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<b>Overview of the State of Nebraska Court System</b>
<b>A. Trial Courts</b>
<p>There are essentially 3 trial courts in the State of Nebraska where an attorney can appear: County Court, District Court and Juvenile Court. There is a Small Claims Court with a jurisdiction limit of \$3500, but it is available to pro se litigants only. If a defendant that is sued in Small Claims wishes to be represented by counsel it is necessary for counsel to remove the action to County Court. Neb. Rev. Stat. §25-2805</p> <p>I. County Court. Nebraska County Courts are courts of limited jurisdiction. The amount in controversy in County Court may not exceed \$52,000. Neb. Rev. Stat. § 6-1462. The County Court may certify the case to District Court on the basis that pleadings and discovery indicate the amount in controversy exceeds the statutory maximum. Neb. Rev. Stat. §26-2706</p> <p>The County Court has exclusive original jurisdiction in all matter relating to decedants' estates and conservatorships. It also has exclusive jurisdiction over guardianship matters except where a separate juvenile court already has jurisdiction over a child, wherein it has concurrent jurisdiction. The County Court also has concurrent jurisdiction in divorce matters and misdemeanor criminal matters. Neb. Rev. Stat. §24-517</p> <p>II. District Court. Nebraska District Courts are the Nebraska courts of general jurisdiction. Neb. Rev. Stat. §24-302. They also have appellate jurisdiction with regard to appeals from Small Claims, County Court and under the Administrative Procedure Act. Neb. Rev. Stat. §25-2728, Neb. Rev. Stat. §25-2807 and Neb. Rev. Stat. §84-917. Claims against the state are also heard in the District Court, although there is a separate tort and contract claim process that must first be completed in most cases. Neb. Rev. Stat. §13-905 and Neb. Rev. Stat. §82-8213.</p> <p>III. Separate Juvenile Court. The Separate Juvenile Court is only present in 3 Counties: Douglas, Lancaster and Sarpy. If there is not a separate juvenile court, juvenile matters are heard by the County Court.</p>
<b>B. Appellate Courts</b>
<p>There are potentially 3 levels of appeal in the State of Nebraska.</p> <p>I. District Court. Generally, if the action is first heard under the Administrative Procedures Act or as a County Court or Small Claims matter, the matter is first appealed to the District Court. An administrative appeal is considered by the court de</p>

novo on the record. Neb. Rev. Stat. §84-917. Most other appellate matters are reviewed based on errors assigned in the appeal. If no errors are asserted, then the matter is reviewed for plain error.

II. Nebraska Court of Appeals. This Court generally serves as the initial appellate court for the State of Nebraska except for the types of cases described above that are first heard by the District Court. The Court consists of 6 judges and sits in panels of 3 that are periodically rotated. Neb. Rev. Stat. §24-1101.

This court has no jurisdiction in cases involving a sentence of death or life imprisonment or cases involving the constitutionality of a statute. Neb. Rev. Stat. §24-1106. The authority of the Court was further limited in the case of *Metro Renovation v. Dep't of Labor*, 249 Neb. 337 (Neb. 1996), overruled on other grounds, wherein it was found that the published opinions of the Court of Appeals may be cited for whatever persuasive force they may have, but have no binding authority. Generally when a case is before the Court of Appeals, for an issue to be considered by an appellate court, an error must be assigned and discussed in the brief of the party claiming that prejudicial error has occurred.

There is an option for a matter is filed in in the Court of Appeals to file a Petition to Bypass to the Supreme Court. The Petition to Bypass is filed at the same time as the initial brief of the party requesting to bypass the Court of Appeals. Nebraska Rules of Appellate Practice §2-102(b) The Petition to Bypass must set out reasons the bypass is requested, keeping in mind the factors the Supreme Court considers when making a determination regarding whether to grant the Petition. The factors include: 1) whether the case involves a novel legal question or a question of first impression; 2) whether the case is a matter of state or federal constitutional interpretation; 3) whether the raises the issue of the validity of a statute; 4) whether the case involves an issue of inconsistency in the decisions of the appellate courts; 5) whether the case is one of significant public interest. Neb. Rev. Stat. §24-1106

III. Nebraska Supreme Court. The Supreme Court has original, appellate and final jurisdiction. The original jurisdiction of the Court relates to matters such as mandamus, habeas corpus and election contests. Neb. Rev. Stat. §24-204. The Court consists of a Chief Justice and 6 additional judges. Neb. Rev. Stat. §24-201.

As with the Court of Appeals, in matters that are before the Supreme Court on appeal, an error must be assigned and discussed if it is to be considered by the Court.

IV. Supersedeas Bond – No appeal shall act as a supersedeas unless the appellant within 30 days after the final entry of judgment, order or decree the party: executes a bond with one or more sureties, makes a deposit of government bonds with the clerk or a cash deposit with the clerk for the benefit of the adverse party. When the matter that is being appealed directs the payment of money the amount of the bonds or deposits shall be the lesser of 1) the amount of the judgment plus estimated interest that will accrue, estimated cost of appeal and estimated court costs (Such costs are

determined by the trial court); 2) 50% of the appellant's net worth; or 3) fifty million dollars. In equity matters the bond is to be in a reasonable sum, not to exceed the lesser of 50% of the appellant's net worth or fifty million dollars Neb. Rev. Stat. §25-1916.

## **Procedural**

### **A. Venue**

Neb. Rev. Stat. §25-401 et seq

I. Actions involving trespass or injury to real estate are brought in the county where the real estate is located, except if the case is brought against a corporation owning or operating a railroad it may be filed in any county where service of summons may be had.

II. Specific performance of a contract for sale of real estate may be brought in whatever county the defendants or any of them reside. If all the Defendants are located out of state the action is commenced in the county where the property is located.

III. Other types of actions may be brought a) in the county where any defendant resides; b) the county where the cause of action arose; c) the county where all or some the transaction occurred; d) if all defendants are nonresidents of Nebraska, then in any county.

IV. For the convenience of the parties and witnesses or in the interest of justice, a district court of any county may transfer a case to any other county.

### **B. Statute of Limitations**

I. Recovery of Title and Foreclosure – 10 years after the cause of action accrues. Neb. Rev. Stat. §25-202

II. Forcible Entry and Detainer – 1 year after the cause of action accrues. Neb. Rev. Stat. §25-203

III. Written Contract – 5 years Neb. Rev. Stat. §25-205(1)

IV. Recovery of Collateral under section 9-102 UCC or farm products which became the inventory of someone engaged in farming. – 18 months. Neb. Rev. Stat. §25-205(2)

V. Actions on Oral Contracts- 4 years. Neb. Rev. Stat. §25-206

VI. Actions for trespass, conversion, fraud and other torts – 4 years. Neb. Rev. Stat. §25-207.

VII. Actions for Libel and Slander – 1 year. Neb. Rev. Stat. §25-208

VIII. Malpractice – 2 years. If the malpractice could not be discovered within the 2 year time frame, 1 year from the date of discovery of the malpractice or discovery of facts that would reasonably lead to such discovery, but in no event more than 10 years from

the time the malpractice occurred. Neb. Rev. Stat. §25-208 & 25-222

IX. Recovery of tax declared unconstitutional – 1 year from date it was declared unconstitutional. Neb. Rev. Stat. §25-208

X. Actions on official bonds or judicial bonds – 10 years Neb. Rev. Stat. §25-209

XI. Actions against Sureties on a guardian's bond – 4 years from the time the guardian is discharged. Neb. Rev. Stat. §25-210

XII. Actions based on failure of consideration – 4 years. Neb. Rev. Stat. §25-211

XIII. General Statute of Limitations – if the action is not specified the statute of limitations is 4 years. Neb. Rev. Stat. §25-212

XIV. Claims against the State must be brought within 2 years. Neb. Rev. Stat. §25-218.

XV. Claims based on federal statute – 3 years. Neb. Rev. Stat. §25-219

XVI. Actions based on breach of warranty for improvements to real property or based on deficiency of design, planning, supervision or observation of construction – 4 years. If the defect could not be reasonably discovered within the 4 years or within one year preceding the expiration of the 4 years, then within 2 years of discovery or the discovery of facts that would reasonably lead to such discovery, whichever is earlier, but in any event no more than 10 years beyond the time the act that gave rise to the action occurred. Neb. Rev. Stat. §25-223

XVII. Action based on Product Liability - 4 years after the date the damage, injury or death occurs.

Actions may be brought for products alleged to have caused injury manufactured in the State of Nebraska - within 10 years of the date of sale or lease of the product for use or consumption.

For products produced outside of Nebraska, within the time of that state's or country's applicable statute of repose, but no less than 10 years. In the case of asbestos composed of chrysotile, tremolite, anthrophyllite, actinolite or any combination thereof – within 4 years after the injured person is informed by competent medical authority of an injury caused by exposure to asbestos or the discovery of facts that would reasonably lead to such discovery, which ever is earlier. Neb. Rev. Stat. §25-224

XVIII. Action against a Common Carrier - A cause of action for a freight damage claim, a rate overcharge, a claim for damages resulting from a delay in transportation, or a claim for a lost shipment against a common carrier – 2 years Neb. Rev. Stat. §25-226

XIX. Action to enforce payment of a Certificate of Deposit.- An action to enforce the

obligation of a depository institution to pay all or part of the balance of a certificate of deposit shall be commenced by the earlier of:

(a) The time that an action to enforce an obligation under subsection (e) of section 3-118, Uniform Commercial Code, must be commenced if the certificate of deposit is subject to such section; or

(b) Seven years after the later of:

(i) The maturity date of the certificate of deposit;

(ii) The due date of the certificate of deposit indicated in the depository institution's last written notice of renewal of the certificate of deposit, if any;

(iii) The date of the last written communication from the depository institution recognizing the depository institution's obligation with respect to the certificate of deposit; or

(iv) The last day of the taxable year for which a person identified in the certificate of deposit last reported interest income earned on the certificate of deposit on a federal or state income tax return.

Neb. Rev. Stat. §25-227

XX. Wrongful Death – 2 years, Neb. Rev. Stat. §30-810

**C. Time for Filing An Answer**

30 Days from date of Service of Date of Summons – NE Court Rules §6-1112

**D. Dismissal Re-Filing of Suit**

A Plaintiff may dismiss a case, upon payment of costs, without prejudice at anytime prior to submission of the case to the judge or jury provided there is no counterclaim or setoff alleged. If there is a counterclaim or setoff alleged, then the Defendant has a right to proceed to trial on the Defendant's claim even though the Plaintiff may have dismissed their complaint. Neb. Rev. Stat. §§25-601 thru 25-603

**Liability**

**A. Negligence**

Any contributory negligence chargeable to the claimant shall diminish proportionately the amount awarded as damages for an injury attributable to the claimant's contributory negligence but shall not bar recovery, except that if the contributory negligence of the claimant is equal to or greater than the total negligence of all persons against whom recovery is sought, the claimant shall be totally barred from recovery. The jury shall be instructed on the effects of the allocation of negligence. Neb. Rev. Stat. §25-21,185.09

**B. Negligence Defenses**

Assumption of the Risk - Before the defense of assumption of risk is submitted to a jury,

the evidence must show that the plaintiff (1) knew of the specific danger, (2) understood the danger, and (3) voluntarily exposed himself or herself to the danger that proximately caused the damage. When a defendant pleads the affirmative defense of assumption of risk, the defendant has the burden to establish the elements of assumption of the risk before that defense, as a question of fact, may be submitted to the jury. Pachunka v. Rogers Constr., Inc., 271 Neb. 950, 953-954 (Neb. 2006)

Sudden Emergency - NJI2d Civ. 3.09 recommends no jury instruction on sudden emergency should be given. The comments to NJI2d Civ. 3.09 suggest that since the sudden emergency doctrine is simply a restatement of the general duty of care. The Supreme Court has likewise ruled that the giving of an independent sudden emergency instruction is not warranted in a negligence action. McClymont v. Morgan, 238 Neb. 390, 394 (Neb. 1991)

Last Clear Chance – NJI2d Civ. 3.23 recommends no jury instruction on last clear chance should be given. The comments indicate that the committee believes that outside of what are essentially proximate cause cases, the doctrine of last clear chance has been subsumed by comparative negligence..

#### C. Gross Negligence, Recklessness, Willful and Wanton Conduct

Only applicable in certain scenerios where there is general immunity such as food, rescue equipment donation, and other specified causes of action.

#### D. Negligent Hiring and Retention

To impose liability on an employer for negligently entrusting work to an employee incompetent to perform such work, a plaintiff must not only show that the employer negligently selected a person incapable of performing the work but also show that the conduct of the incompetent employee was a proximate cause of injury to another. Greening v. School Dist., 223 Neb. 729, 737 (Neb. 1986)

#### E. Negligent Entrustment

Nebraska has adopted the Restatement (Second) of Torts § 308 and § 390 with regard to negligent entrustment. The Restatement § 308 states that it is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others. The Restatement, § 390, explains, in a "special application" of § 308, that one who supplies .a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

It is not necessary to be the owner of an item in a negligent entrustment case in Nebraska. Rather the issue is control over the item, and ownership is merely evidence to show control.

DeWester v. Watkins, 275 Neb. 173, 176 (Neb. 2008)

## F. Dram Shop

Dram Shop liability is not available generally in the State of Nebraska (see *Holmes v. Circo*, 196 Neb. 496 (Neb. 1976)) but is limited to providing alcohol to minors pursuant to the Minor Alcoholic Liquor Liability Act, Neb. Rev. Stat. §§54-404 thru 54-409. The elements are:

Any person who sustains injury or property damage, or the estate of any person killed, as a proximate result of the negligence of an intoxicated minor shall have, in addition to any other cause of action available in tort, a cause of action against:

(1) A social host who allowed the minor to consume alcoholic liquor in the social host's home or on property under his or her control;

(2) Any person who procured alcoholic liquor for the minor, other than with the permission and in the company of the minor's parent or guardian, when such person knew or should have known that the minor was a minor; or

(3) Any retailer who sold alcoholic liquor to the minor. The absolute defenses found in section 53-180.07 shall be available to a retailer in any cause of action brought under this section.

Defenses:

It is a complete defense to this action that the intoxication did not contribute to the negligent conduct.

No cause of action is available to the intoxicated person, his or her estate, or anyone whose claim is based upon injury to or death of the intoxicated person.

Settlement:

(1) A plaintiff's settlement and release of one defendant in an action under the Minor Alcoholic Liquor Liability Act does not bar claims against any other defendant.

(2) The amount paid to a plaintiff in consideration for the settlement and release of a defendant in an action under the act shall be offset against all other subsequent judgments awarded to the plaintiff.

(3) The retailer, licensee, social host, person procuring alcoholic liquor for a minor, and minor who are defendants in an action brought under the act are jointly and severally liable in such action as provided in section 25-21,185.10 for those who act in concert to cause harm.

(4) In an action based on the act, the retailer, licensee, social host, person procuring alcoholic liquor for a minor, and minor shall have a right of contribution and not a right of subrogation from one another.

#### G. Joint and Several Liability

In general:

In an action involving more than one defendant when two or more defendants as part of a common enterprise or plan act in concert and cause harm, the liability of each such defendant for economic and noneconomic damages shall be joint and several.

In any other action involving more than one defendant, the liability of each defendant for economic damages shall be joint and several and the liability of each defendant for noneconomic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of noneconomic damages allocated to that defendant in direct proportion to that defendant's percentage of negligence, and a separate judgment shall be rendered against that defendant for that amount.

Neb. Rev. Stat. § 25-21,185.10

Elements essential to a joint enterprise are: (1) an agreement, express or implied, among members; (2) a common purpose; (3) a community of pecuniary interest in that purpose; and (4) an equal right of direction and control. *Bahrs v. R M B R Wheels, Inc.*, 6 Neb. App. 354, 574 N.W.2d 524 (1998).

If settling a case that involves joint and several liability it is important to examine a statute and a controlling case. First, pursuant to Neb. Rev. Stat. § 25-21,185.11:

(1) A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable shall discharge that person from all liability to the claimant but shall not discharge any other persons liable upon the same claim unless it so provides. The claim of the claimant against other persons shall be reduced by the amount of the released person's share of the obligation as determined by the trier of fact.

(2) A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable shall preclude that person from being made a party or, if an action is pending, shall be a basis for that person's dismissal, but the person's negligence, if any, shall be considered in accordance with section 25-21,185.09.

This statute was analyzed in the case of [Tadros v. City of Omaha, 273 Neb. 935, 938-939 \(Neb. 2007\)](#). The Plaintiff settled with one of the defendants, Bowley, prior to trial for \$35,000. The case proceeded to trial and the jury came back with a verdict of \$1,258,999.81 in economic damages and \$300,000 in non-economic damages. The trial court simply reduced the award by the percentage of fault allocated to the Plaintiff and the \$35,000 settlement. On the verdict form the jury had indicated that the settling



defendant was 30% liable. The Supreme Court rejected the award given by the trial court and stated that based on the comparative negligence statutes, the reduction must be pro rata. This ruling resulted in a substantial reduction in the Plaintiff's recovery.

#### H. Wrongful Death and/or Survival Actions

Wrongful Death and Survival Actions are separate causes of action in the State of Nebraska. [Corona de Camargo v. Schon, 278 Neb. 1045, 776 N.W.2d 1 \(2009\).](#)

With regard to Wrongful Death, the action is brought by and in the name of the person's personal representative for the exclusive benefit of the widow or widower and next of kin. The verdict or judgment should be for the amount of damages which the persons in whose behalf the action is brought have sustained. Neb. Rev. Stat. §30-810. In a wrongful death action, predeath damages for pain and suffering are not available. However, a claim for predeath pain and suffering survives as a separate cause of action and the 4 year statute of limitations for personal injury applies, rather than the 2 year statute of limitations for wrongful death. (also see Neb. Rev. Stat. §25-1401.

#### I. Vicarious Liability

In order to sustain a recovery under the doctrine of respondeat superior, the relationship of master and servant must be shown to exist at the time of the injury and with respect to the particular transaction resulting in the alleged tort, and the servant must be shown to be acting within the scope of his employment. Further, the conduct of a servant is within the scope of employment if, but only if, it is of the kind he is employed to perform, it occurred substantially within the authorized time and space limits, and it is actuated, at least in part, by a purpose to serve the master.

[Strong v. K & K Invs., 216 Neb. 370, 374-375 \(Neb. 1984\)](#)

Section 25-21,239 of the Nebraska Revised Statutes addresses the liability of a party who leases trucks that cause damage to persons or property within the State of Nebraska. The statute applies to any truck that is leased for a period of less than 30 days, or any truck that is leased for commercial purposes for any amount of time. Any truck owner that is covered by the statute shall be found jointly and severally liable for the damage caused by the operator of the leased truck. However, if the owner of the truck carries liability insurance with coverage limits in the minimum amount of one million dollars per occurrence which is available to compensate any person with a claim arising out of the operation or use of the leased truck, truck-tractor, or trailer, s/he won't be held jointly and severally liable

Generally, one who employs an independent contractor is not liable for the contractor's negligence. However, the employer of an independent contractor may be liable if the employer retains control over the contractor's work, or if, by rule of law or statute, the employer has a nondelegable duty to protect another from harm caused by the contractor.

Parrish v. Omaha Public Power Dist., 242 Neb. 783, 792 (Neb. 1993)

#### J. Exclusivity of Workers' Compensation

The Workers' Compensation Act is considered to be an exclusive remedy. Pursuant to Neb. Rev. Stat. § 48-106 the Act applies to "any employee, or his or her dependents in case of death, of any employer subject to the Nebraska Workers' Compensation Act." Section 48-148 goes on to provide that if the dependent "accepts any payment from such employer" or "makes any agreement," then "such action shall constitute a release to such employer of all claims or demands at law, if any, arising from such injury." This exemption from liability does not extend to any case when the injury or death is proximately caused by the willful and unprovoked physical aggression of such employee, officer, or director.

Neb. Rev. Stat. § 48-111

#### Damages

##### A. Statutory Caps on Damages

The total amount recoverable under the Political Subdivisions Tort Claims Act is limited to: (1) One million dollars for any person for any number of claims arising out of a single occurrence; and (2) Five million dollars for all claims arising out of a single occurrence. Neb. Rev. Stat. §13-926.

The total amount recoverable under the Nebraska Hospital-Medical Liability Act (NHMLA) from any and all health care providers and the Excess Liability Fund for any occurrence resulting in any injury or death of a patient may not exceed \$1,750,000. Hospitals under the NHMLA are responsible for only \$500,000 of the recovery, however, and the balance is paid by the Excess Liability Fund. Neb. Rev. Stat. § 44-2825

These caps have been upheld by appellate courts.

##### B. Compensatory Damages for Bodily Injury

There are two main jury instructions that discuss personal injury - NJI2d 4.00 (damages when joint and several liability is an issue) and NJI2d 4.01(damages when joint and several liability is not an issue) The instruction specifically states that it is broader than physical injury only. The commentary also indicates that the elements set out in the instructions are not inflexible or all-inclusive. Note that the joint and several instruction breaks down the damages as economic and non-economic. This is due to the language of the joint and several statute cited herein.

Economic elements include: 1) the reasonable value of medical care and supplies reasonably needed by and provided to Plaintiff; 2) Lost wages, salary, profit, business or reasonable value of working time; 3) future lost earning capacity, business or employment opportunities; 4) reasonable funeral costs; 5) reasonable value of loss of use of property; 6) reasonable value of repair and replacement of property; 7) reasonable cost of obtaining substitute domestic

services.

Non-Economic elements: 1) physical and mental suffering (and emotional distress) past and future; 2) inconvenience suffered; 3) loss of society and companionship by the plaintiff; 4) injury to reputation; 5) humiliation; 6) the plaintiff's spouse's loss of consortium. The instruction also addresses permanency and disability (partial and total).

#### C. Collateral Source

Generally evidence of collateral compensation is inadmissible with regard to evidence of damages.

"Under the collateral source rule, the fact that the party seeking recovery has been wholly or partially indemnified for a loss by insurance or otherwise cannot be set up by the wrongdoer in mitigation of damages. The collateral source rule 'provides that benefits received by the plaintiff from a source wholly independent of and collateral to the wrongdoer will not diminish the damages otherwise recoverable from the wrongdoer. The theory underlying the adoption of this rule by a majority of jurisdictions is to prevent a tort-feasor from escaping liability because of the act of a third party, even if a possibility exists that the plaintiff may be compensated twice.'"

*Countryside Coop. v. Harry A. Koch Co.*, 280 Neb. 795, 802-803 (Neb. 2010)

Also note that medical expenses are calculated at the private party rate and are not reduced to a Medicare or Medicaid rate based on this rule.

#### D. Pre-Judgment/Post judgment Interest

For decrees and judgments rendered on and after July 20, 2002, interest on decrees and judgments for the payment of money shall be fixed at a rate equal to two percentage points above the bond investment yield, as published by the Secretary of the Treasury of the United States, of the average accepted auction price for the first auction of each annual quarter of the twenty-six-week United States Treasury bills in effect on the date of entry of the judgment. The State Court Administrator shall distribute notice of such rate and any changes to it to all Nebraska judges to be in effect two weeks after the date the auction price is published by the Secretary of the Treasury of the United States. This interest rate shall not apply to: (1) An action in which the interest rate is specifically provided by law; or (2) An action founded upon an oral or written contract in which the parties have agreed to a rate of interest other than that specified in this section. The interest accrues from the date of judgment until the judgment is paid. Neb. Rev. Stat. § 45-103 and § 45-103.01.

Pre-judgment interest is available when damages are liquidated and no reasonable controversy exists, a creditor is entitled to prejudgment interest as a matter of law. *Fletcher v. Mathew*, 233 Neb. 853, 448 N.W.2d 576 (1989). Under this rule the interest

accrues from the time the cause of action arose.

Interest may also accrue on unliquidated claims from the date of the plaintiff's first offer of settlement which is exceeded by the judgment until the entry of judgment if all of the following conditions are met:

(a) The offer is made in writing upon the defendant by certified mail, return receipt requested, to allow judgment to be taken in accordance with the terms and conditions stated in the offer;

(b) The offer is made not less than ten days prior to the commencement of the trial;

(c) A copy of the offer and proof of delivery to the defendant in the form of a receipt signed by the party or his or her attorney is filed with the clerk of the court in which the action is pending; and

(d) The offer is not accepted prior to trial or within thirty days of the date of the offer, whichever occurs first. Neb. Rev. Stat. § 45-103.02

Prejudgment interest is not available against the state, political subdivisions or their employees acting within their scope of employment. Neb. Rev. Stat. §45-104

#### E. Damages for Emotional Distress

A separate cause of action is available for emotional distress in Nebraska.

**Intentional Infliction of Emotional Distress** -To recover for intentional infliction of emotional distress, a plaintiff must prove (1) intentional or reckless conduct (2) that was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and is to be regarded as atrocious and utterly intolerable in a civilized community and (3) that the conduct caused emotional distress so severe that no reasonable person should be expected to endure it. Roth v. Wiese, 271 Neb. 750, 761 (Neb. 2006)

**Negligent Infliction of Emotional Distress** – A plaintiff must show that the defendant's negligent actions caused severe emotional distress. To be actionable, emotional distress must have been so severe that no reasonable person could have been expected to endure it. Furthermore, the emotional anguish or mental harm must be *medically diagnosable* and must be of sufficient severity that it is *medically significant*.

Sleich v. Archbishop Bergan Mercy Hosp., 241 Neb. 765, 770 (Neb. 1992)

**Zone of Danger** - In James v. Lieb, 221 Neb. 47, 375 N.W.2d 109 (1985), the Court abolished the strict "zone of danger" requirement for negligent infliction of emotional distress, adopting instead the "bystander recovery" test. Under this approach, a plaintiff bystander can recover for negligently inflicted suffering resulting from the plaintiff's concern for the safety of another if (1) there was a marital or intimate familial

relationship between the plaintiff and the victim and (2) the plaintiff's emotional trauma resulted from either death or serious injury to the victim.

F. Wrongful Death and/or Survival Action Damages

See Wrongful Death and Survival above.

G. Punitive Damages

**Punitive damages are not available in the State of Nebraska**

H. Diminution in Value of Damaged Vehicle

No case law.

I. Loss of Use of Motor Vehicle

This is available as recoverable damage in Nebraska. Chlopek v. Schmall, 224 Neb. 78 (Neb. 1986) The measure of damages for the loss of use of a vehicle is an amount which does not exceed either the fair rental value of a vehicle of similar nature for a reasonable length of time or the amount actually paid, whichever is the least. Rose v. U.S. Nat'l Bank, 218 Neb. 97 (Neb. 1984)

**Evidentiary Issues**

A. Preventability Determination

No case law. Unlikely to be admissible.

B. Traffic Citation from Accident

The rule in Nebraska is that violation of traffic safety statutes "does not constitute negligence in and of itself, but is merely evidence of negligence." Youngs v. Potter, 237 Neb. 583, 587 (Neb. 1991)

C. Failure to Wear a Seat Belt

A 5% reduction in the damages award may be taken if the person injured is not restrained. The fact that the injured person was not wearing a seatbelt may not be used as evidence of liability or proximate cause. Neb. Rev. Stat. §60-6,273.

D. Failure of Motorcyclist to Wear a Helmet

There is no authority on this subject.

E. Evidence of Alcohol or Drug Intoxication

Intoxication is a defense to a worker's compensation claim. The burden is on the employer to show intoxication. Neb. Rev. Stat. §48-127  
Evidence of intoxication is allowed in some cases. The Supreme Court has stated:

The issue of drinking alcoholic liquors by, or the intoxication of, the operator of a motor vehicle as evidence of negligence, leads us to distinguish three factual situations: (1) There is evidence of consumption of alcoholic liquors by the operator of a motor vehicle and an absence of evidence from which the trier of fact might conclude that the drinking affected the safe operation of the vehicle, and there is no evidence of any other alleged negligent act. (2) There is evidence of consumption of alcoholic liquors, accompanied by other evidence of a negligent act or acts which may have proximately caused the accident. (3) There is evidence of consumption of alcoholic liquor by the driver, together with

evidence of facts or circumstances or competent opinion, either lay or expert, from which the trier of fact could conclude that because of the consumption of alcohol the physical or mental faculties of the driver were impaired in any appreciable degree so as to affect the driver's ability to operate his motor vehicle as an ordinarily prudent and cautious driver would operate it.

In the first situation, the consumption of alcohol as a negligent act should not be submitted.. In the second situation, the consumption of alcohol alone is not evidence of negligence, but may be considered by the trier of fact together with evidence of the other acts or omissions from which negligence may be inferred.. In the third situation, intoxication is submissible as an independent act of negligence contributing to the accident. Where the evidence is conflicting, of course, the determination of the issue is one for the trier of fact.  
Fortin v. Hike, 205 Neb. 344, 350 (Neb. 1980)

#### F. Testimony of Investigating Police Officer

It has been held that the opinion of an officer with regard to vehicular speed is proper, provided a sufficient foundation is laid to show the expertise of the witness, as well as specific knowledge of the underlying facts to deal with the question in issue.

Herman v. Lee, 210 Neb. 563, 571 (Neb. 1982)

Based on this holding it is likely that officers can give opinion testimony as long as sufficient foundation is laid.

#### G. Expert Testimony

Schafersman v. Agland, 262 Neb. 215, 631 N.W.2d 862 (2001)

In this case Nebraska adopted the test set forth in *Daubert v. Merrell Dow Pharmaceuticals*, 506 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). The Court held that when faced with the issue of expert admissibility the **trial judge must determine whether the expert is proposing to testify to (1) scientific, technical, or other specialized knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This requires an assessment of whether the reasoning or methodology underlying the testimony is valid and whether the reasoning or methodology can be applied to the facts at issue.**

The Court further noted:

- 1) Once the validity of the reasoning or methodology is established, any questions regarding how such reasoning or methodology is applied to the case generally goes to the weight of the evidence.
- 2) The focus of the analysis must be on the principles and methodology utilized by the expert, not the conclusions they generate.

The Court also listed a **non-exhaustive list of factors** that may be used in evaluating an expert's opinion testimony which include:

- whether the theory or technique can be tested
- whether it has been subjected to peer review and publication
- whether a technique has a high known or potential rate of error
- whether there are standards controlling the technique
- whether the technique enjoys general acceptance in the relevant scientific community

The Court further discussed the **factors** to specifically consider when evaluating **epidemiology testimony**.

- 1) Methodological soundness of the study
- 2) Its implication on the establishment of causation
- 3) Whether there are sources of error in the study that may contribute to an inaccurate result.
- 4) Whether the relationship between the agent and disease is causal
- 5) Differential diagnoses/Whether the expert has accounted for other possible causes for the disease.

#### H. Collateral Source

See above.

#### I. Recorded Statements

Recorded statements are admissible if the statements come within an exception to the hearsay rule. State v. Anderson, 245 Neb. 237 (Neb. 1994)

#### J. Prior Convictions

Evidence of a prior conviction is allowed under certain circumstances. See Rules of Evidence Neb. Rev. Stat. §§27-403 thru 27-405. It is also allowed in certain instances in sexual assault cases.

#### K. Driving History

DMV abstracts are not admissible as evidence in any action for damages or criminal proceedings arising out of a motor vehicle accident. Neb. Rev. Stat. §60-504

#### L. Fatigue

There is limited case law on this issue. Evidence regarding fatigue and hours of service have been used in a Worker's Compensation cases and in a case by a widow against a railroad but the issues are not specifically addressed. In the railroad case there was an attempt to use an expert to establish that excess hours caused the death of her husband. Larsen v. Union Pac. R.R. Co., 2010 Neb. App. LEXIS 187 (Neb. Ct. App. 2010) Estate of Coe v. Willmes Trucking, L.L.C., 268 Neb. 880 (Neb. 2004)

#### M. Spoliation

Spoliation is the intentional destruction of evidence. It is a general rule that the intentional spoliation or destruction of evidence relevant to a case raises an inference that this evidence would have been unfavorable to the case of the spoliator. The rationale of the rule is that intentional destruction amounts to an admission by conduct of the weakness of one's own case; thus, only intentional destruction supports the

rationale of the rule. The inference does not arise where destruction was a matter of routine with no fraudulent intent because the adverse inference drawn from the destruction of evidence is predicated on bad conduct. In Nebraska, the proper remedy for spoliation of evidence is an adverse inference instruction.

McNeel v. Union Pac. R.R., 276 Neb. 143, 156 (Neb. 2008)

## **Settlement**

### **A. Offer of Judgment**

A defendant in the action for recovery of money may serve upon the plaintiff or his attorney an offer in writing to allow judgment to be taken against it for the sums specified there. If the plaintiff accepts the offer and gives notice to the defendant or his attorney within five (5) days after the offer was served, judgment shall be rendered accordingly. If notice of acceptance is not given within five (5) days, the offer is deemed withdrawn and is not admissible into evidence or mentioned at the trial. If the plaintiff fails to obtain a judgment for more than was offered by the defendant, the plaintiff pays defendant's costs from the time of the offer. Neb. Rev. Stat. § 25-901. Typically, the costs that can be assessed are witness fees, subpoena fees, deposition transcription fees for any testimony used at the trial and any filing fees.

### **B. Liens**

Whenever any person employs a physician, nurse, chiropractor, or hospital to perform professional service or services of any nature, in the treatment of or in connection with an injury, and such injured person claims damages from the party causing the injury, such physician, nurse, chiropractor, or hospital, as the case may be, shall have a lien upon any sum awarded the injured person in judgment or obtained by settlement or compromise on the amount due for the usual and customary charges of such physician, nurse, chiropractor, or hospital applicable at the times services are performed, except that no such lien shall be valid against anyone coming under the Nebraska Workers' Compensation Act. For persons covered under private medical insurance or another private health benefit plan, the amount of the lien shall be reduced by the contracted discount or other limitation which would have been applied had the claim been submitted for reimbursement to the medical insurer or administrator of such other health benefit plan. The measure of damages for medical expenses in personal injury claims shall be the private party rate, not the discounted amount.

In order to prosecute such lien, it shall be necessary for such physician, nurse, chiropractor, or hospital to serve a written notice upon the person or corporation from whom damages are claimed that such physician, nurse, chiropractor, or hospital claims a lien for such services and stating the amount due and the nature of such services, except that whenever an action is pending in court for the recovery of such damages, it shall be sufficient to file the notice of such lien in the pending action.

A physician, nurse, chiropractor, or hospital claiming a lien under this section shall not be liable for attorney's fees and costs incurred by the injured person in securing the judgment, settlement, or compromise, but the lien of the injured person's attorney shall have precedence over the lien created by this section.



Upon a written request and with the injured person's consent, a lienholder shall provide medical records, answers to interrogatories, depositions, or any expert medical testimony related to the recovery of damages within its custody and control at a reasonable charge to the injured person.

[Neb. Rev. Stat. § 52-401](#)

### C. Minor Settlement

The interest of a minor cannot be compromised without approval of the court.

*Zimmerman v. Smile*, 62 Neb. 204, 86 N.W. 1059, 1059 (1901); *see also*, Neb. Rev. Stat. §30-2630. The safest way to settle a case in Nebraska involving a minor is through the use of a conservatorship. *See* Neb. Rev. Stat. §30-2630(1). Conservatorship proceedings are handled in county court. The practice in Nebraska is for the conservator to place all cash funds from the settlement in a restricted, insured account, and no funds can be withdrawn without prior court order. If the settlement exceeds \$10,000 a bond may be required.

Settlements for amounts less than \$25,000 can cause some disagreement among Nebraska practitioners. Neb. Rev. Stat. §30-2603 provides

Any person under a duty to pay or deliver money or personal property to a minor may perform this duty, in amounts not exceeding twenty-five thousand dollars per annum, by paying or delivering the money or property to:

- (1) The minor, if he or she has attained the age of eighteen years or is married;
- (2) Any person having the care and custody of the minor with whom the minor resides;
- (3) A guardian of the minor; or
- (4) A financial institution incident to a deposit in a federally insured savings account in the sole name of the minor and giving notice of the deposit to the minor

Based on this language, it can be asserted there is no need for a conservatorship; rather, and settlement proceeds under \$25,000 may be paid directly to the parent or guardian of the minor. The problem is that §30-2603 does not authorize a parent or guardian to negotiate the settlement resulting in the obligation. Thus, potentially, when the minor reaches the age of 21, he or she could disavow the settlement pursuant to §25-213.

### D. Negotiating Directly With Attorneys

This is allowed.

### E. Confidentiality Agreements

These are permitted, except in the case of a settlement with the state.

### F. Releases

There are no general requirements regarding releases.

**G. Voidable Releases**

Releases are voidable if they are unconstitutional or the product of fraud or duress.

**Transportation Law**

**A. State DOT Regulatory Requirements**

Nebraska follows the FMCSR. There are farm and other agricultural exemptions from FMCSR

**B. State Speed Limits**

- (a) Twenty-five miles per hour in any residential district;
- (b) Twenty miles per hour in any business district;
- (c) Fifty miles per hour upon any highway that is not dustless surfaced and not part of the state highway system;
- (d) Fifty-five miles per hour upon any dustless-surfaced highway not a part of the state highway system;
- (e) Sixty miles per hour upon any part of the state highway system other than an expressway or a freeway, except that the Department of Roads may, where existing design and traffic conditions allow, according to an engineering study, authorize a speed limit five miles per hour greater;
- (f) Sixty-five miles per hour upon an expressway that is part of the state highway system;
- (g) Sixty-five miles per hour upon a freeway that is part of the state highway system but not part of the National System of Interstate and Defense Highways; and
- (h) Seventy-five miles per hour upon the National System of Interstate and Defense Highways, except that the maximum speed limit shall be sixty miles per hour for:
  - (i) Any portion of the National System of Interstate and Defense Highways located in Douglas County; and
  - (ii) That portion of the National System of Interstate and Defense Highways designated as Interstate 180 in Lancaster County and Interstate 129 in Dakota County.

**C. Overview of State CDL Requirements**

An applicant for any original or renewal commercial driver's license or an applicant for a change of class of commercial motor vehicle, endorsement, or restriction shall demonstrate his or her knowledge and skills for operating a commercial motor vehicle as prescribed in the Motor Vehicle Operator's License Act. An applicant for a commercial driver's license shall provide the information and documentation required by this section and sections 60-484 and 60-4,144.01 and also, beginning on an implementation date designated by the director on or before January 1, 2014, the

information and documentation required by section 60-484.04. Such information and documentation shall include any additional information required by 49 C.F.R. parts 383 and 391 and also include:

(a) Certification that the commercial motor vehicle in which the applicant takes any driving skills examination is representative of the class of commercial motor vehicle that the applicant operates or expects to operate; and

(b) The names of all states where the applicant has been licensed to operate any type of motor vehicle in the ten years prior to the date of application.

(2) Any person applying for any commercial driver's license on or before December 31, 2011, must present the certification required pursuant to section 60-4,145 or 60-4,146.

(3) Any person applying for any commercial driver's license on or after January 1, 2012, must make one of the certifications in section 60-4,144.01 and any certification required under section 60-4,146 and must provide such certifications to the department in order to be issued a commercial driver's license.

(4) On or after January 1, 2012, but no later than January 30, 2014, every person who holds any commercial driver's license must provide to the department medical certification as required by section 60-4,144.01. The department may provide notice and prescribe medical certification compliance requirements for all holders of commercial driver's licenses. Holders of commercial driver's licenses who fail to meet the prescribed medical certification compliance requirements may be subject to downgrade.

Any applicant who operates or expects to operate a commercial motor vehicle solely in intrastate commerce and who is subject to 49 C.F.R. part 391 adopted pursuant to section 75-363 shall certify that the applicant meets the qualification requirements of 49 C.F.R. part 391. An Applicant may also certify that they are not subject to the regulation and they are then required to answer various health questions.

Neb. Rev. Stat. § 60-4,146 and 60-4,144.01

### **Insurance Issues**

#### **A. State Minimum Limits of Financial Responsibility**

\$25,000 Bodily injury liability maximum for one person injured in an accident.

\$50,000 Bodily injury liability maximum for all injuries in one accident.

\$25,000 Property damage liability maximum for one accident.

#### **B. Uninsured Motorist Coverage**

Uninsured Motorist Coverage is required in the state of Nebraska Neb. Rev. Stat. §44-6408. Stacking is generally prohibited. In the event of payment under the uninsured or underinsured motorist coverage, the insurer making such payment shall, to the extent of such payment, be entitled to the proceeds of any settlement or judgment to

the extent such settlement or judgment exceeds the amount paid under any applicable bodily injury liability policy or bond.

Neb. Rev. Stat. § 44-6412

#### C. No Fault Insurance

Click to enter – Discuss generally mandatory/waive able; limits; exemptions/off sets.

#### D. Disclosure of Limits and Layers of Coverage

There is no statutory requirement to disclose. Sometimes limits are not disclosed until the discovery process is commenced.

#### E. Unfair Claims Practices

Sections 44-1536 to 44-1544 of the Nebraska Revised Statutes contain the Unfair Insurance Claims Settlement Practices Act.

#### F. Bad Faith Claims

To show a claim for bad faith, a plaintiff must show the absence of a reasonable basis for denying benefits of the insurance policy and the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim. The tort of bad faith can be alleged only if the facts pleaded would, on the basis of an objective standard, show the absence of a reasonable basis for denying the claim, i.e., would a reasonable insurer under the circumstances have denied or delayed payment of the claim under the facts and circumstances.

*Ruwe v. Farmers Mut. United Ins. Co.*, 238 Neb. 67 (Neb. 1991)

Nebraska case law recognizes two types of bad faith claims against an insurer: The first is a traditional third-party bad faith claim which arises when an insurer wrongfully fails to settle a claim brought by a third party against an insured. The second type is a first-party bad faith action based upon allegations that the insurer, in bad faith, refused to settle with its own policyholder insured, who thereby suffered some type of direct loss.

*Weatherly v. Blue Cross Blue Shield Ins. Co.*, 2 Neb. App. 669 (Neb. Ct. App. 1994)

#### G. Coverage – Duty of Insured

The duty to cooperate is discussed in dicta, but there is no caselaw holding on the issue.

#### H. Fellow Employee Exclusions

It is not an employer defense under workers compensation that the injury was caused by a fellow employee Neb. Rev. Stat. §48-102