

North Dakota State Law Summary

North Dakota State Courts

The North Dakota judicial system consists of the Supreme Court, Court of Appeals, District Courts, and Municipal Courts.

The **Supreme Court** is the highest court in the state of North Dakota. It is composed of five justices elected in a non-partisan election for ten-year terms. Each justice must be a licensed attorney and a citizen of the United States and North Dakota. One member of the Supreme Court is selected as Chief Justice by the justices of the Supreme Court and the judges of the district courts. N.D.C.C. § 27-02-01. The Chief Judge's term is five years. *Id.* The North Dakota Supreme Court has two major types of responsibilities – judging and administering. In its judging capacity, the Supreme Court is primarily an appellate court with the responsibility of hearing appeals from decisions of the district courts and the Court of Appeals. In its administrative capacity, the supreme court has responsibility for ensuring the efficient and effective operation of all non-federal courts in the state, maintaining high standards of judicial conduct, supervising the legal profession, and adopting procedural rules. When a supreme court justice is disqualified from a case, the justice's position is filled by a district court judge.

The legislature has also established a temporary **Court of Appeals**, which will continue to exist through January 1, 2020. N.D.C.C. § 27-02.1-04. It hears only the cases assigned to it by the Supreme Court.

The **District Courts** are the courts of general jurisdiction in North Dakota. N.D.C.C. § 27-05-06. The state is divided into eight judicial districts. In each district, a presiding judge supervises court services of all courts in the district. There is a district court in each of the state's fifty-three counties. The office of district judge is an elected position filled every six years by non-partisan election held in the district in which the judge will serve.

Municipal Courts have jurisdiction of all violations of municipal ordinance with some exceptions. All municipal judges in North Dakota are part-time and are elected by the people for four-year terms.

Venue

In an action relating to real or personal property, the venue must be the county in which the subject matter of the action, or some part thereof, is situated. N.D.C.C. § 28-04-01; N.D.C.C. § 28-04-02.

A motor vehicle case may be brought either in the county where the action arose, the county of residence of the defendant, or the county of residence of the majority of the defendants. N.D.C.C. § 28-04-03.1

An action against a domestic corporation or limited liability company must be brought in the county designated in the plaintiff's complaint if such corporation or limited liability company transacts business in that county. N.D.C.C. § 28-04-04.

In all other cases, the action must be brought in the county in which the defendant or one of the defendants resides at the time of the commencement of the action. If none of the defendants reside in the state, the action must either be brought in the county in which the plaintiff or one of the plaintiffs resides or in the county in which the cause of action arose. N.D.C.C. § 28-04-05

The court may change the venue when the convenience of the witnesses and the ends of justice would be promoted by the change. N.D.C.C. § 28-04-07.

Statute of Limitations

Legal Cause of Action	Limitation
Personal Injury or Survival	6 years (N.D.C.C. § 28-01-16(5))
Wrongful Death	2 years (N.D.C.C. § 28-01-18(4))
Property Damage	6 years (N.D.C.C. § 28-01-16(2), (3))
Breach of Contract	6 years (N.D.C.C. § 28-01-16(1))
Libel, slander, assault, battery, false imprisonment	2 years (N.D.C.C. § 28-01-18(1))
Fraud	6 years (N.D.C.C. § 28-01-16(6))
Malpractice	2 years (N.D.C.C. § 28-01-18(4))

Time for Serving Answer

A defendant must serve an answer within 21 days after being served with the summons and complaint. N.D. R. Civ. P. 12(a)(1)(A). A party must serve an answer to a counterclaim or crossclaim within 21 days after being served with the pleading that states the counterclaim or crossclaim. N.D. R. Civ. P. 12(a)(1)(B).

Negligence

“[A]ctionable negligence consists of a duty on the party of an allegedly negligent party to protect the plaintiff from injury, a failure to discharge that duty, and a resulting injury proximately caused by the breach of the duty.” *Azure v. Belcourt Pub. Sch. Dist.*, 2004 ND 128, ¶ 9, 681 N.W.2d 816, 819.

North Dakota is a modified comparative fault state. N.D.C.C. § 32-03.2-02.

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. Any damages allowed must be diminished in proportion to the amount of contributing fault attributable to the person recovering. The liability of each party is several only, and not joint, and each party is liable only for the amount of damages attributable to the percentage of fault of that party, except that any persons who act in concert in committing a tortious act or aid or encourage the act, or ratifies or adopts the act for their benefit, are jointly liable for all damages attributable to their combined percentage of fault.

Enacted in 1987, the modified comparative fault provisions of N.D.C.C. chapter 32-03.2 “significantly revised tort liability in North Dakota and shifted the focus from traditional tort doctrines to the singular inclusive concept of ‘fault.’” *Grager v. Schudar*, 2009 ND 140, ¶ 16, 770 N.W.2d 692, 697.

Contribution

Subject to some exceptions, if two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them. N.D.C.C. § 32-38-01(1). The right of contribution exists only in favor of a tortfeasor who has paid more than its pro rata share of the common liability, and the recovery is limited to the amount paid by that tortfeasor in excess of its pro-rata share. N.D.C.C. § 32-38-01(2). There is no right of contribution in favor of an intentional tortfeasor. N.D.C.C. § 32-38-01(3). A settling tortfeasor does not have a right of contribution against any tortfeasor whose liability is not extinguished by the settlement or for an amount in excess of what is reasonable. N.D.C.C. § 32-38-01(4). The right in contribution in cases decided after the adoption of comparative negligence is determined by the parties’ relative degrees of fault. *Bartels v. City of Williston*, 276 N.W.2d 113 (N.D. 1979).

Contribution may be pursued by motion during the original proceeding or in a separate action brought within one year of judgment. N.D.C.C. § 32-38-03.

Gross Negligence

“Gross negligence” is the omission of a care which even the most inattentive and thoughtless seldom fail to take of their own concerns and is a lack of care which is practically willful in its nature; it evinces a reckless temperament. *Bjerke v. Heartso*, 183 N.W.2d 496, 501 (N.D. 1971); *Rettler v. Ebreck*, 71 N.W.2d 759, 762 (N.D. 1955).

Negligent Hiring, Retention, and Supervision

“Where there is a foreseeable risk of harm to others unless precautions are taken,” it is the duty of one who employs another to do work to exercise reasonable care in selecting a contractor “and to provide, in the contract or otherwise, for such precautions as reasonably appear to be called for.” *McLean v. Kirby Co.*, 490 N.W.2d 229, 234 (N.D. 1992) (citing *Prosser & Keeton on Torts* § 71, at 510 (5th ed. 1984)).

An employee may be directly liable for the employer’s act in negligently supervising an employee. *Nelson v. Gillette*, 1997 ND 205, ¶ 39, 571 N.W.2d 332. A claim for negligent supervision may arise when an employer fails to exercise ordinary care in supervising the employment relationship to prevent the foreseeable misconduct of an employee from causing harm to other employees or third persons. *Id.* Because the claim is based on negligence principles, the plaintiff has the burden of demonstrating a duty, breach of that duty, causation, and damages.

Negligent Entrustment

North Dakota has adopted Section 390 of the Restatement (Second) of Torts, which provides that “[o]ne who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.” Restatement (Second) of Torts § 390 (1965). “Reason to know” means “the actor has information from which a person of reasonable intelligence or of superior intelligence of actor would infer that the fact in questions exists, or that such person would govern his conduct upon the assumption that such fact exists.” Restatement (Second) of Torts § 12(1); *Collette v. Clausen*, 2003 ND 129, ¶ 17, 667 N.W. 2d 617, 622.

North Dakota has not only applied the doctrine to cases involving motor vehicles, but also “to other chattels which, if placed in the hands of an incompetent or inexperienced person, present a likelihood of unreasonable risk of harm to third persons.” *Barsness v.*

Gen. Diesel & Equip. Co., Inc., 383 N.W.2d 840, 842 (N.D. 1986).

Dram Shop

Every spouse, child, parent, guardian, employer, or other person who is injured by any obviously intoxicated person has a claim for relief against any person who knowingly disposes, sells, barter, or gives away alcoholic beverages to a person under 21 years of age, an incompetent, or an obviously intoxicated person. No claim for relief may be had on behalf of the intoxicated person or of an adult passenger in an automobile driven by an intoxicated person. N.D.C.C. § 5-01-6.1.

Joint and Several Liability

The liability of each party is several only and liable for the amount of damages attributable to the percentage of fault of that party. Any persons who act in concert in committing a tortious act or aid or encourage the act, ratify or adopt the act for their benefit are jointly liable for all damages. N.D.C.C. §32-03.2-02.

Absent a claim of concerted action, a party cannot be liable for more than its percentage share of claimed damages, and therefore cannot make a third-party claim for contribution. *Target Stores v. Automated Maint. Servs., Inc.* 492 N.W.2d 899, (N.D. 1992).

To constitute concerted action, evidence must be presented showing a common plan to commit a tortious act where the participants knew of the plan and its purpose and took substantial steps to encourage the achievement of the result. *Schneider v. Schaaf*, 603 N.W.2d 869 (N.D. 1999). “Acting in concert” is not construed to include concurrent negligence. *Reed v. Univ. of N.D.*, 1999 ND 25, ¶ 34, 589 N.W. 2d 880, 888-89.

Wrongful Death/Survival Actions

N.D.C.C. chapter 32-21 provides for wrongful death actions: “Whenever the death of a person shall be caused by a wrongful act, neglect, or default, and the act, neglect, or default is such as would have entitled the party injured, if death had not ensued, to maintain an action and recover damages in respect thereto, then and in every such case the person who, or the corporation, limited liability company, or company which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured or of the tortfeasor, and although the death shall have been caused under such circumstances as amount in law to felony. N.D.C.C. § 32-21-01.

Damages under the wrongful death act are “based on the loss suffered by the beneficiaries, and not on the loss sustained by the decedent’s estate.” *Schneider v. Baisch*, 256 N.W.2d 370, 371-72 (N.D. 1977). A jury determines the quantity of damages and “shall give such damages as it finds proportionate to the injury resulting from the death to the persons entitled to the recovery. N.D.C.C. § 32-21-02. Damages available in wrongful death actions include compensation for economic damages, which are damages resulting from medical expenses and medical care, rehabilitation services, custodial care, loss of earnings and earning capacity, loss of income or support, burial costs, cost of substitute domestic services, loss of employment or business or employment opportunities and other monetary losses. Compensable noneconomic damages including damages arising from pain, suffering, inconvenience, physical impairment, disfigurement, mental anguish, emotional distress, fear of injury, loss or illness, loss of society and companionship, loss of consortium, injury to reputation, humiliation, and other nonpecuniary damage. N.D.C.C. § 32-03.2-04.

The intended recipients of damages under the wrongful death act are the decedent’s heirs at law. N.D.C.C. § 32-21-04. The term “heirs at law,” means those people entitled to a decedent’s estate by the laws of intestate succession. *Goodleft v. Gullickson*, 556 N.W.2d 303 (N.D. 1996).

N.D.C.C. § 28-01-26.1 provides for survival actions: “No action or claim for relief, except for breach of promise, alienation of affections, libel and slander, abates by the death of a party or of a person who might have been a party had such death not occurred.” This statute is “remedial in nature, and . . . intended to permit recovery by the representatives of the deceased for damages the deceased could have recovered had he lived. . . . A survival action merely continues in existence an injured person’s claim after death as an asset of his estate. *Sheets v. Graco, Inc.*, 292 N.W.2d 63, 66-67 (N.D. 1980).

Vicarious Liability

An employer is vicariously liable for tortious acts of its employees committed while they are acting within the scope of employment. *Nelson v. Gillette*, 1997 ND 205, ¶ 10, 571 N.W.2d 332, 334. North Dakota has adopted Section 228 of the Restatement to determine whether one was acting within the “scope of employment.” *Id.* at ¶ 20, 571 N.W.2d at 337. The employee’s conduct is within the scope of employment if: (1) it is the kind he is he is employed to perform; (2) it occurs substantially within the authorized time and space limits; (3) it is actuated, at least in part, by a purpose to serve the master; and (4) if force is intentionally used by the employee against another, the use of force is not unexpected by the employer. *Id.* at ¶ 13, 571 N.W.2d at 335 (citing Restatement (Second) of Agency, § 228 (1958)).

Under North Dakota law, employers are not generally liable for the negligence of independent contractors, unless the employer retains control over the independent contractor’s work. *Doan ex. rel. Doan v. City of Bismarck*, 2001 ND 152, ¶ 20, 632

N.W.2d 815, 822.

Workers' Compensation Exclusivity

Under North Dakota law, workers' compensation is the exclusive remedy for injured employees. Employers are immune from civil liability unless the action is for an injury to an employee caused by an employer's intentional act done with the conscious purpose of inflicting the injury. N.D.C.C. § 65-01-01.1.

While the law relieves employers from liability for their workers' work-related injuries, it does not relieve third-party tortfeasors from liability for such injuries. *Haugenoe v. Workforce Safety & Ins.*, 2008 ND 78, ¶ 9, 748 N.W.2d 378, 381. Instead, it "expressly provides measures for realizing upon that liability, both in the interest of making the fund whole on account of the award and in the interest of the employee." *Id.* N.D.C.C. Section 65-01-09 grants Workforce Safety and Insurance a subrogation interest in workers' recoveries against certain third parties: "When an injury or death for which compensation is payable under provisions of this title shall have been sustained under circumstances creating in some person other than the fund a legal liability to pay damages in respect thereto, the injured employee, or the employee's dependents, may claim compensation under this title and proceed at law to recover damages against such other person. N.D.C.C. § 65-01-09.

Traditional Tort Defenses

Traditional tort defenses include: assumption of risk, release, statute of limitations, and waiver. N.D. R. Civ. P. 8(c)(1).

Emotional Distress

In general, North Dakota allows claims for emotional distress stemming from tort actions, but not from breach of contract claims. *Muchow v. Lindblad*, 435 N.W.2d 918, 922 (N.D. 1989). A claim for negligent infliction of emotional distress requires some physical manifestation of harm or other compensable injury. *Id.* at 921-22. Furthermore, "in a case involving only a claim for emotional and mental shock induced solely by a plaintiff's apprehension of a negligently caused injury to a third person, a plaintiff may not recover damages for emotional and mental anguish unless the negligent act threatened the plaintiff with harm or placed her within the zone of danger. *Id.* at 921.

The elements of a claim for intentional infliction of emotional distress "are extreme

and outrageous conduct that is intentional or reckless and causes severe emotional distress.” *Zuger v. State*, 2004 N.D. 16, ¶13, 673 N.W.2d 615, 621.

Negligent infliction of emotional distress differs from the intentional tort in that it involves the breach of a duty of care, rather than an intentional action. *Muchow v. Lindblad*, 435 N.W.2d 918 (N.D. 1989).

Damages in General

Damages should be adequate to fairly compensate the plaintiff for all detriment proximately caused by the acts or omissions of those found to be at fault, whether or not the detriment could have been anticipated. N.D.C.C. § 32-03-20. Damages in all cases must be reasonable. N.D.C.C. § 32-03-37.

In contract cases, there is a much more narrow scope of liability. “Unlike a tortfeasor, a contracting party is not liable for unforeseeable injury consequent to his breach.” *Id.* at 439.

Statutory Caps on Damages

The only statutory cap on compensatory damages under North Dakota applies to medical malpractice claims, where noneconomic damages are limited to \$500,000. N.D.C.C. § 32-42-04.

Attorney's Fees

North Dakota follows the “American rule” and courts generally do not award attorney fees to the prevailing party unless authorized by contract or statute. *Deacon's Dev., LLP v. Lamb*, 2006 ND 172, ¶ 11, 719 N.W.2d 379, 382.

North Dakota law requires that courts in civil actions award costs and fees, including attorney fees, upon finding a claim for relief was frivolous. N.D.C.C. § 28-26-01(2). Frivolous claims are those which have “such a complete absence of actual facts or law that a reasonable person could not have expected that a court would render judgment in his favor.” *Peterson v. Zerr*, 477 N.W.2d 230, 236 (N.D. 1991); N.D.C.C. § 28-26-01(2).

Prejudgment/Post-Judgment Interest

Prejudgment interest in tort cases is governed by N.D.C.C. § 32-03-05, which provides that “[i]n an action for the breach of an obligation not arising from contract and in every case of oppression, fraud, or malice, interest may be given in the discretion of the court of jury.” The trier of fact has broad discretion in determining whether to award prejudgment interest. *Gonzalez v. Tounjian*, 2003 ND 121, ¶ 37, 665 N.W.2d 705, 717. Prejudgment interest is properly awarded on past damages as a means of fully compensating the plaintiff for the lost use of those funds prior to judgment. *Id.* at ¶ 40, 665 N.W.2d at 718. An award of prejudgment interest on future damages would be improper because such damages do not become due until the date of judgment. *Id.*

Interest is payable on judgments entered at the same rate as is provided in the original instruction on which the action resulting in the judgment is based, but may not exceed the maximum rate provided in N.D.C.C. § 47-14-09. N.D.C.C. § 28-20-34. If the original instrument does not contain a provision regarding the interest rate, or if the action resulting in the judgment was not based on an instrument, interest is payable at a rate equal to the prime rate published in the Wall Street Journal on the first Monday in December of each year, plus three percentage points rounded up to the next one-half percentage point and may not be compounded in any manner or form. N.D.C.C. § 28-20-34.

Collateral Source Rule

After an award of economic damages, the party responsible for the payment thereof is entitled to and may apply to the court for a reduction of the economic damages to the extent that the economic losses presented to the trier of fact are covered by payment from a collateral source. N.D.C.C. § 32-03.2-06. A “collateral source” payment is any sum from any other source paid or to be paid to cover an economic loss which need not be repaid by the party recovering economic damages, but does not include life insurance, other death or retirement benefits, or any insurance or benefit purchased by the party recovering economic damages. *Id.*

Negotiated discounts between medical insurers and providers are not deductible under the collateral source statute because they are considered to be a benefit traceable to the insurance policy. *Dewitz by Nuestel v. Emery*, 508 N.W.2d 334, 340 (N.D. 1993).

The collateral-source rule is designed to prevent a tortfeasor from taking advantage of payments made to an injured party by a source other than the tortfeasor. *Nelson v. Trinity Med. Ctr.*, 419 N.W.2d 886, 892-93 (N.D. 1988). It ensures that a wrongdoer does not benefit at the expense of an innocent party, even where the injured party subsequently receives reimbursement from someone other than the wrongdoer. *Id.* (citing *Keller v. Garma*, 378 N.W.2d 867, 868 (N.D. 1985)). It also serves to eliminate double recovery from sources such as workers’ compensation and Social Security. *Dewitz*, 508 N.W.2d at 341.

Exemplary Damages

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 the jury may give damages for the sake of example and by way of punishing the defendant. N.D.C.C. § 32-03.2-11(1). A plaintiff cannot seek exemplary damages in the complaint, but may make a motion to amend the pleadings to claim exemplary damages. *Id.* The court must grant the moving party permission to amend the pleadings to claim exemplary damages if the court finds 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. *Id.*

If either party so elects, the trier of fact must first determine whether compensatory damages are to be awarded before addressing any issues related to exemplary damages. N.D.C.C. § 32-03.2-11(2). No award of exemplary damages may be made if the claimant is not entitled to compensatory damages. N.D.C.C. § 32-03.2-11(4).

Exemplary damage awards are limited to double the amount of compensatory damages, or \$250,000, whichever is greater. N.D.C.C. § 32-03.2-11(4). The jury cannot be

informed of this limit, and any jury award in excess of the limit must be reduced by the court. *Id.*

Exemplary damages may not be awarded against a manufacturer or seller if the product's manufacture, design, formulation, inspection, testimony, packaging, labeling and warning complied with federal statutes or administrative regulations at the time the product was produced or premarket approval or certification by a federal agency. N.D.C.C. § 32-03.2-11(6).

Evidence of a Party's Failure to Use Seatbelt

Failure to use a seatbelt in violation of N.D.C.C. § 39-21-41.4 is not itself evidence of negligence and a violation of this statute cannot be used in any proceeding other than one charging the violation. *Tessier v. Am. Family Mut. Ins. Co.*, No. 1:12-cv-027, 2013 WL 1290229 at *2 (D. N.D. Mar. 27, 2013). Evidence of a party's failure to wear a seatbelt is, however, a mitigating factor to reduce damages. *Duma v. Keena*, 680 N.W.2d 627, 630 (N.D. 2004).

Evidence of a Party's Failure to Wear a Helmet

Evidence of a motorcyclist's failure to wear a protective helmet is admissible to reduce his damages so long as there is competent testimony by a qualified expert that use of a helmet would have lessened the injuries the plaintiff sustained. *Halvorson v. Voeller*, 336 N.W.2d 118, 121 (N.D. 1983).

Evidence of a Party's Violation of Speed Limits

Violations of the rules of the road, including speed limits, are evidence of negligence, but is not negligence as a matter of law. *Garrett v. Nagel*, 417 N.W.2d 855, 859 (N.D. 1988).

Uninsured / Underinsured Motorist Coverage

North Dakota law requires that that all automobile insurance policies include liability and uninsured and underinsured motorist coverage. The minimum liability limits are \$25,000 per person for bodily injury or death, and \$50,000 per accident. Minimum property damage limits are \$25,000. N.D.C.C. § 39-16.1-11(2)(b). Uninsured and underinsured coverage must be at least equal to the bodily injury liability limits or \$100,000 per person and \$300,000 per accident, or a combined single limit of

\$300,000. N.D.C.C. § 26.1-40-15.2, -15.3.

North Dakota law prohibits the stacking of uninsured and underinsured motorist benefits. N.D.C.C. § 26.1-40-15.4(2).

Any damages payable to or for any uninsured or underinsured motorist coverage must be reduced by the amount paid or payable under workers' compensation or other similar law, and amounts paid or payable under any valid and collectible motor vehicle medical payments, personal injury protection insurance, or similar motor vehicle coverages. N.D.C.C. § 26.1-40-15.4.

No-Fault Insurance

Motor vehicle owners are also required to provide security for payment of no-fault benefits. N.D.C.C. § 26.1-41-02(1). "Basic no-fault benefits" are defined as benefits for economic loss resulting from accidental bodily injury and are limited to \$30,000 per person for any one accident. N.D.C.C. § 26.1-41-01. Stacking of basic no-fault benefits is prohibited. N.D.C.C. § 26.1-41-14. A basic no-fault insurer that has paid or may become obligated to pay basic no-fault benefits is subrogated to the extent of its obligations to all of the rights of the injured person against any person other than a secured person. N.D.C.C. § 26.1-41-16.

Unfair Claims Practices

North Dakota law obligates an insurer to act in good faith in its relationship with its policy holders. Breach of this duty may subject the insurer to liability for damages to the insured. *Szarkowski v. Reliance Ins. Co.*, 404 N.W.2d 502, 505 (N.D. 1987).

Under North Dakota law, several acts justify a claim for unfair claim settlement practices, including a failure to, in good faith, effectuate prompt, fair, and equitable settlements of claims submitted in which liability has become reasonably clear. N.D.C.C. § 26.1-04-03(9).

Coverage – Duty of Insured

An insured party must meet the conditions precedent to the policy, including providing proper notice, to trigger the insured's duty to defend. *Employers Reins. Corp. v. Landmark*, 547 N.W.2d 527 (N.D. 1996). The insured also has a duty to comply with any applicable cooperation clause in the policy. *See, e. g., Wilson v. Farmers Ins. Group*, 655 N.W.2d 414, 416 (N.D. 2003) ("A cooperation clause in an insurance policy is generally regarded as a condition precedent, so that no rights accrue under a

policy until the condition is satisfied.”)