SOUTH DAKOTA STATE LAW

LIND JENSEN SULLIVAN & PETERSON
ATTORNEYS AT LAW

Brian A. Wood, Esq.
(612) 746-0151 (Direct Dial)
brian.wood@lindjensen.com
Eric J. Steinhoff, Esq.
(612) 746-0115 (Direct Dial)
eric.steinhoff@lindjensen.com
1300 AT&T Tower
901 Marquette Avenue
Minneapolis, MN 55402
(612) 333-3637

South Dakota State Law Summary

Court System

The South Dakota Court system is composed of small claims court, drug court, district court, appellate court, and the Supreme Court.

Small Claims

The small claims court is an informal court which allows people to sue for small losses of money or property. An individual can file and handle his or her own claim in court.

The limit set by the law for small claims actions is $12,000.00 or less. SDCL 16-12C-13. However, limits may change from time to time, it is suggested that the plaintiff verify with the clerk of court the maximum amount that can be claimed.

Drug Court

All South Dakota Drug Courts are post-plea and designed to help those battling with addiction and their related criminal offense. The purpose of the drug court is to reduce substance abuse and recidivism among targeted offenders and reliance on incarceration. All programs operate with a team of agencies working together for service integration and collective treatment planning within individual communities.

Circuit Court

The circuit courts are the trial courts of the Unified Judicial System. The United States District Court for the District of South Dakota currently hears cases in four locations: Aberdeen, Pierre, Rapid City, and Sioux Falls. All circuit court judges hear both civil and criminal cases.

Supreme Court

The Supreme Court established the number of circuits, their boundaries, and the number of judges in each circuit. The South Dakota Supreme Court most often serves as an appellate court, hearing appeals of circuit court decisions. Parties seeking to change an adverse Circuit Court decision appeal to the Supreme Court. The Court then examines the Circuit Court proceedings and determines whether the Circuit Court's decision was correct.

The Supreme Court has such appellate jurisdiction as may be provided by the Legislature. The Supreme Court or any justice may issue any original or remedial writ which is then heard and determined by that Court as provided in Section five of Article V South Dakota Constitution.

Venue

15-5-1. Venue based on location of subject matter. Actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial in the cases provided by the statute:

(1) For the recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property;
(2) For the partition of real property;
(3) For the foreclosure of a mortgage of real property;
(4) For the recovery of personal property distrained for any cause;
(5) For the recovery on a policy of insurance for loss or damage to the property insured, such property, for the purposes of this subdivision being deemed the subject of the action.

Source: SDC 1939 and Supp 1960, § 33.0301.

15-5-2. Venue where cause of action arose. Actions for the following causes, or upon the following instruments, must be tried in the county where the cause, or some part thereof, arose, or the forfeiture was declared, subject to the power of the court to change the place of trial:

(1) For the recovery of a penalty or forfeiture imposed by statute, except that when it is imposed for an offense committed on a lake or river, or other stream of water situated in two or more counties, the action may be brought in any county bordering on such lake, river, or stream, and opposite to the place where the offense was committed;
(2) Against a public officer, or person specially appointed to execute his duties, for an act done by him in virtue of his office, or against a person, who, by his command or his aid, shall do anything touching the duties of such office.
(3) Upon a forfeited recognizance, bond, or undertaking of bail.

Source: SDC 1939 and Supp 1960, § 33.0303.

15-5-3. Venue of actions on life, health and accident insurance policies. Actions on a life, health, or accident insurance policy issued by a company organized under the laws of this state shall be tried in the county where the insured resided at the time a liability is alleged to have accrued under the policy.

15-5-8. Venue of actions for conversion or recovery of damages. Actions for conversion of personal property, or for the recovery of damages to persons or property,

may at the option of the plaintiff be brought and tried in the county where the damages were inflicted or the cause of action arose.

Source: SDC 1939 and Supp 1960, § 33.0304.

Time for Serving Defenses

15-6-12(a). Time for presenting defenses and objections. A defendant shall serve the answer within thirty days after the service of the complaint upon defendant, except when otherwise provided by statute or rule. A party served with a pleading stating a cross-claim shall serve an answer within twenty days after the service. The plaintiff shall serve a reply to a counterclaim in the answer within twenty days after service of the answer or, if a reply is ordered by the court, within twenty days after service of the order, unless the order otherwise directs. The service of a motion permitted under § 15-6-12 alters these periods of time as follows, unless a different time is fixed by order of the court:

(1) If the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within ten days after notice of the court's action;
(2) If the court grants a motion for a more definite statement, the responsive pleading shall be served within ten days after the service of the more definite statement;
(3) If an appeal is taken from an order sustaining a motion to dismiss and such order is thereafter reversed, the responsive pleading shall be served within twenty days after the judgment or order of reversal is filed in the trial court.

Source: SDC 1939 and Supp 1960, § 33.0907; SD RCP, Rule 12 (a), as adopted by Sup. Ct. Order March 29, 1966, effective July 1, 1966; SL 2006, ch 284 (Supreme Court Rule 06-10), eff. July 1, 2006.

Statute of Limitations	
Assault and Battery, **1 year**	S.D. Codified Laws § 15-2-15(1)
Contract (in writing), **6 or 20 years** (Depending on if the contract is "under seal")	S.D. Codified Laws §§ 15-2-13(1) and 15-2-6(2)
Contract (oral or not in writing), **6 years**	S.D. Codified Laws § 15-2-13(1)
False Imprisonment, **1 year**	S.D. Codified Laws § 15-2-15(1)
Fraud, **6 years**	S.D. Codified Laws § 15-2-13(6)
Enforcing Court Judgments, **20 years**	S.D. Codified Laws § 15-2-6(1)
Legal Malpractice, **3 years**	S.D. Codified Laws § 15-2-14.2
Libel, **1 year**	S.D. Codified Laws § 15-2-15(1)
Medical Malpractice, **2 years**	S.D. Codified Laws § 15-2-14.1
Personal Injury, **3 years**	S.D. Codified Laws § 15-2-14(3)
Product Liability, **3 years**	S.D. Codified Laws § 15-2-12.2
Property Damage, **6 years**	S.D. Codified Laws § 15-2-13(4)

Slander, **1 year**	S.D. Codified Laws § 15-2-15(1)
Trespass, **6 years**	S.D. Codified Laws § 15-2-13(3)
Wrongful Death, **3 years**	S.D. Codified Laws § 21-5-3

Comparative Negligence

Comparative negligence--Reduction of damages. In all actions brought to recover damages for injuries to a person or to that person's property caused by the negligence of another, the fact that the plaintiff may have been guilty of contributory negligence does not bar a recovery when the contributory negligence of the plaintiff was slight in comparison with the negligence of the defendant, but in such case, the damages shall be reduced in proportion to the amount of plaintiff's contributory negligence.

S.D.C.L. § 20-9-2

South Dakota is the only state to use a modified version of a pure comparative fault system based on slight/gross negligence (S.D.C.L. § 20-9-2). Under this system, a plaintiff may be prevented from legal recourse if it is determined that the plaintiff's contributory negligence is more than "slight" in comparison to the defendant's negligence. In the case of *Wood v. City of Crooks* (S.D. 1997), the South Dakota Supreme Court held that contributory negligence of 30 percent is more than slight, as a matter of law, thus barring the plaintiff any recovery. *Woods v. City of Crooks*, 559 N.W.2d 558 (SD 1997), the determination of whether the contributory negligence of the plaintiff was slight in comparison with the negligence of the defendant shall be made without disclosing any determination of percentage of plaintiff's fault by special interrogatory.

Collateral Source Rule

South Dakota applied the collateral source rule in personal injury actions. *Degen v. Bayman*, 241 N.W.2d 703, 708 (S.D. 1976). The applicability of the collateral source rule in personal injury cases was more recently reiterated in *Jurgensen*. South Dakota's Supreme Court stated, "it is well settled under South Dakota law that total or partial compensation received by an injured party from a collateral source, wholly independent of the wrongdoer does not operate to reduce the damages recoverable from the wrongdoer." Since *Jurgensen*, the South Dakota Supreme Court indicated that in certain circumstances, it may be appropriate to allow evidence of collateral sources in a personal injury case if "the collateral source evidence is being offered for a relevant purpose such as to prove malingering." Cruz v. Gorth, 2009 SD 19, ¶12-13 763 N.W. 2d 810."

Respondeat Superior

The doctrine of respondeat superior holds an employer or principal liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency. *Kirlin v. Halverson*, 758 N.W.2d 436, (2008 SD 107).

Scope

"[W]ithin the scope of employment" has been called vague but flexible, referring to "those acts which are so closely connected with what the servant is employed to do, and so fairly and reasonably incidental to it, that they may be regarded as methods, even though quite improper ones, of carrying out the objectives of the employment." *Deuchar v. Foland Ranch, Inc.*, 410 N.W.2d 177, 180 (S.D.1987).

Forseeability

In respondeat superior, foreseeability includes a range of conduct which is "fairly regarded as typical of or broadly incidental to the enterprise undertaken by the employer." *Leafgreen v. American Family Mutual Insurance Co.*, 393 N.W.2d 275 (S.D. 1986).

The *Leafgreen* foreseeability formulation was guided by the Restatement (Second) of Agency. This provides guidance on what is foreseeable and, therefore, what is within the scope of employment. *Kirlin v. Halverson*, 758 N.W.2d 436, (2008 SD 107).

In South Dakota, the law imposes no duty to prevent the misconduct of a third person. *State Auto Ins. Companies*, 702 N.W.2d 379 (S.D. 2005). However, an employer may be held liable for negligent hiring, retention, training and supervision. *See Rehm v. Lenz*, 1996 SD 51, (recognizing that employers can be held responsible for negligent hiring, retention and supervision of their employees); see also *Nelson v. Nelson Cattle Co.*, 513 N.W.2d 900, 904 4

Defenses

Admission of Agency/Admitting Liability Under Respondeat Superior

A negligence claim brought under a respondeat superior theory is based upon an employer's vicarious liability for the wrongful acts of its employees. A negligence claim brought under a theory of negligent hiring or retention is based upon the employer's negligence in hiring or retaining the employee, rather than the employee's wrongful act.

The employer's duty exists at the time the employee is hired and depends on the degree of contact the employee will have with the public in the prospective job. *Kirlin v. Halverson*, 2008 S.D. 107, 758 N.W.2d at 452.

Negligent Hiring Retention

South Dakota utilizes the standard enumerated in the Restatement (Second) of Torts, Section 317 for claims of negligent hiring and negligent retention. Accordingly, a "master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming

others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if

(a) the servant
  (i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or
  (ii) is using a chattel of the master, and
(b) the master
  (i) knows or has reason to know that he has the ability to control his servant, and
  (ii) knows or should know of the necessity and opportunity for exercising such control."

In *Kirlin*, the Court recognized an employer's limited duty to conduct a background investigation before hiring an employee. When an employee comes into minimum contact with the public or those in a special relationship with the employer, the employer need not perform a background investigation. The opposite is true when the employee makes frequent contact with the public and those in a special relationship with the employer. *Kirlin v. Halverson*, 758 N.W.2d 436, 452 (SD 2008).

An employer's direct liability for negligent hiring and retention is distinct from its respondeat superior liability for the acts of its employees. *Iverson v. NPC Intern., Inc*., 801 N.W.2d 275 (2011 S.D. 40). Under a theory of negligent hiring or retention, the proximate cause of the plaintiff's injury is the employer's negligence in hiring or retaining the employee, rather than the employee's wrongful act. *Iverson v. NPC Intern., Inc*., 801 N.W.2d 275 (2011 S.D. 40)

A claim of negligent supervision avers that the employer failed to exercise reasonable care in supervising (managing, directing, or overseeing) its employees so as to prevent harm to other employees or third persons. A duty to control, in contrast, examines whether the employee caused harm while using a chattel if the employer or while on the premises of the employer, which conduct the employer could and should control. *McGuire v. Curry*, 766 N.W.2d 501 (2009 SD).

A prerequisite to proceeding on this cause of action is establishing the existence of a duty." *Poelstra v. Basin Elec. Power Coop*., 545 N.W.2d 823, 825 (SD 2005). The duty involved in a negligent supervision claim is one of ordinary care. *Kirlin*, 2008 S.D. 107, 758 N.W.2d at 451. The duty to control concerns the employer's handling of its special relationship with its employee, the general duty concerns the employer's duty to conduct itself reasonably. Like the duty to control, the existence of the duty of ordinary care depends on the foreseeability of the injury. *McGuire*, 766 N.W.2d at 509 (2009 S.D.)

Negligent Entrustment

The courts have recognized negligent entrustment as a valid cause of action in South Dakota. *Colonial Ins. Co. of Cal. v. Lundquist*, 539 N.W.2d 871, 872 (S.D.1995).

Negligent entrustment is an action to hold the owner of an insured motor vehicle liable for his negligence in acts arising out of the ownership of the vehicle. Lundquist, 539 N.W.2d 871 at 876. An owner of a vehicle may be guilty of negligence if he permits an incompetent, inexperienced and knowingly reckless and accident prone person to drive his vehicle. *Stover v. Critchfield*, 510 N.W.2d 681, 684 (SD 1994); Robe v. Ager, 597, 129 N.W.2d 47, 51 (S.D.1964); see also *Arbach v. Gruba*, 89 S.D. 322, 232 N.W.2d 842, 846 (S.D.1975).

This doctrine applies to situations where an owner negligently permits another to drive his vehicle. Permission, either express or implied, is a prerequisite to a suit for negligent entrustment. To establish the existence of implied permission or consent, there must be a showing of "a course of conduct or practice known to the owner and acquiesced in by him that would lead to an application of permission of a particular venture." *Western Casualty & Surety Co. v. Anderson*, 273 N.W.2d 203, 205 (S.D.1979).

In South Dakota, an automobile liability insurer is not required to pay policy limits for permissive user's negligence in causing accident and policy limits for insured owner's negligent entrustment of vehicle. The Court found that it is clear that the limits apply to each insured vehicle. Under SDCL 32-35-69 "[a]n owner's policy of liability insurance referred to in § 32-35-68 shall designate by explicit description or by appropriate reference all vehicles with respect to which coverage is thereby to be granted." *Schulte v. Progressive Northern Ins. Co.*, 699 N.W.2d 437 (S.D. 2005).

Joint and Several Liability

South Dakota has limited the application of joint and several liability to cases involving certain percentages of negligence. SDCL. § 15-8-15.1 provides:

If the court enters judgment against any party liable on the basis of joint and several liability, any party who is allocated less than fifty percent of the total fault allocated to all the parties may not be jointly liable for more than twice the percentage of fault allocated to that party.

Joint and Several Liability Reform: SB 263 (1987): S.D. Codified Laws Ann. § 15-8-15.1.

Provides that "any party who is allocated less than 50% of the total fault allocated to all parties may not be jointly liable for more than twice the percentage of fault allocated to that party."

21-5-7. Damages proportionate to pecuniary injury to beneficiaries. In every action for wrongful death the jury may give such damages as they may think

proportionate to the pecuniary injury resulting from such death to the persons respectively for whose benefit such action shall be brought.

Source: SL 1909, ch 301, § 3; RC 1919, § 2931; SDC 1939, § 37.2203; SL 1947, ch 173; SL 1951, ch 193; SL 1957, ch 194; SL 1963, ch 235; SL 1967, ch 149.

In South Dakota, defendants 50 percent or more at fault are, without limitation, jointly and severally liable for the plaintiff's damages. S.D. Codified Laws § 15-8-11 (2005); *Centrol, Inc. v. Morrow*, 489 N.W.2d 890 (S.D. 1992). Defendants who are less than 50 percent at fault are still jointly and severally liable, but there is a cap on their liability for no more than twice their proportionate share of fault. S.D. Codified Laws § 15-8-15.1 (1987); *Landstrom v. Shaver*, 550 N.W.2d 699 (S.D. 1996). Joint tortfeasors have a right to contribution should they pay more than their proportionate share of the plaintiff's damages. S.D. Codified Laws § 15-8-12 (1960); *Freeman v. Berg*, 482 N.W.2d 32, 34 (S.D. 1992). A plaintiff's negligence does not bar recovery provided that it was "slight." S.D. Codified Laws § 20-9-2 (1998); *Harmon v. Washburn*, 751 N.W.2d 297 (S.D. 2008). Whether the plaintiff's fault is "slight" is determined on a case-by-case basis and not by assignment of a specific percentage of liability. S.D. Codified Laws § 20-9-2 (1998); Schmidt v. Royer, 574 N.W.2d 618 (S.D. 1998). Where the plaintiff's action is not barred by excessive negligence on his part, his recovery is reduced by the proportion of his negligence. S.D. Codified Laws § 20-9-2 (1998); *Steffen v. Schwan's Sales*, 713 N.W.2d 614 (S.D. 2006). A partial settlement reduces by its amount what the plaintiff may recover from the non-settling tortfeasors. S.D. Codified Laws § 15-8-17 (1960); *Fix v. First State Bank*, 807 N.W.2d 612 (S.D. 2011)

Comparative Negligence

South Dakota has the "slight negligence" system in which the plaintiff may recover a proportionate fault share of his damages only so long as the trier of fact finds the plaintiff's negligence to be "slight" in comparison to the negligence of the defendant.

S.D. CODIFIED LAWS §§ 20-9-1, 20-9-2 (2004).

South Dakota originally enacted the "slight-gross" system which allowed plaintiff a comparative fault recovery only when plaintiff's negligence was "slight" in comparison with defendant's "gross" negligence.

The meaning of slight is deemed not capable of precise definition. *Am. State Bank v. List-Mayer*, 350 N.W.2d 44, 47 (S.D. 1984) ("[T]he term 'slight' negligence . . . defies precise definition and prohibits an arbitrary mathematical ratio." (quoting *Crabb v. Wade*, 167 N.W.2d 546, 549 (S.D. 1969)).

The issue is generally left to the trier of fact. *Schmidt v. Royer*, 574 N.W.2d 618, 627 (S.D. 1998) (leaving the issue of contributory negligence to the jury because the facts were in dispute whether "either driver committed negligence more than slight"); *Musilek v. Stober*, 434 N.W.2d 765, 768 (S.D. 1989) (finding that there was no error in not

submitting the issue of what constitutes "slight negligence" to the jury because the court found plaintiff's contributory negligence was more than slight in comparison with that of the defendant). The jury is free to characterize the plaintiff's negligence as slight so long as it is less than the negligence of the defendant.

As with the 49% rule, the plaintiff is completely barred from any recovery if his negligence is equal to or greater than the defendant's negligence. Plaintiff's negligence is to be compared with the negligence of the defendant and not with the conduct of the reasonable prudent person. *Schmidt,* 574 N.W.2d at 627; *Musilek,* 434 N.W.2d at 768.

Whether a plaintiff's negligence is slight compared to that of the defendant is a question of fact and varies with the facts and circumstances of each case. *Estate of Largent v. United States*, 910 F.2d 497, 499 (8th Cir. 1990).

Dram Shop

No licensee may sell any alcoholic beverage to any person who is obviously intoxicated at the time. A violation of this section is a Class 1 misdemeanor.

S.D. Codified Laws Ann. §35-4-78

However, no licensee is civilly liable to any injured person or the injured person's estate for any injury suffered, including any action for wrongful death, or property damage suffered because of the intoxication of any person due to the sale or consumption of any alcoholic beverage in violation of the provisions of this section.

S.D. Codified Laws Ann. §35-4-78

It is a Class 1 misdemeanor to sell or give for use as a beverage any alcoholic beverage to any person under the age of 18 years unless:

(1) It is done in the immediate presence of a parent or guardian or spouse, who is at least 21 years of age, while not on the premises of an establishment licensed for the retail sale of alcoholic beverages pursuant to §35-4-2 or at a special event for which an alcoholic beverage license has been issued or

(2) It is done by prescription or direction of a duly licensed practitioner or nurse of the healing arts for medicinal purposes.

S.D. Codified Laws Ann. §35-9-1

However, no licensee is civilly liable to any injured person or the injured person's estate for any injury suffered, including any action for wrongful death, or property damage suffered because of the sale or consumption of any alcoholic beverage in violation of the provisions of this section.

S.D. Codified Laws Ann. §35-9-1

It is a Class 2 misdemeanor to sell or give for use as a beverage any alcoholic beverage to any person who is 18 years of age or older but less than 21 years of age unless it is done in the immediate presence of a parent or guardian or spouse over 21 years of age or by prescription or direction of a duly licensed practitioner or nurse of the healing arts for medicinal purposes.

S.D. Codified Laws Ann. §35-9-1.1

However, no licensee is civilly liable to any injured person or the injured person's estate for any injury suffered, including any action for wrongful death, or property damage suffered because of the sale or consumption of any alcoholic beverage in violation of the provisions of this section.

S.D. Codified Laws Ann. §35-9-1.1

The Legislature finds that the consumption of alcoholic beverages, rather than the serving of alcoholic beverages, is the proximate cause of any injury inflicted upon another by an intoxicated person. Therefore, the rule in *Walz v. City of Hudson*, 327 N.W. 2nd 120 (S.D. 1982) is hereby abrogated.

S.D. Codified Laws Ann. §35-11-1

Social Host (Liquor) Liability

Under South Dakota law, social hosts are not liable: “No social host who furnishes any alcoholic beverage is civilly liable to any injured person or injured person's estate for any injury suffered, including any action for wrongful death, or property damage suffered because of the intoxication of any person due to the consumption of the alcoholic beverage.” § 35-11-2. The South Dakota Legislature has found that the consumption of alcoholic beverages, rather than the serving of alcoholic beverages, is the proximate cause of any injury inflicted upon another by an intoxicated person.

Wrongful Death

A “wrongful death” as a death caused by the “wrongful act, neglect, or default” of another.

A wrongful death claim is available in any situation in which the deceased person would have had a claim for personal injury if he or she had lived. A South Dakota wrongful death lawsuit must be brought to court by the personal representative of the deceased person's estate. Although filing the wrongful death claim is the job of the personal representative, any damages recovered in the wrongful death claim belong to the deceased person's surviving spouse and children. If there is no surviving spouse or

child, the damages belong to the deceased person's surviving parents or next of kin. If the deceased person was an unborn child, the damages belong to the child's natural parent or parents.

S.D. Codified Laws Ann. §21-5-1

In a wrongful death claim, liability is expressed solely in terms of money damages.

Wrongful Death can be sorted into two categories: damages the surviving family members suffered due to the loss of their loved one, and damages the estate suffered as a result of the untimely death.

Damages available for surviving family members include:

- loss of love, companionship, comfort, advice, guidance, affection, and moral support
- the value of household services the deceased person would have provided if he or she had lived, and
- the value of financial support the surviving family members would have received from the deceased person if he or she had lived.

Damages available to the estate include:

- reasonable medical expenses related to the deceased person's final illness or injury
- funeral and burial expenses, and
- lost wages and benefits, including the value of the wages and benefits the deceased person could reasonably have been expected to earn if he or she had lived.

South Dakota also allows punitive damages to be awarded in wrongful death cases. Unlike other types of damages, punitive damages are not awarded to compensate the estate or family for its losses. Rather, punitive damages are awarded when a death results from intentional or particularly reckless or egregious conduct. Their purpose is both to punish the defendant for bad conduct and to send a message to similar defendants that such behavior will not be tolerated.

Time Limits for Filing Wrongful Death Claims in South Dakota

South Dakota's statute of limitations provides a limited window of time in which to file a wrongful death claim in the state's courts. A wrongful death claim must be filed within three years of the date of the deceased person's death.

A wrongful death claim may be filed even if a criminal case is proceeding based on the same events that led to the death. Unlike a criminal case, which is filed by the prosecuting attorney, a wrongful death case must be filed by the personal

representative directly. Also, if the defendant in a criminal case is found guilty, he or she may face penalties like imprisonment or fines, whereas in the wrongful death case, liability is expressed solely in terms of money damages.

S.D. Section 21-5-3

Proving Negligence

The common element in most wrongful death actions is negligence. Negligence is the failure to use the standard of care that a reasonable person would have used in a similar situation. Negligence must be proven in wrongful death cases and our attorneys are skilled in helping clients prove that the four critical components of negligence exist in their claim:

1. That the defendant had a **duty** to the deceased;
2. That the defendant failed in that duty (**breach** of duty);
3. That the defendant's breach was the **cause** of the fatality; and
4. That the survivors are entitled to **damages** as a result of the loss of their loved one.

In addition to establishing negligence, the joint life expectancy of the deceased and the survivor or beneficiary must be presented (to establish the loss of future earnings). The relationship of the survivor and deceased must also be shown. Last, but certainly not least, effective presentation of the non-economical or emotional loss suffered by the survivor is critical to a fair award of damages.

Bad Faith

Unfair or deceptive consumer practices are proscribed by S.D. Codified Laws Ann. § 37-24-1 (1986 and Supp. 1993). A duty to act in good faith is an implied term of all insurance policies. *Helmbolt v. LeMars Mut. Ins. Co*., 404 N.W.2d 55, 57 (S.D. 1987).

Insurer must give its insured's interests at least "equal consideration" in controlling the defense of a case. *Kansas Bankers Surety Co. v. Lynass*, 920 F.2d 546 (8th Cir. 1990).

The insured must show, however, that the insurer intentionally denied coverage without any reasonable basis for its position. *Carroll v. Gulf Ins. Co*., 886 F.2d 1071, 1073 (8th Cir. 1989).

Under South Dakota law, an award of punitive damages requires a finding of actual or implied malice. *Dahl v. Sittner*, 474 N.W.2d 897, 900 (S.D. 1991).

In *Biehrle v. Liberty Mut. Ins. Co*., 992 F.2d 873 (8th Cir. 1993), the Circuit Court held that "sloppy business practices" did not rise to the level of implied malice, since there was no evidence that the insurer consciously realized that its conduct would result in injury.

Under South Dakota law, damages for emotional distress may result from an insurer's breach of contract. *Athey v. Farmers Insurance Exchange*, No. 00-1206 (8th Cir. December 6, 2000) and *Kunkel v. United Security Insurance Company of New Jersey*, 168 N.W.2d 723, 734 (S.D. 1969).

Conditioning the settlement of an underinsurance policy on the release of a bad faith claim has been found to be evidence of bad faith and to support an award of punitive damages against an insurer. *Harter v. Plains Insurance Company*, 579 N.W.2d 625, 634 (S.D. 1998) and *Isaac v. State Farm Mutual Auto Insurance Compan*y, 522 N.W.2d 752, 761 (S.D. 1994).

Statutory Cap on Damages

In South Dakota, non-economic damages in medical malpractice cases are capped at **$500,000**. This includes cases against almost any kind of health care provider you can think of, including physicians, chiropractors, optometrists, dentists, hospitals, registered nurses, physicians' assistants, and corporate employers.

S.D. Cod. Laws section 21-3-11

They include compensation for things like pain and suffering, emotional distress, and the loss of enjoyment of life that result from the malpractice. Non-economic damages are said to be more "subjective" from plaintiff to plaintiff, and they're not so easy to capture with a dollar amount. Economic damages, on the other hand, typically consist of payment for past and future medical care, reimbursement of lost income, compensation for lost earning capacity, and other financial losses that can be attributed to the doctor or hospital error on which the malpractice lawsuit is based.
South Dakota does not cap economic damages in medical malpractice cases, and that's an important distinction to keep in mind.

Caps on Injury Damages in South Dakota

Caps on personal injury damages work to limit the amount of <u>compensation an injured person can receive</u> from another at-fault party. Many states have caps on certain types of damages, like pain and suffering damages or punitive damages.

In South Dakota, damages in medical malpractice cases are capped at $1,000,000, including both economic and non-economic or "pain and suffering" damages. Similarly, damages in product liability cases are capped at $1,000,000. South Dakota does not currently cap punitive damages.

Injury Claims Against the Government in South Dakota

If your accident or injury case involves the potential liability of a government employee or government agency, you'll have to follow a different set of rules than you would in an

ordinary personal injury case. In South Dakota, you have **one year** to file a claim against a government agency or employee.

Chapter 21-32 of the South Dakota Codified Laws, "Remedies Against the State," contains the full text of key South Dakota laws that apply to injury claims against the state or local government. Our section on Injury Claims Against the Government also contains plenty of background information on these types of claims.

Attorney's Fees

15-17-38. Award of attorneys' fees--Taxed as disbursements. The compensation of attorneys and counselors at law for services rendered in civil and criminal actions and special proceedings is left to the agreement, express or implied, of the parties. However, attorneys' fees may be taxed as disbursements if allowed by specific statute. The court, if appropriate, in the interests of justice, may award payment of attorneys' fees in all cases of divorce, annulment of marriage, determination of paternity, custody, visitation, separate maintenance, support, or alimony. The court may award the fees before or after judgment or order. The court may award attorneys' fees from trusts administered through the court as well as in probate and guardianship proceedings. Attorneys' fees may be taxed as disbursements on mortgage foreclosures either by action or by advertisement.

Source: SL 1992, ch 148, § 3; SL 2006, ch 111, § 1.

Statutes S.D. Codified Laws § 15-17-37; Prevailing party to recover disbursements--Taxation of disbursements The prevailing party in a civil action or special proceeding may recover expenditures necessarily incurred in gathering and procuring evidence or bringing the matter to trial. Such expenditures include costs of telephonic hearings, costs of telephoto or fax charges, fees of witnesses, interpreters, translators, officers, printers, service of process, filing, expenses from telephone calls, copying, costs of original and copies of transcripts and reporter's attendance fees, court appointed experts, and other similar expenses and charges. These expenditures are termed "disbursements" and are taxed pursuant to § 15-6-54(d). Cases *Casillas v. Schubauer*, 2006 SD 42, 714 N.W.2d 84, 91, 2006 WL 1132066 (S.D. 2006). More importantly, the expense for non-computerized legal research is not taxable and is not within "other similar expenses and charges." We hold that computerized legal research fees cannot be taxed as disbursements under § 15-17-37. *Duffy v. Circuit Court*, Seventh Judicial Circuit, 2004 SD 19, 676 N.W.2d 126, 133, 2003 WL 23220997 (S.D. 2004) Charges for electronic research services such as Lexis or Westlaw will not be allowed.

21-1-13.1. Interest on damages--Prejudgment interest--Retroactive application. Any person who is entitled to recover damages, whether in the principal action or by counterclaim, cross claim, or third-party claim, is entitled to recover interest thereon from the day that the loss or damage occurred, except during such time as the debtor is prevented by law, or by act of the creditor, from paying the debt. Prejudgment interest is not recoverable on future damages, punitive damages, or intangible damages such

as pain and suffering, emotional distress, loss of consortium, injury to credit, reputation or financial standing, loss of enjoyment of life, or loss of society and companionship. If there is a question of fact as to when the loss or damage occurred, prejudgment interest shall commence on the date specified in the verdict or decision and shall run to, and include, the date of the verdict or, if there is no verdict, the date the judgment is entered. If necessary, special interrogatories shall be submitted to the jury. Prejudgment interest on damages arising from a contract shall be at the contract rate, if so provided in the contract; otherwise, if prejudgment interest is awarded, it shall be at the Category B rate of interest specified in § 54-3-16. Prejudgment interest on damages arising from inverse condemnation actions shall be at the Category A rate of interest as specified by § 54-3-16 on the day judgment is entered. This section shall apply retroactively to the day the loss or damage occurred in any pending action for inverse condemnation. The court shall compute and award the interest provided in this section and shall include such interest in the judgment in the same manner as it taxes costs.

Source: SL 1990, ch 156, § 1; SL 2003, ch 242, § 2.

South Dakota Yes Date of Verdict 10%.

Automobile Insurance

Non-No-Fault State. South Dakota, unlike Minnesota and North Dakota, does not have automobile no-fault insurance statutes. *See Stover v. Critchfield*, 510 N.W.2d 681 (S.D. 1994).

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. Codified Laws § 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. § 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. § 58-11-9.4. Underinsured coverage limited to underinsured limits less amount paid by liability insurer of party recovered against. § 58-11-9.5; *Farmland Ins. Cos. v. Heitmann*, 498 N.W.2d 620 (S.D. 1993). Section 58-11-9.5 referred to as difference in limits statute. *Westfield Ins. Co. v. Rowe*, 631 N.W.2d 175 (S.D. 2001); Nickerson v. American States Ins., 616 N.W.2d 468 (U.S. 2000). Court compares limits of underinsured motorist 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*., 619 N.W.2d 677 (S.D. 2000*); Great West Cas. Co. v. Hovaldt*, 603 N.W.2d 198 (S.D. 1999); *Gloe v. Union Ins. Co*., 694 N.W.2d 252 (S.D. 2005).

UM and UIM. 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. §§ 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.*, 694 N.W.2d 238 (S.D. 2005). It is lawful for insurer to exclude insured's vehicle from underinsured motorist coverage. *Employers Mut. Cas. Co. v. State Auto Ins*., 623 N.W.2d 462 (S.D. 2001). Furthermore, underinsured coverage is limited to underinsured limits less amount paid by tortfeasor's liability insurer. § 58-11-9.5. As such, section 58-11-9.5 is a difference in limits statute and prevents a double recovery by the plaintiff insured. *Gloe v. Union Ins. Co*., 694 N.W.2d 292 (S.D. 2005).

Benefits. Certain automobile insurance policy provisions covering accident, disability and medical benefits have been provided by statute. §§ 58-23-(6-8), 58-23-7. Section 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. Section 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. § 58-23-7; *Trammell v. Prairie States*, 473 N.W.2d 460 (S.D. 1991).

Insurance Coverage

"Occurrence" or "Accident." Under South Dakota law, if the insured knows of the loss at the time the insurance is effected but the underwriters are ignorant of the loss, the insurer is not liable. *N. Stat. Mut. Ins. Co. v. Rasmussen*, 734 N.W.2d 352, 357 (S.D. 2007). The generally accepted meaning of "accident" within liability policies of type obligating insurer to pay all sums insured must pay because of injury to or destruction of property caused by accident is the same as the popular understanding or usage of the word, that is, a befalling, an event taking place without one's foresight or expectation, an un-designed, sudden, and unexpected event. *Taylor v. Imperial Cas. & Indem. Co.,* 144 N.W.2d 856, 858 (S.D. 1966).

Intentional act exclusion. South Dakota recognizes an insurer's ability to exclude intentional acts from coverage, which stems from public policy that is embedded in statutory law, namely S.D. Codified Laws § 53-9-3, which provides: "All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud or willful injury to the person or property of another or from violation of law whether willful or negligent, are against the policy of the law." Unfortunately, there is no legislative guidance as to the meaning of "willful injury."

What intent is required before the exclusion precludes coverage? South Dakota courts take the majority approach—that is, that an insured must have intended both the act and bodily injury before coverage will be precluded. *Am. Family Mut. Ins. Co. v. Purdy*,

483 N.W.2d 197, 199 (S.D. 1992) (requiring that for the exclusion to apply, the insured must have intended the injury, not merely the act). According to one law review article, South Dakota courts have a propensity to favor excluding coverage for an insured's intentional misconduct. South Dakota Law Review, 51 S.D. L. Rev. 346 (2006).

Punitive damages

South Dakota's punitive damages statute, Section 21-3-2, provides that punitive damages are recoverable for the breach of any obligation, excluding contract, when defendant's behavior was oppressive, fraudulent or malicious. A 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*, 621 N.W.2d 592 (S.D. 2001).

Punitive damages awards may be reduced for excessiveness. In evaluating punitive damages awards, South Dakota courts apply a five-factor test:

(1) the harm caused was physical as opposed to economic;
(2) the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others;
(3) the target of the conduct had financial vulnerability;
(4) the conduct involved repeated actions or was an isolated incident; and
(5) the harm was the result of intentional malice, trickery, or deceit, or mere accident.

South Dakota's five-factor analysis for evaluating punitive damages awards incorporates into 3 guideposts outlined by U.S. Supreme Court in *State Farm v. Campbell*, 538 U.S. 408 (2003); *Roth v. Farner-Bocken Co.*, 667 N.W.2d 651 (S.D. 2003) ($500,000 punitive damages award excessive under reprehensibility guidepost).

Dog bite law quirks?

Under South Dakota law, a cause of action by someone injured by a domestic animal can arise under a theory of strict liability or negligence. *Sybesma v. Sybes*ma, 534 N.W.2d 355, 357 (S.D. 1995). Under South Dakota law, when a dog owner does not know of the dog's dangerous propensities, the ordinary negligence standard of foreseeability will still be applied. In contrast, if a plaintiff proves that the dog owner knew or had reason to know of the dog's dangerous propensity the plaintiff will be deemed to have established the foreseeability element of negligence. *Rowland v. Log Cabin, Inc.*, 658 N.W.2d 76 (S.D. 2003).