

NEW MEXICO

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1. Identify the venues/areas in your State that are considered dangerous or liberal.

The Fourth Judicial District (San Miguel County) and First Judicial District Courts (Santa Fe County and Rio Arriba County) of New Mexico are considered New Mexico's most dangerous and liberal venues. Moreover, New Mexico's liberal venue statute allows a personal representative in a wrongful death action to file an action where the personal representative resides. Accordingly, a wrongful death action arising from an incident in any county of New Mexico could potentially be filed in either of these two liberal venues.

2. Identify any significant trucking verdicts in your State during 2017-2018, both favorable and unfavorable from the trucking company's perspective.

We did not identify any significant trucking verdicts during 2017-2018. Nonetheless, on February 6, 2018, the New Mexico Court of Appeals issued its opinion in which it upheld the \$165,533,000 verdict and all decisions of the trial court in *Morga v. Fedex Ground Package Sys., Inc.* See *Morga v. Fedex Ground Package Sys., Inc.*, 2018-NMCA-039, 420 P.3d 586, cert. granted (June 4, 2018). The New Mexico Supreme Court ruling in the *Morga* matter remains pending.

3. Are accident animations and/or computer-generated evidence admissible in your State?

Yes, provided that such evidence meets the applicable evidentiary standard. The evidentiary standard could include the validity standard set forth in *State v. Alberico*, which is defined as "the measure of determining whether the testimony is grounded in or a function of established scientific methods or principles, that is, scientific knowledge." *State v. Alberico*, 1993-NMSC-047, ¶ 50, 116 N.M. 156, 168, 561 P.2d 192, 203.

The use and admission into evidence of computer-generated images was an issue of first impression addressed in *State v. Tollardo*, 2003-NMCA-122, ¶ 8, 134 N.M. 430, 434, 77 P.3d 1023, 1027. Computer-generated evidence has been divided into two categories: computer animations and computer simulations. Animations are computer-generated exhibits used as visual aids to illustrate an opinion that has been developed without using the computer. Simulations are computer-generated exhibits created when information is fed into a computer that is programmed to analyze the data and draw a conclusion from it. *Id.* at ¶ 12. Visual aids do

not require a showing that the exhibit was produced by a scientifically or technologically valid method. *Id.* Often the issue when addressing visual aids is whether the visual aid fairly and accurately represents the evidence or some version of the evidence. *Id.*

When computer-generated evidence is used to illustrate an expert witness' opinion, the central question is who or what the source of the opinion is. *Id.* at ¶ 14. "When the computer-generated evidence is used to illustrate an opinion that an expert has arrived at without using the computer, the fact that the visual aid was generated by a computer probably does not matter because the witness can be questioned and cross-examined concerning the perceptions or opinions to which the witness testifies. In such a situation, the computer is no more or less than a drafting device." *Id.* However, if an expert's opinion is based in part on the computer-generated evidence, the proponent of that evidence must be prepared to show that the computer-generated evidence was generated in a way that is scientifically valid. *Id.*

4. Identify any significant decisions or trends in your State in the past two (2) years regarding (a) retention and spoliation of in-cab videos and (b) admissibility of in-cab videos.

We did not identify significant decision or trends in New Mexico in the past two years regarding the retention and spoliation of in-cab videos and their admissibility.

A party's duty to preserve electronically store information as required under Rule 1-026 NMRA, would be assessed in matters involving retention and spoliation of in-cab videos. *See* Rule 1-026 NMRA (committee commentary). New Mexico does not recognize a separate cause of action for negligent spoliation because adequate remedies exist in traditional negligence to redress the negligent destruction of potential evidence. *Coleman v. Eddy Potash, Inc.*, 1995-NMSC-063, ¶16, 120 N.M. 645, 650, 905 P.2d 185, 190. A party would need to establish that the spoliation of evidence was intentional by proving: (1) the existence of a potential lawsuit; (2) the defendant's knowledge of the potential lawsuit; (3) the destruction, mutilation, or significant alteration of potential evidence; (4) intent on part of the defendant to disrupt or defeat the lawsuit; (5) a causal relationship between the act of spoliation and the inability to prove the lawsuit; and (6) damages. *Id.* at ¶13, *see also* UJI 13-1650 NMRA.

We have not had any cases in the past two years where it has been alleged that in-cab videos were overridden or destroyed that triggered the foregoing analysis.

The admissibility of relevant in-cab videos would be subject to authentication as required under the New Mexico Rules of Evidence. *See* Rule 11-901 NMRA.

5. What is your State's applicable law and/or regulation regarding the retention of telematics data, including but not limited to, any identification of the time frames and/or scope for retention of telematics data and any requirement that third party vendors be placed on notice of spoliation/retention letters.

Under the New Mexico Motor Carrier Act, the Public Regulation Commission shall established reasonable requirements with respect to report, records, and uniform systems of account and preservation of records for motor carriers. NMSA 1978, § 65-2A-29. The New Mexico regulations provide that motor carrier operating pursuant to a certificate or permit shall

maintain records of equipment and equipment lists. See NMAC 18.3.7.14 (A)(4). Such records shall be retained for the previous three complete calendar years. N.M. Admin. Code 18.3.7.14(B). The New Mexico Motor Carrier Act and respective regulations do not specifically address the retention and/or preservation of telematics data in the context of anticipated and/or imminent litigation. In New Mexico, a party has a duty to preserve information or evidence when it reasonably anticipates litigation. According to the Supreme Court: “We do not require the filing of a complaint or even express notice that a complaint is to be filed in order to trigger liability for intentional spoliation of evidence...the relevant inquiry is knowledge on the part of the defendant of a probability of a lawsuit in the future.” *Torres v. El Paso Elec. Co.*, 1999-NMSC-029, 127 N.M. 729, 746, 987 P.2d 386, 403 *overruled on other grounds by Herrera v. Quality Pontiac*, 2003-NMSC-018, 134 N.M. 43, 73 P.3d 181; *see also Coleman v. Eddy Potash, Inc.*, 120 N.M. 645, 905 P.2d 185 (1995) (holding that tort of intentional spoliation of evidence requires, among other things, proof of the existence of a potential lawsuit and defendant’s knowledge of that potential lawsuit).

6. Is a positive post-accident toxicology result admissible in a civil action?

Yes, provided that such toxicology results meet the *Alberico* validity evidentiary standard. *State v. Alberico*, 1993-NMSC-047, ¶ 50 9 (“the measure of determining whether the testimony is grounded in or a function of established scientific methods or principles, that is, scientific knowledge.”).

Furthermore, in cases involving an arrest of a driver, the results of a test performed pursuant to the Implied Consent Act, may be introduced into evidence in any civil action arising out of the acts alleged to have been committed by the person tested for driving a motor vehicle while under the influence of intoxicating liquor or drugs. See NMSA 1978, § 66-8-110.

7. Is post-accident investigation discoverable by adverse counsel?

The discoverability of a post-accident investigation is highly dependent on the judge hearing the matter. Discovery requests seeking post-accident materials are likely to be objected to on the grounds that such information is protected under the work-product and/or attorney client privilege. “The work-product rule is an immunity that protects documents and tangible things prepared in anticipation of litigation by or for a party or its representative, including materials prepared by the attorney’s agents and consultants.” *S.F. Pacific Gold Corp. v. United Nuclear Corp.*, 2007-NMCA-133, ¶ 38, 143 N.M. 215, 228, 175 P.3d 309, 322. The New Mexico Rules of Civil Procedure provides an exception to the work-product rule. A party may obtain discovery of documents “prepared in anticipation of litigation or for trial by or for another party or that party's representative (including the party's attorney, consultant, surety, indemnitor, insurer or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.” Rule 1-026(B)(5) NMRA. If a court ordered the discovery of work-product documents, the court shall protect against disclosure of mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation. Accordingly, the discoverability of a post-accident investigation is dependent on whether the presiding judge finds that the party seeking the discovery of such materials has met the work-product rule exception.

8. Describe any laws in your State which regulate automated driving systems (autonomous vehicles) or platooning.

New Mexico does not have enacted laws regulating automated driving systems or platooning. However, it appears that the Legislature is researching the rise of such technology. On February 2, 2018, the State Legislature requested that the State Department of Transportation create and lead an autonomous vehicle committee to review the current and developing technology for autonomous vehicle operation and existing state policy and statutes that may be relevant to autonomous vehicle operations. *See*, 2018 NM S.J.M. 3 (NS).

9. Describe any laws or Court decisions in your State which would preclude a commercial driver from using a hands-free device to have a conversation over a cell phone.

The use of hands-free devices is permitted while driving. The New Mexico Motor Vehicle Code prohibits the use of a “handheld mobile communication” device for any purpose while driving a commercial motor vehicle except to summon medical or other emergency help or unless that device is an amateur radio and the driver holds a valid amateur radio operator license issued by the federal communications commission. NMSA 1978, § 66-7-375(A). A “handheld mobile communication device” as used in the New Mexico Motor Vehicle Code does not include voice operated or hands-free devices that allow the user to compose, send or read a text message or talk without the use of a hand, except to activate, deactivate or initiate a feature or function. § 66-7-375(C)(3). Accordingly, under New Mexico statute, commercial drivers are not precluded from using a hands-free device to have a conversation over a cell phone.

10. Identify any Court decisions in your State precluding Golden Rule and/or Reptile style arguments by Plaintiffs’ counsel.

“I don’t think a man on this jury would sell his leg for a hundred thousand dollars” is a statement that the New Mexico Supreme Court ruled as improper. *See Jackson v. Southwestern Public Service Co.*, 1960-NMSC-027, ¶ 52, 66 N.M. 458, 475, 349 P.2d 1029, 1040. The majority rule is that it is improper to ask the jury to place themselves in the position of the plaintiff. *Id.* at ¶ 59.

11. Compare and contrast the advantage and disadvantages of Federal Court versus State Court in your State.

Advantages

In federal court, a civil complaint is subject to the plausibility pleading standard set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). This pleading standard is a higher standard when compared to New Mexico’s notice pleading standard.

The New Mexico Rules of Civil Procedure permits parties to serve discovery along with the summons and copy of a civil complaint. This is a practice that is not permitted in federal court. The Federal Rules of Civil Procedure provide that a party cannot seek discovery under the

Rules before the parties have conferred as required by Fed. R. Civ. P. 26(f). *See* D.N.M. LR-Civ. 26.4(a).

Moreover, in federal court, litigants are required to serve initial disclosures, which are not required by the New Mexico Rules of Civil Procedure. Accordingly, this provides litigants in federal court an opportunity to assess what medical or mental conditions are at issue prior to extensive discovery.

Furthermore, venue does not have as much of an impact as in cases litigated in state court, thereby minimizing the possibility of excessive jury verdicts.

Disadvantages

Generally, federal courts do not have jurisdiction in personal injury matters. The basis for a removal from state court is usually premised on diversity jurisdiction. A parties' citizenship is reasonably ascertained. However, there may be times where it is difficult to ascertain whether the amount in controversy exceeds the \$75,000.00 as required under 28 U.S.C. § 1332. Accordingly, the removal process could be delayed by a party who is not forthcoming as to the amount of monetary damages sought.

Moreover, in federal court, Pretrial Scheduling Orders are strictly adhered to by federal judges. Unlike in state court, Pretrial Scheduling Orders are not always required. Accordingly, in federal court, the parties have minimal discretion in agreeing to extensions of time pertinent to motions and discovery practice.

12. How does your State handle the admissibility of traffic citations (guilty plea, pleas of no contest, etc.) in subsequent civil litigation?

Evidence that a party received or did not receive a citation is not admissible in evidence. *See Turner v. Silver*, 1978-NMCA-107, ¶16, 92 N.M. 313, 316, 587 P.2d 966, 969. Evidence that a party, "merely paid a fine, is not an admission against interest in the civil case involving the offense, and is not admissible into evidence." *Id.* The general exception the rule is when the party pays the fine because he understood or thought that he was guilty. *Id.*

A plea of guilty to a citation can be admissible in evidence in a civil case. *See id.* While a guilty plea to a citation is sufficient to support a finding of negligence, it is not conclusive and is only one factor to be considered with the other evidence. *S. Union Expl. Co. v. Wynn Expl. Co.*, 1981-NMCA-006, ¶12, 95 N.M. 594, 598, 624 P.2d 536, 540.

Pleas of no contest do not impact civil litigation. Absent a plea of guilty, proof of conviction of criminal charges is inadmissible in the trial of a subsequent civil action for tort arising out of the same act. *Gray v. Grayson*, 1966-NMSC-087, ¶ 3, 76 N.M. 255, 256, 414 P.2d 228, 229 (reversing trial court's finding that defendant was liable for injuries sustained in automobile accident where district court had been improperly influenced by criminal conviction for careless driving in connection with accident: proof of conviction has no probative force to show negligence).

13. Describe the laws in your State which regulate whether medical bills stemming from an accident are recoupable. In other words, can a plaintiff seek to recover the amount charged by the medical provider or the amount paid to the medical provider? Is there a basis for post-verdict reductions or offsets?

In New Mexico, a plaintiff may recover “the reasonable expense of necessary medical care, treatment and services received.” See UJI 13-1804, NMRA. However, the instruction providers is legally or contractually obligated to write off a portion of the amount charged. To the contrary, many providers do not have a standard fee for services and the amount they accept as payment in full often depends upon who is paying the bill.

While the question of what constitutes a “reasonable” expense has not been settled in New Mexico courts, we have relied upon other jurisdictions that have answered the question by limiting the claim to amounts actually paid for services. “[T]he amount paid and accepted... as payment in full for the medical services in the amount [plaintiff] is entitled to recover as compensatory damages.” *Moorhead v. Crozer Chester Medical Center*, 765 A.2d 786, 789 (Pa. 2001) abrogated by *Northbrook Life Ins. Co. v. Com.*, 949 A.2d 333 (Pa. 2008). “[T]he measure of damages is not what the highest payor would have paid for the same medical services but what was actually incurred in the care and treatment of plaintiff’s injuries.” *Ellsworth v. Schelbrock*, 611 N.W.2d 764, 774 (Wis. 2000) (Skyles, J., dissenting).

One New Mexico statute addresses medical treatment for individuals who receive public assistance. “The rate of payment for in-patient hospital services shall be based either on reasonable cost or the customary cost of such services, whichever is less.” See, NMSA 1978, §27-2-9 (1973). The reasonable cost would be the amount paid as opposed to the customary cost, which would be the amount charged. The argument is that a Plaintiff should not be able to recover amounts in excess of what was actually paid.

The Restatement (2nd) of Torts, §911, further supports this proposition:

When the plaintiff seeks to recover for expenditures made or liability incurred to third parties for services rendered, normally the amount recovers is the reasonable value of the services rather than the amount paid or charged. If, however, the injured person paid less than the exchange rate, he can recover no more than the amount paid, except where the low rate was considered a gift to him.

New Mexico appellate courts have not yet ruled on this issue; however, a number of trial courts have held that amounts written off by providers are *not* recoverable as damages. Some Judges recognize that a plaintiff would receive a windfall if he or she were to recover for medical expenses that were never actual expenses, *i.e.*, amounts for which neither the plaintiff nor anyone else is liable. In the *McAmis v. Wallace*, 980 F.Supp. 181 (W.D. Va. 1997), the court granted a motion in limine that “if Plaintiff could recover these fees without a showing of personal liability, she would reap a windfall recovery at the expense of the taxpayers who made her Medicaid benefits possible.” *Id.* at 185.

In federal court, one judge has held that a plaintiff may *not* recover the amounts written off by the provider in a Medicare context. In *Grover Lee Pettes v. City of Las Cruces*, No. CV 00-1803 LH/LCS (D. N.M.), the court adopted the reasoning set forth in *Wildemuth v. Staton*,

No. Civ. A.01-2418-CM, 2002 WL 922137 (D. Kan. Apr. 29, 2002). The court in the *Wildemuth* case that was cited by New Mexico Judge Leroy Hansen granted a defendant's motion in limine to exclude evidence of damages "written off" by providers under their Medicare contracts and never paid by plaintiff or another party. The court held the proper measure of damages was the amount actually paid by Medicare. Judge Hansen, in the *Grover Lee Pettes* case, stated that although the Medicare payments are a collateral source, the plaintiff should be limited to recovering the amount actually paid.

Another judge took the opposite view in *Pipkins v. TA Operating Corporation*, 466 F.Supp.2d 1255, 1257 (D.N.M. 2006), where Judge Lynch found the collateral source rule applicable to write-offs by medical providers in as much as that the write-offs are a benefit or contribution to the plaintiff that come from a source collateral to the tortfeasor. *See id.* at 1259. The Court in *Pipkins* also directly address the decision in *Wildemuth* by stating it fails to recognize that the focal point of the collateral source rule is not whether the plaintiff incurred certain medical expenses or whether an amount has been paid, but whether the plaintiff has received the benefits of a collateral source. *See id.* at 1260. Ultimately, the Court in *Pipkins* found that, "New Mexico law does not prevent Plaintiff from introducing into evidence, or from recovering medical expenses written off by a health care provider." *Id.* at 1262.

Though the decision in *Pipkins* is not from a New Mexico appellate court, the decision is well-reasoned and would serve as persuasive authority for a New Mexico court to take the same approach. Even if the decision becomes binding in New Mexico and a plaintiff is allowed to present evidence on the amounts for medical care that were billed, there is nothing in the *Pipkins* decision that would preclude the *defendant* from introducing evidence on the amount for medical care that was actually paid and making an argument to the jury that this amount is the "reasonable" amount.

The purpose of the collateral source rule was to prevent the defendant from receiving credit for such compensation and thereby reduce the amount payable as damages to the injured party. *Id.*

14. Describe any statutory caps in your State dealing with damage awards.

New Mexico does not have a statutory cap on damages involving non-government defendants. Personal injury damage awards can exceed \$165 million. *See Morga v. Fedex Ground Package System, Inc.*, 2018-NMCA-039, 420 P.3d 586, *cert. granted* (June 4, 2018).

