section 1131(a) or 30166 of title 49, United States Code, and the personally identifiable information of an owner or a lessee of the vehicle and the vehicle identification number is not disclosed in connection with the retrieved data, except that the vehicle identification number may be disclosed to the certifying manufacturer;
(4) the data is retrieved for the purpose of determining the need for, or facilitating, emergency or medical response in response to a motor vehicle crash; or
(5) the data is retrieved for traffic safety research, and the personally identifiable information of an owner or a lessee of the vehicle and the vehicle identification number is not disclosed in connection with the retrieved data.

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?

N.C. Gen. Stat. §1D-15 provides that punitive damages "may be awarded only if the claimant proves [by clear and convincing evidence] that the defendant is liable for compensatory damages and that one of the following aggravating factors was present and was related to the injury for which compensatory damages were awarded: (1) Fraud. (2) Malice. (3) Willful or wanton conduct." Punitive damages cannot be awarded solely on the basis of vicarious liability.

Willful and wanton conduct is defined as "the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm." N.C.G.S. §1D-5. It means more than gross negligence. *Id.*

N.C. Gen. Stat. §1D-1 provides that the purpose of punitive damages is to "punish a defendant for egregiously wrongful acts and to deter the defendant and others from committing similar wrongful acts." Based on this, in order to recover punitive damages from a corporation, a plaintiff must prove the officers, directors, or managers of the corporation participated in or condoned the conduct constituting the aggravating factor giving rise to punitive damages. Likewise, punitive damages cannot be recovered against a driver if the driver died as a result of the accident.

N.C. Gen. Stat. §1D-25 limits punitive damages to "three times the amount of compensatory damages or two hundred fifty thousand dollars ($250,000), whichever is greater." However, this cap does not apply for cases involving a defendant operating a vehicle while under the influence. North Carolina appellate courts have interpreted this cap to apply to limit the Plaintiff's total award, rather than serve as a cap on damages for each defendant. *GE Betz, Inc. v. Conrad*, 231 N.C. App. 214, 240, 752 S.E.2d 634, 653 (2013), *writ denied*, *review denied*, 367 N.C. 786, 766 S.E.2d 837 (2014).

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?

We are not aware of any significant reported cases of late regarding punitive damages in the transportation context.

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?

In general, North Carolina Rule of Evidence 702 governs the admissibility of expert testimony, which has been interpreted by North Carolina courts to require "only that the expert be better qualified than the jury as to the subject at hand, with the testimony being helpful to the jury." *State v. Davis*, 106 N.C. App. 596, 601, 418 S.E.2d 263, 267 (1992), *disc. rev. denied*, 333 N.C. 347, 426 S.E.2d 710 (1993). In *Rabon v. Hopkins*, an expert was qualified to testify as an expert in the area of motor carrier safety, the requirements of FMCSRs and North Carolina motor vehicle law. 208 N.C. App. 351, 358, 703 S.E.2d 181, 187 (2010). The issue on appeal in *Rabon* was whether the expert was allowed to testify about the operation of tractor-trailer brakes when the expert admitted during *voir dire* that the mechanical features on the brakes were outside his expertise. *Id.* However, the expert was permitted to read and explain a "lengthy portion of the Regulations detailing the compliance requirements on combination trucks with air brakes" and the Court found that despite his unfamiliarity with the mechanical features, his experience with motor carrier safety and his knowledge of the FMCSRs were sufficient to allow him to testify as to the types of brake systems required by the FMCSRs. *Id.* at 208 N.C. App. 360, 703 S.E.2d 188.

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?

We are not aware of reported cases in North Carolina addressing whether a broker or shipper is in a "joint venture" or similar agency relationship with a motor carrier for purposes of personal injury or wrongful death claims. In the absence of cases directly addressing the issue, North Carolina's rules regarding independent contractors would likely apply. Generally, under North Carolina law, "one who employs an independent contractor is not liable for the independent contractor's negligence." *Gordon v. Garner*, 127 N.C. App. 649, 658, 493 S.E.2d 58, 63 (1997); *but see Little v. Omega Meats I, Inc.*, 171 N.C. App. 583, 586, 615 S.E.2d 45, 48 (2005) ("in certain limited situations an employer may be held liable for the negligence of its independent contractor. Such a claim is not based upon vicarious liability, but rather is a direct claim against the employer based upon the actionable negligence of the employer in negligently hiring a third party.") (citation omitted); *Kinsey v. Spann*, 139 N.C. App. 370, 374, 533 S.E.2d 487, 491 (2000) ("if the work to be performed by the independent contractor is either (1) ultrahazardous or (2) inherently dangerous, and the employer either knows or should have known that the work is of that type, liability may attach despite the independent contractor status.") (citation omitted). An independent contractor is "one who exercises an independent employment and contracts to do certain work according to his own judgment and method, without being subject to his employer except as to the result of his work." *Gordon*, 127 N.C. App. at 658, 493 S.E.2d at 63 (citation omitted). The central issue in determining whether an individual is an independent contractor is "whether the hiring party 'retained the right of control or superintendence over the contractor or employee as to details.'" *Id*. (citation omitted). Factors to be considered in making the determination of whether an individual is an independent contractor include whether the person employed:

> (a) is engaged in an independent business, calling or occupation; (b) is to have the independent use of his special skill, knowledge, or training in the execution of the work; (c) is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis; (d) is not subject to discharge because he adopts one method of doing the work rather than another; (e) is not in the regular employ of the other contracting party; (f) is free to use such assistants as he may think proper; (g) has full control over such assistants; and (h) selects his own time.

Id. at 568-59, 493 S.E.2d at 63.

In *Gordon*, the defendant driver was hired as an independent contractor to haul sand from a sand pit to a specified destination. *Id*. at 652, 493 S.E.2d at 60. Applying the above factors to the facts of the case, the North Carolina Court of Appeals held that the defendant driver was an independent contractor. *Id*. at 659, 493 S.E.2d at 64. The court noted that the defendant driver was engaged in an independent business and occupation, i.e. the hauling of materials, and that his possession of a CDL, completion of driver training courses, and discretion in how to operate his dump truck when hauling sand were proof that he had the independent use of his special skill and training in the execution of his work. *Id*. The court further noted that the defendant driver was not subject to discharge if he adopted one method of doing his work rather than another; that he retained the power to set his own work hours, that he was free to decide if he wanted to work, when he wanted to work, and when and how long his breaks or lunch hour would be; and that he was free to decide how many loads of sand he would haul on a given day. *Id*. The court found that all of the above evidence was further proof that the defendant driver was an independent contractor. *Id.*

Provide your state's comparative/contributory/pure negligence rule.

North Carolina follows the doctrine of contributory negligence. Under this rule, if a plaintiff's own negligence was a proximate cause of his/her injuries, the plaintiff will be barred from recovery. In theory, even if a plaintiff is only 1% at fault, he/she cannot recover damages, although jury instructions on the issue do not reference a percentage of fault.

However, some circumstances allow a plaintiff to overcome contributory negligence. Those include when:

- The defendant was grossly negligent, and the plaintiff was only ordinarily negligent; or
- The defendant had the "last clear chance" to avoid the accident.

Provide your state's statute of limitations for personal injury and wrongful death claims.

N.C. Gen. Stat. § 1-52 sets forth a statute of limitations for three years for personal injury actions; the cause of action does not accrue until bodily harm to the claimant becomes apparent or ought reasonably to have become apparent to the claimant, whichever is first. Additionally, no personal injury cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action.

N.C. Gen. Stat. § 1-53 sets forth a statute of limitations of two years for actions for damages on account of the death of a person due to negligence or wrongful act.

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?

North Carolina's wrongful death statute provides that a wrongful death action is "to be brought by the personal representative or collector of the decedent . . . ." N.C.G.S. § 28A-18-2. A "personal representative" includes both an executor and an administrator, but does not include a collector, whereas a "collector" is "any person authorized to take possession, custody, or control of the personal property of the decedent for the purpose of executing the duties outlined in N.C.G.S. 28A-11-3." N.C.G.S. 2A8-1-1(1), (4b)(5).

Is a plaintiff's failure to wear a seatbelt admissible at trial?

No. North Carolina statutes explicitly state that the "failure to wear a seat belt shall not be admissible in any . . . civil trial, action, or proceeding[,]" N.C. Gen. Stat. § 20-135.2A(d). Additionally, "[t]he violation shall not constitute

negligence per se" nor "evidence of negligence or contributory negligence." N.C. Gen. Stat. § 20-137.1(d)(3)-(4).

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.

No, there is no such limitation.

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

North Carolina follows the lex loci delicti rule, law of the situs of the claim, in resolving tort claims. Boudreau v. Baughman, 322 N.C. 331, 335, 368 S.E.2d 849, 854 (1988). In tort claims, such as motor vehicle accident cases, the state where the injury occurs is considered the situs of the claim and thereby that state's law governs "because an act has legal significance only if the jurisdiction where it occurs recognizes that legal rights and obligations ensue from it." Terry v. Pullman Trailmobile, 92 N.C. App. 687, 690, 376 S.E.2d 47, 49 (1989). Similarly, in wrongful death claims, the "actionable quality or nature of acts causing death is to be determined by the lexi loci." *Goode v. Barton*, 238 N.C. 492, 497, 78 S.E.2d 398, 402 (1953).