

NORTH DAKOTA

- 1. What are the legal considerations in your State governing the admissibility or preventability in utilizing the self-critical analysis privilege and how successful have those efforts been?**

The North Dakota Supreme Court has not directly addressed the applicability of the privilege of self-critical analysis. Chapter 23-24 of the North Dakota Century Code provides for a self-review privilege in the context of health care facilities and care.

- 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 discovery of Third-Party Litigation Funding. 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.

- 3. Who travels in your State with respect to a Rule 30(b)(6) witness deposition; the witness or the attorney and why?**

Generally the practice is for attorneys to travel to a Rule 30(b)(6) witness.

- 4. What are the benefits and detriments in your State by admitting a driver was in the “course and scope” of employment for direct negligence claims?**

Generally the practice would be to admit that a driver was in the course and scope of employment for direct negligence claims if the facts of the case were consistent with that approach.

- 5. Please describe any noteworthy nuclear verdicts in your State?**

Although not directly trucking related, in November of 2019 a family of a deceased college age female was awarded \$1 billion against an intoxicated motor vehicle driver. The defendant was incarcerated at the time of trial and did not participate in the defense of the claim.

- 6. What are the current legal considerations in terms of obtaining discovery of the amounts actually billed or paid?**

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.

7. How successful have efforts been to obtain the amounts actually charged and accepted by a healthcare provider for certain procedures outside of a personal injury? (e.g. insurance contracts with major providers)

North Dakota does not have any current case law regarding this question.

8. What legal considerations does your State have in determining which jurisdiction applies when an employee is injured in your State?

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).

9. What is your State’s current position and standard in regards to taking pre-suit depositions?

Pre-suit depositions are generally not allowed unless both parties consent.

10. Does your State have any legal considerations regarding how long a vehicle/tractor-trailer must be held prior to release?

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 the release of a tractor-trailer has created an evidentiary issue. The general approach should be that the tractor-trailer should be released until the units have been photographed and the all electronic data has been controlled and protected.

11. What is your state’s current standard to prove punitive or exemplary damages and is there any cap on same?

A claim for exemplary damages is controlled by N.D.C.C. § 32-03.2-11. 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. For purposes of tolling the statute of limitations, pleadings amended under this section relate back to the time the action was commenced.

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.

12. Has your state mandated Zoom trials? If so, what have the results been and have there been any appeals.

No.

13. Has your state had any noteworthy verdicts premised on punitive damages? If so, what kind of evidence has been used to establish the need for punitive damages? Finally, are any such verdicts currently up on appeal?

Yes. In November of 2019, a decedent's family was awarded \$1 billion resulting from an intoxicated driver who crossed the center line of the roadway into oncoming traffic. The defendant was incarcerated and did not participate in the defense of the case. The verdict is currently up on appeal. See discussion in No. 11 above regarding the cap for any exemplary damages award.