

SOUTH DAKOTA

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

Black Box Data: Trial courts and the appellate courts in South Dakota have not yet addressed the admissibility of black box/event data recorder data. South Dakota currently has no legislation relating to black box/event recorder data.

Simulations: Simulations are admissible under South Dakota law as long as they can satisfy some basic requirements. S.D. Codified Laws § 19-19-901 requires the proponent of computer generated evidence to describe the system and show that the program produced an accurate result. *See Sommervold v. Grevlos*, 518 N.W.2d 733, 738 (S.D. 1994). Then the animation must be relevant, probative and nearly identical in order to be admissible. *State v. Jenkins*, 260 N.W.2d 509, 511 (S.D.1977). The animation must fairly and accurately reflect the oral testimony of the witness and be an aid to the jury in understanding the issues. *People v. McHugh*, 124 Misc.2d 559, 476 N.Y.S.2d 721, 723 (N.Y.1984).

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.

The use of dashboard mounted cameras (“dash cams”) is becoming increasingly popular with motorists in the United States, and South Dakota is no different. There are no South Dakota court opinions addressing the admissibility of dash cam videos in particular. However, dash-camera footage from police squad cars has been admitted in criminal cases. South Dakota case law regarding the admissibility of video footage is instructive. “It is well settled that photograph[ic images] are generally admissible where they accurately portray anything that a witness may describe in words. They are also admissible when they are helpful in clarifying a verbal description of objects and conditions. They must, however, be relevant to some material issue.” *State v. Owens*, 2002 S.D. 42, ¶ 89, 643 N.W.2d 735, 756-757. If relevant, photographic evidence is not rendered inadmissible merely because it incidentally tends to arouse passion or prejudice. *State v. Huth*, 334 N.W.2d 485, 489 (S.D.1983); *State v. Rash*, 294 N.W.2d 416, 418 (S.D.1980). Therefore, even a dash cam video showing graphic accident footage could be admissible if other criteria are satisfied.

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?

Spoliation: South Dakota does not have a specific law or regulations regarding the retention of telematics data. In South Dakota, there is a general rule, the “adverse inference rule” that the intentional spoliation or destruction of evidence relevant to a case raises a presumption, or inference, that the evidence would have been unfavorable to the spoliator. *Amert v. Lake County Bd. of Equalization*, 1998 SD 66, ¶ 28, 580 N.W.2d 616, 621 (quoting *Sabhari v. Sapari*, 1998 SD 35, ¶ 14, 576 N.W.2d 886, 891, n. 6 (quoting *Matters v. Custer County*, 538 N.W.2d 533, 536 (S.D.1995))). Such a presumption arises, however, only where the spoliation was intentional and indicates fraud and a desire to suppress the truth. It does not arise where the destruction was a matter of routine with no fraudulent intent.

The burden is on the spoliator, to show it acted in a non-negligent, good faith manner in destroying the document sought. *See Wuest ex rel. Carver v. McKennan Hosp.*, 2000 S.D. 151, ¶ 11, 619 N.W.2d 682, 686. The spoliator must provide an explanation for the disappearance of any documentary evidence. *Id.* A duty is imposed to give an “adequate explanation” for the absence of the evidence. *Id.* (internal citations omitted) The trial court, as gatekeeper of evidence, must use its discretion in deciding whether an adverse inference instruction should be given. *Id.* The explanation for the original record’s absence may be fully satisfying either that it was lost through no fault, or that it was deliberately destroyed, or as in most cases, somewhere in between, thereby making it a jury issue. *Id.* (internal citations omitted). Where the evidence is positive that it was destroyed inadvertently, such circumstance would adequately account for the loss of the evidence without fault, and there would be no reason for the jury to be instructed on a presumption or inference arising from the loss. *Id.* But if the court concludes the spoliator maliciously destroyed the document, it is unavailable because of negligence, or for some other reason evidencing a lack of good faith, the jury should be given an adverse inference instruction.

Claims Documents/Files: South Dakota Rule of Civil Procedure 15-6-26(b) describes the scope and limits of discovery. Generally “parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.” Investigation files or information or insurance company claim files can be considered work product privileged in South Dakota when created in anticipation of litigation. An attorney’s work product is defined by SDCL 15–6–26(b)(3) as “documents and tangible things ... prepared in anticipation of litigation or for trial by or for another party or by or for that other party’s representative (including his attorney, consultant, surety, indemnitor, insurer or agent)....” The test applied for determining whether a document or tangible thing is attorney work product is whether “in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.” *Kaarup v. St. Paul Fire & Marine Ins. Co.*, 436 N.W.2d 17, 21 (S.D. 1989). Unlike some courts that

have a bright line rule on whether an insurance adjuster's claim file is discoverable, South Dakota courts look at this issue on a case by case basis.

If outside counsel has not yet been retained, it can be challenging to prevent discovery of company investigation files or insurance claim files. As a result, we recommend clients retain counsel immediately after any serious trucking accident and be in communication with the claims adjuster which maximizes the opportunity to claim privilege for both work product and attorney-client privileges.

Social Media: There is enormous growth in the use of e-evidence in both civil and criminal cases, such as: website data; social network communications; postings; email; text messages; computer stored/generated documents; and electronic writings. South Dakota trial courts and appellate courts have not yet addressed the admissibility of e-evidence. Whenever a new case comes in, we perform a diligent social media search on all parties involved in the litigation, with a focus on recording the data in a way that will allow us to prove its authenticity.

Dealing with Law Enforcement: Having counsel retained early in the process is very important in dealing with law enforcement and controlling the flow of information.

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?

Generally, under South Dakota law an employer is not liable for physical harm to another resulting from acts or omissions of an independent contractor or its servants. *See Blumhardt v. Hartung*, 283 N.W.2d 229, 233 (S.D.1979); *McCarrier v. Hollister*, 15 S.D. 366, 368, 89 N.W. 862, 863 (1902). South Dakota courts have defined an independent contractor as “one who carries on an independent business and contracts to do a piece of work according to his own methods, without being subject to the control of the employer, except as to the product or the result of the work.” *Moritz v. C & R Transfer Co.*, 266 N.W.2d 568, 571 (S.D.1978). The courts have focused on two primary factors used to determine whether one is an employee or an independent contractor: (1) Whether the individual has been and will continue to be free from control or direction over the performance of the services, both under contract of service and in fact; and (2) Whether the individual is customarily engaged in an independently established trade, occupation, profession or business. *See Dumire v. Martin*, 84 S.D. 572, 575, 174 N.W.2d 215, 216–17 (1970); *Steen v. Potts*, 75 S.D. 184, 186, 61 N.W.2d 825, 826 (1953). In examining the control an employer has over an independent contractor, the “right of control” test includes consideration of the following factors:

- (1) Direct evidence of the right of control;
- (2) The method of payment;
- (3) The furnishing of major items of equipment; and
- (4) The right to terminate the employment relationship at will and without liability.

Dumire, 84 S.D. at 575–76, 174 N.W.2d at 217.

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?

South Dakota does not have a different standard for assessing the admissibility of expert testimony regarding traumatic brain injuries. South Dakota has adopted its own rules of evidence. Most of the statutes are based upon the Federal Rules, but there are certain statutes that have significant modifications. In South Dakota, the use of an expert witnesses is governed by S.D. CODIFIED LAWS § 19-15-2. The statute states that “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if: (1) The testimony is based upon sufficient facts or data, (2) The testimony is the product of reliable principles and methods, and (3) The witness has applied the principles and methods reliably to the facts of the case. A) if scientific, technical, or other specialized knowledge will assist the trier of fact, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify in the form of opinion or otherwise.” According to S.D. CODIFIED LAWS § 19-15-4, expert testimony is not objectionable merely because it embraces an ultimate issue to be decided by trier of fact.

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

There are no South Dakota court opinions or statutes regarding the admissibility of drug or toxicology tests as it relates to illicit or prescription drug use. However, the results of an approved breath test are admissible in evidence without foundational expert testimony. It is likely that a toxicology test would be treated similarly in South Dakota courts.

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

With the FMCSA Clearinghouse officially implemented, employers are required to conduct electronic queries in the Clearinghouse, checking CDL driver violation histories (as well as traditional manual inquiries with previous employers in accordance with existing procedures). This will change the landscape of the trucking industry because under the previous regulations, a driver who was terminated from a position due to drugs often could obtain employment with a carrier in a different state. The Clearinghouse, however, will make it easier to identify drivers who received violations. If the FMCSA were to implement hair follicle testing instead of urine, that could eliminate more drivers from the workforce.

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

South Dakota has no mandatory mediation requirements other than as to claims involving agricultural land and family law cases involving minor children. Both parties must voluntarily agree to participate in the mediation process. Alternatively, the court can order both parties to participate. We are not aware of any local jurisdictions mandating cases to arbitration.

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

Yes, there is no prohibition on using corporate deposition testimony in support of a motion for summary judgment in South Dakota.

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

Joint and Several Liability: Remedies for joint and several liability are governed by S.D. CODIFIED LAWS 15-8-11 et seq. Joint tortfeasors are jointly or severally liable in tort for the same injury, whether or not judgment has been recovered against all or some of them. S.D. CODIFIED LAWS § 15-8-11. However, in the case of joint tortfeasors, any party who is allocated less than fifty percent of the total fault allocated to all parties may not be jointly liable for more than twice the percentage of fault allocated to that party. S.D. CODIFIED LAWS § 15-8-15.1.

Contribution: Contribution is governed by S.D. CODIFIED LAWS § 20-1-6. Contribution allows portion of liability to be shifted, but a party is entitled to contribution only when there is joint and several liability. *Parker v. Stetson-Ross Mach. Co., Inc.*, 427 F. Supp. 249 (D.S.D. 1977). The mere fact of concurrent negligence or fault does not give rise to right of contribution. *Id.* When contribution is allowed, burden of liability is shared in proportion to degree of fault. *Highway Const. Co. v. Moses*, 483 F.2d 812 (1973). South Dakota has not directly ruled on the issue of when the applicable statute of limitations commences to run on contribution claims.

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

Although South Dakota is relatively conservative as a whole, the most plaintiff-friendly, in respect to jury awards, are Hughes County, Pennington County, and Lincoln County.

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

There is no general cap on compensatory or punitive damages in South Dakota. A ratio of punitive damages to compensatory damages of 20 to 1 is within permissible range under South Dakota law. *Davis v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 906 F.2d 1206 (D.S.D. 1990).

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

A plaintiff can recover the “reasonable value” of medical services provided. *Degan v. Bayman*, 241 N.W.2d 703 (S.D. 1976). If the parties cannot stipulate to the bill being reasonable for the services provided, proof of its reasonableness must be established. Because of the collateral source rule, the defendant is precluded from entering into evidence any amounts “written off” by medical care providers because of contractual agreements with sources independent of the defendant. *Papke v. Harbert*, 2007 SD 87, 738 N.W.2d 510. *Papke* also held that the amount billed does not necessarily constitute the reasonable value for the provided service.