

North Dakota

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

North Dakota recognizes the self-critical analysis privilege. Except as provided in sections 26.1-51-05, 26.1-51-06, and 26.1-51-07, an insurance compliance self-critical analysis audit document is privileged information and is not discoverable or admissible evidence in any legal action in any civil, criminal, or administrative proceeding. N.D. CENT. CODE § 26.1-51-03. The privilege is a matter of substantive law of North Dakota and is not merely a procedural matter governing administrative, civil, or criminal procedures in the courts of North Dakota. *Id.*

If an insurer, person, or entity performs or directs the performance of an insurance compliance audit, an officer, employee, or agent involved with the insurance compliance audit, or any consultant who is hired for the purpose of performing the insurance compliance audit, may not be examined in any civil, criminal, or administrative proceeding as to the insurance compliance audit or any insurance compliance self-critical analysis audit document. N.D. CENT. CODE § 26.1-51-04.

Upon request of the insurance commissioner, an insurer must submit an insurance compliance self-critical analysis audit document to the commissioner, or the commissioner's designee, as a confidential document without waiving the privilege to which the insurer would otherwise be entitled. N.D. CENT. CODE § 26.1-51-05.

The self-critical analysis privilege does not apply to the extent that it is expressly waived by the insurer that prepared or caused to be prepared the insurance compliance self-critical analysis audit document. N.D. CENT. CODE § 26.1-51-06(1). In a civil or administrative proceeding, a court of record, after an in-camera review, may require disclosure of material for which the privilege is asserted, if the court determines: (a) the privilege is asserted for a fraudulent purpose; or (b) the material is not subject to the privilege. N.D. CENT. CODE § 26.1-51-06(2).

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?

The North Dakota Supreme Court has not addressed the discovery of 3rd party litigation funding files at this time. Considerations would be first, whether material prepared by a plaintiff for review by third-party litigation funders is protected by attorney-client privilege. If so, the next question would be whether disclosure to a third-party litigation funder constitutes waiver of privilege, or the disclosure is exempt from waiver because of the "common interest doctrine." Notwithstanding the attorney-client privilege question, material prepared by the plaintiff for review by third-party litigation funders may be protected by work-product privilege.

In light of the 3rd party litigation funding considerations above, N.D. R. Prof. Conduct 18.(e)(3) provides, “A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client; and

(3) a lawyer may guarantee a loan reasonably needed to enable the client to withstand delay in litigation that would otherwise put substantial pressure on the client to settle a case because of financial hardship rather than on the merits, provided that the client remains ultimately liable for repayment of the loan without regard to the outcome of the litigation and, further provided that no promise of financial assistance was made to the client by the lawyer, or by another in the lawyer's behalf, prior to the employment of that lawyer by the client.”

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?

Procedure: The Court must approve a Petition for approval of Minor Settlement pursuant to N.D.C.C. § 30.1-29-09 prior to the execution of releases and settlement funds being distributed.

A minor’s age can affect the statute of limitations for a personal injury claim. “[I]f a person who is entitled to bring an action is under eighteen years old when the cause of action accrues the period of minority is not part of the time limited for the commencement of the action, and the statutory limitations period can be extended for not more than one year from that person's eighteenth birthday. *See Osland v. Osland*, 442 N.W.2d 907, 908 (N.D. 1989); N.D. CENT. CODE § 28-01-25. Further, the action

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?

The North Dakota Supreme Court has not addressed the issue concerning whether the admission of agency by an employer will subsume the independent negligence claims against the employer.

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

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.*

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

Whether the jury is to consider the amount actually billed or paid is within the direction of the trial judge. Courts will usually allow discovery of both the amounts billed and paid.

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

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. Our practice it to obtain permission from the owner of the vehicle.

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?

North Dakota Century Code section 32-03.2-11 governs when a court or jury may give exemplary damages. It provides, “In any action for the breach of an obligation not arising from contract, when the defendant has been guilty by clear and convincing evidence of oppression, fraud, or actual malice, the court or jury, in addition to the actual damages, may give damages for the sake of example and by way of punishing the defendant. Upon commencement of the action, the complaint may not seek exemplary damages. After filing the suit, a party may make a motion to amend the pleadings to claim exemplary damages. The motion must allege an applicable legal basis for awarding exemplary damages and must be accompanied by one or more affidavits or deposition testimony showing the factual basis for the claim. The party opposing the motion may respond with affidavit or deposition testimony. If the court finds, after considering all submitted evidence, that there is sufficient evidence to support a finding by the trier of fact that a preponderance of the evidence proves oppression, fraud, or actual malice, the court shall grant the moving party permission to amend the pleadings to claim exemplary damages.” N.D. CENT. CODE § 32-03.2-11.

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).

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?

Zander v. Morsette, 2021 ND 84, 959 N.W.2d 838. \$242 million in compensatory damages and \$885 million in punitive damages were awarded to victims and deceased victim’s families following a wrong way drunk driving collision. The district court allowed the plaintiffs to amend their complaint to add punitive damages. *Id.* ¶ 30. Plaintiffs alleged Morsette’s conduct was malicious and oppressive and argued that defendant intended to drink himself to a level of intoxication 3x the legal limit and drive on the wrong side of the road. *Id.* On appeal, the North Dakota Supreme Court held the district court misapplied the law because “intentional or willful conduct is not synonymous with oppressive, fraudulent, or malicious conduct.” *Id.* ¶ 32. On remand, Judgment was entered for the families in the amount of \$50 million and \$75 million for the surviving victim. *See* Case No. 08-2016-CV-02137, Index # 481.

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?

There does not appear to be any case law in North Dakota addressing whether experts are permitted to testify as to the content or applicability of the FMCSRs. Generally speaking, “[t]he district court has broad discretion whether to allow expert witness testimony, and its decision will not be reversed on appeal unless it abused its discretion.” *Klein v. Estate of Luithle*, 2019 ND 185 ¶ 3, 930 N.W.2d 630. “[T]he probative effect and admissibility of evidence is a matter for the trial court’s discretion.” *Lenertz v. City of Minot*, 2019 ND 53 ¶ 17, 923 N.W.2d 479. Usually, “[r]elevant evidence is admissible.” N.D.R.Ev. 402. Of course, relevant evidence may be excluded “if its probative value is substantially outweighed by a danger of ... unfair prejudice” or other evidentiary considerations. N.D.R.Ev. 403. “It is the district court’s responsibility to make certain expert testimony is reliable as well as relevant.” *Myer v. Rygg*, 2001 ND 123, ¶ 10, 630 N.W.2d 62. This Court “appl[ies] this deferential standard of review to provide trial courts with greater control over the admissibility of evidence.” *Davis v. Killu*, 2006 ND 32, ¶ 6, 710 N.W.2d 118.

Notably, North Dakota has adopted Part 390 of the “Federal Motor Carrier Safety Regulations: General” and amendments by reference in N.D. Admin. Code § 38-04-01-02.

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?

The North Dakota Supreme Court addressed the relationship between a broker and a motor carrier in *Crocker v. Morales-Santana*, 2014 ND 182, 854 N.W.2d 663 in a personal injury context. 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.* ¶ 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.* ¶ 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.*

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

North Dakota applies the modified comparative fault standard. Contributory fault does not bar recovery in an action by any person to recover damages for death or injury to person or property unless the fault was as great as the combined fault of all other persons who contribute to the injury, but any damages allowed must be diminished in proportion to the amount of contributing fault attributable to the person recovering. N.D. CENT. CODE § 32-03.2-02.

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

Personal injury claims have a six year statute of limitations. N.D. CENT. CODE § 28-01-16.

Wrongful death claims have a two year statute of limitations. N.D. CENT. CODE § 28-01-18.

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 Dakota Century Code section 32-21-03 governs who may bring an action for wrongful death claims: "The action shall be brought by the following persons in the order named: 1. The surviving husband or wife, if any. 2. The surviving children, if any. 3. The surviving mother or father. 4. A surviving grandparent. 5. The personal representative. 6. A person who has had primary physical custody of the decedent before the wrongful act. If any person entitled to bring the action refuses or neglects so to do for a period of thirty days after demand of the person next in order, that person may bring the action." Further, "The person entitled to bring the action may compromise the same, or the right thereto, and such compromise shall be binding upon all persons authorized to bring the action or to share in the recovery." N.D. CENT. CODE § 32-21-06.

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

North Dakota has only indirectly addressed the admissibility of seatbelt usage as it pertains to mitigation of damages. In *Duma v. Keena*, the North Dakota Supreme Court discussed Plaintiff's damage mitigation from the use of a seatbelt. 2004 ND 104 ¶ 2, 680 N.W.2d 627. Plaintiff argued the jury's special verdict was inconsistent as the jury answered that the fault of Plaintiff was not the proximate cause of her injuries and that she could have avoided damages by the use of a seat belt. *Id.* ¶ 5. The instructions in question also provided, "Evidence was presented from which you could find that the plaintiff was not using an available seatbelt and shoulder harness at the time of the accident." *Id.* ¶ 8. The North Dakota Supreme Court favorably cited *Halvorson v. Voeller*. *Id.* ¶ 9. The *Halvorson* court held that helmet use, which is similar to wearing a seat belt, was relevant to the issue of damages but not the issue of liability for causing the accident. 336 N.W.2d 118, 121 (N.D. 1983). It adopted the position that failure to wear a helmet, along with qualified expert testimony, could reduce plaintiff's damages. *Id.* at 121. Accordingly, the court in *Duma* found the jury's special verdict was not "perverse or clearly contrary to the evidence based on the jury instructions which became the law of the case." *Duma*, 2004 ND 104 ¶ 14. The *Duma* case suggests that the use of a seatbelt could be admissible for mitigation of damages, although the ND Supreme Court has not explicitly held as such.

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.

North Dakota law provides very few limitations on damages. Most notably, non-economic damages from medical malpractice claims are limited to \$500,000. See N.D. CENT. CODE § 32-42-02. However, any party responsible for the payment of damages may request a review of the reasonableness of the award by the court for awards in excess of \$250,000 before reduction for contributory fault and collateral source payments. N.D. CENT. CODE § 32-03.2-08. The burden is on the moving party to establish that the amount of economic damage awarded was not reasonable in that it does not bear a reasonable relation to the economic damage incurred and to be incurred as proven by the party recovering the award. If the court finds that the jury award of economic damages is unreasonable, the court must reduce the award to a reasonable amount. *Id.*

No-fault benefits are not payable to or no behalf of any person who is injured while occupying a motor vehicle owned by such person which is not insured. N.D.C.C. § 26.1-41-07.

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

North Dakota courts utilize the “significant contacts” approach to resolving choice of law issues arising from cases involving multistate contacts. See *Nodak Mut. Ins. Co. v. Wamsley*, 2004 ND 174, 687 N.W.2d 226; see also *Daley v. American States Preferred Ins. Co.*, 1998 ND 225, ¶ 21, 587 N.W.2d 159. As the North Dakota Supreme Court held in *Wamsley*:

In deciding what law to apply in a case presenting multistate contacts, our significant contacts test for deciding choice-of-law questions requires a two-pronged analysis. “Initially, we determine all of the relevant contacts which might logically influence the decision of which law to apply.” Secondly, we apply Leflar’s choice-influencing considerations “to determine which jurisdiction has the more significant interest with the issues in the case.”

Wamsley, 2004 ND 174 at ¶ 13 (quoting *Daley*, 1998 ND 25 at ¶ ¶ 10-12) (internal citations omitted). The Leflar choice-influencing considerations referenced by the Court in *Wamsley* are: “predictability of results, maintenance of interstate and international order, simplification of the judicial task, advancement of the forum’s governmental interests, and application of the better rule of law.” *Schleuter v. Northern Plains Ins. Co., Inc.*, 2009 ND 171, ¶ 11, 772 N.W.2d 879 (internal citations omitted).