

# DIGEST OF INSURANCE LAW

## NORTH DAKOTA

Courtesy of  
[Crowley Fleck PLLP](#)  
Bismarck, North Dakota

### CIVIL JUDICIAL SYSTEM

#### Courts of Original Jurisdiction

Municipal courts have jurisdiction to hear and determine all offenses against city ordinances. Supreme Court rule provides that all appeals from municipal court pursuant to §40-18-19, N.D.C.C., and N.D. R. Crim. P., Rule 37, shall be filed and heard in district court. County courts were abolished on January 1, 1995. §27-05-00.1, N.D.C.C.

District courts have unlimited original civil and criminal jurisdiction. State is divided into seven judicial districts. District courts have concurrent jurisdiction in appeals from judgments entered in municipal court. Appeals are taken from district courts directly to Supreme Court. District courts also have jurisdiction over appeals from determinations of boards, tribunals, and officers, such as boards of county commissioners, Workers' Compensation Bureau, and like.

#### Appellate Courts

There is a temporary court of appeals assigned to hear appeals in a variety of cases, primarily domestic law, misdemeanor convictions, municipal and small claims court proceedings, and appeals from trial court orders on motions for summary judgment. Chap. 27-01, N.D.C.C., and Supreme Court Adm. Rule 27.

Supreme Court has original jurisdiction to issue writs of habeas corpus, mandamus, quo warranto, certiorari and injunction, in such cases of strictly public concern as involve questions affecting sovereign rights of state or its franchises or privileges. This is state court of last resort, civil and criminal.

### LAW

#### Abbreviations

- A.L.R. – American Law Reports.
- L.R.A. – Lawyer's Reports Annotated.
- L.R.A. (N.S.) – Lawyer's Reporter Annotated (New Series).
- N.D. or Dak. – North Dakota Reports.

- N.W. – North Western Reporter.
- S.L. – Session Laws.
- N.D.C.C. or R.S. – Statutory references are to North Dakota Century Code.
- N.D. R. Civ. P. – North Dakota Rules of Civil Procedure.
- N.D. R. Evid. – North Dakota Rules of Evidence.

### ACCIDENT AND HEALTH INSURANCE

See "ACCIDENTAL MEANS" and "DISABILITY."

There are comprehensive statutes regulating accident and health insurance. *See*, N.D.C.C.

Contract Law.

Cancellation. Coverage under comprehensive plan terminates for failure to pay premium subject to 31-day grace period. *See* §26.1-08-13, 26.1-36-04, N.D.C.C.

Renewal. *See* generally policy provisions §26.1-36-04, N.D.C.C.

Disease Induced by Accident. No statutory provisions. Where injury itself did not result in death but did result in physical condition which caused poisoning of system of insured resulting in death, it is held that in order to render injury one caused by "external, violent and accidental means," within meaning of insurance policy, it is not necessary that external means itself should cause death but that cause of death shall be external to person although it acts internally, and that when accident causes diseased condition which together with accident results in injury or death, accident alone is to be considered cause of injury or death. *Druhl v. Equitable Life*, 56 N.D. 517, 218 N.W. 220 (1928), 60 A.L.R. 962. Due to the adoption of comparative fault and of N.D.C.C. §32-03.2-02, apportionment of damages is based on the percentages of fault attributable to the original tortfeasor and subsequent medical providers who negligently treat the initial injury. *Haff v. Hettish*, 1999 ND 94, 593 N.W.2d 383.

Injury is sole producing cause of death when it stands out as predominating factor in causing death.



Hence, pre-existing illness does not preclude coverage under accidental death policy if evidence establishes that accident caused bodily injury that was predominating factor in producing death by setting in motion chain of events without intervention of new and independent source. *Valenta v. Life Ins. Co. of No. America*, 196 N.W.2d 393 (1972).

Accident is accident whether it was caused by unintended accidental means or is caused by intended means that produced unintended accidental result, as long as some unusual exertion or muscular effort occurred. *Wall v. Pennsylvania Life Ins. Co.*, 274 N.W.2d 208 (1979).

Double Indemnity. Policies generally provide therefor. Death caused by carbon monoxide fumes in stalled car held to have occurred while "riding in automobile" within double indemnity provision. *Johnson v. Federal*, 60 N.D. 397, 234 N.W. 661 (1931).

Excepted Risks. See §26.1-36-04, N.D.C.C., which allows exceptions for certain claims including illegal activities and use of narcotics.

Notice and Proof of Loss. Generally notice must be given within 20 days after occurrence or commencement of any loss covered by policy. Failure to give this notice does not invalidate or reduce any claim if it was not reasonably possible to give notice. §26.1-36-04, N.D.C.C., 26.1-36-05.

Statute of Limitations. There is a general 6-year statute of limitations.

Damages. Governed by contract, no statutory regulation.

In action against insurer, there may be claim in tort separate and apart from claim on insurance contract. *Corwin Chrysler-Plymouth, Inc. v. Westchester Fire Ins. Co.*, 279 N.W.2d 638 (1979); *Bender v. Time Ins. Co.*, 286 N.W.2d 489 (1980); *Smith v. American Family Mut. Ins. Co.*, 294 N.W.2d 751 (1980).

Bad Faith. Violations of North Dakota Prohibited Practices in Insurance Business Act arguably evidence of bad faith even in absence of a frequency indicating general business practice. *Ingalls v. Paul Revere Ins.*, 1997 ND 43, 561 N.W.2d 273.

Rate Regulation. Prescribed by Ch. 214, Session Laws of 1947. Casualty Insurance Rates, §26.1-25, N.D.C.C.

## ACCIDENTAL MEANS

No statutory Provisions. Suicide while insane held accidental. *Weber v. Interstate*, 48 N.D. 307, 184 N.W. 97 (1921). Where bodily infirmity or disease is induced by accident disease is incidental means used by original

moving cause to bring about its fatal effect and death resulting is attributable to accident alone. *Druhl v. Equitable Life*, 56 N.D. 517, 218 N.W. 220 (1928), 60 A.L.R. 962. Bodily strain resulting in heart injury as "bodily injury." *Jacobson v. Mutual*, 69 N.D. 632, 289 N.W. 591 (1940); same case, 296 N.W. 545 (1941).

Accident Defined When interpreting an insurance policy, accident is defined as "happening by chance unexpectedly taking place, not according to the usual course of things." *Acquity v. Burd & Smith Cont., Inc.*, 2006 ND 187, 721 N.W.2d 33. (Assault). *Haser v. Maryland*, 53 N.W.2d 508 (1952); *Wall v. Pennsylvania Life Ins.*, 274 N.W.2d 208 (1979).

Whether death is caused by disease or accident is jury question. *Kasper v. Provident Life Ins. Co.*, 285 N.W.2d 548 (1979).

Sanity or insanity is not a factor in determining whether person committed suicide within terms of life insurance policy. Suicide is no defense to life policy after one year. §26.1-33-37, N.D.C.C.

When party is found guilty of an intentional crime, the act cannot be held "accidental" in the civil suit. *Ohio Cas. Ins. Co. v. Clark*, 1998 ND 153, 583 N.W.2d 377.

Aneurysm death which occurred during hunting was not accident because the congenital defect that caused it could have happened with normal exertion. *Grabau v. Hartford Accid. & Ins. Co.*, 149 N.W.2d 361 (N.D. 1967).

## ADJUSTERS

There are no statutory provisions except §26.1-13-23, N.D.C.C., which provides for adjustment of losses by fire, lightning or cyclone where insured by county mutual company, by committee of not more than three members, and in case parties cannot agree upon amount of damage, board of arbitration consisting of three members is chosen to determine controversy and its decision is final.

Definition. There are no statutory provisions defining adjuster. Adjuster defined (case law). *Taylor-Baldwin Co. v. Northwestern Fire & Marine Ins. Co.*, 122 N.W. 396 (1909).

There are no licensing requirements for adjusters in North Dakota.

## AGE

See "AUTOMOBILES"; "LIABILITY INSURANCE"; "NEGLIGENCE."

In General. Age of majority, in general, is 18. §14-10-01, N.D.C.C. Persons under age 21 may not purchase or consume alcoholic beverages. §5-01-08, N.D.C.C.

### AGENTS AND BROKERS

In General. Definition of, §26.1-26-02, N.D.C.C. controls contrary stipulations in fire insurance policy. *Anderson v. N.W. Fire & Marine*, 51 N.D. 917, 201 N.W. 514 (1924). Extent of an agent's powers and scope of his authority are not defined by statute. *Kopald v. Ocean Accident*, 64 N.D. 213, 251 N.W. 852 (1933). Provision does not apply to fraternal, assessment or beneficiary associations. Where one's service to insurance company is purely ministerial in character, he is not agent of company. *Aetna Indem. v. Schroeder*, 12 N.D. 110, 95 N.W. 436 (1903). Advertised statements as to job potential are "puffing," not fraudulent inducement to enter an employment contract. *Kary v. Prudential*, 541 N.W.2d 703 (N.D. 1996). Evidence was sufficient to support instruction on issue of whether insolvent insurer's licensed agent was "insurance broker" as defined under North Dakota statute, in action by insurer's receiver to recover unearned premiums that agent had distributed to policyholders. *Gallinger v. Vaaler Ins.*, 1995, 62 F.3d 250.

For Whom. Cashier of bank who is also insurance agent and who transmits application for insurance on buildings with loss payable clause to bank is agent for insurance company in transaction. *Michelsen v. North American*, 53 N.D. 391, 206 N.W. 225 (1925). Agent who took application for insurance is agent for company not agent for deceased. *National Farmers Union v. Michaelson*, 110 N.W.2d 431 (N.D. 1961); *Lindlout v. Northern Founders Ins.*, 130 N.W.2d 86 (N.D. 1964). Also where insured told agents of high blood pressure 4 years earlier, but concealed pre-cordial pain from medical examiner, this was not sufficient notice of condition and policy was voidable for misrepresentation. Licensed agent of foreign company who solicited insurance, took applications, received policies, countersigned them and collected premiums was company's agent with authority to make oral agreement to insure personally pending issuance of policy. *Ulledalen v. U.S. Fire Ins.*, 23 N.W.2d 856 (N.D. 1946). Agent who completed application for disability insurance policy was agent of disability insurer, not insured. *Ingalls v. Paul Revere Life Ins.*, 1997 ND 43, 561 N.W.2d 273.

Fraud by Agent. Fraud of agent in making out application for insurance incorrectly notwithstanding all facts are stated to him truthfully by applicant will not defeat policy. But where insured is silent after notice of fraud he becomes party to it and is estopped from deny-

ing knowledge thereof. *Johnson v. Dakota Fire & Marine*, 1 N.D. 167, 45 N.W. 799 (1890).

Knowledge of Agent. Where agent acting for conflicting interests, knowledge not imputed to principal. *First Nat'l Bank of Nome v. German Am. Ins.*, 23 N.D. 139, 134 N.W. 873 (1912). Agent's knowledge or concealment of error is not imputed to innocent principal with distinct corporate identity. *Employers Re. v. Landmark Ins.*, 547 N.W.2d 527 (N.D. 1996). Information of assured's title obtained by local agent who accepts premium and issues policy, held to bind insurer. *Stotlar v. German Alliance Ins. Co.*, 23 N.D. 346, 136 N.W. 792 (1912); *Leisen v. St. Paul Fire & Marine Ins. Co.*, 20 N.D. 316, 127 N.W. 837 (1910); *Michelsen v. North Am. Ins. Co.*, 53 N.D. 391, 206 N.W. 225 (1925); *Anderson v. U.S. Fire Ins. Co.*, 57 N.D. 462, 222 N.W. 609 (1928). Knowledge of general agent and adjuster acquired in adjustment of loss, imputed to insurer. *Michigan Idaho Lumber Co. v. Northern Fire & Marine Ins.*, 35 N.D. 244, 160 N.W. 130 (1916). Knowledge of soliciting agent deemed that of insurer where applicant truthfully answers questions but agent records same incorrectly. *French v. State Farmers' Mut. Hail Ins.*, 29 N.D. 426, 151 N.W. 7 (1915); *Horswill v. Mut. Fire Ins. Co. of N.D.*, 45 N.D. 600, 178 N.W. 798 (1920); *Michigan Idaho Lumber Co. v. Northern Fire & Marine Ins.*, *supra*. Insurance agent's knowledge of insured's illness is imputed to insurer and estops insurer from asserting lack of disclosure of material facts as defense against insured's claim arising from insurance contract. *Schock v. Ocker Ins.*, 248 N.W.2d 786 (N.D. 1976).

Liability of Agent. Agent must exercise skill and care which reasonably prudent person engaged in an insurance business would use under similar circumstances. This duty is ordinarily limited to the duties imposed in any agency relationship to act in good faith and follow instructions. *Rawlings v. Fruhwirth*, 455 N.W.2d 574 (N.D. 1990). Negligence or contract claims against insurance agents must be brought within two years starting from the date discovered or should have been discovered. No claim shall be brought six years after performance of services unless discovery is prevented by fraud. §26.1-26-51, N.D.C.C.

Failure to Procure Policy. Absent special circumstances, agent has no duty to procure additional insurance to fill gap between liability policy and umbrella policy unless specifically asked by insured to do so. *Rawlings v. Fruhwirth*, *supra*.

For insolvent company. No reported cases or statutes.

Licensing and Regulation. Insurance agent must have license from Commissioner of Insurance. §26.1-26-



03, N.D.C.C. Non-residents may be licensed pursuant to Ch. 26.1-26, N.D.C.C. Commissioner of Insurance may suspend revoke or refuse to continue or issue license to agent if agent is found to have knowingly solicited, procured or sold "unnecessary" or "excessive" insurance coverage. *Gust v. Pomeroy*, 466 N.W.2d 137 (N.D. 1991); §26.1-26-42(8), N.D.C.C.

### ARBITRATION

Statutory prohibition of specific performance of agreement to submit controversy to arbitration has been removed. §32-04-12, N.D.C.C. North Dakota has adopted the Uniform Arbitration Act. Ch. 32-29.2, N.D.C.C. Arbitrators have authority to decide law and factual issues unless limited by the contract or statute granting the right of arbitration. *Allstate v. Nodak Mut. Ins.*, 540 N.W.2d 614 (1995). Parties to an arbitration agreement cannot contractually expand the scope of judicial review beyond that provided by statute. *John T. Jones Const. Co. v. Grand Forks*, 2003 N.D. 109, 665 N.W.2d 698. If the proceeding described in the insurance contract merely establishes the amount of loss, it is not an arbitration proceeding under Uniform Arbitration Act. An arbitration proceeding describes the entire controversy including liability. *Minot Town & Country v. Fireman's Fund Ins. Co.*, 1998 ND 215, 587 N.W.2d 189.

### ATTORNEYS

Appointment and Authority. See Admission to Practice Rules and Rules of Professional Conduct adopted for practice in North Dakota.

Conflict of Interest. Conflict of interest defined and discussed at Rules 1.6, 1.7 and 1.8 of the North Dakota Rules of Professional Conduct.

Corporate Agents. Business entities may not be represented by non-attorneys in legal proceedings. *Carlson v. WSI*, 2009 ND 87, \_\_\_ N.W.2d \_\_; *State ex rel. Dept. of Labor*, 2008 ND 191, 757 N.W.2d 50.

Legal Malpractice. A client may be entitled to damages for losses resulting from his attorney's failure to exercise the degree of care, skill, and diligence commonly exercised by reasonable and prudent lawyers. *Johnson v. Haugland*, 303 N.W.2d 533 (N.D. 1981). An attorney found guilty of deceit, collusion or willfully delays is subject to treble damages. *Bjorgen v. Kinsey*, 466 N.W.2d 553 (N.D. 1991). However, a criminal conviction is not necessary before treble damages are available. *Id.* Ambiguous professional liability policy required insurer to pay for punitive damages up to the policy limits and allowed company to seek indemnity from

the insured attorney. *Continental Cas. v. Kinsey*, 499 N.W.2d 574 (N.D. 1993).

Fees. No set standard for private litigants. Guidelines set forth in Rule 1.5 of North Dakota Rules of Professional Conduct. Attorneys fees recoverable in Workers' Compensation proceedings, §§65-04-24, 65-04-25, 65-02-08, N.D.C.C. The trial court is considered an expert to decide attorneys fees, and the North Dakota Supreme Court will not overturn a decision absent a clear abuse of discretion. *State Farm Fire & Cas. v. Sigman*, 508 N.W.2d 323 (N.D. 1993). Insured is entitled to recover attorney fees and costs incurred in the course of defending a declaratory judgment action by the insurer. *Id.* For claims for uninsured or underinsured motorist benefits after August 1, 2003, insured can no longer recover attorney fees absent bad faith by insurer or if contract so provides. §§26.1-40-15.2 and .3, N.D.C.C. While insured entitled to recover attorney fees expended in litigation to determine coverage, insured may not recover attorney fees incurred in enforcing a settlement agreement. *Fisher v. American Family Mut. Ins. Co.*, 1998 ND 109, 579 N.W.2d 599 (1998).

### AUTOMOBILES

See Law Digest Tables.

See "NEGLIGENCE" and "NO-FAULT."

Age/Licensing/Learner's Permit. Person under sixteen years of age cannot be licensed as operator. §39-06-03, N.D.C.C. Exception to foregoing provision in case of child more than 14 and less than 16, otherwise qualified, for restricted permit or restricted license. §§39-06-05, 39-06-17, N.D.C.C.

Parent or Guardian responsible for any damages due to negligent operation of motor vehicle by such child. §39-06-17, N.D.C.C. The negligence of a minor driver is imputed to an injured passenger when the injured passenger is the person who signed the minor driver's application for an instructional permit. *Anderson v. Anderson*, 1999 ND 57, 591 N.W.2d 138.

Agency. Employee taking employer's truck, contrary to instructions, and using truck for his own pleasure, is not engaged in employer's business. *McIntee v. Boker*, 66 N.D. 669, 268 N.W. 661 (1936). An agent has no implied authority to invite guest to ride in motor vehicle in his charge, as respects master's liability for injuries sustained by guest. *Erickson v. Foley*, 65 N.D. 737, 262 N.W. 177 (1935). To hold employer liable for salesman's negligence in driving his own automobile, relation of master and servant must exist. *Ignabowitch v. McLoughlin*, 66 N.D. 132, 262 N.W. 352 (1935).

Negligent Entrustment. An action for negligent entrustment is recognized. *Barsness v. General Diesel & Equip. Co.*, 383 N.W.2d 840 (1986).

Comparative/Contributory Negligence. See “NEGLIGENCE.”

Compulsory Insurance Coverage. Limits of \$25,000/\$50,000/\$25,000 required. Ch. 39-16, N.D.C.C. Automobile insurance also requires no-fault, uninsured motorist, and underinsured motorist. See Ch. 26.1-41, N.D.C.C. Non-owned car exclusion was not contrary to public policy. *State Farm Mut. Auto. v. LaRoque*, 486 N.W.2d 235 (N.D. 1992). Statutory spousal exclusion. §26.1-40-16, N.D.C.C.

Alcohol/D.W.I. Various statutory regulations, fines, restrictions - Title 39, N.D.C.C. Statutes prohibit driving with blood alcohol in excess of .08.

Damages. See “NEGLIGENCE”; “LIABILITY INSURANCE”; “DAMAGES.”

Family Purpose Doctrine. This doctrine has been variously applied. *Vannett v. Cole*, 41 N.D. 260, 176 N.W. 663 (1918); *Miller v. Kraft*, 57 N.D. 559, 223 N.W. 190 (1929); *Ulman v. Lindeman*, 44 N.D. 36, 176 N.W. 25 (1919); *Carpenter v. Dunnell*, 61 N.D. 263, 237 N.W. 779 (1931); *Posey v. Krogh*, 65 N.D. 490, 259 N.W. 757 (1954). See also *Michaelsohn v. Smith*, 113 N.W.2d 571 (N.D. 1962); *Staroba v. Heitkamp*, 338 N.W.2d 640 (N.D. 1983). After adoption of comparative negligence in 1973, the family purpose doctrine was extended to impute a driver’s negligence to owner of family vehicle for purpose of limiting owners recovery for property damage against third-party tort-feasor. *Scho-binger v. Ivy*, 467 N.W.2d 728 (N.D. 1991).

Guests. Guest statute declared unconstitutional in *Johnson v. Hassett*, 217 N.W.2d 771 (N.D. 1974).

Ordinary negligence of host is sufficient to render him liable to guest when it is superinduced by intoxication of host. *Borstad v. LaRoque*, 98 N.W.2d 16 (N.D. 1959); *Sahli v. Fuehrer*, 127 N.W.2d 900 (N.D. 1964). See also *Sheets v. Pendergrast*, 106 N.W.2d 1 (N.D. 1960), for definition of gross negligence.

Imputed Negligence/Joint Enterprise. There is joint liability where injury results from concurring acts of two or more persons. *Stockfield v. Sayre*, 69 N.D. 42, 283 N.W. 788 (1939). There is no joint enterprise between minors. *Dimond v. King*, 221 N.W.2d 86 (N.D. 1974).

Last Clear Chance. See “NEGLIGENCE.”

Ownership/Title. All statutory requirements. Ch. 39-05, N.D.C.C.

Pedestrians. Whether pedestrian negligently left place of safety and was equally negligent with driver was a fact question for jury. *Marohl v. Osmundson*, 462 N.W.2d 145 (1990). Statutory regulations, §39-10-34, N.D.C.C.

No-Fault. Generally Ch. 26.1-41, N.D.C.C. Minimum benefits of \$30,000 required. 26.1-41-02, N.D.C.C. Maximum amount of basic no-fault benefits payable for all economic loss incurred and resulting from accidental bodily injury to any one person from any one accident is \$30,000. §26.1-41-01, N.D.C.C. A tort-feasor who has required no-fault is exempt from tort liability for damages covered by no-fault. §26.1-41-08, N.D.C.C. Under Section 26.1-41-20 of the North Dakota Century Code, an owner of an automobile cannot recover damages for non-economic loss if that owner has at least one prior unrelated conviction under Section 39-08-20 (carrying requisite amounts of insurance required by law in North Dakota).

Motorized Bicycles. Defined §39-01-01, N.D.C.C. Subject to same regulations as motorcycles. §39-10.2-01, N.D.C.C.

Seat Belts. Required for each front seat passenger of a vehicle operated upon a highway and designed to carry fewer than eleven passengers. §39-21-41.4, N.D.C.C. Children under 7 years of age must have available and be secured in while moving, an approved child restraint system. However, a child under the age of 7, who is at least 57 inches and weighs at least 80 pounds is not required to use a child restraint system. §39-21-41.2, N.D.C.C. Children ages 7 through 17 must be in an approved system or buckled seatbelt when the vehicle is moving. §39-21-41.2 N.D.C.C. A child weighing more than forty pounds may be restrained by a lap belt if the vehicle is not equipped with both lap and shoulder belts, or if lap and shoulder belts are in use by other occupants of the vehicle. §39-21-41.2, N.D.C.C. A child transported by emergency is not subject to this statute. *Id.* Violation of §39-21-41.2, results in a twenty-five dollar fine. §39-06.1-06, N.D.C.C.

Service of Process upon Nonresident Motorists. Use and operation by nonresident or his agent of motor vehicle on highways of state shall be deemed appointment by such nonresident of the highway commissioner to be his true and lawful attorney upon whom to serve process in action against him growing out of such operation on highways of state resulting in damages to person or property. Process is served by delivering copy to highway commissioner or filing same in his office and paying fee of \$10.00; provided, however, that notice of such service and copy of the process within ten days after service are sent by certified mail by plaintiff to de-

defendant at his last known address and return receipt requested, and that plaintiff's affidavit of compliance with provisions of act are attached to summons. Court in which such action is pending shall order such continuance as is necessary to afford reasonable opportunity to defend action. §§39-01-11 to 39-01-14, N.D.C.C. Statutory provisions providing for service of process on non-resident motor vehicle operator are mandatory and must be complied with in order to obtain personal jurisdiction by statute over non-resident defendant. *Loken v. Magrum*, 364 N.W.2d 79 (N.D. 1985).

Plaintiff injured while unloading parked truck, can not institute suit against owner, foreign corporation, by serving Highway Commissioner, when injury did not proximately result from any defective condition of truck and injury did not arise out of use and operation of truck. *Langness v. Fernstrom*, 253 F. Supp. 879 (D.N.D. 1966).

Speed Limit. No person may drive at a speed greater than is reasonable and prudent under the circumstances. Subject to this general provision, speed limits generally set forth in §39-09-02 (interstate) 75 mph; (paved two-lane highways unless otherwise posted) 65 mph; (paved and divided multi-lane highways unless otherwise posted) 70; (city) 25 mph; (school zone) 20 mph.

Trailers/Weight Limits. Weight and size restrictions set forth in Ch. 39-12, N.D.C.C.

Uninsured and Underinsured Endorsements. Compulsory coverages in minimum amounts of \$25,000/\$50,000. Definitions of "uninsured" and "underinsured" vehicles, as well as determination of eligible amounts provided by statute. §26.1-40-15.1, 15.2, 15.3, N.D.C.C. It is the insured status of the vehicle that is determinative, not the insured status of the driver. *Rask v. Nodak Mut. Ins.*, 2001 ND 94, 626 N.W.2d 693. Passenger is not entitled to recover under the underinsured motorist coverage statute when workers' compensation afforded exclusive remedy against co-employee. *Cormier v. National Farmers Union*, 445 N.W.2d 644 (N.D. 1989). A combine is an "uninsured motor vehicle" under policy providing coverage for any "land motor vehicle" without liability coverage. *Theidin v. U.S. Fidelity & Guar. Ins.*, 518 N.W.2d 703 (N.D. 1994). Not bad faith for insurer to deny claim which is fairly debatable or if there is a reasonable basis for denying claim or delaying payment. *Fetch v. Quam*, 2001 ND 48, 623 N.W.2d 357.

Stacking is prohibited and statutory system established for priority of payment. Reimbursement, subrogation and excludable claims detailed in §26.1-40-15.4, 15.5, 15.6, N.D.C.C.

Tort threshold is accidental bodily injury resulting in death, dismemberment, serious and permanent disfig-

urement or disability beyond 60 days, or medical expenses in excess of \$2,500. §26.1-41-01, N.D.C.C. Injured person can testify as to what medical expenses have been incurred due to accident to establish tort threshold. *Erdmann v. Thomas*, 446 N.W.2d 245 (N.D. 1989). Claimant's testimony as to causation for medical bills can establish no-fault tort threshold but claimed future medical expenses require an expert witness. *Tuhy v. Schlabsz*, 1998 ND 31, 574 N.W.2d 823. Secured person exemption to driver was unavailable where injured (unsecured) person did not have claim payable by no-fault insurer. *VanKlootwyk v. Arman*, 477 N.W.2d 590 (1991). An aneurysm resulting in death during operation of a vehicle, which is neither caused by, no aggravated by, a subsequent collision, is not within no-fault coverage. *State Farm Mut. Auto v. Estate of Gabel*, 539 N.W.2d 290 (1995). Insurance providing bodily injury coverage may not limit or reduce benefits payable because the person receiving such benefits is related to the policyholder. §26.1-40-16.1, N.D.C.C.

Stacking of benefits prohibited. §26.1-41-14, N.D.C.C.

## AVIATION

No Uniform Act. Civil liability of owner or operator determined by state tort law. §§2-03-05, 2-03-14, N.D.C.C. Rules and regulations adopted and enforced by State Aeronautics Commission. Ch. 2-05, N.D.C.C. Separate products liability provisions applicable to aviation manufacturers and sellers. Ch. 28-01.4, N.D.C.C.

Limits to Liability. The sale or modification of aircraft components within this state can be subject to an after market product liability insurance policy that covers exposure to tort liability within the United States. §26.1-48-02, N.D.C.C.

Service of process made at the designated office of the agent of the air carrier. §41-09-27, N.D.C.C.

## BROKERS

See "AGENTS AND BROKERS."

## BURGLARY INSURANCE

In determining whether property was stolen within meaning of theft policy, circumstances as to how property is secured is significant. *Lavas v. St. Paul*, 240 N.W.2d 53 (1976).

## CANCELLATION

See "ACCIDENT AND HEALTH INSURANCE, Contracts"; "LIABILITY INSURANCE"; "FIRE INSURANCE, Contracts."

When agent for independent agency issued certificate of insurance, insured acquired automobile liability coverage; absent cancellation of coverage by insurer in accordance with terms of policy, insurer was liable for coverage as indicated on certificate. *Blackburn, Nickles Smith, Inc. v. National Farmers Prop. & Cas.*, 482 N.W.2d 600 (1992).

## CHATTEL MORTGAGE

See "FIRE INSURANCE."

## CONSTRUCTION OF POLICY

Ambiguity of Terms. Doctrine of reasonable expectations not adopted by North Dakota. *Center Mut. Ins. v. Thompson*, 2000 ND 192, 618 N.W.2d 505. Policies drawn by insurer are adhesion contracts and any ambiguity must be construed most strongly against company. *Wall v. Pennsylvania Life Ins.*, 274 N.W.2d 208 (N.D. 1979); *Dolajak v. State Auto & Cas. Underwriters*, 278 N.W.2d 373 (N.D. 1979). Construction of written insurance contract to determine its effect is question of law for court to decide. *Kasper v. Provident Life*, 285 N.W.2d 548 (N.D. 1979). If there is doubt concerning insurer's duty to defend, such doubt will be resolved in favor of insured. *Kyllo v. Northland Chemical Co.*, 209 N.W.2d 629 (N.D. 1973). Language is ambiguous if it can be reasonably construed as having at least two alternative meanings. *Johnson v. Center Mut. Ins.*, 529 N.W.2d 568 (N.D. 1995). If blanket exclusion encompasses all losses other than coverage designated by policy, failure to designate coverage relieves insurer of liability. *Symington v. Walle Mut. Ins.*, 1997 ND 93, 563 N.W.2d 400. Policy terms "vacant" and "unoccupied" are clear and unambiguous. *Landis v. CNA*, 1999 ND 35, 589 N.W.2d 590. The presence of an undefined term allows court to look at other sources for meaning. *Hanneman v. Continental Western Ins.*, 1998 ND 46, 575 N.W.2d 445. For commercial liability insurance policy, property damage caused by faulty workmanship is a covered accidental occurrence to the extent the faulty workmanship causes damage to property other than the insured's work product. *Acquity v. Burd & Smith Constr., Inc.*, 2006 ND 187, 721 N.W.2d 33.

Conditional Receipt of Application. §26.1-24-02, N.D.C.C. Acknowledgement in policy of receipt of premium is conclusive evidence of payment so far as to make the policy binding, notwithstanding any stipulation in policy that policy is not binding until premiums are actually paid. *Anderson v. American Standard Ins. Co. of Wisc.*, 293 N.W.2d 878 (1980).

Inconsistent Policy Terms and Endorsements. Where repugnancy between clauses exists, whole policy should be construed so as to conform to evident consis-

tent purpose. *Myli v. American Life Ins. Co. of Des Moines, IA*, 43 N.D. 495, 175 N.W. 631 (1919), 11 A.L.R. 1097. Certificate of group life insurance must be construed in light of terms of group policy. *Magee v. Equitable Life Assur. Soc'y of U.S.*, 62 N.D. 614, 244 N.W. 518 (1932), 85 A.L.R. 1457. Ambiguous policy is construed most favorably to insured. *Minnesota Mut. Life Ins. v. Marshall*, 29 F.2d 977 (8th Cir. 1928). Contract must receive reasonable interpretation. *Donohue v. Mutual Life Ins. Co. of N.Y.*, 37 N.D. 203, 164 N.W. 50 (1917), L.R.A. 1918A, 300. See *Beauchamp v. Retail Merchants Ass'n Mut. Fire Ins.*, 38 N.D. 483, 165 N.W. 545 (1917). Language of endorsement that conflicts with language of main policy governs interpretation. *Nodak Mut. v. Heim*, 1997 ND 36, 559 N.W.2d 846. Application must be construed as part of contract. *Montgomery v. Whitbeck*, 12 N.D. 385, 96 N.W. 327 (1903). Statutes are part of contract made thereunder. *Tennefos v. Guarantee Mut.*, 136 N.W.2d 155 (N.D. 1965).

Insurer may not contractually exclude coverage when covered peril is efficient proximate cause of damage, even though excluded peril may have contributed to damage. *Western Nat'l Mut. Ins. v. UND*, 2002 ND 63, 643 N.W.2d 4.

Oral Binders. Preliminary oral contract for temporary insurance is valid and in force until issuance of written policy or risk rejected and insurer liable during interim. *Reishus v. Implement Dealers Mut. Ins.*, 118 N.W.2d 673 (N.D. 1962).

## DAMAGES

### Appellate Review.

Excessive Verdicts. Verdict of \$25,033.90 in favor of employee who fell while assembling concrete form manufactured by defendant was not excessive where employee fell 16 to 18 feet, sustained injuries to his neck which physician estimated caused 10% permanent partial disability, employee's special damages were about \$5,500, and employee had life expectancy of 47.2 years. *Seibel v. Symons Corp.*, 221 N.W.2d 50 (N.D. 1974). \$400,000 verdict for soft tissue injury was not excessive, plaintiff was a "young woman of unusual athletic ability" who suffered a 21% whole person impairment. *Miller v. Breidenbach*, 520 N.W.2d 869 (N.D. 1994).

Where contractor who did carpentry and siding work was permanently disabled, had been sole support of his wife and minor daughter, had life expectancy of approximately 26 years, and had earnings ranging from \$2,126.03 to \$5,827.06 in five years prior to injury, award of \$47,700 for loss of past and future earnings was not excessive. *Anderson v. Miller's Fairway Foods*, 225 N.W.2d 579 (1975). Verdict of \$283,300 not exces-



sive to plaintiff with minor compression fracture of back and pre-existing history of migraines; \$2,800 past medical, \$17,500 future medical, \$33,000 loss of productive time, \$20,000 permanent disability, \$110,000 pain and discomfort, \$100,000 punitive damages. *Olmstead v. First Interstate Bank of Fargo*, 449 N.W.2d 804 (N.D. 1980). Total award of \$223,000, which included no separate award for pain, discomfort or mental anguish, is inadequate for 23 year old female who suffered spine injury; complete loss of bladder and bowel function, and all sensation of sexual organs, fracture leg and shoulder injury. *Slaubaugh v. Slaubaugh*, 466 N.W.2d 573 (N.D. 1991).

**Arbitration Awards.** Res judicata applies to arbitration proceedings as well as judicial proceedings. *Byron's Constr. Co. v. North Dakota Dept. of Transp.*, 463 N.W.2d 660 (1990). Specific statutory grounds for vacating, modifying or correcting awards. §§32-29.3-23 and 24, N.D.C.C.

**Collateral Estoppel.** Collateral estoppel or res judicata applies to arbitration proceedings as well as judicial proceedings. *Byron's Constr. Co. v. North Dakota Dept. of Transp.*, 463 N.W.2d 660 (1990).

**Comparative Negligence.** Contributory fault (including comparative negligence) does not bar recovery unless plaintiff's fault was as great as combined fault of all other persons who contribute to injury, but any damages must be reduced by percentage of contributing fault of plaintiff. §32-03.2-02, N.D.C.C.

**Indemnification.** Generally, Ch. 22-02. A contract of indemnity may be express or implied. *Johnson v. Haugland*, 303 N.W.2d 533 (N.D. 1981). The contract of indemnity is to be construed as all other contracts. Indemnity agreement will not be construed to indemnify a party against the consequences of its own negligence unless that interpretation is clearly intended. *Bridston v. Dover Corp.*, 352 N.W.2d 194 (N.D. 1984). See *Rupp v. American Crystal Sugar Co.*, 465 N.W.2d 614 (N.D. 1991). An insurer has no duty to indemnify insured's intentional shooting. *Ohio Cas. Ins. v. Clark*, 1998 ND 153, 583 N.W.2d 377.

**Psychic Injuries - Mental Pain and Suffering.** Mother of new-born baby could not recover damages from hospital for emotional and mental shock suffered as result of seeing baby dropped from arms of hospital employee onto tiled floor of mother's hospital room. *Wheatham v. Bismarck Hospital*, 197 N.W.2d 678 (N.D. 1972). Emotional distress is a constituent of damages parents may recover for severe injury or death of child. *Jacobs v. Anderson Bldg. Co.*, 430 N.W.2d 558 (N.D. 1988). Plaintiff not in zone of danger may recover negligent infliction of emotional distress provided emotional

distress is severe. *Muchow v. Lindblad*, 435 N.W.2d 918 (N.D. 1989). Injury or death of children. Parents or beneficiaries may recover damages for loss of society, comfort and companionship, and mental anguish, for injury or death of child. *Hopkins v. McBane*, 427 N.W.2d 85 (N.D. 1988); *First Trust Co. v. Scheels Hardware*, 429 N.W.2d 5 (N.D. 1988). No recognized cause of action for loss of parental consortium. *Butz v. World Wide, Inc.*, 492 N.W.2d 88 (N.D. 1988). No recognized cause of action for loss of parental consortium. *Id.*

**Punitive Damages.** When evidence is such that jury may find that defendants, in committing wrong, knowingly, willfully and recklessly violated express provisions of law, jury may also infer malice and award exemplary damages. *Mahanna v. Westland Oil Co.*, 107 N.W.2d 353 (N.D. 1960). Presumed malice may be found where the defendant's conduct amounts to a reckless disregard of the rights of others. *Slaubaugh v. Slaubaugh*, 466 N.W.2d 573 (N.D. 1991). Punitive damages cannot be alleged in complaint, rather, after suit has begun, moving party can make motion to amend complaint to include punitive damages provided affidavits filed with motion show by a preponderance of the evidence fraud, malice, or oppression exists. §32-03.2-11, N.D.C.C. Punitive damages may be awarded only when fraud, malice or oppression exists. §32-03.2-11, N.D.C.C.; *Rath v. Armour & Co.*, 136 N.W.2d 142 (N.D. 1962). Punitive damages may be recovered in a wrongful death action. *Puppe v. A.C. & S., Inc.*, 733 F. Supp. 1355 (1990). In action against insurer to recover punitive damages for breach of obligation not arising from contract, insured must show that insurer acted with intent to vex, injure, or annoy, or with conscious disregard of insured's rights. *Corwin Chrysler-Plymouth, Inc. v. Westchester Fire Ins.*, 279 N.W.2d 638 (N.D. 1979). It is not required that punitive damages be in reasonable proportion to actual damages suffered. *Smith v. American Family*, 294 N.W.2d 751 (N.D. 1980). Punitive damages limited to the greater of \$250,000 or two times the compensatory damages. §32-03.2-11, N.D.C.C. (1993). Punitive damage award of \$2.5 million prior to statutory cap. *Ingalls v. Paul Revere Ins.*, 1997 ND 43, 561 N.W.2d 273.

**Collateral Source Rule.** Reduction for economic damages permitted provided there is a "collateral source" as that term is defined. §32-03.2-06, N.D.C.C. Payments made on farm worker's behalf by Indian Health Services did not fall under personal insurance exception to collateral source rule, and thus farm worker's personal injury damages award would be reduced by amount of those payments, where farm worker failed to show that he purchased benefits he received. *Leingang v. George*, 589 N.W.2d 585 (N.D. 1999). Money given to plaintiff as gift was not included in statutory definition

of “collateral source payment” so as to require that jury award be reduced on the basis of thereof. *Dewitz by Nuestel v. Emery*, 508 N.W.2d 334 (N.D. 1993).

**Statutory Caps on Awards.** Liability limited for political subdivisions to \$250,000/\$500,000 unless insurance is purchased in greater amounts. §32-12.1-03, N.D.C.C. Exemplary damages cap. §32-03.2-11, N.D.C.C. (1993). \$500,000 cap on noneconomic damages in medical malpractice claim. §32-42-02, N.D.C.C. Against the state damages limited to \$250,000 per person, \$1,000,000 per occurrence. §32-12.2-02, N.D.C.C. If exemplary damages are awarded, they may not exceed twice the amount of compensatory damages or \$250,000, whichever is greater. §32-03.2-11, N.D.C.C.

**Breach of Contract.** Recovery may be had for loss of anticipated profits, where they are reasonably certain in character and are proximate result of either tort or breach of contract, or where, in case of contract, they may be reasonably supposed to have been within contemplation of parties when contract was made as probable result of breach. *Truscott v. Peterson*, 50 N.W.2d 245, 78 N.D. 498 (1951).

**Loss of Earnings.** One who is injured in his person through fault of another may recover for loss sustained through being deprived of his earning power. *Wilson v. Oscar H. Kjorlie Co.*, 12 N.W.2d 526, 73 N.D. 134 (1944). Under collateral source rule, plaintiff is entitled to claim lost wages resulting from injuries even though plaintiff continues to receive his salary through employer’s wage continuation program. *Keller v. Gama*, 378 N.W.2d 867 (N.D. 1985).

**Loss of Profits.** In order to justify recovery of damages for loss of anticipated profits, it must be made to appear that business, which has been interrupted, was established one which had been successfully conducted for such length of time and had such trade established that profits thereof were reasonably ascertainable. *Truscott v. Peterson*, 50 N.W.2d 245, 78 N.D. 498 (1951); *Swain v. Harvest States Coops.*, 469 N.W.2d 571 (N.D. 1991).

**Injury to Property.** In tort action by lessees of grocery store to recover damages sustained as result of store falling into excavation, half salary paid by lessees to their department heads in return for agreement by department heads to return to their jobs when lessees would be ready to open business in new building, was not proper item of damages. *Truscott v. Peterson*, 50 N.W.2d 245, 78 N.D. 498 (1951). For commercial liability insurance policy, property damage caused by faulty workmanship is a covered accidental occurrence to the extent the faulty workmanship causes damage to property other than the insured’s work product. *Acquity v.*

*Burd & Smith Constr., Inc.*, 2006 ND 187, 721 N.W.2d 33.

**Pain and Suffering.** Pain and suffering may be considered by jury as one of elements of damages, but sympathy may not be made basis for rendering or upholding otherwise excessive verdict. *Leonard v. North Dakota Co-op. Wool Mktg. Ass’n*, 6 N.W.2d 576, 72 N.D. 310 (1942). Although jury may award damages in one category and not in another, award must reflect “logical and probable decision” and must be consistent when “considering the evidence in the light most favorable to the verdict.” *Barta v. Hinds*, 1998 ND 104, 578 N.W.2d 553.

**Duty to Mitigate.** “Doctrine of avoidable consequences,” is general rule relating to duty of contracting party to minimize damages. *Stetson v. Investors Oil, Inc.*, 140 N.W.2d 349 (N.D. 1966); *Selland v. Fargo Public School Dist. No. 1*, 302 N.W.2d 391 (N.D. 1981).

**Liquidated Damages.** In absence of evidence to contrary, liquidated damages clause is so inconsistent with any other damages remedy as to require that it contemplates exclusiveness. *Ray Farmers Union Elevator Co. v. Weyrauch*, 238 N.W.2d 47 (N.D. 1975). Contractual provision for liquidated damages will not permit recovery for actual damages for events not covered by liquidated damages clause, unless contract expressly provides that damages other than those enumerated shall not be recovered. *Meyer v. Hanson*, 373 N.W.2d 392 (N.D. 1985). Parties may agree upon damages to fix actual damage. §9-08-04, N.D.C.C.; *Bottineau Public Sch. Dist. No. 1 v. Zimmer*, 231 N.W.2d 178 (N.D. 1975).

Where passenger and drivers involved in auto accident were all “secured persons” exempt from liability for economic losses to extent of all basic no-fault benefits paid or payable, passenger who had not exhausted all her no-fault benefits was properly prevented from introducing evidence of economic loss. *Moser v. Wilhelm*, 300 N.W.2d 840 (N.D. 1980).

Evidence of person’s failure to wear protective helmet while traveling on motorcycle is admissible to reduce plaintiff’s damages so long as there is competent testimony by qualified expert. *Halvorson v. Voeller*, 336 N.W.2d 118 (N.D. 1983). In *Duma v. Keena*, the North Dakota Supreme Court noted that it was not deciding whether separation of the questions of negligence and mitigation was now inappropriate under comparative fault. The concurrence stated that the correct analysis would be to combine the questions; however, in this case the parties failed to object to the instructions or the verdict form. Therefore, the law of the case is essentially as it was in *Halvorson*. 2004 N.D. 104, 680 N.W.2d 627.

**DEATH**

Abatement and Survival. No cause of action shall abate due to death except breach of promise, alienation of affections, libel and slander. §28-01-26.1 N.D.C.C.

Action for Wrongful Death. Statutory act governing cause of action, damages, parties in interest and two year statute of limitations. Ch. 32-21, N.D.C.C. Wrongful-death action may be brought against one whose tortious conduct causes death of viable unborn child. *Hopkins v. McBane*, 359 N.W.2d 862 (N.D. 1984). Insurer has no duty to defend or indemnify insured in wrongful death action when insured intentionally shot victim. *Ohio Cas. Ins. v. Clark*, 1998 ND 153, 583 N.W.2d 377.

Damages. As a matter of North Dakota law, punitive damage claim may be argued to a jury in wrongful death actions. *Puppe v. A.C. & S., Inc.*, 733 F. Supp. 1355 (1990). Loss of society and companionship and mental anguish damages are recoverable. Damages arising from wrongful death may be economic or non-economic. §32-03.2-04, N.D.C.C.

Parties in Interest. In the following order: surviving spouse, children, parents, grandparents, personal representative, or person with primary physical custody of decedent before wrongful act. §32-21-03, N.D.C.C.

Statute of Limitations. Injured party must bring action within two years from time of death. §28-01-18, N.D.C.C.

Unexplained Absence. It is presumed that person not heard from in seven years is dead. §§31-11-04.1, 04.2 and 04.3, N.D.C.C. This presumption, however, arises only upon unexplained absence from last known home of absentee. *Wright v. Jones*, 23 N.D. 191, 135 N.W. 1120 (1912). Statute construed in *Satterberg v. Minnesota*, 19 N.D. 38, 121 N.W. 70 (1909); *Willard v. Mohn*, 24 N.D. 390, 139 N.W. 979 (1913). Operation of statute limited to persons designated. *Harshman v. M. P. Ry. Co.*, 14 N.D. 69, 103 N.W. 412 (1905).

**DISABILITY**

No statutory classifications.

“Wholly disabled,” “totally disabled,” “immediately” and “continuously” defined. *Jacobson v. Mutual*, 70 N.D. 566, 296 N.W. 545 (1941).

“Total Disability” means an inability to do all the substantial and material acts necessary to carry on the insured’s business for which insured is qualified. *Kooker v. Benefit Assn. of Ry. Emp.*, 246 N.W.2d 743 (1976).

Proof of Condition. Where policy provides for disability benefits upon receipt by insurer of due proof of disability, furnishing of such proof is condition prece-

dent in liability for benefits. *Mullaney v. Equitable Life Assur. Soc’y of U.S.*, 66 N.D. 235, 264 N.W. 663 (1936). Insured entitled to disability benefits for a subsequent disability from an unrelated cause only when previous cause of disability, for which he received benefits, had ceased. *Ziegelmann v. TMG Life Ins.*, 2000 ND 55, 607 N.W.2d 898.

**FINANCIAL RESPONSIBILITY LAW**

See Law Digest Tables.

See also, “AUTOMOBILES, Compulsory Coverage.”

**FIRE INSURANCE**

Arson. Criminal definition, §12.1-21-01, N.D.C.C. Insurer may rely on circumstantial evidence to support inference that insured intentionally set fire. *Zajac v. Great American Ins.*, 410 N.W.2d 155 (1987).

Appraisal. Appraisal establishes only amount of loss and not liability for loss under insurance contract. *Minot Town & Country v. Fireman’s Fund Ins.*, 587 N.W.2d 189 (N.D. 1998).

Assignment. May be oral or in writing. If policy is assigned to mortgagee insurance is deemed to be upon interest of mortgagor who continues to be party to original contract, and any act of his which would otherwise avoid insurance will have same effect although property is in hands of mortgagee. §26.1-29-29, N.D.C.C. But if insurer assents to transfer of the insurance from mortgagor to mortgagee and at time of assent imposes further obligations on assignee so as to make new contract with him, acts of mortgagor do not affect his right. §26.1-29-30. Fire policy may be assigned orally. *Hecker v. Comm.*, 35 N.D. 12, 159 N.W. 97 (1916). See §26.1-39-23, N.D.C.C. temporary insurance, use of binders.

Chattel Mortgages. No Cases.

Contract - Policy.

Binder. General agent has implied authority to write temporary policies and insurer will be bound by agreement that loss will be covered pending negotiations for larger policy. *Michigan Idaho Lumber Co. v. Northern Fire & Marine Ins.*, 35 N.D. 244, 160 N.W. 130 (1916). See §26.1-39-23, N.D.C.C. temporary insurance, use of binders.

Cancellation. Holder of any policy of insurance against loss or damage to property by fire or other casualty may, notwithstanding any provision thereof or contract to contrary, at any time surrender the same for cancellation and upon such surrender company issuing pol-

icy shall retain or receive short rate premium for time policy remained in force. §26.1-24-05, N.D.C.C.

**Mortgage Clause.** Policies in use stipulate generally that mortgage of property insured invalidates policy. There are no decisions discussing divisibility of contract where part of property insured is mortgaged.

**Contract created by policy with mortgage clause,** held one between insurer and insured and mortgagee. *Anderson v. U.S. Fire Ins.*, 57 N.D. 462, 222 N.W. 609 (1928).

**Reformation.** Insurance contract may be reformed and recovery thereon enforced in same action. *French v. State Farmers' Mut. Hail Ins.*, 29 N.D. 426, 151 N.W. 7 (1915), L.R.A. 1915 D. 432. Evidence of mutual mistake is insufficient to justify reformation of fire policy. *Pipan v. Aetna Ins.*, 55 N.D. 585, 214 N.W. 901 (1927).

**Severable Contracts.** Policy is written for gross premium for stated amounts on building and its contents, which requires account books kept in iron safe, held divisible. *Ennis v. Retail Merchants Ass'n Mut. Fire Ins.*, 33 N.D. 20, 156 N.W. 234 (1916).

**Standard Provisions.** §26.1-39-06, N.D.C.C. Provisions of standard policy are subject to same rules of construction as any other written contract. *Yuske v. Middlewest Fire Ins. Co. of Valley City, N.D.*, 39 N.D. 66, 166 N.W. 539 (1917).

**Damages - Expected Risks Fixtures.** Barn on blocks, was not fixture but was personalty, therefore there was insurable interest under fire policy although land had been lost on execution sale before barn burned. *Strobel v. Northwest G.F. Mut. Fire Ins.*, 152 N.W.2d 794 (N.D. 1967). Insured's fraudulent conduct is defense to valued fire insurance policy action. *Zuraff v. Empire Fire & Marine Ins. Co.*, 252 N.W.2d 302 (N.D. 1977).

**Proof of Loss.** Regulated by §§26.1-32-05 to 26.1-32-10, N.D.C.C. Notice of loss must be given promptly; insured must give best evidence when preliminary proof of loss is required by policy; all defects in notice of loss or in preliminary proof thereof which insured might remedy and which insurer omits to specify to him without unnecessary delay as grounds of objection are waived; insurer must furnish proof of loss forms upon notice of loss. Where proof blanks are not furnished by company upon request they are deemed waived. *Horswill v. North Dakota Mut. Fire Ins. Co.*, 45 N.D. 600, 178 N.W. 798 (1920). Formal proof also is waived by refusal to pay loss for alleged non-payment of premiums. *Ennis v. Retail Merchants*, 33 N.D. 20, 156 N.W. 234 (1916).

**Repair/Replacement Value.** Where, through mutual fault or without either party's fault, appraisal fails and new appraisal is impossible, insurer's option to take

property at appraised value or to replace is not available. *Siegel v. Insurance Co. of Am.*, 56 N.D. 841, 219 N.W. 467 (1928).

**Multiple Policies.** No statutory provision. Will be a matter of contract.

**Excessive Policies.** Proof of fraud in procurement of a stated value policy by overvaluing insured property will defeat insured's claim. *Zuraff v. Empire Fire & Marine Ins.*, 252 N.W.2d 302 (N.D. 1977).

**Insurable Interest.** Every interest in property or relation thereto or liability in respect thereof if of such nature that contemplated peril might damnify insured directly, is insurable interest. §26.1-29-04, N.D.C.C. One loaning money and taking as collateral assignment of fire policy on goods used by borrower in his business, has insurable interest. *Hecker v. Commercial State Bank of Carrington*, 35 N.D. 12, 159 N.W. 97 (1916).

Person has insurable interest if he stands to gain advantage from it, or suffer loss by destruction, even though he has no title. *Reishus v. Implement Dealers Mut. Ins.*, 118 N.W.2d 673 (N.D. 1962).

**Ownership.** Clause in policy of fire insurance providing for forfeiture in case of change in title is strictly construed and change of interest giving right to declare forfeiture must be calculated to make assured less watchful in caring for and preserving insured property. *Anderson v. U.S. Fire Ins.*, 57 N.D. 462, 222 N.W. 609 (1928).

## GUEST CASES

See "AUTOMOBILES, guests."

## HOSPITALS

**Evidence - Records.** A party who commences an action in malpractice waives privilege as to medical records of defendant. §28-01-46.1, N.D.C.C.

**Liens.** Provision for hospital lien. Ch. 35-18, N.D.C.C. See *Rolla Community Hosp., Inc. v. Dunseith Community Nursing Home, Inc.*, 354 N.W.2d 643 (N.D. 1984), holding statutory hospital lien valid against insurer if insurer had actual notice.

**Warranties.** No statutory provision. A matter of contract.

**Immunity.** State hospital immunity abolished. *Bulman v. Hulstrand Constr. Co.*, 521 N.W.2d 632 (N.D. 1994).

## HUSBAND AND WIFE

**Community Property.** North Dakota is not a community property jurisdiction.

Interspousal Immunity. Abolished in *Fitzmaurice v. Fitzmaurice*, 62 N.D. 191, 242 N.W. 525 (1932), court construing §§14-07-05, 14-07-06, N.D.C.C. declared common law abrogated and that wife may sue husband for personal tort.

Loss of Consortium. Recognized. *Milde v. Leigh*, 28 N.W.2d 530 (N.D. 1947). A loss of consortium claim must be joined with the underlying action absent a compelling reason. No cause of action recognized children's loss of parental consortium. *Butz v. World Wide, Inc.*, 492 N.W.2d 88 (N.D. 1992).

### INFANTS

See "AUTOMOBILES, Age"; "NEGLIGENCE, Age."

General. Neither parent nor child is liable for the act of the other. §14-09-21, N.D.C.C. Child born alive has cause of action for prenatal injury caused by tortious conduct. *Hopkins v. McBane*, 359 N.W.2d 862 (1984).

### INLAND MARINE

No reported cases.

### LIABILITY INSURANCE

Cancellation. Statutory requirements for auto Ch. 26.1-40, N.D.C.C. property and casualty Ch. 26.1-39, N.D.C.C. and commercial liability Ch. 26.1-30, N.D.C.C.

Compromise of Claims. There are no decisions concerning duty of insurer to make settlement of claim, but rule recognized in practice is that insurer has complete control over claim and may settle or litigate it as in its judgment seems best. Miller-Shugart settlement agreement reduced to judgment may be enforceable against insurer. Notice to insurer of Miller-Shugart agreement is not required if insurer refused to defend insured. *Hanneman v. Continental Western Ins. Co.*, 575 N.W.2d 445 (1998). Insurers duty to negotiate claims in good faith does not extend to injured claimants with no contractual relationship to the insurer. *Dvorak v. American Family Mut. Ins.*, 508 N.W.2d 329 (N.D. 1993). Insured's unauthorized settlement with Workforce Safety and Insurance does not allow the insurer to deny insured un-insured claim because insurer is not adversely affected since insurer retains its statutory right to reduce damages payable to insured by amount paid or payable to insured under worker's compensation law. *Sandberg v. American Family Ins.*, 2006 ND 198, 722 N.W.2d 359. Insurer cannot deny under-insured motorist coverage because of insured's failure to notify insurer or proposed settlement with tortfeasor unless insurer proves it suffered actual prejudice from the lack of notice. To determine if actual prejudice is proved, court will consider

amount of tortfeasor's assets, likelihood of recovery via subrogation, extent of insured's damages, expenses and risks of litigating insured's cause of action. *Hasper v. Center Mut. Ins.*, 2006 ND 220, 723 N.W.2d 409.

Right of Insurer to Settle. See "Compromise of Claims."

Contribution Among Joint Tort-feasors. Based on revised (1957) Uniform Contribution Among tort-feasors Act. §32-38-01, N.D.C.C. Construed in *Levi v. Montgomery*, 120 N.W.2d 383 (N.D. 1963). Nothing in act restricts its application to situations in which parties act in concert or jointly. *Thorson v. City of Minot*, 153 N.W.2d 764 (N.D. 1967).

Joint and Several Liability. The liability of each party is several only and liable only 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. §32-03.2-02, N.D.C.C. Liability of each tort-feasor is separate and several unless tort-feasors acted in concert. *Target Stores v. Automated Maintenance Svc., Inc.*, 492 N.W.2d 899 (1992). "Acting in concert" will not be construed to include concurrent negligence. *Reed v. UND*, 1999 ND 25, 589 N.W.2d 880. 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*, 1999 ND 235, 603 N.W.2d 869. Absent a special relationship between the driver and passenger, the passenger is not liable for the negligence of the driver. *Hurt v. Freeland*, 1999 ND 12, 589 N.W.2d 551.

Cooperation of Insured. There is no established rule.

Coverage - Construction of Terms. See "CONSTRUCTION OF POLICY."

Omnibus Provisions. Motor vehicle liability policy must provide omnibus clause coverage. *Hughes v. State Farm Mut. Auto. Ins.*, 236 N.W.2d 870 (1975).

Direct Action Against Insurer. Injured party has no standing to challenge insurer's duty to defend the insured. *Hins v. Heer*, 259 N.W.2d 38 (N.D. 1977). However, in the declaratory judgment setting, one insurer may litigate the duty of another insurer to defend and indemnify. *Blackburn, Nickels & Smith, Inc. v. National Farmers Union Prop. & Cas.*, 452 N.W.2d 319 (N.D. 1990).

Duty to Defend. A liability insurer's obligation to defend its insured is measured by the terms of the policy and the pleading of the complaint who sued the insured;

if the allegation in claimant's complaint would support a recovery upon a risk covered by policy, duty to defend is present. If there is doubt as to whether insurer's duty to defend is present, such doubt will be resolved in favor of the insured. *Kyllo v. Northland Chemical Co.*, 209 N.W.2d 629 (N.D. 1973). If the allegations in the complaint are outside the terms of the policy, the insurer has no duty to investigate and ascertain facts independent of the complaint before it resolves the question of duty to defend. *National Farmers Union Prop. & Cas. v. Kovash*, 452 N.W.2d 307 (N.D. 1990). Failure to document all endorsements accompanying revised policy can be basis for finding insurer had duty to defend and provide coverage. *Hart Constr. Co. v. American Family Ins. Co.*, 514 N.W.2d 384 (N.D. 1994). No duty to defend when negligent acts indicate continuing pattern of intentional molestation of minors. *Nodak Mut. Ins. v. Helm*, 1997 ND 36, 559 N.W.2d 846.

**Liability Between Insurers.** For automobiles, statutory framework applicable in certain instances. §26.1-40-17, N.D.C.C. Rental vehicles. §26.1-40-17.1, N.D.C.C. Otherwise, largely a matter of contract. *Houser v. Gilbert*, 389 N.W.2d 626 (N.D. 1986).

Primary. §26.1-40-17, N.D.C.C.

Excess. §26.1-40-17, N.D.C.C.

Exclusions.

**Intentional Acts.** *National Farmers Union v. Kovash*, 452 N.W.2d 307 (N.D. 1990); *Medd v. Fonder*, 543 N.W.2d 483 (N.D. 1996).

**Assault.** *Hins v. Heer*, 259 N.W.2d 38 (N.D. 1977).

**Violation of Law.** Transporting intoxicating liquor, *Flath v. Bankers Cas.*, 49 N.D. 1053, 194 N.W. 739 (1923).

Miscellaneous exclusions.

Waiver. See "WAIVER AND ESTOPPEL."

**Reservation of Rights.** Failure to reserve rights or deny coverage for lack of "bodily injury" bars insurer from denying coverage. *D.E.M. v. Allickson*, 555 N.W.2d 596, (N.D. 1996).

**Infants.** No specific reported case dealing with coverage.

**Insolvency of Insured.** No reported cases.

**Jury.** Disclosure, during jury trial, that defendant has or does not have liability insurance is prejudicial error requiring mistrial or reversal. *Neibauer v. Well*, 319 N.W.2d 143 (N.D. 1982); *but see Filloon v. Stenseth*, 498 N.W.2d 353 (N.D. 1993) (allowing evidence if fulfills an exception in N.D. R. Evid. 411).

**Notice.** For fire insurance, must be given without unnecessary delay. §26.1-32-05, N.D.C.C. Otherwise, as defined by policy under the circumstances. Where insured was in jail and hospital from time of accident and mails notice of accident from hospital two months after accident, it was "as soon as practicable." *Automobile Club Ins. Co. v. Hoffert*, 195 N.W.2d 542 (N.D. 1972). Insured was not precluded from recovering benefits under automobile policy by his failure to notify insurer of accident or comply with "conditions precedent" to coverage as required by policy, where insured received no policy or documentation from insurer. *National Farmers Union Prop. & Cas.*, 482 N.D.2d 600 (1992).

**Punitive Damages.** Insured cannot be indemnified for losses caused by insureds own willful acts. *Hins v. Heer*, 259 N.W.2d 38 (N.D. 1977); *but see Continental Cas. v. Kinsey*, 499 N.W.2d 574 (N.D. 1993) (ambiguous contract allowed for payment of punitive damages to policy limits and company may seek indemnity from insured where insured's liability was the result of intentional acts of fraud and deceit). However, punitive damages can be awarded for conduct other than willful acts. §32-03.2-11, N.D.C.C.

## LIMITATION OF TIME FOR COMMENCEMENT OF ACTION

See Law Digest Tables.

**Limitations in Contract.** General statute of limitations, §28-01-16, N.D.C.C., requires that action on contract shall be brought within six years after cause of action has accrued. Stipulations limiting time in absence of permissive statutes are void. §9-08-05, N.D.C.C.; *Storing v. National Surety*, 56 N.D. 14, 215 N.W. 875 (1927). No policy of life insurance may contain provision limiting time within which action at law or equity may be commenced to less than five years after cause of action shall accrue. §26.1-33-06, N.D.C.C.

With regard to statutes of limitation in conjunction with claims based on another state's law, North Dakota has adopted Uniform Conflict of Laws-Limitations Act. Ch. 28-01.2, N.D.C.C.

Availability of an adequate alternative forum is a prerequisite to granting a motion to dismiss based on forum non conveniens, and an adequate alternative forum does not exist if the statute of limitations has expired in the proposed alternative forum. *Vicknair v. Phelps Dodge Industries, Inc.*, 2009 WL 1845570, 2009 ND 113 (currently subject to petition for rehearing).

**Political Subdivisions.** Action against political subdivisions must be brought within three years after cause of action has accrued. §32-12.1-10, N.D.C.C. Unless



otherwise specifically provided for, actions against state or employees must be commenced within three years after claim for relief has accrued. §28-01-22.1, N.D.C.C.

§26.1-36-04, N.D.C.C., which imposes three-year limitation on sickness or accident insurance contract actions, prevails over general six-year limitation on contract actions. *Bender v. Time Ins.*, 286 N.W.2d 489 (N.D. 1980).

Accrual. A cause of action accrues when the right to commence it comes into existence; occurring with the conjunction of damages and the wrongful act so that it can be brought in a court of law without being subject to dismissal for failure to state a claim. *Keller v. Clark Equip. Co.*, 474 F. Supp. 966 (D.C.N.D. 1979).

Discovery Rule. Applicable to medical malpractice. *Wheeler v. Schmid Laboratories, Inc.*, 451 N.W.2d 133 (N.D. 1990); legal malpractice. *Wall v. Lewis*, 393 N.W.2d 758 (N.D. 1986); fraud §28-01.1-02, N.D.C.C. Application and discussion of discovery rule. *BASF Corp. v. Symington*, 512 N.W.2d 692 (N.D. 1994). "Repressed" or "blocked" childhood sex abuse memory discussed. *Osland v. Osland*, 442 N.W.2d 907 (N.D. 1989). Application of discovery rule to repressed sexual abuse claim. *Peterson v. Huso*, 552 N.W.2d 83 (N.D. 1996).

Equitable Estoppel. Statute of limitations may be precluded by equitable estoppel if party was induced not to file within statutory period. *Rutherford v. BNSF Railway*, 2009 ND 88, \_\_\_ N.W.2d \_\_\_.

Fraud. Six years from date claimant knew or should have known. §28-01-16, N.D.C.C.

Tolling. Provisions for infancy, insanity and imprisonment provided for. §28-01-25, N.D.C.C. Also, under certain circumstances, absence from state tolls statute if state court lacks jurisdiction over defendant. §28-01-32, N.D.C.C. §28-01-32, N.D.C.C. (1989) declared unconstitutional. *Muller v. Custom Distributors, Inc.*, 487 N.W.2d 1 (N.D. 1992).

Waiver. No statutory provision, but can generally waive benefits of law unless unconscionable. Specific types of cases. See generally Ch. 28-01 and index to N.D.C.C.

In medical malpractice action, statute §28-01-46, N.D.C.C. requiring claimant to obtain admissible expert opinion to support allegation of negligence within three months of commencement of action or at such later date set by court has attributes of statute of limitations and thus is prospective rather than retroactive in application. *Fortier v. Traynor*, 330 N.W.2d 513 (N.D. 1983). Court will dismiss medical malpractice case if plaintiff does not obtain admissible expert opinion pursuant to §28-01-46, N.D.C.C., and does not move for an extension with

good cause shown. *Weasel v. St. Alexius Med. Ctr.*, 230 F.3d 348 (8<sup>th</sup> Cir. 2000); *Scheer v. Altru Health System*, 2007 ND 104, 734 N.W.2d 778.

Statute of repose covering construction of improvements to real property does not apply to manufacturer of building materials used in improvement. *Hebron Public Sch. Dist. No. 13 of Morton County v. U.S. Gypsum Co.*, 475 N.W.2d 120 (1991).

Six year statute of limitations applies to product liability action based upon negligence and strict liability but a four-year statute of limitations period applies to claims involving transactions in goods which results in personal injuries to parties who are not in privity. *Spieker v. Westgo, Inc.*, 479 N.W.2d 837 (N.D. 1992); §41-02-104, N.D.C.C. Asbestos removal from public buildings, shall have until August 1, 1997 to bring an action for removal and replacement of asbestos. This statute also revives any claims. §28-01-47, N.D.C.C. (1993). North Dakota does not adopt doctrine of equitable tolling of malpractice statute of limitations. *Kendall v. Trinity Hosps.*, 2004 ND 47, 676 N.W.2d 88. Torts which occur in North Dakota, but are subject to federal maritime law utilize the federal 3-year statute of limitations, not the 6-year North Dakota statute of limitations. *Voge v. Schnaidt*, 2001 ND 174, 635 N.W.2d 161.

## MALPRACTICE

### Medical.

Statutory Requirements and Limitations. Two-year statute of limitations and six-year statute of repose (unless discovery prevented by fraud) for medical malpractice actions. §28-01-18, N.D.C.C. Limit of \$500,000 for noneconomic damages and requirement that parties make a "good faith" ADR attempt prior to starting health care malpractice suit. §32-42-02, N.D.C.C.

Medical duties of physicians and surgeons discussed. *Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir. 1972); *Haven v. Randolph*, 494 F.2d 1069 (D.C. Cir. 1974); *Robbins v. Footer*, 553 F.2d 123 (D.C. Cir. 1977); *Winkjer v. Herr*, 277 N.W.2d 579 (N.D. 1979). Radiologist. *Burke v. Washington Hosp. Ctr.*, 475 F.2d 364 (D.C. Cir. 1973). Anesthesiologist. *Asher v. Gutierrez*, 533 F.2d 1235 (D.C. 1976). Dentist. *Graham v. Roberts*, 441 F.2d 995 (D.C. 1970). Optometrist. *Heimer v. Privratsky*, 434 N.W.2d 357 (N.D. 1989). Res ipsa. *Raza v. Sullivan*, 432 F.2d 617 (D.C. 1970). Statutory requirement necessitating expert opinion for medical negligence except in obvious cases not excused by doctrine of res ipsa loquitur. *Larsen v. Zarrett*, 498 N.W.2d 191 (N.D. 1993). Relevant standard of care and prima facie case can be established through cross-examination of defendant doctor. *Greenwood v. Paracelsus Health*



Care, 2001 ND 28, 622 N.W.2d 195. Scope of informed consent. *Winkjer v. Herr*, 277 N.W.2d 579 (N.D. 1979); *Buzzell v. Lib.*, 240 N.W.2d 36 (1983).

Expert Testimony. Expert testimony required. *Larsen v. Zarrett*, 498 N.W.2d 191 (N.D. 1993). Expert opinion required within three months of lawsuit commencement to maintain action based upon alleged medical negligence, unless good cause is shown. §28-01-46, N.D.C.C.; *Scheer v. Altru Health System*, 2007 ND 104, 734 N.W.2d 778. Waiver of privilege for health care providers in malpractice cases. §28-01-46.1, N.D.C.C.

Standard of Care.

Wrongful birth/life actions prohibited. §32-03-43, N.D.C.C.

Hospital. See above discussion. Common law rule of charitable immunity has been abolished. *Granger v. Deaconess Hosp. of Grand Forks*, 138 N.W.2d 443 (N.D. 1965).

Legal. See "Attorneys." Legal malpractice is to be determined by rules that apply to professional negligence generally, subject to necessary qualification that court must determine legal questions which underlie ultimate issue. *Dan Nelson Constr. Inc. v. Nodland & Dickson*, 2000 ND 61, 665 N.W.2d 267.

Other Professionals. Engineer. *Three Affiliated Tribes v. Wold Engineering*, 419 N.W.2d 920 (N.D. 1988). Architects and Engineers are "professionals" for purposes of the two-year statute of limitations for professional malpractice actions. *Sime v. Tvenge Assoc. Architects & Planners, P.C.*, 488 N.W.2d 606 (N.D. 1992).

## NEGLIGENCE

See Law Digest Tables.

Age. Negligence of infants discussed. *Kirchoffner v. Quam*, 264 N.W.2d 203 (N.D. 1978); *Sheets v. Pendergrast*, 106 N.W.2d 1 (N.D. 1960).

Attractive Nuisance. Principle discussed. *Ruehl v. Lidgerwood*, 23 N.D. 6, 135 N.W. 793 (1912), L.R.A. 1918 C. 1063.

Assumption of Risk. Included in comparative fault (i.e., negligence). §32-03.2-01, N.D.C.C.; *Erickson v. Schwan*, 453 N.W.2d 765 (1990).

Comparative/Contributory Negligence. Effective July 1, 1973 contributory negligence as defense has been abolished, and doctrine of comparative negligence adopted. §9-10-07, N.D.C.C.; See *McLean v. Kirby Co.*, 490 N.W.2d 229 (N.D. 1990) (a criminal act of one defendant could not be compared with the negligence of another defendant to reduce plaintiff's recovery). See

§32-03.2, N.D.C.C. Effective 1987, comparative fault was adopted. §32-03.2-02, N.D.C.C. Court's finding of apportionment of negligence will not be set aside on appeal unless such finding is clearly erroneous. *Bauer v. Graner*, 266 N.W.2d 88 (N.D. 1978). Comparative negligence is not bar to recovery of damages for personal injuries against railroad company but damages shall be diminished to proportion of amount of negligence of employee. §49-16-03, N.D.C.C. See also §49-16-08, N.D.C.C. Defense of contributory negligence is not available to employer for injury to employee.

Damages. Statutes permit recovery of both compensatory and, when warranted, punitive damages. Cap for damages with regard to political subdivisions. See Ch. 32-03 and §32-12.1-03, N.D.C.C. Cap on exemplary damages is two times the amount of compensatory damages or \$250,000 whichever is greater. §32-03.2-11, N.D.C.C.

Definition/Duty. *Gallagher v. Great Northern Ry. Co.*, 55 N.D. 211, 212 N.W. 839 (1927). "Actionable negligence" is existence of duty or obligation on part of one to protect another from injury, failure to discharge such duty, and resulting injury to other proximately caused by such breach of duty. *Carlson Homes, Inc. v. Messinger*, 307 N.W.2d 564 (N.D. 1981). Employer owes employee non-delegable duty to provide safe workplace, tools, and equipment. *Johansen v. Anderson*, 555 N.W.2d 588 (N.D. 1996). Various auto cases: Under right of way at intersection when there is imminent danger of collision if each maintains speed and course, driver of vehicle on left is negligent if he fails to yield. §39-10-22, N.D.C.C.; *Heid v. Shafer*, 140 N.W.2d 584 (N.D. 1966).

Governmental Immunity. State and its agents can only be sued in contract unless sovereign immunity waived. Ch. 32-12.1, N.D.C.C., and *Schloesser v. Larson*, 458 N.W.2d 257 (N.D. 1990). North Dakota constitution does not preclude the Supreme Court from abolishing the common law doctrine of sovereign immunity if appropriate. *Bulman v. Hulstrand Const. Co.*, 521 N.W.2d 632 (N.D. 1994). Governmental immunity exists for political subdivisions legislative, judicial or discretionary actions. §32-12.1-03, N.D.C.C. The state may be sued for an injury proximately caused by the negligence of a state employee acting within the scope of employment if a private person would be held liable to the claimant if such claim is authorized by the legislature. §32-12.2-02, N.D.C.C. The liability of the state is limited to \$250,00 per person and \$1 million for any number of claims arising from a single occurrence. §32-12.2-02, N.D.C.C. Party must present a written claim for compensation to maintain a non-contractual claim



against the state. *Messiha v. State*, 1998 ND 149, 583 N.W.2d 385.

Driving automobile with windshield so covered with frost that driver can not clearly see where he is going is negligence. *Heid v. Shafer*, 140 N.W.2d 584 (N.D. 1966).

Imputed Negligence. Negligence of driver of vehicle is not imputable to passenger or invitee or guest of driver. *Chambers v. Minneapolis, St. P. & S.S.M. Ry. Co.*, 37 N.D. 377, 163 N.W. 824 (1917). Negligence of driver cannot be imputed to passenger or guest having no control over automobile's movements. *Billingsly v. McCormick Transfer Co.*, 58 N.D. 921, 228 N.W. 427 (1929). The negligence of a minor driver is imputed to the person who signed the minor's application for a permit or license. §39-06-09. The negligence of a minor driver is imputed to an injured passenger when the injured passenger signed the minor's application for an instructional driving permit. *Anderson v. Anderson*, 1999 ND 57, 591 N.W.2d 57.

Negligence of owner's child in driving is imputed to owner under "Family Purpose Doctrine." *Schobinger v. Ivy*, 467 N.W.2d 728 (N.D. 1991).

Test of liability of automobile owner, who is passenger in his car, while it is being driven by spouse, is whether owner had reasonable opportunity, under facts and circumstances to exercise right of control. *Jasper v. Freitag*, 145 N.W.2d 879 (N.D. 1966).

Liquor Liability/Dram Shop Act. North Dakota's Dram Shop Act, provides claim for relief for fault from person who knowingly disposes, sells, barter, or gives away alcoholic beverages to minor, incompetent or obviously intoxicated person. Contributory fault is no defense unless contributory fault was as great as combined fault of other persons. Under this Act liability of defendants is several and not joint unless there is concert of action. Effective July 1, this claim for relief will be for negligence. §5-01-06.1, N.D.C.C. Insurer not liable under general commercial liability policy for injuries resulting from sale of alcohol to minor, where policy excluded dram shop liability. *Continental Western Ins. v. The Dam Bar*, 478 N.W.2d 373 (1991). Third party's criminal act is not, as a matter of law, superseding, intervening cause with respect to a dram shop claim. *Stewart v. Ryan*, 520 N.W.2d 39 (N.D. 1994).

Joint and Several Liability. Plaintiffs injured by two or more tort-feasors who act in concert can recover under joint and several liability. *Kavadas v. Lorenzen*, 448 N.W.2d 219 (1989). Defendant is only liable for percentage of negligence assessed to them absent a concerted action claim. Without a claim of concerted action the defendant cannot make a third-party claim for con-

tribution. *Target Stores v. Automated Maintenance*, 492 N.W.2d 899 (N.D. 1992). An original tort-feasor is not liable for damages caused by medical malpractice in treating original injury due to the modified comparative fault tort revision. *Haff v. Hettich*, 1999 ND 94, 593 N.W.2d 383.

Last Clear Chance. Under this doctrine, wilful negligence is failure to exercise ordinary care after discovering person to be in position of peril. *Cowan v. Minneapolis, St. P. & S.S.M. Ry. Co.*, 42 N.D. 170, 172 N.W. 322 (1919). Person who last has clear opportunity of avoiding accident notwithstanding negligence of his opponent is considered solely responsible for it. *Acton v. Fargo*, 20 N.D. 434, 129 N.W. 225 (1910). One is not in peril when occupying place where by exercise of care, danger may be avoided. *State v. Great Northern Ry. Co.*, 54 N.D. 400, 209 N.W. 853 (1926). Doctrine presupposes negligence on part of plaintiff which, apart from doctrine itself, would constitute contributory negligence precluding recovery in spite of defendant's negligence. *Ramage v. Trepanier*, 69 N.D. 19, 283 N.W. 471 (1938).

Negligence per se. Violation of statute evidence of negligence not negligence per se. *Larson v. Kubisiak*, 1997 ND 22, 558 N.W.2d 852.

Premises Liability. North Dakota has abolished the common law distinction between licensees and invitees, but retained the distinction for trespassers. As to licensees and invitees, an occupier of premises is under a duty to act as a reasonable person in maintaining his property in a reasonably safe condition in view of all the circumstances. *Sternberger v. Williston*, 556 N.W.2d 288 (N.D. 1996). No such duty is owed to trespassers until trespasser's presence in a place of danger becomes known - then occupier has duty to exercise ordinary care to avoid injury to trespasser. *O'Leary v. Coenen*, 251 N.W.2d 746 (N.D. 1977). Landowner not liable for condition on land whose danger is known or obvious. *Sternberger v. Williston*, 556 N.W.2d 288 (N.D. 1996). Obvious means both condition and risk are apparent and would be recognized by a reasonable person. *Groleau v. Bjornson Oil Co.*, 2004 ND 55, 676 N.W.2d 763. A commercial general liability policy with post-1986 language will not cover the insured's work or product. *Fischer v. American Fam. Mut. Ins.*, 1998 ND 109, 579 N.W.2d 599.

Proximate Cause. Negligence is not actionable unless it was proximate cause of injury. *Clark v. Payne*, 48 N.D. 911, 187 N.W. 817 (1921). Proximate cause is that which in natural and continuous sequence, unbroken by any efficient intervening cause, produces injury and without which injury would not have occurred. *Johnson v. Minneapolis*, 54 N.D. 351, 209 N.W. 786; *Kelmis v. Cardinal Petroleum Co.*, 156 N.W.2d 710 (N.D. 1968).

Negligence and proximate cause are separate elements and each must be proved. *Knorr v. K-Mart Corporation*, 300 N.W.2d 47 (N.D. 1980). Expert testimony, to a reasonable degree of medical certainty, is necessary to establish a proximate cause between a motor vehicle accident and a disease or aggravation of a preexisting disease. *Kimble v. Bahl*, 2007 ND 13, 727 N.W.2d 256. Plaintiff's testimony establishing the injury was not sufficient alone. *Id.*

Res Ipsa Loquitur. Allows fact finder to draw an inference that the defendant's conduct was negligent if the accident was one which does not ordinarily occur in the absence of negligence, the instrumentality which caused plaintiff's injury was in the exclusive control of the defendant and there was no voluntary action or contribution on the part of the plaintiff. *Victory Park Apts., Inc. v. Axelson*, 367 N.W.2d 155 (N.D. 1985). If plaintiff can present evidence of negligence and the cause of the accident, plaintiff cannot invoke doctrine of res ipsa loquitur. *Haugen v. BioLife Plasma Servs.*, 2006 ND 117, 714 N.W.2d 841. Negligent repair of airplane proven by res ipsa loquitur doctrine. *Robert and Robert's Aerial Svc., Inc. v. Aircraft Investment Co.*, 1998 ND 62, 575 N.W.2d 672.

Sudden Emergency. Simply principle of law used where party is suddenly confronted with emergency not of his own making. He is required only to exercise degree of care ordinary prudent person would use under similar circumstances. *Farmers Union Grain Terminal Ass'n v. Briese*, 192 N.W.2d 170 (N.D. 1971). Not invoked where emergency caused in part by person's own acts. *Trautman v. New Rockford-Fessenden Co-op. Transport Ass'n*, 181 N.W.2d 754 (N.D. 1970). Essential feature of defense is that negligence of injured party is proximate cause of mishap. *Larson v. Meyer*, 135 N.W.2d 145 (N.D. 1965).

Person who knows that his conduct has caused harm to another has affirmative duty to render assistance to prevent further harm. *South v. National R.R. Passenger Corp. (AMTRAK)*, 290 N.W.2d 819 (N.D. 1980).

## NO-FAULT INSURANCE

Arbitration. A no-fault insurer has no right of subrogation against a secured person for no-fault benefits distributed. *Burgener v. Bushaw*, 545 N.W.2d 163 (N.D.1996). The right to reimbursement from the insurer of the secured person must be determined through the equitable allocation process of agreement or intercompany arbitration under procedures approved by the commissioner. §§26.1-41-16 and 17, N.D.C.C. Many policies provide for Uniform Arbitration Act adopted in North Dakota Ch. 32-29.2, N.D.C.C.

Benefits. North Dakota's No-Fault law Ch. 26.1-41, N.D.C.C. requires that at least \$30,000 be available for "economic loss." "Economic loss" is defined as medical expenses, rehabilitation expenses, work loss, replacement services loss, survivors' income loss, survivors' replacement services loss, and funeral, cremation, and burial expenses. Optional excess no-fault benefits, up to \$80,000, are to be made available, for an additional premium. Basic no-fault benefits are eligible to persons who receive negligent medical treatment for personal injuries sustained in a motor vehicle accident. *Haff v. Hettich*, 1999 ND 94, 593 N.W.2d 383.

Medical. "Medical expenses" are defined as reasonable charges incurred for necessary medical, surgical, x-ray, dental, prosthetic, ambulance, hospital, or professional nursing services or services for remedial treatment and care rendered in accordance with a recognized religious healing method. Does not include that portion of a charge for private/semi-private accommodations unless intensive care is medically necessary. No-fault insurer is not required to duplicate payment of medical expenses where they have been separately paid by health insurance coordinated with no-fault policies. *Kiefer v. General Cas.*, 381 N.W.2d 205 (N.D. 1985).

Wages. 85% of lost income during period of disability. §26.1-41-01, N.D.C.C. Same offset provisions may be in particular instances.

Non-economic. No non-economic benefits payable unless a "serious injury." See "Injury Threshold."

Death. Survivors benefits include wage loss (not to exceed \$150/week) and replacement services loss (not to exceed \$15.00/day). §26.1-41-01, N.D.C.C.

Compulsory. All owners of vehicles registered or operated in state required to have mandatory no-fault coverage in place. Provision is allowed self-insurance by adhering to requirements set by insurance commissioner.

Injury Threshold. No liability for non-economic loss unless there is a "serious injury" under the Act. No liability for economic loss for all basic no-fault benefits paid or to become payable. "Serious injury" is an accidental bodily injury which results in death, dismemberment, serious and permanent disfigurement or disability beyond 60 days, or medical expenses in excess of \$2,500. §26.1-41-01, N.D.C.C. Claimed medical expenses in excess of \$2,500 which could have included pre-existing or future medical expenses don't establish "serious injury." *Schutt v. Schmacher*, 548 N.W.2d 381 (N.D. 1996). Claimant can supply evidence of "serious injury" without expert witness but it is for the jury to determine whether medical expenses exceeded threshold. Future medical expenses claimed to meet the \$2,500

threshold require expert witness. *Tuhy v. Schlabsz*, 1998 ND 31, 574 N.W.2d 823.

Types of coverage. See, Benefits, above.

Financial Responsibility Laws. \$25,000 because of bodily injury to or death of one person, \$50,000 for two or more persons, \$25,000 for property damage. §§39-16-05, 39-16.1-11, N.D.C.C. Self-insurance provisions are available.

No fault automobile insurer may deduct workers' compensation benefits under certain circumstances. *Kroh v. American Family*, 487 N.W.2d 306 (N.D. 1992). No-fault insurer's refusal to waive right of reimbursement from liability insurer not bad faith. *Isaac v. State Farm Mut. Auto.*, 547 N.W.2d 548 (N.D. 1996).

### PENALTY AND ATTORNEY FEES

Not recoverable in tort unless provided for in contract or if claim for relief was frivolous. §28-26-01, N.D.C.C. Punitive damages may be recovered against insurer if insured shows insurer acted with intent to vex, injure or annoy, or with a conscious disregard of plaintiff's rights. *Corwin Chrysler-Plymouth, Inc. v. Westchester Fire Ins.*, 279 N.W.2d 638 (N.D. 1979). When insured receives policy protection only by court order after litigating coverage, it is necessary and proper to award attorney fees to give insured full benefit of insurance contract. *State Farm Fire and Cas. v. Sigman*, 508 N.W.2d 323 (N.D. 1993).

### PRIVILEGED COMMUNICATIONS

Communications between attorney/client, clergymen or priest/confessor, physician or psychotherapist/patient, and husband/wife. Rules 502-505, N.D. R. Evid.

Insurer/Insured. §26.1-02.1-03, N.D.C.C. No cases. Medical peer review/quality assurance processed privileged, but data, information, reports and records supplied merely confidential. *Trinity Medical Ctr. v. Holum*, 544 N.W.2d 148 (N.D. 1996).

Statements to police regarding possible prowler suspect are qualifiedly privileged. *Richland v. Nodland*, 552 N.W.2d 586 (N.D. 1996).

Waiver. Privilege holder must effect voluntary and intentional relinquishment of privilege. *Production Credit Ass'n v. Henderson*, 429 N.W.2d 421 (N.D. 1988). Waiver of physician/patient privilege when patient places physical condition at issue by filing malpractice action. *Sagmiller v. Carlsen*, 219 N.W.2d 885 (N.D. 1974).

Spousal Privilege. Marital communications are presumed to be confidential. That presumption, however,

may be overcome by proof of facts showing that they were not intended to be private. An objective test is used to determine whether or not a spouse intended communication to be confidential. *State v. McMorrow*, 314 N.W.2d 287 (N.D. 1982). Spouse seeking to assert husband-wife privilege must have acted in reliance upon expectancy of confidentiality that is reasonable under all circumstances. Whether a particular communication is protected as a confidential communication is question of fact to be determined by trial court. *State v. Clark*, 570 N.W.2d 195 (N.D. 1997).

### PRODUCTS LIABILITY

"Products liability action" means any action brought against manufacturer or seller of product, regardless of substantive legal theory or theories upon which action is brought, for or on account of personal injury, death, or property damage caused by or resulting from manufacture, construction, design, formula, installation, preparation, assembly, testing packaging, labeling, or sale of any product, or failure to warn or protect against danger or hazard in use, misuse, or unintended use of any product. §28-01.3-01, N.D.C.C. Non-manufacturer's liability is limited to instances where it had significant control over design or manufacture, had actual knowledge of defect, or created defect. §28-01.3-04, N.D.C.C. Circumstantial evidence will prove proximate cause in products liability cases. *Endresen v. Scheels Hardware & Sports Shop, Inc.*, 1997 ND 38, 560 N.W.2d 225.

Strict Liability. North Dakota Supreme Court has expressly adopted rule of strict liability in tort as set forth in §402A, Restatement of Torts (Second). *Johnson v. American Motors Corp.*, 225 N.W.2d 57 (N.D. 1974). To recover under theory of strict liability in tort, it must be shown by preponderance of evidence that product was defective in design or manufacture; that defect rendered product unreasonably dangerous to consumer; that defect existed when product left manufacturer; that product was expected to and did reach consumer without substantial change in condition; and that defect was proximate cause of plaintiff's injuries. *Kaufmann v. Meditec, Inc.*, 353 N.W.2d 297 (N.D. 1984).

Warranty. No reported cases explicitly finding such duty in tort. References usually made to U.C.C. See, *Air Heaters, Inc. v. Johnson Electric, Inc.*, 258 N.W.2d 649 (N.D. 1977).

Duty to Warn. Product may be defective and unreasonably dangerous for failure to give adequate warnings and/or instruction for use. *Anderson v. Teamsters Local 116 Building Club, Inc.*, 347 N.W.2d 309 (N.D. 1984). Both negligent and strict liability failure to warn theories may be pursued in the same case. *Morrison v. Grand*

*Forks Housing Auth.*, 436 N.W.2d 221 (N.D. 1989). Manufacturers have post-sale duty to warn user of foreseeable dangers. *Crowston v. Goodyear Tire & Rubber Co.*, 521 N.W.2d 401 (N.D. 1994). There is no valid reason for automatic preclusion of liability based solely upon "obviousness" of danger in action founded upon risk-spreading concept of strict liability in tort. *Olson v. A.W. Chesterton Co.*, 256 N.W.2d 530 (N.D. 1976). Instruction regarding assumption of risk was justified in light of evidence of plaintiff's awareness of danger. *Spieker v. Westgo, Inc.*, 479 N.W.2d 837 (N.D. 1992). Absence of thought regarding known danger is equivalent to momentary forgetfulness of danger and will warrant instruction on momentary forgetfulness. *Keller v. Vermeer Manufacturing Co.*, 360 N.W.2d 502 (N.D. 1984).

Damages. Compensatory, and when warranted by facts, punitive damages may be recovered. See "DAMAGES." Seller and non-manufacturer entitled to indemnity from seller unless created defect. §28-01.3-05, N.D.C.C. Economic loss, as distinguished from injury to property, may be recovered under express or implied warranty under Uniform Commercial Code but not under §402A, strict liability in tort, *Hagert v. Hatton Commodities, Inc.*, 350 N.W.2d 591 (N.D. 1984) (adopting economic loss doctrine). A manufacturer of a machine which is sold in a commercial transaction may not be liable in negligence or strict liability for economic loss caused by the failure of a component part which causes damage to the machine only. *Cooperative Power Ass'n v. Westinghouse Electric Corp.*, 493 N.W.2d 661 (N.D. 1992). Economic loss doctrine applies to consumer purchases, barring tort claims for economic loss when there is no damage to property other than defective product or persons. *Clarys v. Ford Motor Co.*, 1999 ND 72, 592 N.W.2d 573. Exemplary damages may not be awarded against manufacturer or seller, if they comply with Federal Statute administrative regulation or pre-market approval or certification by agency or Federal government. §32-03.2-11, N.D.C.C.

Indemnification. §28-01.3-05, N.D.C.C. Seller may not recover costs unless trier of fact attributes none of fault to seller. *Winkler v. Filmore & Tatge Mfg. Co., Inc.*, 334 N.W.2d 837 (N.D. 1983). If seller does no active wrong and does not alter product before it is sold seller is entitled to indemnity. *Herman v. General Irrigation Co.*, 247 N.W.2d 472 (N.D. 1976).

Punitive Damages. See "DAMAGES."

Defenses. State of art defense available to aircraft or aircraft component sellers or manufacturers. §28-01.4-03, N.D.C.C. Comparative negligence, assumption of risk, misuse of product are defenses. §§32-03.2-01, 32-03.2-02, N.D.C.C. Liability of parties is several and

not joint unless parties act in concert. §32-03.2-02, N.D.C.C. Rebuttable presumption against defects if product in conformity with government standards or if no government standards, within applicable industry standards. §28-01.3-09, N.D.C.C.

Disposing (spoliation) of physical evidence. *Bachmeier v. Wallwork Truck Ctrs.*, 544 N.W.2d 122 (N.D. 1996); *Belgarde v. Askim*, 2001 ND 206, 636 N.W.2d 916.

Alteration. Alteration or modification of product after its initial sale that changes purpose, use, function, design, or intended use or manner of use of product from that for which product was originally designed, tested, or engineered is defense. §28-01.3-03, N.D.C.C. Manufacturer may be liable for alterations which are foreseeable, regardless of whether the change is intentional or accidental. *Oanes v. Westgo, Inc.*, 476 N.W.2d 248 (1991).

Privity of Contract not required. *Johnson v. American Motors Corp.*, 225 N.W.2d 57 (N.D. 1974); §§9-10-07, 41-02-35, N.D.C.C.

Statute of Repose. 10 year statute of repose on products liability or within 11 years from date of manufacture. §28-01.3-08, N.D.C.C. (held unconstitutional in *Dickie v. Farmers Union Oil Co.*, 2000 ND 111, 611 N.W.2d 168)

Successor. Corporation which purchases assets of another corporation does not succeed to liabilities of selling corporation subject to following exceptions: 1) Where there is express or implied agreement to assume transferor's liabilities; 2) Where transaction amounts to consolidation or merger of two corporations; 3) Where transferee corporation is merely continuation of transferor corporation; or, 4) Transaction is attempt to defraud creditors of corporation. *Downtowner, Inc. v. Acrometal Products, Inc.*, 347 N.W.2d 118 (N.D. 1984).

## RELEASE

See Law Digest Tables.

Contract Law - General.

Consideration. A written instrument is presumptive evidence of consideration. §9-05-10, N.D.C.C. Forbearance from bringing suit can equate consideration. *Farmers Union Oil Co. v. Maixner*, 376 N.W.2d 43 (1985). Existence of consideration is a question of law. *Marangos v. Norwest Bank Minn., N.A.*, 507 N.W.2d 562 (1993).

Accord and Satisfaction. Defined in §§9-13-04 and 9-13-05, N.D.C.C.

Covenant Not to Sue. Release is not effected by covenant not to sue given to one joint tort-feasor. *Security State Bank v. Groen*, 230 N.W. 298 (1930).

Under §§9-08-08 and 9-08-09, a party can rescind personal injury settlement agreement within six months after date of injury if the settlement agreement was signed within 30 days after the injury or if made while the injured person remained disabled. *Swenson v. Ramin*, 1998 ND 150, 583 N.W.2d 102.

Infants' Claims. If amount small, practice is to take release from parents; if substantial, guardianship is used or pro forma order obtained.

Joint Tort-feasors. See *Levi v. Montgomery*, 120 N.W.2d 383 (N.D. 1963), which holds that generally release of one tort-feasor releases all, but giving covenant not to sue one tort-feasor will not release others. This case also holds that where tort-feasor, to whom injured party gave covenant not to sue, pays for such covenant, liability of remaining tort-feasors must be reduced by amount paid for covenant. General release of one tort-feasor is a release for all tort-feasors even if the parties intended otherwise. *Hepper v. Adams County, ND*, 133 F.3d 1094 (8<sup>th</sup> Cir. 1998).

In action for negligence under comparative negligence act, release given in good faith to one of two or more persons liable in tort for same injury discharges tort-feasor to whom it is given from all liability for contribution to any other tort-feasor. *Bartels v. Williston*, 276 N.W.2d 113 (N.D. 1979). Extension to known claims. §9-13-02, N.D.C.C.

Release of servant for his wrongful conduct also releases master from vicarious liability. *Horejsi by Anton v. Anderson*, 353 N.W.2d 316 (N.D. 1984). Release of master (employer) does not release negligent servant (employee). See *Keator v. Gale*, 561 N.W.2d 286 (N.D. 1997), which held negligent servant has no right of indemnity against his or her master.

Mistake. Mutual mistake of a material fact may justify rescission of a release. *Mitzel v. Schatz*, 175 N.W.2d 659 (1970). Mistake must be delineated in §§9-03-13 or 9-03-14, N.D.C.C.

## REPRESENTATIONS AND WARRANTIES

Statutory Provisions. Insured's misrepresentations in application for automobile policy about prior driving record, including convictions, were material misrepresentations, they increased risk of loss and policy was void ab initio. *Farmers Ins. Exch. v. Nagle*, 190 N.W.2d 758 (N.D. 1971).

Negative answer to inquiry of applicant for health insurance regarding existence of certain disease is not

such misrepresentation as will avoid policy if applicant honestly believed that he did not have disease. *Brown v. Inter-state Business Men's Ass'n*, 57 N.D. 941, 224 N.W. 894 (1929). Each party to contract of insurance must communicate to other all facts within his knowledge which he believes material to contract and which other has no means of ascertaining and as to which he makes no warranty.

Materiality. Materiality is determined by probable influence of facts on party to whom communication is due. §§26.1-29-13, 26.1-29-17, N.D.C.C. Provision that policy shall be void if insured misrepresented any material fact in writing or in case of any fraud is enforceable but misrepresentation must be material made knowingly for purpose of deceiving and defrauding insurance company. *Diehl v. Grant Farmers Mut. Fire & Lightning Ins.*, 53 N.D. 273, 205 N.W. 672 (1925). §26.1-29-14, N.D.C.C. defines concealment.

Rescission. §26.1-29-31, N.D.C.C. provides when insurer may rescind contract. Oral or written misrepresentations made in negotiation of contract or policy of insurance are not deemed material so that they will defeat policy or prevent its attaching unless made with actual intent to deceive or unless matter misrepresented increased risk of loss. §26.1-29-25, N.D.C.C. Leading case interpreting predecessor to foregoing section is *Soules v. Brotherhood of American Yeomen*, 19 N.D. 23, 120 N.W. 760 (1909), where it is held that "misrepresentations" as used in statute includes misstatements of fact in applications whether same previously had been known in law of insurance as warranties or representations. Interpretation made in this case has been applied in *Van Woert v. Modern Woodmen of Am.*, 29 N.D. 441, 151 N.W. 224 (1915); *Plotner v. Northwestern National Life Ins. Co.*, 48 N.D. 295, 183 N.W. 1000 (1921); *Donahue v. Mutual Life*, 37 N.D. 203, 164 N.W. 50 (1917); L.R.A. 1918a 300; *Brown v. Inter-state Business Men's Ass'n*, 57 N.D. 941, 224 N.W. 894 (1929). An exhaustive discussion of law of representations is contained in *Thomas v. New York Life*, 65 N.D. 625, 260 N.W. 605 (1935); *New York Life v. Hansen*, 71 N.D. 383, 2 N.W.2d 163 (1941).

Reformation. Reformation is appropriate for the judicial redrafting of a contract, but the Court will not strain insurance contract language to create ambiguity and side with the insured. *Martin v. Allianz Life Ins.*, 573 N.W.2d 823 (1998).

## SERVICE OF PROCESS

See Law Digest Tables.

Upon Corporations. N.D. R. Civ. P., Rule 4 (d) (2) (D). As to service outside state, see Rule 4 (d) (3). Reg-

istered agent of corporation need not simultaneously serve as officer or director of corporation. *Hilzendager v. Skwarok*, 335 N.W.2d 768 (N.D. 1983). Rule that service on officer or agent of corporation who has interest in action or claim antagonistic to interest in corporation is invalid is applicable to situations where officer of agent accepting service is assignor of plaintiff's claim. *Grand Forks v. Mik-Lan Recreation Ass'n, Inc.*, 421 N.W.2d 806 (N.D. 1988). Service of process addressed to foreign corporation by certified mail but not addressed to appropriate officer, director, or manager does not comply with Rule 4(d), N.D. R. Civ. P. *Eggl v. Fleet-guard, Inc.*, 1998 ND 166, 583 N.W.2d 812.

Upon Superintendent of Insurance see §26.1-01-04, N.D.C.C. Upon Insurance Commissioner for process on insurance company see §26.1-02-11, N.D.C.C. For unauthorized insurance company Commissioner is agent for service of process. §26.1-02-10, N.D.C.C.

Upon Non-Resident Motorists. See "AUTOMOBILES."

Personal service. N.D. R. Civ. P., Rule 4 (b).

On general question, see *501 De-Mers, Inc. v. Fink*, 148 N.W.2d 820 (N.D. 1967).

### SUBROGATION

In General. Ordinarily, subrogee does not waive any right to institute action for indemnity absent express waiver of such right. Waiver must be by act of subrogee; it cannot be contracted away by conduct or agreement of third parties. *St. Paul Fire & Marine Ins. v. Amerada Hess Corp.*, 275 N.W.2d 304 (N.D. 1979). See cases cited in Northwest Digest under this subject.

Seller and distributor were not entitled to contribution from driver who was found liable only on negligence theory when plaintiff elected to recover under strict liability claim. *Butz v. Werner*, 470 N.W.2d 224 (1991).

Liability Insurance. Basic no-fault insurer which has or may pay basic no-fault benefits is subrogated to all of the rights of the injured person other than a secured person. §26.1-41-16, N.D.C.C.

Collision Insurance. No cases.

Fire Insurance. Absent an express agreement to the contrary, a tenant is an implied coinsured under the landlord's fire insurance policy, and the insurer may not seek subrogation. *Community Credit Union v. Homelvig*, 487 N.W.2d 602 (N.D. 1992); *Uren v. Dakota Dust-Tex, Inc.*, 2002 ND 81, 643 N.W.2d 678.

Surety. No cases.

Workers' Compensation. Bureau subrogated when claim filed against a third person. §65-01-09, N.D.C.C.

### WAIVER AND ESTOPPEL

In General. When insurer has once manifested intent to waive forfeiture it cannot subsequently withdraw waiver unless acts constituting it were induced by fraud on part of insured. *Beauchamp v. Retail Merchants' Ass'n Mut. Fire Ins.*, 38 N.D. 483, 165 N.W. 545 (1917). In order for acceptance of premium to estop insurer from relying upon breach of condition in policy it must appear that it had knowledge of facts constituting breach. *Thompson v. Travelers Ins.*, 13 N.D. 444, 101 N.W. 900 (1904). When company issues policy providing that it shall be void if interest of insured is other than unconditional or sole ownership at time when it knew that interest was other than unconditional and sole ownership, it waives right to forfeit policy on that ground. *Anderson v. U.S. Fire Ins.*, 57 N.D. 462, 222 N.W. 609 (1928). Waiver by insurer of policy provision must be by affirmative act on its part inducing insured to believe that strict performance of condition claimed to be waived will not be insisted upon. Mere neglect to insist upon forfeiture is not sufficient of itself. *Meyer v. National*, 67 N.D. 77, 269 N.W. 845 (1936). "Ostensible authority" defined. *Meyer v. National Fire Ins.*, 69 N.D. 456, 287 N.W. 813 (1939).

Waiver and estoppel defined and rule applied. *Jacobson v. Mutual Ben. Health & Accid. Ass'n*, 70 N.D. 566, 296 N.W. 545 (1945). *Sjoberg v. State Auto*, 48 N.W.2d 452 (1951); *Diversified Fin. Syst., Inc. v. Binstock*, 1998 ND 61, 575 N.W.2d 677.

Waiver by Agent. Insurance company is estopped to claim forfeiture on account of false answers, as to encumbrances where they were not authorized by applicant and were falsely written by agent of company who was fully informed by insured. *Leisen v. St. Paul Fire & Marine*, 20 N.D. 316, 127 N.W. 837 (1910), 30 L.R.A. (N.S.) 539. Where the agent of fire insurance company knew that premises was occupied by tenant and not by owner, his failure to state facts in application estops company to urge such occupancy to avoid policy. *Horswill v. North Dakota Mut. Fire Ins.*, 45 N.D. 600, 178 N.W. 798 (1920). Company estopped from denying agent's authority where its conduct induced reasonable belief that agent was vested with such authority. *Meyer v. National*, 67 N.D. 67, 269 N.W. 845 (1936).

Non-Waiver Agreements. Knowledge of additional insurance acquired by adjuster after fire loss and failure to complain thereof is not waiver of the defense that policy was avoided by additional insurance. *First Nat'l Bank v. German-American Ins.*, 23 N.D. 139, 134 N.W. 873 (1911), 38 L.R.A. (N.S.) 213.

Premiums. Forfeiture of policy is generally waived by receipt and retention of premiums with knowledge of such forfeiture. *Thompson v. Travelers*, 11 N.D. 274, 91 N.W. 75 (1902). Fire insurance company cannot retain unearned premiums, and still deny liability. *Horswill v. Fire Ins.*, 45 N.D. 600, 178 N.W. 798 (1920). Unconditional acceptance of premium payment after expiration of grace period is a waiver of insurer's right to treat policy as lapsed. *Hanson v. Cincinnati Life Ins.*, 1997 ND 230, 571 N.W.2d 363.

Proof of Loss. Objection to specified defects in proof of loss constitutes waiver of all others not mentioned. *Reineke v. Commonwealth*, 52 N.D. 324, 202 N.W. 657 (1924). Where company has full knowledge of insured's non-compliance with iron safe clause and proceeded to investigate fire and determine loss and put insured to trouble of furnishing other proof of facts which would have been disclosed by books destroyed, waiver is established. *Beauchamp v. Retail Merchants' Ass'n Mut. Fire Ins.*, 38 N.D. 483, 165 N.W. 545 (1917).

### WORKERS' COMPENSATION

Statutory Reference. *In general see* §§65-01 to 65-10, N.D.C.C.

Original Jurisdiction. Workforce Safety and Insurance Organization has jurisdiction over claims. §65-05-03, N.D.C.C.

Appellate Jurisdiction. When available and for what reasons, *see* §65-10-01, N.D.C.C. Appeals are conducted pursuant to North Dakota Administrative Agencies Practice Act. §65-10-01, N.D.C.C. Scope and procedure on appeal. §28-32-46, N.D.C.C.

Benefits. See scheduled benefits, §§65-05-01 to 65-05-37, N.D.C.C.

Wages. Defined. §65-01-02(31), N.D.C.C.

Medical. After injury and resulting period of disability, fund to provide employee with reasonable and appropriate medical care. §65-05-07, N.D.C.C.

Disability. Defined. §65-01-02(14), N.D.C.C. Partial disability benefits not exceed rates defined in §§65-05-09, 09.1, 09.2, 09.3, 09.4 and 10, N.D.C.C. Permanent impairment benefits follow compensation and time paid table. §65-05-12.2, N.D.C.C. Loss of body members benefits. §65-05-12.2 (11), N.D.C.C.

Death. *See generally* §§65-05-16, 17 and 19, N.D.C.C. When death benefits not payable, *see* §65-05-16(2), N.D.C.C.

Statute of limitations on claims, one year after injury or two years after death. §65-05-01, N.D.C.C.

Employment defined. Anytime anyone performs services for another for remuneration unless person performing services is an independent contractor under "common law" test. §65-01-03, N.D.C.C.

Casual. No cases.

Dual Capacity. North Dakota Workers' Compensation Act is exclusive remedy against employer or fellow employee and does not permit application of dual capacity theory. *Schlenk v. Aerial Contractors, Inc.*, 268 N.W.2d 466 (N.D. 1978).

Exclusive Remedy. Workers' compensation is exclusive remedy and provides immunity to employer as to claims of employee. §65-01-01, N.D.C.C. Sole exception is injury caused by employer's intentional act done with conscious purpose of inflicting injury. §65-01-01.1, N.D.C.C. Where employer is in compliance with workers' compensation statute, third party sued by employee of employer cannot seek contribution or indemnity from employer unless a written indemnity contract involved. *Gernand v. Ost Services, Inc.*, 298 N.W.2d 500 (N.D. 1980). Third-party tort-feasor is jointly and severally liable to injured employee of employer covered by workers' compensation act even though employer's negligence contributed to injury; damage award may not be reduced by percentage of negligence attributable to employer. *Layman v. Braunschweigische Maschinenbauanstalt, Inc.*, 343 N.W.2d 334 (N.D. 1983). Reimbursement of workers' compensation benefits to injured worker are not to be reduced by percentage of negligence attributed by negligent worker. *Kelsh v. North Dakota Workers' Comp. Bureau*, 388 N.W.2d 870 (N.D. 1986). Exclusive remedy rule prohibiting third-party tort-feasor from contribution from employer does not prohibit enforcement of employer's contractual agreement to indemnify a third-party tort-feasor. *Barness v. General Diesel & Equip. Co.*, 422 N.W.2d 819 (N.D. 1988). No fault automobile insurer may deduct worker's compensation benefits under certain circumstances. *Kroh v. American Family Ins.*, 487 N.W.2d 306 (N.D. 1992).

Arising out of and in the course of. For injury to be within course of employment, it must occur within period of employment, in place where employee may reasonably be and while he is reasonably fulfilling his duties of employment. *Bierke v. Heartso*, 183 N.W.2d 496 (N.D. 1971).

Occupational Disease. Any disease caused by hazard to which employee is subjected in the course of employment, provided disease is incidental to character of business and not independent of relation of employer and employee. §65-01-02(10)(a), N.D.C.C. Does not include ordinary diseases of life to which general public

outside of employment is exposed. §65-01-02(10)(b), N.D.C.C.

**Mental Injury.** Disabilities, which are result of neurosis caused by injuries, are compensable under workers' compensation. *Lyson v. North Dakota Workers' Comp. Bureau*, 129 N.W.2d 351 (N.D. 1964). Mental injury resulting from termination of employment was not compensable injury. *Choukalos v. North Dakota Workers' Comp. Bureau*, 427 N.W.2d 344 (N.D. 1988).

**Pre-Existing Injury.** Workers' Compensation Bureau calculates aggravation award by terms of statute. §65-05-15, N.D.C.C.

**Trigger.** Injuries attributable to a preexisting injury, disease or other condition, including when employment acts as a trigger to produce symptoms in the preexisting injury, disease or other condition are not compensable, unless the employment substantially accelerates its progression or substantially worsens its severity. §65-01-02(10)(b)(7), N.D.C.C.; *Bergum v. N.D. WSI*, 2009 ND 52, 764 N.W.2d 178.

**Fellow Employee Rule.** *Generally see* §§65-01-01, 65-01-08, N.D.C.C. Employee statutorily immune from suit for injuries suffered in accident by coemployee as passenger in motor vehicle driven by employee in course and scope of their employment. *Stuhlmiller v. Nodak Mut. Ins. Co.*, 475 N.W.2d 136 (N.D. 1991).

**Liens.** Subrogation lien statute allows workers' compensation fund to recover 50% of any damages recovered by employee in action against third party and bureau's subrogation interest in non-negotiable. §65-01-09, N.D.C.C. For delinquent premiums, lien has same priority as income tax lien, except not enforceable against purchaser for valuable consideration without notice. §65-04-26, N.D.C.C.

**Attorneys Fees.** Hourly rate and maximum amount set by Workers' Compensation Bureau. §65-02-08, N.D.C.C.