

DIGEST OF INSURANCE LAW

SOUTH DAKOTA

Courtesy of
Gunderson, Palmer, Nelson & Ashmore, LLP
Rapid City, South Dakota

CIVIL JUDICIAL SYSTEM

Courts of Original Jurisdiction

Magistrate Courts. Law trained magistrates presiding. S.D.C.L. 16-12A-1.1. Any magistrate court with a magistrate judge presiding has concurrent jurisdiction with the circuit courts to try and determine all civil actions if debt, damage, claim, or value of property involved does not exceed twelve thousand dollars (\$12,000) S.D.C.L. 16-12B-13. Any magistrate court with a magistrate judge presiding has jurisdiction in small claims proceedings if debt, damage, claim or value of property involved does not exceed twelve thousand dollars (\$12,000). S.D.C.L. 16-12B-13.

Circuit Courts. Courts of original civil, equitable and criminal jurisdiction. S.D.C.L. 16-6-9, 16-6-12. Seven judicial circuits statewide. S.D.C.L. 16-5-1.2.

Appellate Courts

Supreme Court. Court of last resort in both civil and criminal matters. Composed of 5 Justices appointed by the Governor. Retention elections 3 years after appointment, and every 8 years thereafter. One presiding Justice who serve unlimited number of successive 4-year terms. S.D. Const. of 1889, Art. V, §7 (1980). S.D.C.L. 16-1-2, S.D. Const. of 1889, Art. V, §5.

Appeals from Circuit Court are taken to Supreme Court. S.D.C.L. 15-26A-3.

Appeals from Magistrate Court are taken to Circuit Court. S.D.C.L. 16-6-10.

LAW

Abbreviations

- F. – Federal Reporter.
- F.2d – Federal Reporter, Second Series.
- F.3d – Federal Reporter, Third Series.
- F. Supp. – Federal Supplement.
- N.W. – North Western Reporter.
- N.W.2d – North Western Reporter, Second Series.

S.D. – South Dakota Opinions.

S.D. Const. of 1889 – South Dakota Constitution of 1889.

S.D.C. 1939 – South Dakota Code of 1939.

S.D.C. Supp. – Supplement to 1939 Code.

Citations to 1939 Code are by modern decimal point system.

S.D. Compiled laws of 1967 replace 1939 & 1960 codes. References in earlier cases are to 1939 & 1960 codes and parallel reference tables of 1967 code should be consulted.

S.D.C.L. – South Dakota Codified Laws.

ACCIDENT AND HEALTH INSURANCE

See “ACCIDENTAL MEANS” and “DISABILITY.”

Contract Law. Cancellation - Generally, contract can be cancelled pursuant to its terms, mutual consent accompanied by unequivocal notice from insured to insurer, *Milbank Mut. v. State Farm*, 294 N.W.2d 426 (S.D. 1980); *Auto-Owners Ins. Co. v. Hansen Housing, Inc.*, 2000 SD 13, 604 N.W.2d 504 (2000), or written notice from insurer 30 or 60 days prior to renewal date, depending on type of insurance. S.D.C.L. 58-1-14, 58-17-18. Cancellation of policy by insured can be effected through insured’s agents. *Western States Land & Cattle Co. v. Lexington*, 459 N.W.2d 429 (S.D. 1990). However, authorized broker may not cancel policy once procured (in absence of additional authority). *National American v. Jamison Agency*, 501 F.2d 1125 (8th Cir. 1974). Renewal - Agent cannot revive cancelled policy via mere representations that it is still in effect. *Mid-Century v. Norgaard*, 273 N.W.2d 191 (S.D. 1979). Where renewal of health insurance policy is at option of insurer, such provision must be prominently displayed on cover page and first page of policy. S.D.C.L. 58-17-9.

Disease Induced by Accident. Tuberculosis resulting from continuing duck hunting after stepping into water filled holes held to be independent contributing



factor so as to bar recovery. *Troupe v. Benefit Assoc.*, 57 S.D. 147, 231 N.W. 529 (1930).

Excepted Risks. Any exceptions or reductions of indemnity shall be clearly set out in policy. S.D.C.L. 58-17-8.

Under policy classifying assured as “cattle dealer or broker visiting yards by occupation” and restricting travel to cars provided for passengers, where riding freight cars was necessary in course of business, insurer held liable for death of assured caused by accidental fall from top of freight car. *Richards v. Travelers Ins. Co.*, 18 S.D. 287, 100 N.W. 428 (1904).

Notice and Proof of Loss. Recovery for disability benefits is conditioned upon notice and proof of disability while policy is in force. *Gordinier v. Continental*, 69 S.D. 137, 7 N.W.2d 298 (1942). Written notice of claim must be given within 20 days after occurrence or loss, or as soon thereafter as reasonably possible. S.D.C.L. 58-17-21. Requirement of notice may be waived. *Breeden v. Aetna Life Ins. Co.*, 23 S.D. 417, 122 N.W. 348 (1909). Notice and proof of loss provisions must be set out in policy and will be strictly construed against insurer. *Id.* Newborn coverage not required in blanket health insurance policies. *Cullum v. Mutual of Omaha*, 840 F.2d 619 (8th Cir. 1988).

ACCIDENTAL MEANS

Life insurance includes benefits in event of death or dismemberment by accidental means. S.D.C.L. 58-9-2. Health insurance, *inter alia*, is insurance of human beings against bodily injury, disablement or death by accidental means. S.D.C.L. 58-9-3.

Definition. Disability must be caused solely by external, violent and accidental means to recover on policy. *Troupe v. Benefit Assoc.*, 57 S.D. 147, 231 N.W. 529 (1930).

Whether death from accidental means or suicide held jury question. *Dischner v. Piqua*, 14 S.D. 436, 85 N.W. 998 (1901) (gunshot wound); *Headlee v. New York Life Ins. Co.*, 69 S.D. 499, 12 N.W.2d 313 (1943) (fall down steep creek bank and drowning).

ADJUSTERS

No license required.

Definition of Adjuster. Insurer bound by settlement effected by adjuster where insured knew of no limitation of his authority. *Hemmer-Miller Dev. Co. v. Hudson*, 63 S.D. 109, 256 N.W. 798 (1934).

Insured in signing release could rely on representation of adjuster that insurer was not liable. *Peterson v. Great American*, 74 S.D. 334, 52 N.W.2d 479 (1952).

Actions of adjuster considered in determining whether insurer’s refusal to pay was vexatious or without reasonable cause. *Eldridge v. Northwest G.F. Mutual Ins. Co.*, 88 S.D. 426, 221 N.W.2d 16 (1974).

Question of fact whether adjustors’ knowledge of claimant’s mistaken belief about policy limits constituted fraud, deceit or misrepresentation. *Railsback v. Mid-Century*, 2004 SD 64, 680 N.W.2d 652. Recorded conversation between adjustor and supervisor in which strategies discussed to make insured appear fraudulent, falsely accuse insured of arson and insured’s wife of extra-marital affairs was evidence of bad faith. *Sawyer v. Farm Bureau*, 2000 SD 144, 619 N.W.2d 644.

County adjustors’ telling claimant investigation of claim was ongoing until time for noticing Attorney General of claim against county estopped county from raising statutory notice defense. *Erickson v. County of Brookings*, 1996 SD 1, 541 N.W.2d 734. *See also Smith v. Neville*, 539 N.W.2d 679 (S.D. 1995)

AGE

See “AUTOMOBILES”; “LIABILITY INSURANCE”; “NEGLIGENCE.”

Age of Majority –All persons less than 18 years of age are minors. S.D.C.L. 26-1-1.

If minor does not have a guardian or conservator, he may sue by a guardian ad litem. Guardian ad litem shall be appointed by court for minor not otherwise represented in the action. S.D.C.L. 15-6-17(c).

AGENTS AND BROKERS

Definition. “Producer,” an insurance agent or any person required to be licensed under laws of this state to sell, solicit, or negotiate insurance. S.D.C.L. 58-1-2(16). “Managing general agent,” a person who 1) manages all or part of an insurer’s insurance business, and 2) acts as agent for insurer or produces and underwrites 5% or more of policyholder surplus, and either 3) adjusts or pays claims or negotiates reinsurance on behalf of insurer. S.D.C.L. 58-30-124(2).

For Whom. No insurance producer or business entity may act as agent of an insurer unless insurance producer becomes an appointed insurance producer of that insurer. S.D.C.L. 58-30-175. To appoint an insurance producer or business entity as its agent, appointing insurer shall file notice of appointment within 15 days from date agency contract executed or first insurance application submitted. S.D.C.L. 58-30-176. Insurer who terminates an appointment with insurance producer must notify state Insurance Division within 30 days after termination. S.D.C.L. 58-30-180.

Soliciting agent deemed general agent of insurance company. *Braaten v. Minnesota Mut.*, 302 N.W.2d 48 (S.D. 1981). Until premium was paid, agent was agent of insurer, not of insured. *Bowen v. Mutual Life*, 20 S.D. 103, 104 N.W. 1040 (1905). When insured authorizes agent to select insurer to keep property insured, and agent then places insurance in company not represented by him, he is agent of insured and notice of cancellation to agent binds owner. *Flanagan v. Sunshine Mut.*, 73 S.D. 256, 41 N.W.2d 761 (1950).

Fraud by Agent. Insurance producer's license may be suspended, revoked, or non-renewed for, *inter alia*, misrepresenting terms of insurance contract or application, committing fraud, using fraudulent or dishonest practices. S.D.C.L. 58-30-167. Question of fact whether agent's failure to inform insured of premium increase and re-rating of universal life policy constituted fraud. *McGill v. American Life & Cas.*, 2000 SD 153, 619 N.W.2d 874. Agent's license revoked for misrepresentation, fraud, dishonest practices for concealing conversion of fully funded group health plan to self insured plan. *Kent v. Lyon*, 1996 SD 131, 555 N.W.2d 106 (1996). Knowledge of soliciting agent of fraudulent answers by applicant in application would not bind company, but if agent were general agent, company might be bound. *Knudson v. Grand Council*, 7 S.D. 214, 63 N.W. 911 (1895). Action to recover premiums where plaintiff induced to purchase life insurance by fraud of agent remanded to determine whether plaintiff promptly rescinded after learning of fraud and amount of deduction from recovered premiums for cost of insurance protection while policies were in force. *Sabbagh v. Prof. & Business Men's Life Ins. Co.*, 79 S.D. 615, 116 N.W.2d 513 (1962). In action for refund of premiums paid on life insurance policies procured through fraudulent representations, plaintiffs rescinded policies by their own acts prior to suit and, unlike in *Sabbagh*, no deduction for value of coverage prior to rescission. *Main v. Professional & Business Men's Life Ins. Co.*, 80 S.D. 288, 122 N.W.2d 865 (1963). Independent agent can not prevail on claims against insurer for lost license because the loss was caused by his own misconduct. *Kent v. United of Omaha*, 484 F.3d 988 (8th Cir. 2007).

Knowledge of Agent. Knowledge of soliciting agent becomes knowledge of and binding upon company. *Braaten v. Minnesota Mut.*, 302 N.W.2d 48 (S.D. 1981); *Vesey v. Commercial Union Assur. Co.*, 18 S.D. 632, 101 N.W. 1074 (1904) (insurance agent's knowledge of mortgages on insured property at time fire policy issued deemed to be knowledge of insurer, estopping insurer from avoiding coverage). Under standard form of fire insurance policy making agent soliciting insurance general agent of insurer, knowledge by such agent of existence, at time of issuance of policy, of additional

insurance on insured property was knowledge of insurer. *Hight v. Maryland Ins. Co.*, 69 S.D. 320, 10 N.W.2d 285 (1943) (insurer estopped from denying coverage for insured property destroyed in fire when applicant told agent he did not have fee title in property, agent informed insurer, and insurer issued policy). General agent's knowledge is company's knowledge and such agent has prima facie authority to waive conditions as to notice and proof. *Bruins v. Anderson*, 73 S.D. 620, 47 N.W.2d 493 (1951). General agent's inspection of crops damaged by hail and denial of liability constituted waiver of notice of loss. *Peterson v. Great American Ins. Co.*, 74 S.D. 334, 52 N.W.2d 479 (1952).

Letters between agent and divisional office relating to farmer's application for coverage on crop held admissible under the Uniform Business Records Act (now Fed.R.Evid. 803(6)) in farmer's action for crop damage coverage. *Bentz v. Cimarron Ins. Co.*, 79 S.D. 510, 114 N.W.2d 96 (1962).

Liability of Agent. Failure to procure policy. Agent's duty was to procure insurance of kind and with provisions specified by insured. *Fleming v. Torrey*, 273 N.W.2d 169 (S.D. 1978); *see also City of Colton v. Schwebach*, 1997 SD 4, 557 N.W.2d 769 (1997). Agent's duty is to obey applicant's instructions in good faith and with reasonable professional skill. No duty to ask applicant further questions if applicant appears clear about what wants. *Trammell v. Prairie States Ins.*, 473 N.W.2d 460 (S.D. 1991). Agent who holds himself out as qualified to procure insurance is required to exercise the skill reasonably to be expected of one in that occupation. *Moore v. Kluthe & Lane Ins.*, 89 S.D. 419, 234 N.W.2d 260 (1975). Agent liable for negligent misrepresentation for representing that policy issued to plaintiff included flood coverage, when it did not. *Id.* Agent asked by plaintiffs about eligibility for federal crop insurance had duty to exercise care in providing answer even in absence of privity of contract. *Aesoph v. Kusser*, 498 N.W.2d 654 (S.D. 1993). Agent not liable for failure to procure credit life insurance where application never approved due to physician's failure to respond to request for report and applicant did not rely on agent information. *Worden v. Farmer's State*, 349 N.W.2d 37 (S.D. 1984). Prior to passage of statute requiring insurers to send insureds notice of nonrenewal, liability insurer held to have no duty to advise insured of termination of agency relationship with agency who sold policy or of intent not to renew. *Siemonsma v. Dakota Ins.*, 434 N.W.2d 70 (S.D. 1988); *But see S.D.C.L. 58-1-14; 58-30-8.1.*

Licensing and Regulation. License required to sell, solicit, or negotiate insurance in this state. S.D.C.L. 58-30-143. Resident applying for insurance producer li-

cense shall pass written examination unless exempt. S.D.C.L. 58-30-145. Exam tests knowledge concerning lines for which applying, duties and responsibilities of insurance producer, state laws and rules of insurance. *Id.* Continuing education required. S.D.C.L. 58-30-116. Nonresident may receive nonresident insurance producer license if licensed in good standing in home state with equivalent requirements. S.D.C.L. 58-30-159, -160. The director may suspend for up to twelve months, or may revoke or refuse to continue any issued license after a hearing. S.D.C.L. 58-30-167. Notice must be given twenty days in advance. *Id.* Revocation of agent's license warranted by his failure to transfer premiums to insurance company, to remit refunds to insured, and failing to make good within reasonable time. *Matter of Gridley*, 345 N.W.2d 860 (S.D. 1984); *Kent v. Lyon*, 1996 SD 131, 555 N.W.2d 106; S.D.C.L. 58-30-88.

ARBITRATION

Any insurance policy provision requiring arbitration or limiting legal remedies is void and unenforceable. S.D.C.L. 21-25A-3. However, arbitration clauses between insurance companies are valid and enforceable. *Id.* Consent to be sued provisions have been held void in absence of enforceable arbitration clause, because it is against public policy to preclude court determination of fault and damage in suit against uninsured motorist. *Kremer v. American Fam.*, 501 N.W.2d 765 (S.D. 1993). Proceedings required to comply with policy's provisions, despite difference in phraseology between statutes. *Lee v. Farmer's Ins.*, 72 S.D. 127, 32 N.W.2d 188 (1948)

ATTORNEYS

Proof of authority required. S.D.C.L. 16-18-12.

Conflict of Interest. S.D.C.L. 16-18, Rule 1.7

Legal Malpractice. 3-year statute of limitations on legal malpractice actions. S.D.C.L. 15-2-14.2. Continuous representation doctrine can toll statute of limitations. *Williams v. Maulis*, 2003 SD 138, 672 N.W.2d 702. To prevail in legal malpractice action, must prove four basic elements of negligence, *i.e.*, duty, breach of duty, proximate cause, damages. *Estate of Gaspar v. Vogt, Brown & Merry*, 2003 SD 126, 670 N.W.2d 918 (attorney's failure to advise husband and wife of need to waive elective shares to accomplish testamentary wishes proximate cause of loss to wife's estate). Plaintiff must also show he/she would have prevailed on underlying claim but for attorney's error. *Yarcheski v. Reiner*, 2003 SD 108, 669 N.W.2d 487 (attorney's failure to timely file administrative appeal in grievance process not malpractice because plaintiff would not have prevailed on appeal); *Haberer v. Rice*, 511 N.W.2d 279 (S.D. 1994) (cause remanded to

determine whether attorney's negligence resulted in judgment where otherwise would not have been judgment). In the absence of professional contact, evidence insufficient to invoke exception to strict privity rule, which provides that in order to recover for attorney negligence, must prove attorney client relationship existed between plaintiff and attorney. *Chem-Age Ind. v. Glover*, 2002 SD 122, 652 N.W.2d 756.

Client with knowledge of forgery precluded from recovery on malpractice claim against attorney for negligence and fraud by doctrine of *in pari delicto*. *Quick v. Samp*, 2005 SD 60, 697 N.W.2d 741. Withdrawal or abandonment of a case by attorney may operate as a fraud on client. *Ingalls v. Arbeiter*, 72 S.D. 488, 36 N.W.2d 669 (1949). Attorney's obligation and duty to client is same, regardless of amount of money he is paid. *State v. Goode*, 84 S.D. 369, 171 N.W.2d 733 (1969).

Fees. Generally, not recoverable unless specifically authorized by statute. *Ofstad v. S.D. Dept. of Transp.*, 387 N.W.2d 539 (S.D. 1986). Court shall award reasonable attorney fees in all actions against an insurer when insurer has refused to pay full amount of loss and refusal to pay is vexatious or without reasonable cause, unless judgment does not exceed insurer's tender prior to initiation of proceedings. S.D.C.L. 58-12-3; *Brooks v. Milbank Ins. Co.*, 2000 SD 16, 605 N.W.2d 173; *Sawyer v. Farm Bureau Mut. Ins. Co.*, 2000 SD 144, 619 N.W.2d 644. Recoverable by insured even when insurer initiates the action against insured. *All Nation Ins. v. Brown*, 344 N.W.2d 493 (S.D. 1984). Not recoverable in declaratory judgment action by insurer to resolve coverage question, absent unreasonable or vexatious conduct. *American Family Mut. Ins. v. Merrill*, 454 N.W.2d 555 (S.D. 1990); *Howie v. Penn. Co.*, 1997 SD 45, 563 N.W.2d 116. A finding of bad faith on part of an insurance company does not mean "ipso facto" that its conduct was vexatious or without reasonable cause. Whether insurer's conduct is vexatious or without reasonable cause is question of fact. *Isaac v. State Farm Auto Ins. Co.*, 522 N.W.2d 752 (S.D. 1994) (insurer's refusal to pay amounts due under policy unless insured dismissed bad faith claim was vexatious, justifying award of attorney's fees); *Eldridge v. Northwest G.F. Mut. Ins. Co.*, 88 S.D. 426, 221 N.W.2d 16 (1974). Attorney's fees not awardable on bad faith claim, as bad faith is a tort, not a contract action against an insurer on a policy under 58-12-3. *Isaac*. When legislature authorized state to become self-insured employer, state became subject to attorney's fees awards under S.D.C.L. 58-12-3. *Lewis v. State DOT*, 2003 SD 82, 667 N.W.2d 283.



AUTOMOBILES

See "LIABILITY INSURANCE"; "NEGLIGENCE"; and "NO-FAULT"

See Law Digest Tables.

Age. Must be at least 16 years old to be issued a license. S.D.C.L. 32-12-29. Instruction permit may be issued to persons 14-18 years of age. S.D.C.L. 32-12-11. Restricted minor's permit or operator's license may be issued to person holding instruction permit for 180 days. *Id.* Restrictions void when holder turns 18. S.D.C.L. 32-12-14.1. Licensed operator riding with person possessing only learner's permit does not assume risk of driver's negligence as matter of law. *Jennings v. Hodges*, 80 S.D. 582, 129 N.W.2d 59 (1964).

Agency. Because violation of safety statute is negligence per se, allowing unlicensed person to operate one's automobile is negligence per se, unless justified or excused. S.D.C.L. 32-12-72; *Arbach v. Gruba*, 89 S.D. 322, 232 N.W.2d 842 (1975). Owner in charge of operation of car negligent in allowing inexperienced and knowingly reckless person to drive. *Robe v. Ager*, 80 S.D. 597, 129 N.W.2d 47 (1964). South Dakota recognizes cause of action for negligent entrustment where owner negligently permits an incompetent, inexperienced, reckless or accident prone person to drive his vehicle. *Colonial Ins. Co. of Ca. v. Lundquist*, 539 N.W.2d 871 (S.D. 1995); *Stover v. Critchfield*, 510 N.W.2d 681 (S.D. 1994); *Estate of Trobaugh v. Farmers Ins. Exchange*, 2001 SD 37, 623 N.W.2d 497; *Wilson v. Lewno*, 2001 SD 38, 623 N.W.2d 494; *Tapio v. Grinnell Mut. Reins. Co.*, 2000 SD 147, 619 N.W.2d 522 (coverage for negligent entrustment precluded under specific policy excluding insured's son from coverage).

Comparative/Contributory Negligence. Plaintiff who is contributorily negligent may still recover if negligence is slight or less than slight when compared with the negligence of defendant. S.D.C.L. 20-9-2. If under all evidence both parties could be found negligent, comparative negligence of parties is question of fact within province of jury. *Carpenter v. City of Belle Fourche*, 2000 SD 55, 609 N.W.2d 751. Slight, with regard to negligence, defined as small of its kind or in amount; scanty; meager. *Woods v. City of Crooks*, 1997 SD 20, 559 N.W.2d 558. Jury's finding of 30% contributory negligence, when compared with defendants' combined negligence of 70%, more than slight as matter of law. *Id.* Negligence of both parties must be considered and determined separately by standard of reasonably prudent person. If both parties found causally negligent, jury then determines if negligence of plaintiff is slight when compared with negligence of defendant. *Crabb v. Wade*, 84 S.D. 93, 167 N.W.2d 546 (S.D. 1969); *Nugent v.*

Quam, 82 S.D. 583, 152 N.W.2d 371 (S.D. 1967); *Treib v. Kern*, 513 N.W.2d 908 (S.D. 1994). Plaintiff's negligence compared with defendant's negligence, not with ordinarily prudent person. *Schmidt v. Royer*, 1998 SD 5, 574 N.W.2d 618. Prejudicial error to give contributory negligence instruction which was not supported by the evidence. *Johnson v. Armfield*, 2003 SD 134, 672 N.W.2d 478. Rear-end collision on highway, plaintiff's negligence held jury question under comparative negligence. *Myers v. Quenzer*, 79 S.D. 248, 110 N.W.2d 840 (1961). Under comparative negligence as to plaintiff negligence in making left turn in middle of block and colliding with approaching vehicle is jury question. *Barnhart v. Ahlers*, 79 S.D. 186, 110 N.W.2d 125 (1961). Passing a caravan as opposed to one vehicle was not evidence of contributory negligence. *Harmon v. Washburn*, 2008 SD 42, 751 N.W.2d 297.

Compulsory Insurance Coverage. Minimum liability coverage required: \$25,000 for one person per accident, \$50,000 for 2 or more persons bodily injury or death and \$25,000 for property damage. S.D.C.L. 32-35-70. No liability policy may be issued unless uninsured motorist coverage is provided therein with limits equal to the policy's liability limits for bodily injury or death. S.D.C.L. 58-11-9. No motor vehicle liability policy may be issued unless underinsured motorist coverage is provided therein at a face amount equal to the bodily injury limits of the policy. S.D.C.L. 58-11-9.4. Underinsured coverage limited to underinsured limits less amount paid by liability insurer of party recovered against. S.D.C.L. 58-11-9.5; *Farmland Ins. Cos. v. Heitmann*, 498 N.W.2d 620 (S.D. 1993). S.D.C.L. 58-11-9.5 referred to as difference in limits statute. *Westfield Ins. Co. v. Rowe*, 2001 SD 87, 631 N.W.2d 175; *Nickerson v. American States Ins.*, 2000 SD 121, 616 N.W.2d 468. Court compares limits of underinsured motorist (UIM) coverage with amount paid by tortfeasor's liability insurer. If amount recovered from tortfeasor equals or exceeds UIM limits, no UIM benefits are payable. *Friesz v. Farm & City Ins.*, 2000 SD 152, 619 N.W.2d 677; *Great West Cas. Co. v. Hovaldt*, 1999 SD 150, 603 N.W.2d 198; *Gloe v. Union Ins. Co.*, 2005 SD 30, 694 N.W.2d 252.

Alcohol/DUI. No person may drive or be in actual physical control of any vehicle while there is .08% or more alcohol in blood, or while under the influence of alcohol or any controlled drug or substance not obtained pursuant to a valid prescription, or under influence of controlled substance obtained under valid prescription to a degree which renders person incapable of safely driving. S.D.C.L. 32-23-1. Actual physical control found where defendant asleep behind wheel with keys in pocket. *State v. Kitchens*, 498 N.W.2d 649 (S.D. 1993). Anonymous tip about defendant's driving under influence along with officer's observation of defendant



speeding constituted reasonable suspicion of violation of law sufficient to support stop. *State v. Herrmann*, 2002 SD 119, 652 N.W.2d 725. Court exclusion of horizontal gaze nystagmus test administered by trained and experienced deputy was clearly erroneous. *State v. Hullinger*, 2002 SD 83, 649 N.W.2d 253. Preliminary breath test may be given upon officer's reasonable suspicion that subject driving under the influence. *State v. Anderson*, 359 N.W.2d 887 (S.D. 1984). Jury instruction defining "under the influence" as "any abnormal mental or physical condition which tends to deprive him of that clearness of intellect and control which he would otherwise possess" held proper. Defendant's previous DWAI conviction in Colorado was considered a prior DUI offense in South Dakota under S.D.C.L. 32-23-4.5. *State v. Ducheneaux*, 2007 SD 78, 783 N.W.2d 54. Trial court properly refused to give pattern instruction because other instruction more clearly stated the law and pattern instruction imposed unnecessary burden on prosecution. *State v. Masteller*, 86 S.D. 514, 198 N.W.2d 503 (1972).

Damages. Compensatory. For breach of an obligation not arising from contract, measure of damages is amount which will compensate for all detriment proximately caused thereby, whether it could have been anticipated or not. S.D.C.L. 21-3-1. Party injured must receive compensation commensurate to his loss or injury. *Reed v. Consolidated Feldspar Corp.*, 71 S.D. 189, 23 N.W.2d 154 (1946). Sole object of compensatory damages is to make injured party whole. *Hulstein v. Meilman Food*, 293 N.W.2d 889 (S.D. 1980). Cost of repair, not cost of replacement, was proper measure of damages in negligence action by owner of van damaged in motor vehicle accident, where evidence showed that van could be safely and effectively repaired at cost less than its full market value. *Joseph v. Kerkvliet*, 2002 SD 39, 642 N.W.2d 533. Award for loss of future earnings meant to compensate for loss of earning capacity, not loss of actual earnings. *Allen v. Martley*, 77 S.D. 133, 87 N.W.2d 355 (1958). Party injured through fault of another may recover for impairment of earning capacity measured by difference between amount he was capable of earning before injury and that which he was capable of earning thereafter. *Nepstad v. Randall*, 82 S.D. 615, 152 N.W.2d 383 (1967). Evidence of plaintiff's business income relevant to claim for loss of earning capacity. *Davis v. Knippling*, 1998 SD 31, 576 N.W.2d 525. Damages for loss of future earnings should be reduced to present value. *Watkins v. Ebach*, 291 N.W.2d 765 (S.D. 1980). In determining present allowance for lost future earnings, factors to be considered include occupation in which plaintiff engaged at time of loss, life expectancy, future earnings or income, prospective value of the dollar, expected interest rates, and occupation in which injured party is engaged. *Byre v. Wiczorek*, 85 S.D. 645,

190 N.W.2d 57 (1971). Duplication of damages of same nature and purpose to be avoided. *K & E Land and Cattle, Inc. v. Mayer*, 330 N.W.2d 529 (S.D. 1983). Recovery may be had for emotional distress, though no physical injury results, when act was outrageous, intended to cause emotional distress, caused the emotional injury, and emotional injury is extreme and disabling. *Peterson v. Sioux Valley Hosp.*, 491 N.W.2d 467 (S.D. 1992).

Plaintiff entitled to reasonable value of medical services received. Gratuitous medical services independent of tortfeasor may not be deducted from verdict. *Degen v. Bayman*, 90 S.D. 400, 241 N.W.2d 703 (1976); *Lindholm v. Hassan*, 369 F. Supp. 2d 1104 (D.S.D. 2005).

Excessive Verdict. For verdict to be excessive, damages must be so excessive as to strike mankind, at first blush, as being beyond all measure, unreasonable, outrageous, and such as manifestly show the jury to have been actuated by passion, partiality, prejudice or corruption. *Weidner v. Lineback*, 82 S.D. 8, 140 N.W.2d 597 (1966). Whether damages are excessive turns in facts of each case; comparison of verdicts is not satisfactory way to determine excessiveness. *Roth v. Jelden*, 80 S.D. 40, 118 N.W.2d 20 (1962). If jury's verdict can be explained with reference to the evidence rather than by juror passion, prejudice, or mistake of law, the verdict should be affirmed. *Maryott v. First Bank of Eden*, 2001 SD 43, 624 N.W.2d 96.

Punitive Damages. Recoverable for the breach of any obligation, excluding contract, when defendant's behavior was oppressive, fraudulent or malicious. S.D.C.L. 21-3-2. Trial court may submit punitive damages to jury when clear and convincing evidence shows reasonable basis to believe there has been willful, wanton or malicious conduct. *Diesel Machinery, Inc. v. B.R. Lee Enterprises*, 418 F.3d 820 (8th Cir. 2005). Malice is either actual or presumed. *Biegler v. American Family*, 2001 SD 13, 621 N.W.2d 592. Punitive damages recoverable for wanton and reckless disregard of rights. *Smith v. Montana-Dakota Utilities*, 575 F. Supp. 265 (D.S.D. 1983). South Dakota's five-factor analysis for evaluating punitive damages awards incorporated into 3 guideposts outlined by U.S. Supreme Court in *State Farm v. Campbell*, 538 U.S. 408 (2003); \$500,000 punitive damages award excessive under reprehensibility guidepost. *Roth v. Farner-Bocken Co.*, 2003 SD 80, 667 N.W.2d 651. Exemplary and Compensatory awards may be reduced for excessiveness. *Stene v. Hillgren*, 78 S.D. 1, 98 N.W.2d 156 (1959); *Biegler v. American Family Ins.*, 2001 SD 13, 621 N.W.2d 592; *Shippen v. Parrott*, 1996 SD 105, 553, N.W.2d 503.

Family Purpose Doctrine. South Dakota Supreme Court in *Behseleck v. Andrus*, 60 S.D. 204, 244 N.W.



268 (1932), rejected family purpose doctrine. Parent may be liable, however, for negligently placing dangerous instrumentality in son's possession. *Bock v. Sellers*, 66 S.D. 450, 285 N.W. 437 (1939). This doctrine superseded by negligent entrustment. *Wilson v. Lewno*, 2001 SD 38, 623 N.W.2d 494; *Stover v. Critchfield*, 510 N.W.2d 681 (S.D. 1994); *Robe v. Ager*, 80 S.D. 597, 129 N.W.2d 47 (1964); *Estate of Trobaugh v. Farmers Ins. Exchange*, 2001 SD 37, 623 N.W.2d 497; *Tapio v. Grinnell*, 2000 SD 147, 619 N.W.2d 522; *Colonial Ins. Co. of CA v. Lundquist*, 539 N.W.2d 871 (S.D. 1995).

Guests. Owner liable to guest for ordinary negligence. Guest statute (S.D.C.L. 32-34-1) repealed in 1978. But see "AVIATION," below, for aircraft guest statute.

Imputed Negligence. Imputed negligence means that by some legal relationship existing between two or more persons the negligence of one is charged to another. *Fredrickson v. Kluever*, 82 S.D. 579, 152 N.W.2d 346 (1967). Negligence of operator not imputed to passenger. *Schumacher v. Storberg*, 69 S.D. 103, 7 N.W.2d 141 (1942); nor of husband to wife. *Lapp v. Lauesen & Co.*, 67 S.D. 411, 293 N.W. 536 (1940). Since doctrine of respondeat superior requires imputation of negligence of employee driver to employer owner, default against driver should be set aside to allow employer to prove other parties in pari delicto. *Dehn v. Prouty*, 321 N.W.2d 534 (S.D. 1982). Trial court refusal to give imputed contributory negligence instruction upheld where employer-passenger could not foresee accident and had no opportunity to exercise control over employee driver to avoid it. *Berry v. Risdall*, 1998 SD 18, 576 N.W.2d 1. Mere ownership of vehicle, without more, not sufficient to impose liability. *Stover v. Critchfield*, 510 N.W.2d 681 (S.D. 1994). No basis to impose vicarious liability on the owner of a vehicle (U-Haul) based only on financial responsibility laws. *Id.*

Intersection Accidents. See *Drapeau v. Khopp*, 2008 SD 7, 744 N.W.2d 836; *Carpenter v. City of Belle Fourche*, 2000 SD 55, 609 N.W.2d 751; *Garland v. Rossknecht*, 2001 SD 42, 624 N.W.2d 700; *State v. Janklow*, 2005 SD 25, 693 N.W.2d 685; *Davis v. Knippling*, 1998 SD 31, 576 N.W.2d 525; *Robbins v. Buntrock*, 1996 SD 84, 550 N.W.2d 442; *Musilek v. Stober*, 434 N.W.2d 765 (S.D. 1989). Where both vehicles enter intersection at approximately same time, vehicle on right has right of way. *Smith v. Aspaas*, 71 S.D. 111, 21 N.W.2d 878 (1946). Attempting to overtake and pass at intersection in violation of statute is negligence per se which bars recovery. *Grob v. Hahn*, 80 S.D. 271, 122 N.W.2d 460 (1963). See also *Rumbolz v. Wipf*, 82 S.D. 327, 145 N.W.2d 520 (1966); see also *Bothern v. Peterson*, 83 S.D. 84, 155 N.W.2d 308 (1967). Driver on thru

highway assuming cross traffic would have to stop at stop sign and yield right-of-way, held guilty of negligence more than slight, as matter of law, in driving through intersection at speed of at least 50 m.p.h. *Grosz v. Groth*, 78 S.D. 379, 102 N.W.2d 834 (1960); *Burmeister v. Youngstrom*, 81 S.D. 578, 139 N.W.2d 226 (1965). Defendant's failure to stop at stop sign, held negligence as matter of law, no legal excuse even though defendant was unfamiliar with change in arterial designation at intersection; question of whether plaintiff exercised required care in observing defendant's vehicle, held jury question. *Roth v. Jelden*, 80 S.D. 40, 118 N.W.2d 20 (1962).

Jury Question. Questions of negligence and contributory negligence are almost always questions for the jury. *Thompson v. Melhaff*, 2005 SD 69, 698 N.W.2d 512. Questions of proximate cause are for jury in 'all but the rarest of cases.' *Hertz Motel v. Ross Signs*, 2005 SD 72, 698 N.W.2d 532. Resolving negligence questions is an elemental jury function. *Christensen v. Bergeson*, 2004 SD 113, 688 N.W.2d 421. Under certain circumstances, jury issue is presented as to plaintiff's right to recover under comparative negligence statute where plaintiff was negligent as matter of law for violation of assured clear distant rule. *Winburn v. Vander Vorst*, 74 S.D. 531, 55 N.W.2d 609 (1952), *reh'g*, 75 S.D. 111, 59 N.W.2d 819 (1953); *Carpenter v. City of Belle Fourche*, 2000 SD 55, 609 N.W.2d 751. But see *Pleinis v. Wilson Storage and Transfer*, 75 S.D. 397, 66 N.W.2d 68 (1954). It is for jury to decide whether plaintiff was contributorily negligent for failure to use reasonable care in discovering danger and avoiding collision. *Treib v. Kern*, 513 N.W.2d 908 (S.D. 1994).

Last Clear Chance. Doctrine infrequently applied by courts in this state. Nevertheless, recognized that under certain factual situations it might be within province of jury to find that negligence of defendant after discovering plaintiff's peril was proximate cause of her injuries. *Wilson v. Great Northern Ry. Co.*, 83 S.D. 207, 157 N.W.2d 19 (1968). Inapplicable where pedestrian oblivious to peril and driver of automobile does not discover danger in time to do anything. *Ford v. Hochstetter*, 85 S.D. 4, 176 N.W.2d 501 (1970); see also *First Northwestern Trust v. Schnable*, 334 N.W.2d 16 (S.D. 1983). Where act creating the peril occurs practically simultaneously with happening of the accident, neither party has last clear chance to avoid accident. *Weinzettl v. Johnson*, 292 N.W.2d 805 (S.D. 1980).

Ownership/Title. Burden of proving ownership and title shall be on applicant for a certificate of title. S.D.C.L. 32-3-24. Certificate of title is evidence of ownership. S.D.C.L. 32-3-11.



Pedestrians. Defined as any person moving or traveling on foot including people on roller skates, skateboards or riding an electric personal assistive device. S.D.C.L. 32-27-1.1. Driver within business or residence district must yield right of way to pedestrian in cross walk or any regular pedestrian crossing. S.D.C.L. 32-27-1. Pedestrians have preferential, not absolute, right of way. *American State Bank v. Mayer*, 326 N.W.2d 110 (S.D. 1982). The blood alcohol content (BAC) of pedestrian struck by vehicle while kneeling on side of road admissible in action against driver who struck him. *Wangness v. Aldinger*, 1999 SD 103, 598 N.W.2d 221. Decedent's negligence in walking on right side of road slight compared to drunken driving, so recovery not barred. *Crabb v. Wade*, 84 S.D. 93, 167 N.W.2d 546 (1969). Motorist operating vehicle lawfully not generally liable for injuries to child suddenly darting in front of him. *Stone v. Hinsvark*, 74 S.D. 625, 57 N.W.2d 669 (1953).

No-Fault Insurance. South Dakota, unlike other states in region, does not have automobile no-fault insurance statutes. See *Stover v. Critchfield*, 510 N.W.2d 681 (S.D. 1994).

Motorcycles. Home of the Sturgis Motorcycle Rally. Helmet not required except for minors. S.D.C.L. 32-20-4. Handelbar grips must be below shoulder height. S.D.C.L. 32-20-3. Eye protective device or windscreen required. No dark eye protection after dark. S.D.C.L. 32-20-4.1. Motorcycle entitled to full use of lane. S.D.C.L. 32-20-9.1

Seat Belts. Every operator and front seat passenger of a passenger vehicle shall wear properly adjusted and fastened safety seat belt system. Exceptions: 1) Occupant of vehicle manufactured before Sept. 1, 1973; 2) Written statement from doctor that individual is unable for medical reasons to wear safety belt; 3) Vehicles not equipped with safety belt because federal law does not require vehicle to be equipped; or 4) U.S. postal service carriers. S.D.C.L. 32-38-1; 3. Child under 5 shall be secured in a restraint system. A seat belt will suffice for children at least forty pounds in weight and under 5. S.D.C.L. 32-37-1. Failure to comply is not contributory negligence, comparative negligence or assumption of the risk and is inadmissible. S.D.C.L. 32-38-4; 32-37-4; *Davis v. Knippling*, 1998 SD 31, 576 N.W.2d 525.

Service of Process. Personal injury action arising from motor vehicle accident dismissed for failure to strictly comply with S.D.C.L. 15-2-31, which provides 60-day extension of statute of limitations if summons timely delivered to sheriff or other official with statutory authority to serve process. *Edsill v. Schultz*, 2002 SD 44, 643 N.W.2d 760. Substantial compliance with substituted service statute insufficient. *Id.*

Service of Process upon Nonresident Motorists. Motor vehicle operation by non resident in state deemed appointment of Secretary of State as agent to receive process. S.D.C.L. 15-7-6. Service not dependent upon ownership of vehicle, but by use by nonresident or his agent when accident occurred. *Halverson v. Sonotone Corp.*, 71 S.D. 568, 27 N.W.2d 596 (1947). Service defective where plaintiff's attorney mailed summons and complaint to Secretary of State and on same day mailed notice to defendant, when latter was mailed before service to Secretary of State effectuated, because defendant wasn't given notice within 10 days after Secretary was served. *Fredricks v. Elliot*, 716 F.2d 522 (8th Cir. 1983). Strict, not substantial, compliance with requirements of substituted service statute, S.D.C.L. 15-7-6, required to effectuate valid service. *Lekanidis v. Bendetti*, 2000 SD 86, 613 N.W.2d 542. Long Arm Statute also allows service of process outside state in designated circumstances subject to Due Process. S.D.C.L. 15-7-2.

Speed Limit. Driver may not travel at a speed greater than is reasonable and prudent under the conditions. S.D.C.L. 32-25-3. 75 m.p.h. on interstate highway. S.D.C.L. 32-25-4. 55 m.p.h. for vehicle towing mobile home. S.D.C.L. 32-25-6.1. 10 m.p.h. for vehicle with solid rubber or cushion tires. S.D.C.L. 32-25-6.2. 55 m.p.h. on township road. S.D.C.L. 32-25-9.2. 25 mph in urban not zoned or posted. S.D.C.L. 32-25-12. 15 m.p.h. in school zone when children present. S.D.C.L. 32-25-14. 15 m.p.h. within 50 feet of intersection or railroad crossing where view obstructed. S.D.C.L. 32-25-13; 15. Class 2 misdemeanor for violating speed limit. Fines doubled for violation of construction zone speed limit. S.D.C.L. 32-25-19.1. Driver traveling at unlawful speed when approaching intersection forfeits right of way he might have had otherwise. S.D.C.L. 32-26-13. Increasing speed by driver of overtaken vehicle prohibited S.D.C.L. 32-26-31.

Trailers/Weight Limits. Trailer length limits: 53 feet for semi trailer unit behind truck tractor. 28½ feet on each trailer unit operating in tractor-trailer-trailer combination if towbars do not exceed 19 feet and overall length of trailer-trailer unit including towbars does not exceed 80 feet. 80 feet overall length of straight truck-trailer combination, provided that if towbar between straight truck and trailer exceeds 19 feet, towbar is flagged during daylight hours and lighted at night. Maximum length of semitrailer-semitrailer or semi-trailer-trailer combination, excluding length of truck-tractor, is 81½ feet, provided maximum length of either unit does not exceed 45 feet. If towbar length exceeds 19 feet, towbar shall be flagged during daylight hours and lighted at night. Weight of second unit may not exceed weight of first unit by more than 3,000 lbs. S.D.C.L. 32-



22-8.1. Exceptions and exemptions (for farm trucks, trailers, implements) apply.

No motor vehicle or combination of vehicles on highway may exceed 1) 20,000 lbs. on any one axle; 2) 34,000 on any tandem axle; 3) formula detailed in S.D.C.L. 32-22-16.1; or in excess of tire weight prescribed by 32-22-21, but in no case shall gross weight exceed 80k lbs. on interstate. S.D.C.L. 32-22-16. Overweight vehicle statutes not violative of equal protection under rational basis test. *State v. Krahwinkel*, 2002 SD 160, 656 N.W.2d 451; *State v. Giese*, 2002 SD 161, 656 N.W.2d 30. Vehicle with pneumatic tires may not exceed 1) 600 lbs. on any inch of tire width, on axle equipped with dual tires; steering axle; axle of an over-size or overweight vehicle that cannot be readily reduced in size or weight and is operating with a permit; or axle of trailer towed by vehicle with gross vehicle weight rating of 11,000 lbs. or less; or 2) 500 lbs on any inch of tire width on any other type of axle. S.D.C.L. 32-22-21. Vehicle hauling products within 50 miles of harvest site not subject to enforcement of S.D.C.L. 32-22-16 or 32-22-21, unless exceeds legal limit by more than 10%, except as applied to interstate highways. S.D.C.L. 32-22-42.2.

Uninsured and Underinsured Endorsements. No automobile insurance policy may be issued in state unless uninsured and underinsured coverage is provided therein or supplemental thereto with limits equal to liability limits of policy. Uninsured and underinsured limits may not exceed 100,000/300,000 unless additional coverage requested by insured. S.D.C.L. 58-11-9; 58-11-9.4. Uninsured motorist statutes to be construed liberally in favor of coverage. *Isaac v. State Farm*, 522 N.W.2d 752 (S.D. 1994); *Clark v. Regent Ins.*, 270 N.W.2d 26 (S.D. 1978). However, coverage should not be created where there is none. *Gloe v. Iowa Mut. Ins. Co.*, 2005 SD 29, 694 N.W.2d 238. Judgment against tortfeasor not prerequisite to direct action for uninsured benefits. *Baker v. Continental Western*, 748 F. Supp. 716 (D.S.D. 1990). Okay for insurer to exclude insured's vehicle from underinsured motorist coverage. *Employers Mut. Cas. Co. v. State Auto Ins.*, 2001 SD 34, 623 N.W.2d 462. Underinsured coverage limited to underinsured limits less amount paid by tortfeasor's liability insurer. S.D.C.L. 58-11-9.5. *Nickerson v. American States Ins.*, 2000 SD 121, 616 N.W.2d 468; *Westfield Ins. Co. v. Rowe*, 2001 SD 87, 631 N.W.2d 175. As such, S.D.C.L. 58-11-9.5 is a difference in limits statute and prevents a double recovery by the plaintiff insured. *Gloe v. Union Ins. Co.*, 2005 SD 30, 694 N.W.2d 292. Policy with minimum \$25,000/\$50,000 UIM limits identical to liability limits conforms to statutory requirement that policies carry UIM limits equal to liability limits, and does not provide illusory coverage. *Friesz v. Farm & City Ins. Co.*, 2000

SD 152, 619 N.W.2d 677. Motor vehicle insured by insolvent company defined as "uninsured." S.D.C.L. 58-11-9.1. However, exclusion of passenger's action against insured under liability provisions of policy does not render insured's vehicle uninsured or underinsured for purposes of underinsured coverage. *Canal Ins. Co. v. Abraham*, 1999 SD 90, 598 N.W.2d 512. Self-insured employers are required to provide uninsured motorist coverage. *National Farmers Union v. Bang*, 516 N.W.2d 313 (S.D. 1994).

AVIATION

S.D.C.L. Title 50, Aviation generally.

Death of crew member of plane which crashed in enemy held territory, resulted from "risk of war" and not "participating in aeronautics." *Temmey v. Phoenix*, 72 S.D. 387, 34 N.W.2d 833 (1949).

Liability for collisions between aircraft on ground or in air shall be determined by rules of law applicable to torts on land. S.D.C.L. 50-13-7.

Aircraft guest statute S.D.C.L. 50-13-15. No person being transported without compensation will have a cause of action against owner or operator except where conduct is willful or wanton. Evidence of pilot's state of mind prior to crash failed to establish willful or wanton misconduct. *Hahn v. United States*, 535 F. Supp. 132 (D. S.D. 1982).

In action on airplane policy excluding coverage when plane subject to lease, evidence showed plane not leased at time of crash landing in which plane was damaged. *Ranger Ins. Co. v. Macy*, 88 S.D. 674, 227 N.W.2d 426 (1975).

Limits to Liability. Owner and/or pilot who operates over this state is liable for injuries or damage to people or property by flight in accordance with this state's tort law. S.D.C.L. 50-13-6. In absence of master-servant relationship, negligence of pilot not imputed to aircraft owner except for injury occurring to people or property on ground. *Heidemann v. Rohl*, 86 S.D. 250, 194 N.W.2d 164 (1972). Pilot responsible to maintain vigilance from cockpit to avoid collision while taxiing. *United States v. Hedburg*, 217 F. Supp. 711 (D.S.D. 1963). Violation of state aviation safety statutes by hot air balloon pilot could provide basis for recovery under negligence per se theory, precluding dismissal of action on motion to dismiss. *Thompson v. Summers*, 1997 SD 103, 677 N.W.2d 387.

Service of Process. Use of aircraft in state deemed appointment of secretary of transportation agent for service of process in action arising from operation of aircraft. S.D.C.L. 15-7-9; S.D.C.L. 15-7-10. Proof of service on nonresident or absent aircraft operator must in-



clude affidavit that address to which copies mailed was last known address of defendant which plaintiff could ascertain with reasonable diligence. S.D.C.L. 15-7-11.

BROKERS

See "AGENTS AND BROKERS."

BURGLARY INSURANCE

"Casualty insurance" includes insurance against loss by burglary, theft, larceny, robbery, forgery, fraud, etc. or any attempt at such. S.D.C.L. 58-9-15.

CANCELLATION

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

Sixty days notice to insured of refusal to renew policy. S.D.C.L. 58-1-14.

Automobile insurance. S.D.C.L. 58-11-46 to 54.

Property insurance. S.D.C.L. 58-33-59 to 65.

Workers' Compensation. S.D.C.L. 58-20-14.

CHATTEL MORTGAGE

See "FIRE INSURANCE."

CONSTRUCTION OF POLICY

Every insurance contract shall be construed according to the entirety of its terms as set forth in the policy. S.D.C.L. 58-11-39. Construction of insurance policy is question of law. *Alverson v. Northwestern Nat'l Cas. Co.*, 1997 SD 9, 559 N.W.2d 234.

Ambiguity of Terms. If language of insurance policy is ambiguous, policy liberally construed in favor of insured and strictly against insurer. *American Fam. Mut. Ins. Co. v. Elliot*, 523 N.W.2d 100 (S.D. 1994). Policy is ambiguous when fairly susceptible to two constructions. *Id.* Ambiguity in policy determined with reference to policy as a whole and plain meaning and effect of its words. *Id.* Rule does not mean, however, that court may seek out strained or unusual meaning for benefit of insured. *National Sun Ind. Inc. v. SD Farm Bureau Ins. Co.*, 1999 SD 63, 596 N.W.2d 45. Unambiguous policy will be construed according to its plain and ordinary meaning, and will not be enlarged or diminished by judicial interpretation. *Cain v. Fortis Ins. Co.*, 2005 SD 39, 694 N.W.2d 709.

Conditional Receipt of Application. Conditional receipt, when read as part of policy, the provisions in conditional receipt were self executing once determined that insured desired policy take effect on date of signing.

Sharkey v. Washington Nat'l Ins. Co., 373 N.W.2d 421 (S.D. 1985).

Inconsistent Policy Terms or Endorsements. Type-written endorsement attached to liability policy providing coverage for equipment used in maintenance, ownership and use of premises was controlling under this section over printed exclusion of injury or damage arising out of structural alteration involving new construction. *Aetna v. Labor*, 85 S.D. 192, 179 N.W.2d 271 (1970). Every Insurance contract shall be construed according to the entirety of its terms and conditions as set forth in the policy and as amplified, extended, or modified by any rider, endorsement, or application lawfully made a part of the policy. *Id.* Restrictive endorsement under S.D.C.L. 58-11-9.3 excluding coverage for named person or class of persons must be on a separate page added or attached to a policy. *Mid-Century Ins. Co. v. Lyon*, 1997 SD 50, 562 N.W.2d 888.

Binders or other contracts for temporary insurance may be made orally or in writing, and shall be deemed to include all the usual terms of the policy. S.D.C.L. 58-11-29. A clear distinction exists between binders and insurance policies in this state. *Capitol Indemn. Corp. v. Bank of Hoven*, 452 N.W.2d 551 (S.D. 1990).

CONTRIBUTION

See "FIRE INSURANCE"; "LIABILITY INSURANCE."

DAMAGES

Appellate Review Standard. Excessive or inadequate damages appearing to have been given under influence of passion or prejudice are ground for mistrial. S.D.C.L. 15-6-59(a)(5). Standard of review on court's ruling on motion for new trial is abuse of discretion. *Morrison v. Mineral Palace Ltd. Pship*, 1998 SD 33, 576 N.W.2d 869. Modification of money judgment to be used sparingly and only when certain that such modified judgment would be reasonable, fair and accurate. *Biegler v. American Family Ins.*, 2001 SD 13, 621 N.W.2d 592. Neither the trial nor supreme court may set aside jury verdict unless clearly unreasonable, arbitrary, and unsupported by evidence. *Zahn v. Musick*, 2000 SD 26, 605 N.W.2d 823. Motion for new trial for excessive damages award is addressed to sound discretion of trial court, and if verdict can be explained by other than passion, prejudice, or mistake of law, it should be affirmed. *Maryott v. First Natl. Bank of Eden*, 2001 SD 43, 624 N.W.2d 96. Damage award of less than victim's medical bills not inadequate per se. *Freeman v. Berg*, 482 N.W.2d 32 (S.D. 1992). Inadequate damages ground for new trial because of insufficiency of evidence to justify verdict. *Hanisch v. Body*, 77 S.D. 265, 90 N.W.2d 924

(1958). Wrongful death damages determined inadequate. *Flagtvet v. Smith*, 393 N.W.2d 452 (S.D. 1986).

Arbitration. Arbitration awards presumptively correct. Party challenging award has burden to show error. Judicial review of arbitration awards is very narrow. *Thunderstik Lodge v. Reuer*, 1998 SD 110, 585 N.W.2d 819. Grounds for vacation of arbitration award set forth in S.D.C.L. 21-25A-24. Arbitration award set aside on ground that arbitrator exceeded authority under S.D.C.L. 21-25A-24(3). *Double Diamond Construction v. Farmers Coop. Elevator*, 2004 SD 65, 680 N.W.2d 658. Remand required to determine whether arbitration award procured by undue means, pursuant to S.D.C.L. 21-25A-24(1). *Spiska Engrg., Inc. v. SPM Thermo-Shield*, 2004 SD 44, 678 N.W.2d 804.

Comparative Negligence. See "AUTOMOBILES," "NEGLIGENCE." In all negligence actions, fact that plaintiff guilty of contributory negligence does not bar recovery when plaintiff's negligence slight when compared with negligence of defendant, but in such case, damages shall be reduced in proportion to plaintiff's contributory negligence. S.D.C.L. 20-9-2.

Indemnification. Indemnification arises when a party discharges a liability that equitably should have been discharged by another. *Weiszhaar Farms, Inc. v. Tobin*, 522 N.W.2d 484 (S.D. 1994). Indemnification is a remedial measure and separate cause of action, independent of the underlying liability. *Id.* In South Dakota, indemnity is "all-or-nothing" proposition where party seeking it must show absence of proportionate fault to shift entire liability. *Id.* See *Noble v. Shaver*, 1998 SD 102, 583 N.W.2d 643.

Pain and Suffering. Prejudgment interest not recoverable for pain and suffering. S.D.C.L. 21-1-13.1. South Dakota Supreme Court has long recognized right to recover damages for pain and suffering resulting from negligent acts. *Kyllo v. Panzer*, 535 N.W.2d 896 (S.D. 1995). Rule in state is that where an injury is objective and plainly apparent, jury may consider without medical testimony, but where injury is of a subjective nature where laymen could not reasonably know whether there will be future pain and suffering, expert testimony required. *Koenig v. Weber*, 84 S.D. 558, 174 N.W.2d 218 (1970). Plaintiff estate administrator entitled to new trial on defendant's admitted liability after jury returned zero verdict on survival claim where evidence of pain and suffering endured by decedent in course of suffocating to death following accident was uncontested. *Welch v. Haase*, 2003 SD 141, 672 N.W.2d 689. \$30,000 judgment upheld which included \$18,000 for pain and suffering where decedent lived for 256 days in semi-conscious state. *Plank v. Heirigs*, 83 S.D. 173, 156 N.W.2d 193 (1968).

Punitive Damages. See AUTOMOBILES, Punitive Damages. Prejudgment interest not recoverable on punitive damages. S.D.C.L. 21-1-13.1. Punitive damages may be awarded in any action for breach of any obligation not arising from contract where defendant guilty of oppression, fraud or malice. S.D.C.L. 21-3-2. Before discovery on punitive damages claim may commence, and before such claim submitted to finder of fact, court must hold hearing and find clear and convincing evidence of reasonable basis to believe there has been willful, wanton or malicious conduct by defendant. S.D.C.L. 21-1-4.1. Proponent must prove a prima facie case for punitives, which is a lower quantum of proof than a preponderance. *Kjerstad v. Ravellette Publ. Inc.*, 517 N.W.2d 419 (S.D. 1994). No absolute requirement for pre-trial hearing. S.D.C.L. 21-1-4.1. Hearing may be held in conjunction with case-in-chief. *Schuldies v. Millar*, 1996 SD 120, 555 N.W.2d 90. Malice, for purposes of punitive damages, may be actual or presumed. *Dahl v. Sittner*, 474 N.W.2d 897 (S.D. 1991). Where insurer conditioned its offer to settle within policy limits on policy holder's release of bad faith claim that she may have had, there was reasonable basis to present issue of punitive damages to the jury. *Isaac v. State Farm*, 522 N.W.2d 752 (S.D. 1994). Punitive damages award of \$4,335,000 not violative of due process, but excessive and subject to remittitur to \$2,660,000 under state law. *Diesel Machinery, Inc. v. B.R. Lee Industries, Inc.*, 328 F. Supp. 2d 1029 (D.S.D. 2003).

Collateral Source Rule. Evidence of special damages insurance from certain collateral sources admissible in personal injury actions for health care malpractice. S.D.C.L. 21-3-12. Total or partial compensation received by injured party from collateral source, wholly independent of wrongdoer, does not operate to reduce damages recoverable from wrongdoer. *Jurgensen v. Smith*, 2000 SD 73, 611 N.W.2d 439. Rule rests on premise that it is more just that windfall benefit injured party rather than tortfeasor. *Id.* When medical services rendered gratuitously, collateral source rule applies; no deduction for gratuitous services. *Degen v. Bayman*, 90 S.D. 400, 241 N.W.2d 703 (1976). Plaintiff entitled to reasonable value of medical services received, including medicare write-offs. *Lindholm v. Hassan*, 369 F. Supp. 2d 1104 (D.S.D. 2005).

Statutory Cap on Awards. Non-economic damages in medical malpractice limited to five hundred thousand dollars. S.D.C.L. 21-3-11; *Knowles v. United States*, 1996 SD 10, 544 N.W.2d 183, 91 F.3d 1147 (1996) (general damages cap unconstitutional); *Peterson, ex rel. Peterson v. Burns*, 2001 SD 126, 635 N.W.2d 556 (legislature revived prior damages cap). Damages for wrongful death of or personal injury to rodeo contestant limited to one hundred thousand dollars. S.D.C.L. 21-3-13.



DEATH

See Law Digest Tables.

Abatement and Survival. All causes of action shall survive notwithstanding death of parties. S.D.C.L. 15-4-1. Cause of action for medical expenses and pain and suffering survives death of person injured. *Plank v. Heirigs*, 83 S.D. 173, 156 N.W.2d 193 (1968); *Pexa v. Clark*, 85 S.D. 37, 176 N.W.2d 497 (1970). Survival action is decedent's personal cause of action, which does not abate at decedent's death but is brought by representative seeking damages decedent could have obtained had he survived. *Yellow Horse v. Penn. Co.*, 225 F. 3d 923 (8th Cir. 2000).

Action for Wrongful Death. See S.D.C.L. 21-5-1 to 9. Three-year statute of limitations. S.D.C.L. 21-5-3. In action for wrongful death, damages limited to pecuniary damage. S.D.C.L. 21-5-7. Pecuniary damage includes loss of companionship and society as expressed by, but not limited to words "advice," "assistance," and "protection" but without consideration for grief and mental anguish suffered by plaintiffs. *Flagtwet v. Smith*, 367 N.W.2d 188, (S.D. 1985). Statutory heirs include wife or husband and children, or if there be neither of them, parents and next of kin. S.D.C.L. 21-5-5. Action for wrongful death brought by personal representative. *Id.*

Unexplained Absence. Absentee presumed to have died after 5 years of continuous absence. S.D.C.L. 29A-1-107(5).

DISABILITY

See "ACCIDENT AND HEALTH INSURANCE."

Disability Insurance. See generally S.D.C.L. Ch. 58-17.

Defined. Does not mean absolute helplessness but inability to do all substantial and material acts necessary to insured's business. *Frazier v. Travelers*, 66 S.D. 638, 287 N.W. 589 (1939); *Matter of Templeton*, 403 N.W.2d 398 (S.D. 1987). "Good Health" held not to mean perfect health or freedom from all minor ailments. *Walther v. Educational*, 66 S.D. 405, 284 N.W. 776 (1939). The term "good health" when used in an application for life insurance means that the applicant has no grave, important, or serious disease and is free from any ailment or infirmity that seriously affects the general soundness and healthfulness of the system. *Norwick v. United Sec. Life Co.*, 82 S.D. 640, 152 N.W.2d 439 (S.D. 1967); *Herdman v. Nat'l Reserve Life Ins. Co.*, 87 S.D. 389, 209 N.W.2d 364 (1973).

Performance of duties as manager of tailoring store required all insureds' time. Policy provided for disability income in event of continuous total loss of business

time. Held insured entitled to recover by reason of inability to perform duties of manager even though he could work part of time. *Cass v. Pacific*, 62 S.D. 502, 253 N.W. 622 (1934).

Premiums, waiver of. See *Dietrich v. Midland*, 64 S.D. 102, 264 N.W. 724 (1936).

Classifications. "Total disability" does not mean absolute helplessness but rather inability to do substantially all material acts in insured's business. *Hale v. Metro. Life Ins. Co.*, 65 S.D. 314, 273 N.W. 657 (1937). Person is totally disabled if physical condition, in combination with age, training, experience, and type of work available in community, causes her to be unable to secure anything more than sporadic employment resulting in insubstantial income. *Petersen v. Hinky Dinky*, 515 N.W.2d 226 (S.D. 1994).

Proof. Condition precedent to recovery of monthly benefits. *Binder v. Gen. Am. Life Ins. Co.*, 66 S.D. 305, 282 N.W. 521 (1938). Proof of change in condition on party asserting a change. *Truck Ins. Exch. v. CNA*, 2001 SD 46, 624 N.W.2d 705.

FINANCIAL RESPONSIBILITY LAW

See Law Digest Tables.

See "AUTOMOBILES, Compulsory Coverage."

Where judgment for injuries, death, or property damage, caused by motor vehicle on highways not paid within 30 days, defendant's license and registration of all his motor vehicles suspended by Secretary of State until minimum of \$25,000 for personal injury and more in certain cases and \$25,000 property damage paid. S.D.C.L. 32-35-50 to 63.

FIRE INSURANCE

Arson. Former arson statute, S.D.C.L. 22-33-4, repealed. Chapter 22-33 of the S.D.C.L. amended to add new section stating any person who starts fire or causes explosion with intent to destroy or damage any property to collect insurance for such loss is guilty of reckless burning or exploding, a Class 4 felony. S.D.C.L. 22-33-9.2. Actual ownership is immaterial. *State v. Korth*, 38 S.D. 539, 162 N.W. 144 (1917). Arson committed if property burned without consent of all owners. *State v. Hays*, 1999 SD 89, 598 N.W.2d 200.

Appraisal. South Dakota subscribes to "broad evidence rule" in determining value of insured's property. *Zochert v. Nat'l Farmers Union Prop. & Cas. Co.*, 1998 SD 34, 576 N.W.2d 531.

Assignment. S.D.C.L. 58-11-36. When fire insurance policy provided that it should be void if insured's interest be other than unconditional ownership, or if any



change other than by death of insured take place in interest, title or possession of property insured, trustee in bankruptcy of insured could not recover on policy, and it also held that under such policy, if insurer consented to assignment of insured's interest as owner of property, assignment to assignee in trust for bank to which insured was indebted rendered policy void. *Smith v. Retail Merchants*, 29 S.D. 332, 137 N.W. 47 (1912). Where vendor of land acquired by assignment interest of purchaser in insurance policy after property had been destroyed by fire, he is in no better position as to insurance than would purchaser be were he plaintiff. *Williams v. Aetna*, 49 S.D. 33, 206 N.W. 419 (1925). Agreement to assign before loss does not invalidate policy unless assignment completed. *Wormstadt v. Security*, 5 N.W.2d 30 (S.D. 1942).

Chattel Mortgages.

Contract. Policy. See S.D.C.L. Ch. 58-11.

Binder. See S.D.C.L. 58-11-(29-32).

Cancellation. See "ACCIDENT AND HEALTH INSURANCE" contract law, cancellation. Notice of insurer's refusal to renew policy not effective unless mailed or delivered at least 60 days before effective renewal date. S.D.C.L. 58-1-14. Fire insurance policy of different company issued by agent who had been directed to renew expired policy was not binding upon such different company if cancelled by such company before delivery to insured. *Ferguson v. Northern*, 26 S.D. 346, 128 N.W. 125 (1910). Cancellation by insured of policy on ground of fraud must be made promptly on discovery of facts. *Northwestern v. Fleming*, 12 S.D. 36, 80 N.W. 147 (1899). Request for cancellation of policy by insured must be unequivocal and absolute. *Auto Owners Ins. v. Hansen Housing*, 2000 SD 13, 604 N.W.2d 504.

Reformation. Generally. When through fraud or mistake a written contract does not truly express intention of parties, it may be revised on the application of a party aggrieved so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value. S.D.C.L. 21-11-1. Rules of reformation apply to insurance policies in same manner as other policies. *Severson v. Home Ins. Co.*, 51 S.D. 293, 213 N.W. 726 (1927).

Severable Contracts. See S.D.C.L. 58-11-37.

Damages. See S.D.C.L. Ch. 58-12.

Excepted Risks. Insured's willful burning of insured property is defense to claim of loss by fire, and recovery precluded by clause providing that insurer shall not be liable for loss occurring while hazard is increased by any means within control or knowledge of insured,

and such willful burning precludes recovery even where policies contain no express provision to that effect. *Raphitis v. St. Paul Fire & Marine*, 86 S.D. 491, 198 N.W.2d 505 (1972).

Proof of Loss. Defective notice waived. *State v. Rasmussen*, 58 S.D. 556, 237 N.W. 771 (1931). Insurer within time for presentation of proof of loss refused to pay, proof waived. *Alderman v. New York Underwriters*, 61 S.D. 284, 248 N.W. 261 (1933). Property wholly destroyed by fire, policy amount taken to be true value of property, loss, and damages. S.D.C.L. 58-10-10.

Insurable Interest. Purchaser of assignment of taxes on real estate, in possession, and negotiating with owner for purchase and facts were known to insurer's agent, therefore, insurable interest. *Hight v. Maryland*, 69 S.D. 320, 10 N.W.2d 285 (1943). Insured seller retains insurable interest in house after sale but before severance from real estate. *St. Paul Fire & Marine v. Toman*, 351 N.W.2d 146 (S.D. 1984).

Multiple Policies. See S.D.C.L. 58-11-(9.5-9.9).

Multiple Policies- Contribution between Companies. Both plaintiff and defendant policies covered same risk on mobile home and contained pro rata clauses; however, defendant held not liable for contribution to loss where plaintiff voluntarily paid more than pro rata share. *American Reliable Ins. Co. v. St. Paul Fire & Marine*, 79 S.D. 226, 110 N.W.2d 344 (1961).

FRAUD

See "AGENTS AND BROKERS"; "REPRESENTATIONS AND WARRANTIES."

GUEST CASES

See "AUTOMOBILES"; "AVIATION," "GUESTS."

HOSPITALS

Evidence. Offering to pay medical bills not admissible to prove liability. S.D.C.L. 19-12-11. Records. S.D.C.L. 34-12-15; 36-4-26.2.

Liens. S.D.C.L. 44-12-1 through 9.

Immunity. No liability for hospital officials on peer review committees formed to improve delivery and quality of services. S.D.C.L. 36-4-25. Hospital itself not immune. S.D.C.L. 36-4-26. Proceedings of committees privileged and not discoverable S.D.C.L. 36-4-26.1; 36-4-42; 36-4-43. Good Samaritan statute. S.D.C.L. 20-9-4.1.

HUSBAND AND WIFE

See Law Digest Tables.



Inter-spousal Immunity. Inter-spousal Immunity Doctrine has been abolished. *Pickering v. Pickering*, 434 N.W.2d 758 (S.D. 1989). Wife's status is same as unmarried woman, including transactions with husband. S.D.C.L. 25-2-10. Wife may sue husband for damages for personal injury. *Scotvold v. Scotvold*, 68 S.D. 53, 298 N.W. 266 (1941).

Loss of Consortium. Spouse allowed to recover for loss of consortium resulting from negligent injury. *Hoekstra v. Helgeland*, 78 S.D. 82, 98 N.W.2d 669 (1959); *Binegar v. Day*, 80 S.D. 141, 120 N.W.2d 521 (1963).

INDEMNITY

Subcontractor not liable to contractor for indemnity where there is no express indemnity provision in contract. *Schull Constr. v. Koenig*, 121 N.W.2d 559 (S.D. 1963).

Negligence by indemnitee precludes right to indemnification. *Degen v. Baymen*, 200 N.W.2d 134 (S.D. 1972).

INFANTS

See "NEGLIGENCE, Age"; "AUTOMOBILE, Age."

Intrusting car to minor known to be reckless and incompetent driver constitutes negligence on part of owner. *Wilson v. Lewno*, 2001 SD 38, 623 N.W.2d 494.

INLAND MARINE

Marine and transportation insurance. Defined. S.D.C.L. 58-9-6 to 10.

LIABILITY INSURANCE

See "CANCELLATION," "INFANTS."

Compromise of Claims. Agreements to compromise and settle are favored. *Johnson v. Norfolk*, 76 S.D. 565, 82 N.W.2d 656 (1957). Insurer has duty to act in good faith. *Isaac v. State Farm*, 522 N.W.2d 752 (S.D. 1994). Insurers duty to settle does not become absolute upon rendition of adverse verdict. *Crabb v. Nat'l Indemn.*, 87 S.D. 222, 205 N.W.2d 633 (1973).

Contribution between Joint Tortfeasors. See Uniform Contribution Among Tortfeasors Act. S.D.C.L. 15-8-11 to 15-8-20; 15-8-22; *Freeman v. Berg*, 482 N.W.2d 32 (S.D. 1992). Jury verdict of \$1,250,000 must be reduced pro tanto where three defendants were found negligent and six other defendants settled for total of \$125,000 prior to trial. *Carr v. Korkow*, 788 F.2d 485 (8th Cir. 1986). Where two primary liability policies both contain "other insurance" clause, general rule is

that both are liable for pro rata share of judgment or settlement. *Royal Indem. v. Metropolitan Cas.*, 80 S.D. 541, 128 N.W.2d 111 (1964). Where policies contain "other insurance" clause, umbrella policies are not liable for any portion for the loss until the primary policies are exhausted. *Nat'l Farmers Union v. Farm & City Ins.*, 2004 SD 124, 689 N.W.2d 619. In malpractice action, first doctor under uniform act could join second doctor as joint tortfeasor, although alleged negligence of each doctor was at different times, place and each followed separate treatment. *Brown v. Murdy*, 78 S.D. 367, 102 N.W.2d 664 (1960).

Co-operation of Insured. Failure of insured to comply with terms of auto policy requiring him to aid in effecting settlements, in securing evidence and attendance of witnesses in prosecuting appeals, constitutes forfeiture of all rights against insurer on policy. *Ziegler v. Ryan*, 66 S.D. 491, 285 N.W. 875 (1939).

Coverage. Construction of terms. In Motor Vehicle Liability Policy, word "conveyance" is given plain and ordinary meaning and cannot be given limited and special definition as referring to conveyance of passengers only. *Sunshine Mut. v. Addy*, 74 S.D. 387, 53 N.W.2d 539 (1952). Landlord. May have duty to control conduct of others to protect third party. *Bucholz v. City of Sioux Falls*, 77 S.D. 322, 91 N.W.2d 606 (1958). Restriction as to Use. Casual or incidental use distinguished from regular and frequent use forbidden in policy beyond 50 mile radius. *Bruins v. Anderson*, 73 S.D. 620, 47 N.W.2d 493 (1951). Standard provisions. Where insured motor vehicle, title to which had been registered in wife's name, had been given to insured's son on purchase of another vehicle, vehicle had been disposed of by named insured within meaning of policy provision that 30 day notice of acquisition of another vehicle need not be given if newly acquired automobile replaces owned automobile covered by policy. Notwithstanding that certificate of vehicle was never assigned to son, thus, insurance was in effect on newly acquired vehicle when insured was involved in automobile accident some 31 days following purchase. *Wilson v. Allstate*, 85 S.D. 553, 186 N.W.2d 879 (1971). Claim of racial discrimination not covered under incidental provisions of comprehensive general liability extension endorsement. *Larson v. Continental Cas.*, 377 N.W.2d 148 (S.D. 1985). Insurer has burden of proving that noncovered auto was furnished for regular use and not for temporary use. *State Auto v. Ishmael*, 87 S.D. 49, 202 N.W.2d 384 (1972). Comprehensive farm liability policy does not cover accident not "immediately adjoining" farm premises. *Connolly v. Standard*, 76 S.D. 95, 73 N.W.2d 119 (1955). Omnibus Provision. See *State Farm v. Ragatz*, 1997 SD 123, 571 N.W.2d 155.



Direct Action against Insurer. Insured may maintain action against insurer for an execution returned unsatisfied. S.D.C.L. 58-23-1. Direct action allowed “only under the terms of the policy.” No action for failure to provide full coverage. *Klatt v. Continental*, 409 N.W.2d 366 (S.D. 1987). Reliance by auto insurer on local counsel as to whether to settle death action arising out of “hit and run accident” was merely one factor in test of “good faith” of insurer in refusing to settle. *Crabb v. Nat’l Indemn.*, 87 S.D. 222, 205 N.W.2d 633 (1973).

Duty to Defend. If it is clear or arguably appears from face of pleadings in action that alleged claim, if true, falls within policy coverage insurer must defend. *Hawkeye-Security v. Clifford*, 366 N.W.2d 489 (S.D. 1985); see also *Stoebner v. S.D. Farm Bur.*, 1999 SD 106, 598 N.W.2d 557. There was held to be no duty to defend action brought against city for knowing disregard of permit requirements concerning the discharge of fill material during road construction. City’s actions deemed intentional and not a “negligent act, error or omission” which were within the policy. *City of Fort Pierre v. United Fire*, 463 N.W.2d 845 (S.D. 1990). Insurer not liable to boy struck by electrically impelled lure at race track under “participating in any contest” exclusion, and has no duty to defend action based on claim outside of coverage. *Black Hills Kennel Club v. Fireman’s Fund*, 77 S.D. 503, 94 N.W.2d 90 (1959). No duty to defend if criminal conviction exclusion is satisfied. *American Fam. v. Kostaneski*, 688 N.W.2d 410 (S.D. 2004).

Liability between Insurers. Liability coverage for permissive user primary and for auto owner secondary. *Employers Mut. v. State Auto*, 623 N.W.2d 462 (S.D. 2001).

Exclusions. Intentional Acts. Injuries inflicted in self defense are not always intended within meaning of intentional act exclusion. *Stoebner*, 598 N.W.2d 557. Assault. Exclusion applies to assault. *American Fam. Mut.*, 688 N.W.2d 410. Miscellaneous Exclusions.

Automobile policy exclusion - “Accident arising out of operation of auto sales agency” did not apply when insured was driving to determine whether he wanted to purchase car from auto sales agency. *Dairyland Ins. Co. v. Kluckman*, 86 S.D. 694, 201 N.W.2d 209 (1972). Truck used for custom combining was being used as “public conveyance” within policy exclusion. *Allied Mut. v. Milbank Mut.*, 80 S.D. 613, 129 N.W.2d 543 (1964). Waiver. Liability insurer’s failure to assert business pursuits exclusions at time of denial did not preclude assertion at later date. *Nat’l Sun Indemn. v. S.D. Farm Bureau*, 1999 SD 63, 596 N.W.2d 45.

Insurance Commissioner cannot be given authority to contravene state public policy by approving contrary

policy provision. S.D.C.L. 58-2-22 & 23, 58-11-5 to 58-11-7, 58-11-10, 58-11-15; *Leuning v. Dornberger Ins., Inc.*, 250 N.W.2d 675 (S.D. 1977).

Insolvency of Insured. All liability insurance policies must provide that bankruptcy or insolvency of the insured shall not release insurer from liability. S.D.C.L. 58-23-2.

Notice. Letter not specific to back injury sufficient notice that statute of limitations began to run. *Owens v. F.E.M.*, 2005 SD 35, 694 N.W.2d 274.

Punitive Damages. Evidence sufficient to submit punitive damages to jury. *Sawyer v. Farm Bureau Mut.*, 2000 SD 144, 619 N.W.2d 644.

LIMITATION OF TIME FOR COMMENCEMENT OF ACTION

See Law Digest Tables.

Accrual. A cause of action accrues when a plaintiff has either actual notice of a cause of action or is charged with notice. *Huron Center, Inc. v. Henry Carlson Co.*, 2002 SD 103, 650 N.W.2d 544. Medical malpractice statute of limitations begins to run on date of occurrence. *Burgard v. Benedictine Living Communities*, 2004 SD 58, 680 N.W.2d 296. Continuing injury action accrues when the wrong terminates. *Holland v. City of Geddes*, 2000 SD 71, 610 N.W.2d 816. Statutory notice within 60 days to municipality and institution of action within two years after accident, held not applicable to wrongful death action. *Stormo v. City of Del Rapids*, 75 S.D. 582, 70 N.W.2d 831 (1955); S.D.C.L. 21-5-3.

No Discovery Rule. *Shippen v. Parrott*, 506 N.W.2d 82 (S.D. 1993). Action for childhood sexual abuse to be commenced within 3 years of discovery. S.D.C.L. 26-10-25.

Fraud. Fraudulent concealment may act to toll statute of limitations. *Roth v. Farner-Bocken Co.*, 2003 SD 80, 667 N.W.2d 651.

Tolling. Defendant absence from the state may toll the statute of limitations. S.D.C.L. 15-2-20. Absence must be coupled with plaintiff’s inability to pursue remedy. *Burke v. Foss*, 334 N.W.2d 861 (S.D. 1983). Disability may toll statute of limitations up to 5 years, but not longer than one year after disability ceases. S.D.C.L. 15-2-22. To equitably toll statute of limitations, plaintiff must show (1) timely notice, (2) lack of prejudice to defendant, and (3) reasonable, good faith conduct by plaintiff. *Pecoraro v. Diocese of Rapid City*, 435 F.3d 870 (8th Cir. 2006). Liability insurer owes a duty not to knowingly cause or further a third party claimant’s misunderstanding of the policy limits to her detriment.

Railsback v. Mid-Century, 2004 SD 64, 680 N.W.2d 652.

Waiver. Waiver of limitations statute usually applicable only to person agreeing to it. *Kobbeman v. Oleson*, 1998 SD 20, 574 N.W.2d 633.

Statutory and Case Law. Failure to comply and give notice to City within statutory time is affirmative defense, not condition precedent to bringing action. *Brandner v. City of Aberdeen*, 78 S.D. 574, 105 N.W.2d 665 (1960); *Myers v. Charles Mix County*, 1997 SD 89, 566 N.W.2d 470.

In absence of any other statute, insurance policy is within that class of contracts to which general six year limitation statute of state applies. Provision in contract limiting time to enforce rights by legal proceedings is void. S.D.C.L. 53-9-6. Agreements to submit controversy to arbitration in accordance with Uniform Arbitration Act are valid. *Id.* However, insurance policy provisions requiring submission of controversy to arbitration are void. S.D.C.L. 21-25A-3. Where substituted service is void—general appearance after statute of limitations has run, for purpose of pleading statute of limitations, did not relate back. *Dyksterhouse v. Parrot*, 78 S.D. 538, 105 N.W.2d 205 (1960).

Sheriff. Claims barred where summons and complaint received by sheriff within statute of limitations but were served more than 60 days later and after statute of limitations had run. *Arbach v. Gruba*, 86 S.D. 591, 199 N.W.2d 697 (1972).

Specific Limits. Generally, statute of limitations for bringing an action in contract or for property damages is 6 years after cause of action has accrued. S.D.C.L. 15-2-13. Action for health insurance policy shall be brought within 1 year from when proof of loss is required. S.D.C.L. 58-17-24. Action for personal injury must be brought within 3 years after cause of action accrues. S.D.C.L. 15-2-14. Action for medical malpractice in contract or tort must be brought within 2 years after the alleged malpractice. S.D.C.L. 15-2-14.1. The inability of plaintiff to discover alleged acts of malpractice does not automatically toll the statute of limitations. *Jumper v. Healthone Corp.*, 699 F. Supp. 220 (D.S.D. 1988). Product liability actions barred 3 years after injury. S.D.C.L. 15-2-12.2. Cause of action based on fraud does not accrue until injured party discovers or has actual or constructive notice of the facts constituting fraud. S.D.C.L. 15-2-3. Action on life insurance policy subject to 6-year statute of limitations. *Schanzenback v. American Life Ins. Co.*, 58 S.D. 528, 237 N.W. 737 (1931). Coma tolls statute of limitations until appointment of guardian. *Clifford v. United States*, 738 F.2d 977 (8th Cir. 1984).

MALPRACTICE

Medical. Statutory requirements and limitations. Time for bringing actions is within 2 years after alleged malpractice. S.D.C.L. 15-2-14.1. For tort liability purposes, sexual misconduct falls within definition of medical malpractice. *Martinmaas v. Engelmann*, 2000 SD 85, 612 N.W.2d 600. Loss of chance doctrine not recognized in South Dakota. S.D.C.L. 20-9-1.1. Action alleging negligence by psychologist is not medical malpractice action. *Richards v. Lenz*, 539 N.W.2d 80 (S.D. 1995).

Expert Testimony. Negligence generally must be established by testimony of medical experts, except where lack of care comes within the comprehension of laymen and requires only common knowledge or experience. *Magbuhat v. Kovarik*, 382 N.W.2d 43 (S.D. 1986).

Informed Consent. Degree of disclosure is only actionable where conduct falls below standard deemed acceptable by peers. *Wheeldon v. Madison*, 374 N.W.2d 367 (S.D. 1985). Plaintiff must show he would have refused treatment if fully informed and the test is whether a reasonable person would have refused treatment if fully apprised. *Id.* No consent required in emergency where patient in immediate danger. *Id.* Expert testimony not required in malpractice action on issue of informed consent. *Savold v. Johnson*, 443 N.W.2d 656 (S.D. 1989). It is the duty of a physician to obtain the consent of a patient before providing treatment. *Wheeldon*, 374 N.W.2d 367.

Standard of Care. See “Medical,” *supra*. Doctor guilty of malpractice when he deviates from the required standard of care, regardless of whether conduct was in bad faith or merely “bona fide error of judgment.” *Magbuhat*, 382 N.W.2d 43. Medical specialist should be measured against national standards of care of his profession. *Shamburger v. Behrens*, 418 N.W.2d 299 (S.D. 1988); *see also VanZee v. Witzke*, 445 N.W.2d 34 (S.D. 1989). Physician has the duty to possess that degree of knowledge and skill ordinarily possessed by physicians in same or similar communities. *Martinmaas*, 2000 SD 85.

Wrongful birth/wrongful life. Actions for wrongful life prohibited. *See generally* S.D.C.L. 21-55- (1-4).

Hospital. Charitable immunity/limitations. Insurer estopped from asserting as defense to liability that institution covered by policy is immune as charitable institution. S.D.C.L. 58-23-3.

Damages. Non-economic damages in malpractice action against provider limited to \$500,000. S.D.C.L. 21-3-11; *Knowles v. United States*, 1996 SD 10, 544 N.W.2d 183, 91 F.3d 1147 (1996) (rehearing and suggestion for rehearing en banc denied). Appropriate standard of care that hospital must meet is that of hospital in



same or similar communities or hospitals in general. *Wuest v. McKennan Hosp.*, 2000 SD 151, 619 N.W.2d 682. Informed Consent. See "Medical" above.

Legal Malpractice. See "ATTORNEYS."

Other Professionals. DOT did not owe duty to sub-contractor apart from contract. *Fisher Sand & Gravel v. State*, 1997 SD 8, 558 N.W.2d 864. Abstractor owed no duty to third party lien creditor. *Muhlenkort v. Union County Land Trust*, 530 N.W.2d 658 (S.D. 1995). In suit for economic damages from professional negligence, outside privity of contract, foreseeability dictates whether duty exists. *Mark, Inc. v. Maguire Ins.*, 518 N.W.2d 227 (S.D. 1994). Damages. In professional negligence action against accountant, damages are different because of what taxpayer would have owed in absence of negligence and what paid due to negligence, plus incidental damages. *Lien v. McGladrey & Pullen*, 509 N.W.2d 421 (S.D. 1993). Standard of care. Expert testimony is required to establish standard of care and professionalism. *Midwestern Elec. v. Dewild*, 500 N.W.2d 250 (S.D. 1993).

NEGLIGENCE

See Law Digest Tables.

Age. Objective reasonable person standard does not apply to minor, rather subjective standard is used which takes into account age, intelligence, experience, and capacity. *Alley v. Siepman*, 87 S.D. 670, 214 N.W.2d 7 (1974). Minor is generally not held to same standard of conduct as adult unless she engages in activity normally only undertaken by adults. *Id.*

Attractive Nuisance. South Dakota has adopted attractive nuisance as stated in Restatement (Second) of Torts §339. *Hofer v. Meyer*, 295 N.W.2d 333 (S.D. 1980). Rules of evidence do not permit plaintiff instruction on direct negligence in addition to attractive nuisance instruction. *Kuhn v. Watertown Cement*, 75 S.D. 491, 68 N.W.2d 241 (1955); S.D.C.L. 20-9-2. Whether a horse on land is artificial condition for purposes of application of attractive nuisance doctrine is determined by facts of case. *Hofer*, 295 N.W.2d 333.

Assumption of Risk. To charge a party it must be established that he had knowledge of danger involved, appreciated risk, and voluntarily accepted risk. *Underberg v. Cain*, 348 N.W.2d 145 (S.D. 1984).

Comparative/Contributory Negligence. Contributorily negligent plaintiff may not recover anything in South Dakota if plaintiff's negligence is more than slight in comparison with negligence of defendant. *Chambers v. Dakotah Charter*, 488 N.W.2d 63 (S.D. 1992); S.D.C.L. 20-9-2. Slight means small in quantum in comparison with negligence of defendant and is question of

fact for jury. *Estate of Largent v. United States*, 910 F.2d 497 (8th Cir. 1990); S.D.C.L. 20-9-2. Comparative negligence instruction held error in rear end collision when plaintiff's vehicle stopped for stop sign. *McDonnell v. Lakings*, 78 S.D. 195, 99 N.W.2d 799 (1960). Comparative negligence statute applies in wrongful death cases. *Stone v. Hinsvark*, 74 S.D. 625, 57 N.W.2d 669 (1953); see also *Wibeto v. Ristvedt*, 83 S.D. 221, 157 N.W.2d 343 (1968). Issue of comparative negligence is not operative unless both parties are negligent. *Johnson v. Jongeling*, 328 N.W.2d 275 (S.D. 1983); S.D.C.L. 20-9-2. Experienced farmer who entered portable feed grinder tank with blades plainly visible without informing operator was guilty of contributory negligence more than slight. *Ries v. Daffin Corp.*, 81 S.D. 134, 131 N.W.2d 577 (1964). The determination of whether plaintiff's contributory negligence was more than slight in comparison to defendant may be made without disclosing any determination of percentage of plaintiff's fault by special interrogatory. *Wood v. City of Crooks*, 1997 SD 20, 559 N.W.2d 558. However, see FN5, indicating such practice is disfavored. *Id.*

Damages. Generally, for breach of non-contractual obligations, measure of damages is compensation for the detriment caused thereby, whether it could have been anticipated or not. S.D.C.L. 21-3-1. Punitive damages available in tort when defendant is guilty of oppression, fraud, or malice, or willful and wanton misconduct in disregard of humanity. S.D.C.L. 21-3-2.

Dogs. Where owner is aware of abnormally dangerous propensities of dog, he may be liable for injuries caused by dog. *Gehrts v. Batteen*, 2001 SD 10, 620 N.W.2d 775.

Duty. Whether or not one owes another duty of care is question of law. However, whether one has assumed that duty is a question of fact for jury. *Erickson v. Lavielle*, 368 N.W.2d 624 (S.D. 1985); *Barger for Wares v. Cox*, 372 N.W.2d 161 (S.D. 1985).

Governmental Immunity. Governmental entities immune from civil liability if acting in good faith within scope of individual's official functions and injury not caused by gross negligence, or willful and wanton misconduct. S.D.C.L. 47-23-29. No governmental immunity for negligent operation of motor vehicle. S.D.C.L. 47-23-30. Immunity granted to volunteers for nonprofit corporations. S.D.C.L. 47-23-29. See also, *E.P. v. Riley*, 1999 SD 163, 604 N.W.2d 7 (public duty doctrine).

Horses. Sufficient evidence existed for jury to find that defendants who owned horses were negligent in their duty to maintain their fences sufficient to confine horses, several of which wandered onto highways causing collision with bus in which driver was killed. *Pexa v.*

Clark, 85 S.D. 37, 176 N.W.2d 497 (1970). Rodeo operators negligent in allowing spectators to cross area where wild horses were loose. *Nicholas v. Tri-State Fair*, 82 S.D. 450, 148 N.W.2d 183 (1967). Rodeo operators negligent in selection of stock. *Carr v. Korkow Rodeos*, 788 F.2d 485 (8th Cir. 1986).

Imputed Negligence. Parent's negligence not imputed to child. *Sears v. McKee*, 298 N.W.2d 521 (S.D. 1980). Any one of several persons engaged in joint enterprise, such as to make each member of group responsible for physical harm to other persons caused by negligence of any member, is barred from recovery against such other persons by the negligence of any member of the group. *Fredrickson v. Kluever*, 82 S.D. 579, 152 N.W.2d 346 (1967). Restatement (Second) of Torts §491.

Landlord. In limited circumstances, may have duty to control conduct of others to protect third party. *Smith v. Lagow Constr. Co.*, 2002 SD 37, 642 N.W.2d 187.

Liquor Liability/Dram Shop Act. Consumption rather than serving of alcohol is proximate cause of injury. S.D.C.L. 35-11-1. However, negligence action against liquor vendors by third parties still exists. *Baatz v. Arrow Bar*, 426 N.W.2d 298 (S.D. 1988). Social hosts not liable. S.D.C.L. 35-11-2.

Joint and Several Liability. S.D.C.L. 15-8-11 through 22; 15-18-22. See *Centrol v. Morrow*, 489 N.W.2d 890 (S.D. 1992).

Last Clear Chance Doctrine. Last clear chance doctrine does not apply in situation where pedestrian was oblivious to peril and driver of automobile does not actually discover and see pedestrian in time to do anything to avoid hitting pedestrian. *Ford v. Hochstetter*, 85 S.D. 4, 176 N.W.2d 501 (1970).

Negligence Per Se. Violation of a safety statute, without legal excuse is negligence as a matter of law and not merely evidence of negligence. *Thompson v. Summers*, 1997 SD 103, 567 N.W.2d 387. Government owes duty of protection to the public, not to particular persons or classes. *Tipton v. Town of Tabor*, 1997 SD 96, 567 N.W.2d 351.

Premises Liability. Landowner owes business visitor or invitee duty of using ordinary or reasonable care for invitee's safety which includes duties owed to licensees to warn of concealed, dangerous conditions known to landowner. *Luke v. Deal*, 2005 SD 6, 692 N.W.2d 165.

Proximate Causation. Held no causal connection between plaintiff's injury and absence of flares on highway for stalled truck. *Serles v. Braun*, 79 S.D. 456, 113 N.W.2d 216 (1962). Where hail storm so delayed matur-

ity of crop of grain that rust set in, hail was proximate cause of injury, and insurer liable therefor. *Reeves v. Nat'l Fire*, 41 S.D. 341, 170 N.W. 575 (1919).

Efficient and Predominating Cause Doctrine. Where concurrent causes exist and corresponding damages cannot be distinguished, party responsible for dominating efficient cause is liable for loss. *Lummel v. Nat'l Fire*, 50 S.D. 502, 210 N.W. 739 (1926). Doctrine of efficient proximate cause does not extend to health insurance policies. *Cain v. Fortis Ins. Co.*, 2005 SD 39, 694 N.W.2d 709.

Res Ipsa Loquitur. Doctrine is to be used sparingly and only when facts and demands of justice make application essential. *Malloy v. Commonwealth Highland Theaters*, 375 N.W.2d 631 (S.D. 1985); *Wuest v. McKennan*, 2000 SD 151, 619 N.W.2d 682. Res ipsa loquitur instruction held not applicable: Action for injuries to passenger resulting from failure of operation of heating system of bus. *Henrichs v. Inter City Bus Lines*, 79 S.D. 267, 111 N.W.2d 327 (1961). In action for negligent operation of sewer system, it was error to charge "res ipsa" where sewer system was not under City's exclusive control. *Shipley v. City of Spearfish*, 89 S.D. 559, 235 N.W.2d 911 (1975). Evidence, in wrongful death action by administrator of estate of deceased who fell backwards onto pavement after alighting from bus, showed no act of bus driver warranting application of doctrine of res ipsa loquitur. *Kramer v. Sioux Transit*, 85 S.D. 232, 180 N.W.2d 468 (1970). Res ipsa loquitur held applicable: *Fleege v. Cimpl*, 305 N.W.2d 409 (S.D. 1981) (alleged electrocution while swimming in river); *Van Zee v. Sioux Valley Hosp.*, 315 N.W.2d 489 (S.D. 1982) (medical malpractice action).

Servant. Does not assume a suddenly confronted risk unless he has knowledge of such risk and voluntarily enters or continues the employment. *Bartlett v. Gregg*, 77 S.D. 406, 92 N.W.2d 654 (1958).

Sudden Emergency. No person is liable for civil damages as result of good faith rendering of services during an emergency. S.D.C.L. 20-9-4.1 (Good Samaritan Law). Employer not liable for not furnishing safe place to work if danger is obvious. *Ecklund v. Barrick*, 82 S.D. 280, 144 N.W.2d 605 (1966). Supreme Court has defined "sudden emergency doctrine" as merely expansion of reasonably prudent person standard of care; instruction on such doctrine should be given only if evidence is sufficient to support findings of four elements listed. *Meyer v. Johnson*, 254 N.W.2d 107 (S.D. 1977).

NO-FAULT INSURANCE

Arbitration. Provisions in insurance policies requiring arbitration are void and unenforceable. S.D.C.L. 21-25A-3.



Benefits. Certain automobile insurance policy provisions covering accident, disability and medical benefits have been provided by statute. S.D.C.L. 58-23-(6-8); 58-23-7. S.D.C.L. 58-11-9.4 requires that underinsured motorist coverage must be made available to insured when policy is issued, coverage not to exceed \$100,000 unless additional coverage requested by insured. S.D.C.L. 58-23-8 provides for offering to named insured, minimum Supplemental Coverage of \$10,000 accidental death - \$60 per week disability (extending beyond 14 days from accident) for at least 52 consecutive weeks-when prevented from performing usual duties of regular occupation-no reduction in disability payments by reason of benefits from Worker's Compensation or any other sources - medical expenses \$2,000 (irrespective of legal liability) incurred within 2 years. This supplemental coverage may be rejected in writing by named insured. S.D.C.L. 58-23-7; *Trammell v. Prairie States*, 473 N.W.2d 460 (S.D. 1991).

Compulsory. South Dakota does not have a compulsory liability insurance statute. *American Fam. v. Howe*, 584 F. Supp. 369 (D.S.D. 1984).

Financial Responsibility. Held no basis to impose liability on owner of a rental vehicle for negligent operation of vehicle by rental customer under financial responsibility laws. *Stover v. Critchfield*, 510 N.W.2d 681 (S.D. 1994).

PENALTY AND ATTORNEY FEES

Bad Faith. Plaintiff may recover attorney's fees in action against insurer failing to pay loss without reasonable cause. S.D.C.L. 58-12-3.

PRIVILEGED COMMUNICATIONS

Attorney/Client. Communications between client and lawyer, for purpose of facilitating legal services, are privileged. S.D.C.L. 19-13-3.

Clergy. Communications between individual and clergy are privileged. S.D.C.L. 19-13-17.

Physician/Patient. Communications between physician and patient for the purposes of diagnosis or treatment are privileged. S.D.C.L. 19-13-7. This privilege is waived when health of person is at issue, S.D.C.L. 19-2-3, and when the condition is an element of the patient's claim or defense. S.D.C.L. 19-13-11.

Spousal. Communications between husband and wife are privileged. S.D.C.L. 19-13-12.

Waiver. Voluntary disclosure of communication waives privilege, but privilege is not waived by involuntary disclosure. S.D.C.L. 19-13-26, 19-13-27.

PRODUCTS LIABILITY

For good discussion of South Dakota products liability law see *Peterson v. Safway Steel Scaffolds*, 400 N.W.2d 909 (S.D. 1987).

Strict Liability. S.D.C.L. 20-9-9, wholesalers and retailers immune from strict liability unless certain circumstances exist. Restatement (Second) Torts §402A, concerning Strict Liability, adopted in *Smith v. Smith*, 278 N.W.2d 155, (S.D. 1979). Strict liability in tort for defective product applies regardless of negligence or privity. *Parker v. Western Dakota*, 2000 SD 14, 605 N.W.2d 181.

Warranty. Breach. Jury's failure to find defect in herbicide did not preclude farmer from recovering damages for breach of warranty based on seller's improper mixing and application of herbicide and fertilizer. S.D.C.L. 57A-2-313; *Larson v. Meckling Fertilizer*, 90 S.D. 521, 243 N.W.2d 167 (1976).

Implied Warranty of Merchantability. S.D.C.L. 57A-2-314; Fitness for a particular purpose. S.D.C.L. 57A-2-315.

Duty to Warn. An otherwise properly manufactured and well designed product may be found to be defective without adequate warning. *Peterson v. Safway Steel Scaffolds*, 400 N.W.2d 909 (S.D. 1987). Also, *Jahnig v. Coisman*, 283 N.W.2d 557 (S.D. 1979). Evidence sustained finding of defendant's liability on ground that unsafe design of boat and defendant's failure to warn of fact that boat would start in gear were proximate cause of plaintiff's injury. *Degen v. Bayman*, 90 S.D. 400, 241 N.W.2d 703 (1976).

Damages. Finding facts sufficient to award compensatory and punitive damages. *Holmes v. Wegman Oil*, 492 N.W.2d 107 (S.D. 1992). Generally, retailer or other seller suffering and paying against him by injured party in warranty action is entitled to indemnity from manufacturer who sold product to him with a similar warranty. *Drier v. Perfection*, 259 N.W.2d 496 (S.D. 1977).

Defenses. State of the Art. Conformity of product to state of the art at the time it was sold may be considered in determining standard of care, breach, defective condition, or unreasonably dangerous. S.D.C.L. 20-9-10.1.

Assumption of Risk. To support assumption of risk defense, defendant must show that plaintiff had actual or constructive knowledge of the risk, appreciation of its character, and voluntarily accepted risk, having had time, knowledge, experience to make intelligent choice. *Gerlach v. Ethan*, 478 N.W.2d 828 (S.D. 1991).

Alteration. Subsequent alteration or modification is valid defense to strict liability action. S.D.C.L. 20-9-10.

Contributory negligence is not a defense to strict liability cause of action. *Smith v. Smith*, 278 N.W.2d 155 (S.D. 1979).

RELEASE

See Law Digest Tables.

Contract Law. Consideration. Any benefit conferred or agreed to be conferred upon the promiser to which she is not lawfully entitled is good consideration for a promise. S.D.C.L. 53-6-1. Burden of showing want of consideration lies with the party seeking to invalidate the instrument. S.D.C.L. 53-6-4. Accord and Satisfaction. S.D.C.L. 20-7-3. Release extinguishes obligation if consideration given, or if release is in writing. S.D.C.L. 20-7-10.

Agreement by prospective purchaser involved in accident, to purchase car after accident, does not include release of purchaser's liability, if any, for damage to car, nor effect insurer's right of subrogation. *Libertin v. St. Paul*, 74 S.D. 436, 54 N.W.2d 168 (1952), *reh'g*, 63 N.W.2d 248 (S.D. 1954). Release could be set aside where parties were not aware of injuries at time of execution of release, and amount given for release was grossly inadequate in comparison to injuries. *Boman v. Johnson*, 83 S.D. 265, 158 N.W.2d 528 (1968). General release of all claims and rights of action executed by parents against motorist who struck their eight year old daughter, prior to payment of medical expenses by parents' automobile liability insurer, destroyed insurer's right of subrogation and barred any action by parents for recovery on medical payment provisions of policy, absent any showing of bad faith, consent, waiver and denial of liability by insurer before release. *Hart v. State Farm*, 248 N.W.2d 881 (S.D. 1976).

Covenant Not To Sue. If a defendant executes a release or covenant not to sue, then the liability of the remaining defendants must be reduced by the amount paid for the release or covenant not to sue. *Shick v. Rodenburg*, 397 N.W.2d 464 (S.D. 1986).

Fraud and Misrepresentation. A release is not fairly made and is invalid if the nature of the instrument was misrepresented or there was other fraudulent or overreaching conduct. *Holzer v. Dakota Speedway*, 2000 SD 65, 610 N.W.2d 787.

Infants/Capacity. *Alley v. Siepman*, 87 S.D. 670, 214 N.W.2d 7 (1974).

Joint Tortfeasors. Uniform Contribution Among Joint Tortfeasors Law exists. S.D.C.L. 15-8-11, *et seq.* For effect of release of one or more joint tortfeasors, see *Duncan v. Pennington County H.A.*, 283 N.W.2d 546 (S.D. 1979); *Carr v. Korkow Rodeos*, 788 F.2d 485 (8th Cir. 1986); *Schick v. Rodenburg*, 397 N.W.2d 464 (S.D.

1986); *Freeman v. Berg*, 482 N.W.2d 32 (S.D. 1992). Release by one of joint debtors does not extinguish obligation of other joint debtors, unless they are only guarantors. S.D.C.L. 20-7-12. Document settling a breach of contract claim and purporting to release all joint tortfeasors did not release breach of fiduciary duty claims. *Rosebud Sioux Tribe v. Strain*, 432 N.W.2d 259 (S.D. 1988). Release executed by plaintiff, killed in plane crash, in favor of college and church was obviously intended to release only college and church from liability, release was not given in full satisfaction of plaintiff's claim and did not preclude plaintiff from recovering against defendant who had leased plane to the college. *Heidemann v. Rohl*, 86 S.D. 250, 194 N.W.2d 164 (1972).

Mistake. *Johnson v. Norfolk*, 76 S.D. 565, 82 N.W.2d 656, (1957).

REPRESENTATIONS AND WARRANTIES

Statutory Provisions. All statements and descriptions in any insurance application or annuity contract shall be deemed to be representations and not warranties. S.D.C.L. 58-11-44. Misrepresentations, omissions, concealments of facts and incorrect statements in application for insurance shall not prevent recovery under policy except in designated circumstances, i.e. fraud, materiality, etc. *Id.*

Misrepresentation. Applicant's knowledge that he had acute arthritis and in application answered "No" to question, "Have you ever had any of following diseases: Rheumatism in any form?," constitutes false representation. *Norris v. World Ins.*, 75 S.D. 315, 63 N.W.2d 804 (1954); See also, *Overfield v. American Underwriters*, 2000 SD 98, 614 N.W.2d 814.

"It is settled law in this jurisdiction that a false representation as to a material matter in an application for insurance, even absent a showing of an intent to deceive, renders the policy voidable, because an insurer is entitled to rely on the truthfulness of the answers given." *Braaten v. Minnesota Mut.*, 302 N.W.2d 48 (S.D. 1981). Where insurance agent had inserted false answers in application; insured owed duty to company when application was attached and made part of policy and sent to insured. *Norwick v. United Security*, 82 S.D. 640, 152 N.W.2d 439 (1967). Hospital indemnity policy held voidable by company where insured misrepresented fact that she had been treated by numerous physicians in five year period preceding application for policy and application was made part of policy. *Bushfield v. World Mut.*, 80 S.D. 341, 123 N.W.2d 327 (1963). Actual fraud, in contract law, is distinct from tort of deceit. *Rist v. Karlen*, 90 S.D. 426, 241 N.W.2d 717 (1976).



Materiality. Failure to mention a minor or temporary ailment is not material to the risk and will not void the policy. *Herdman v. Nat'l Reserve*, 87 S.D. 389, 209 N.W.2d 364 (1973). A false warranty in an insurance policy vitiates the policy, whether material or immaterial, while a false representation to so operate must be material to the risk. *Dakota Life v. Morgan*, 47 S.D. 361, 199 N.W. 43 (1924).

Rescission. An insured who entered into an insurance contract procured by fraud holds a voidable contract. *Main v. Professional & Business Men's Life*, 80 S.D. 288, 122 N.W.2d 865 (1963).

Reformation. Showing sufficient to sustain reformation of insurance policy was unnecessary to justify determination of insurer's estoppel to defend policy because of representations made to insured by its resident agent. *Farmers v. Bechard*, 80 S.D. 237, 122 N.W.2d 86 (1963).

SERVICE OF PROCESS

Upon Entities. Service on registered agent appointed by entity. S.D.C.L. 59-11-16. If service cannot be made pursuant to S.D.C.L. 59-11-16, then may be made to the manager, clerk, or other person in charge of any regular place of business of entity. S.D.C.L. 59-11-17.

Upon Director of Insurance. Insurer shall appoint director as attorney to receive service of legal process. S.D.C.L. 58-6-39.

Upon Non-Resident Motorists. See "AUTOMOBILES."

Personal Service. S.D.C.L. 15-6-4(d).

SOVEREIGN IMMUNITY

Remedies against the state. S.D.C.L. 21-32- (1-21).

Indemnification of public officers and employees. S.D.C.L. 3-19- (1-3).

Notice Requirements. S.D.C.L. 3-21- (2-5).

SUBROGATION

In General. Subrogation of Insurer. S.D.C.L. 58-11-9.6.

General nature of right defined in *Berendes v. Berendes*, 385 N.W.2d 119 (S.D. 1986). The insurer's right to subrogation is an equitable right and is not conditioned on whether plaintiff's insured is a party to the action where the insurer has indemnified the insured. *Maryland Cas. v. Delzer*, 283 N.W.2d 244 (S.D. 1979). Subrogation clauses in automobile policies did not constitute illegal assignment of claim for personal injuries

and are valid. *Schuldt v. State Farm*, 89 S.D. 687, 238 N.W.2d 270 (1975).

Liability Insurance. Auto insurer's payment of claim for collision loss entitled it to reimbursement out of liability insurance proceeds, whether or not the insureds were made whole. *Westfield Ins. v. Rowe*, 2001 SD 87, 631 N.W.2d 175. An insurer is entitled to subrogation for payments made under the medical payments provision of an automobile liability policy. *Hart v. State Farm*, 248 N.W.2d 881 (S.D. 1976).

Surety. Surety subrogated to rights of creditor. S.D.C.L. 56-2-17.

Workers' Compensation. Carrier can assert a subrogation interest against uninsured and underinsured proceeds. *Kaiser v. N. River*, 2000 SD 15, 605 N.W.2d 193. Employer who pays workers' compensation benefits is entitled to subrogation. *Isaac v. State Farm*, 522 N.W.2d 752, (S.D. 1994); S.D.C.L. 62-4-39; 62-4-40.

WAIVER AND ESTOPPEL

In General. Parties to insurance contract may, by express or implied agreement, subsequent conduct, or by terms of policy waive provisions of written application on which policy is based. *House v. Bankers' Reserve*, 43 S.D. 440, 180 N.W. 69 (1920). Action by insured after denial of liability by company but within time given by policy within which company entitled to make payment not prematurely brought. *Schultz v. Des Moines Mut.*, 35 S.D. 627, 153 N.W. 884 (1915). Renewal of auto policy does not constitute waiver and estoppel with respect to prior grounds for cancellation. S.D.C.L. 58-11-51. Waiver or changes in fire insurance policies must be written on or attached to policies. Such endorsements are only competent evidence of such changes or waivers. *Amos v. Hardware Mut.*, 64 S.D. 434, 267 N.W. 336 (1936). Forfeiture may be waived where company with knowledge of breach of conditions recognizes continued validity of policy. *Ziegler v. Ryan*, 66 S.D. 491, 285 N.W. 875 (1939). Application of waiver and estoppel rules may preclude insurer from relying upon policy as to notice. *Bruins v. Anderson*, 73 S.D. 620, 47 N.W.2d 493 (1951). Insurer estopped from denying coverage on second car where premium renewal receipt issued for it instead of first car and, after discovery by insurer, insured not notified. *Craig v. Nat'l Farmers*, 76 S.D. 349, 78 N.W.2d 464 (1956).

Waiver by Agent. General managing agent of accident insurance company can bind it by his acts notwithstanding provision in policy that "no agent had authority to waive or change any condition of this policy." *Breeden v. Aetna*, 23 S.D. 417, 122 N.W. 348 (1909). Representations of soliciting agent estopped insurance company from defending on basis of exclusion clause in

death and disability endorsement. *Farmers Mut v. Bechard*, 80 S.D. 237, 122 N.W.2d 86 (1963). Equitable estoppel to deny coverage held not allowed where insured knew that agent did not have authority to change policy terms except by endorsement. *Cromwell v. Hosbrook*, 81 S.D. 324, 134 N.W.2d 777 (1965). Estoppel and waiver by acts of agent held established as to tool trailer which was not mentioned in automobile liability policy. *State Auto v. Ruotsalainen*, 81 S.D. 472, 136 N.W.2d 884 (1965).

Non-waiver agreements. A "reservation of rights" is a notice to the insured that the insurer will defend the insured but that the insurer is not waiving any defenses it may have under the policy. *St. Paul v. Engelmann*, 2002 SD 8, 639 N.W.2d 192. Notwithstanding participation in defense, insurer is not estopped from asserting noncoverage if timely notice was given to insured. *Id.*

Premiums. Policy insuring automobile against theft and providing that it shall be void if car encumbered by mortgage may be voided by insurer where car unknown to insurer or to its agent was mortgaged when policy was issued, although agent after subsequently learning of such mortgage accepted payment of premiums. *Prose v. Hawkeye Securities*, 51 S.D. 3, 211 N.W. 970 (1927).

Proof of Loss. Purposes of notification clause are met by timely submission of deficient proof of loss forms. *Auto-Owners v. Hansen Housing*, 2000 SD 13, 604 N.W.2d 504. Oral notification of loss may be sufficient to comply with notice requirements. *Kremer v. American Fam.*, 501 N.W.2d 765 (S.D. 1993).

WARRANTIES

See "REPRESENTATIONS AND WARRANTIES."

WORKERS' COMPENSATION

Statutory Reference. S.D.C.L. Title 62. Original Jurisdiction. S.D.C.L. 62-7-12. Appellate Jurisdiction. Appeals may go to the Circuit Courts. S.D.C.L. 62-7-19. Worker's Compensation proceedings are not governed by rules of civil procedure unless otherwise ordered by hearing officer. S.D.C.L. 1-26-19.2, 15-6-1; *Sowards v. Hills Materials*, 521 N.W.2d 649 (S.D. 1994).

Benefits. Wages. "Average weekly wages" defined. S.D.C.L. 62-1-1. Calculated S.D.C.L. 62-4-3.1. Lump sum award may be renewed if department finds change of condition of employee warrants such action. S.D.C.L. 62-7-33. Lump sum payments must be in best interest of employee for reason of exceptional financial need as result of injury, or when necessary to pay attorney fees. *Thomas v. Custer State Hosp.*, 511 N.W.2d 576 (S.D. 1994). Medical. S.D.C.L. 62-4-1. See also *Cozine v.*

Midwest Coast Transport, 454 N.W.2d 548 (S.D. 1990). Disability. S.D.C.L. 62-4-5 and 6. Rehabilitation benefits. S.D.C.L. 62-4-5.1. Four year college degree is not reasonable means of restoring carpenter to suitable gainful employment. *Chiolis v. Lage Development*, 512 N.W.2d 158 (S.D. 1994). A claimant is not entitled to use job opportunities outside his community to establish the reasonableness of a program of rehabilitation. *Kurtenbach v. Frito-Lay*, 1997 SD 66, 563 N.W.2d 869. Waiting period for temporary disability benefits is seven consecutive days S.D.C.L. 62-4-2. Person is totally disabled if his physical condition, in combination with his age, training, and experience, and the type of work available in his community, causes him to be unable to secure anything more than sporadic employment resulting in an insubstantial income. *Barkdull v. Homestake Mining*, 317 N.W.2d 417 (S.D. 1982). Burden is on claimant to make prima facie showing of total disability; if it is obvious that claimant is in odd-lot category, burden shifts to employer to show that suitable employment in the community is available. *Welch v. Automotive*, 528 N.W.2d 406 (S.D. 1995). Employer must show existence of specific positions, regularly and continuously available, and actually open in the community. *Stang v. Meade School Dist.*, 526 N.W.2d 496 (S.D. 1995). Under "last injurious exposure rule," when disability develops gradually, or when it comes as result of succession of accidents, insurance carrier covering risk at time of most recent injury or exposure bearing a causal relation to the disability is usually liable for entire compensation. *Schuck v. John Morrell*, 529 N.W.2d 894 (S.D. 1995). Death. S.D.C.L. 62-4-(12-22). Death compensable as within scope of employment when occurring on trip from construction site to home and transportation furnished by employer as inducement or benefit to employees. *Pickrel v. Martin Beach*, 80 S.D. 376, 124 N.W.2d 182 (1963). Jury question whether employee was acting within scope of his employment while using his own automobile for trip to obtain needed machinery parts when the only state vehicle available was defective. *Alberts v. Mutual Service*, 80 S.D. 303, 123 N.W.2d 96 (1963).

Employment Defined. Any person in the services of another under any contract of employment, express or implied is an employee. S.D.C.L. 62-1-3. See also *Jackson v. Lee's Travelers Lodge*, 1997 SD 63, 563 N.W.2d 858. Person using employment agency is an employee of both the agency and special employer she has been assigned to. *McMaster v. Amoco Foam Products*, 735 F. Supp. 941 (D.S.D. 1990).

Exclusive Remedy. Workers' Compensation designed to be exclusive remedy. *Jensen v. Sport Bowl*, 469 N.W.2d 370 (S.D. 1991). Employee election to proceed against employer. S.D.C.L. 62-3-11. See *Keil v.*

Nelson, 355 N.W.2d 525 (S.D. 1984). Negligence theory is discarded and affirmative defenses of assumption of risk and contributory negligence are unavailable to employers. *Fenner v. Trimac*, 1996 SD 121, 554 N.W.2d 485 (Konenkamp J., dissenting). Benefits may be denied when injuries result from willful misconduct. *Id.* Willful misconduct constitutes serious, deliberate, and intentional misconduct. *Holscher v. Valley Queen*, 206 SD 35, 713 N.W.2d 555. Common law actions arising under Workers' Compensation statute precluded not only against employer, but also "any employee, partner, officer or director of the employer." See S.D.C.L. 62-3-2. Intentional tort exception. *Jensen v. Sport Bowl*, 469 N.W.2d 370 (S.D. 1991). Unless the employer's action is conscious and deliberate intent to inflict injury, the exclusive remedy is workers' compensation. *McMillian v. Mueller*, 2005 SD 41, 695 N.W.2d 217.

Arising out of and in Course of. Claimant has burden by preponderance of evidence to show that coronary occlusion was caused or contributed to by employment and doctor's testimony was not conclusive. *Bruns v. Stedman*, 76 S.D. 586, 82 N.W.2d 845 (1957). Employee, who had suffered coronary thrombosis several years before and did emergency work in adverse weather on Thursday, and died following Monday, held unreasonable for commissioner to conclude decedent's work in no way contributed to his death. *Campbell v. City of Chamberlain*, 78 S.D. 245, 100 N.W.2d 707 (1960). Unusual exertion aggravated pre-existing disease and caused or contributed to death of employee from coronary thrombosis. *Oviatt v. Oviatt Dairy*, 80 S.D. 83, 119 N.W.2d 649 (1963).

Employee injured in motor vehicle while returning from eating 2½ miles from town of employment, held compensable. *Krier v. Dick's Linoleum Shop*, 78 S.D. 116, 98 N.W.2d 486 (1959). Employee who is discharged or quits his work is allowed reasonable time to leave employer's premises, and he is within protection of compensation law in that time period as he covers that space necessary to leave employer's premises. See S.D.C.L. 62-5-2; *Donovan v. Powers*, 86 S.D. 245, 193 N.W.2d 796 (1972). No compensation payable to widow who was separated from husband and had instituted di-

voiced proceedings prior to death of husband. *Demaray v. Mannerud Constr.*, 80 S.D. 554, 128 N.W.2d 551 (1964). Injury "by accident" no longer required. S.D.C.L. 62-1-1(7); *Caldwell v. John Morrell*, 489 N.W.2d 353 (S.D. 1992).

Occupational disease. Defined in S.D.C.L. 62-8-1(6). Workers' Compensation law generally applies to occupational disease cases. S.D.C.L. 62-8-4. South Dakota law does not require an autopsy on Workers' Compensation cases or authorize the Commission to order an autopsy, except in cases of death from occupational diseases. A claimant who refuses permission for an autopsy may still recover for accidental death. *King v. Johnson Bros. Constr.*, 83 S.D. 69, 155 N.W.2d 183 (1967).

Mental Injury. A mental injury is compensable only if a compensable physical injury is and remains a major cause of the mental injury. As shown by clear and convincing evidence. *Gilchrist v. Trail King*, 2000 SD 68, 612 N.W.2d 1; S.D.C.L. 62-1-1. Mental injury is any psychological, psychiatric, or emotional condition for which compensation is sought. *Id.*

Pre-Existing Injury. Procedure outlined in S.D.C.L. 62-7-38. Workers' compensation benefits may be barred if employee makes false representation on employment application. *Oesterreich v. Canton-Inwood Hosp.*, 511 N.W.2d 824 (S.D. 1994). Preexisting medical condition does not disqualify Workers' Compensation claim under "arising out of employment" requirement if the employment aggravates, accelerates, or combines with condition to produce disability for which compensation is sought. *Hendrix v. Graham Tire*, 520 N.W.2d 876 (S.D. 1994).

Fellow Employee Rule. S.D.C.L. 62-3-2. *Canal Ins. v. Abraham*, 1999 SD 90, 598 N.W.2d 512; see also *Hagemann v. N.J.S. Engineering*, 2001 SD 102, 632 N.W.2d 840; *Thompson v. Mehlhaff*, 2005 SD 69, 698 N.W.2d 512.

Liens. S.D.C.L. 62-4-39. *Kaiser v. N. River*, 2000 SD 15, 605 N.W.2d 193. Lien of worker upon amount due under policy. S.D.C.L. 58-20-9.

Attorney Fees. S.D.C.L. 62-7-36. Attorneys fee subject to approval of department. *Id.*