

SOUTH 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?

Courts in South Dakota have not adopted a self-critical analysis privilege. In general, they are reluctant to adopt additional privileges. “[P]rivileges are to be construed narrowly as they constitute a barrier to the search for the truth.” *State v. Karlen*, 589 N.W.2d 594, 601 (S.D. 1999).

However, in the healthcare context, S.D. Codified Laws § 36-4-26.1 has a peer review privilege, which states:

The proceedings, records, reports, statements, minutes, or any other data whatsoever, of any committee described in § 36-4-42, relating to peer review activities defined in § 36-4-43, are not subject to discovery or disclosure under chapter 15-6 or any other provision of law, and are not admissible as evidence in any action of any kind in any court or arbitration forum, except as hereinafter provided. No person in attendance at any meeting of any committee described in § 36-4-42 is required to testify as to what transpired at such meeting.

The Court recognizes that the purpose of the peer review privilege is to encourage candor within the peer review processes, and there is a public policy protected when information created by the peer review committees is protected. *Novotny v. Sacred Heart Health Services*, 887 N.W.2d 83 (S.D. 2016). Additionally, despite the existence of a crime-fraud exception to other privileges, the court declined to extend it to the peer review privilege. *Id.* (noting plaintiffs can obtain the fraud-related evidence from sources other than from the peer review materials and leaving it up to state legislators to codify the exception).

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?

South Dakota maintains a public policy prohibition against champerty and maintenance, “which would disturb the peace of society, lead to corrupt practices, and prevent the remedial process of law.” *McKellips v. Mackintosh*, 475 N.W.2d 926, 928 (S.D. 1991) (citing *Schnabel v. Taft Broad. Co.*, 525 S.W.2d 819, 823 (Mo. Ct. App. 1975) (citations omitted)). See also *A. Unruh Chiropractic Clinic v. De Smet Ins. Co.*, 782 N.W.2d 367, 370 (S.D. 2010). Because South Dakota does not allow 3rd Party Litigation Funding, the Courts have not addressed discovery of such information.

3. Who travels in your State with respect to a Rule 30(b)(6) witness deposition; the

witness or the attorney and why?

A party intending to depose another party may select the location for the deposition, wherever they would like, but if the other party objects to the location, they may move for a protective order from the court to designate a different location. *See* Fed. R. Civ. P. 26(c)(1)(b). However, a deposition under Fed. R. Civ. P. 30(b)(6) for a party corporation will ordinarily take place where the corporation has its principal place of business. *Atmosphere Hosp. Mgmt., LLC v. Curtullo*, No. 5:13-CV-05040-KES, 2015 WL 136120, at *10 (D.S.D. Jan. 9, 2015).

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

South Dakota upholds the “ancient doctrine of respondeat superior,” which holds an employer or principal vicariously liable for the wrongful acts committed by an employee or agent within the scope of employment or agency. *Iverson v. NPC Int’l, Inc.*, 801 N.W.2d 275, 278 (S.D. 2011) (quoting *Black’s Law Dictionary* (8th ed. 2004)); *Kirlin v. Halverson*, 758 N.W.2d 436 (S.D. 2008).

When determining whether the employee was acting “within the scope of employment,” courts will include “acts which are so closely connected with what the servant is employed to do, and so fairly and reasonably incidental to it, that they may be regarded as methods . . . of carrying out the objectives of employment.” *Deuchar v. Foland Ranch, Inc.*, 410 N.W.2d 177, 180 (S.D. 1987).

One benefit to admitting a driver was acting in the course and scope of employment is that the South Dakota Public Entity Pool for Liability, also known as the South Dakota Public Assurance Alliance (SDPAA), provides coverage for underinsured motorists acting as employees within the scope of employment and acting on behalf of or in the interest of their employer. *S. Dakota Pub. Entity Pool for Liab. v. Winger*, 566 N.W.2d 125, 126 (S.D. 1997).

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

In 2004, three insurance companies were ordered to pay a former nursing home cook over \$12 million in a bad-faith suit where they initially denied her \$8,000 workers’ compensation claim for carpal tunnel syndrome. *Alice Torres v. Travelers*, CIV. 01-5056-KES, United States District Court of South Dakota, Western Division. Torres claimed they denied her claim in an attempt to meet an internal incentive program used to reduce claims payments. The companies insisted for over two years that no such program existed. Claims are intended to be awarded fairly. The incentive program was instead bribing claims adjusters with incentives that correlated directly to their performance in paying claims.

The jury was likely outraged by the attempt to conceal the incentive program as they continued to deny until finally, a note was found tucked in a file congratulating a claims adjuster for being awarded a cash bonus in the “Claims Professional Incentive Program.” The insurance companies apparently did not see anything wrong with this conduct, and therefore the jury awarded punitive damages for \$12 million to punish the dishonest behavior.

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

In South Dakota, the actual amounts paid are inadmissible. *Papke v. Harbert*, 738 N.W.2d 510 (S.D. 2007). Damages are calculated based on the amount billed. Write-offs are also not admissible. Plaintiff is entitled to recover the reasonable value of medical services which is a question for the jury. Ruling that either amount is

the reasonable value makes the other value inherently unreasonable. S.D. Codified Laws § 21-3-12.

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)

South Dakota follows the common law Collateral Source Rule, which prohibits evidence that a plaintiff's medical expenses were paid by a collateral source. *Degen v. Bayman*, 241 N.W.2d 703 (S.D. 1976). The plaintiff gets the "benefit of the bargain," and their damages cannot be reduced due to payment from a collateral source. *Jurgensen v. Smith*, 611 N.W.2d 439 (S.D. 2000).

Write-offs from private insurance are not admissible. Plaintiff is entitled to recover the reasonable value of medical services, which is a question for the jury. Ruling that either amount is the reasonable value makes the other value inherently unreasonable. S.D. Codified Laws § 21-3-12. Write-offs from Medicare or Medicaid are also not admissible. *Papke v. Harbert*, 738 N.W.2d 510 (S.D. 2007). There is an exception to this rule for malingering, and then the amount actually paid is discoverable. *Cruz v. Gorth*, 763 N.W.2d 810 (S.D. 2009).

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

In a workers' compensation claim, if sufficient significant contacts with South Dakota exist so that it can be reasonably concluded that the employment is located in South Dakota, then the South Dakota Department of Labor holds statutory jurisdiction. If the circumstances and elements instead indicate that the individual's employment is located in another state, then the individual is not protected under South Dakota's laws. S.D. Codified Laws § 62-3-3.

In determining the location of employment, the South Dakota Supreme Court considers factors such as those listed in the Restatement (Second) of Conflict of Laws, including where the individual was injured, principal location of employment, location of employer-supervised activities, and whether the parties have agreed in contract to the state that will have jurisdiction over workers' compensation. *Martin v. Am. Colloid Co.*, 804 N.W.2d 65, 69 (S.D. 2011) (quoting *Restatement (Second) of Conflict of Laws* § 181 (1971)). No single factor is dispositive, and the court will analyze based on the facts of each individual case. *Id.*; *Knapp v. Hamm & Phillips Serv. Co.*, 824 N.W.2d 785, 790 (S.D. 2012).

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

A pre-suit deposition is allowed in South Dakota under S.D. Codified Laws § 15-6-27(a). A person who desires to take a pre-suit deposition is required to file a petition with the court outlining the anticipated parties, subject matter, facts desired to establish through the deposition, names or descriptions of persons expected to be adverse parties, and the names and addresses of the persons being deposed and the substance of the testimony the petitioner expects to elicit. The petitioner then must submit to the court and serve along with a notice on the expected adverse party. The court will then determine if the perpetuation of the testimony may prevent a failure or delay of justice and will issue an order designating the persons whose depositions may be taken on a specified subject matter and whether the depositions will be taken orally or through written interrogatories.

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

South Dakota does not have any legal considerations regarding how long a vehicle/tractor-trailer must be

held prior to release.

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

Punitive or exemplary damages are only available upon express provision in a statute. S.D. Codified Laws § 21-1-4. To obtain punitive damages, the plaintiff must prove the conduct was marked by "oppression, fraud, or malice, actual or presumed, or in any case of wrongful injury to animals, being subjects of property, committed intentionally or by willful and wanton misconduct in disregard of humanity . . ." S.D. Codified Laws § 21-3-2; *Kjerstad v. Ravellette Publications, Inc.*, 517 N.W.2d 419 (S.D. 1994).

When pleading punitive damages in South Dakota, prior to discovery on punitive damages claims, the court determines "after a hearing and based upon clear and convincing evidence, that there is a reasonable basis to believe that there has been willful, wanton or malicious conduct on the part of the party claimed against." S.D. Codified Laws § 21-1-4.1; *Diamond Surface, Inc. v. State Cement Plant Comm'n*, 583 N.W.2d 155 (S.D. 1998).

No cap exists for the amount of punitive damages able to be awarded. The amount is entirely at the discretion of the jury. However, a jury's punitive damages award is subject to review by the trial court and the state supreme court. *Davis v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 906 F.2d 1206, 1227 (8th Cir. 1990). The state supreme court will also review punitive damages for excessiveness and has awarded a new trial or reduced the size of the award due to excessiveness. *Id.*

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

South Dakota has not had any trials via Zoom or other videoconferencing software; however, the Supreme Court has heard oral arguments over Zoom. Press Release, Unified Judicial System, *Supreme Court Conducts Oral Arguments Via Zoom* (Apr. 23, 2020), <https://uj.s.d.gov/uploads/news/Zoomoralarguments.pdf> (last visited Mar. 30, 2021).

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?

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