FOR MORE INFORMATION

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New Mexico

1. **What are the statute of limitations for tort and contract actions as they relate to the transportation industry.**

   Personal injury tort actions must be brought within three years from the date of the injury. NMSA 1978, § 37-1-8. Actions arising in contract must be brought within six years of the date of loss. NMSA 1978, § 37-1-3.

2. **What effects, if any, has the COVID Pandemic had on tolling or extending the statute of limitation for filing a transportation suit and the number of jurors that are sat on a jury trial.**

   The COVID-19 Pandemic did not affect the tolling or extending of the statute of limitations, or the number of jurors seated on a jury trial. That said, civil jury trials during the COVID Pandemic came to a near-complete stop during the early phases of the pandemic, and have only recently begun to take place. New Mexico courts, given our State's COVID restrictions, are still required to ensure six-feet of social distancing between all individuals in the court, and still recently require all participants in a trial to wear a mask at all times. The social distancing requirement has proved particularly problematic in cases with numerous parties, and in cases filed in rural districts with small courthouses. In instances where social distancing requirements could not be met, trials have been vacated.

3. **Does your state recognize comparative negligence and if so, explain the law.**

   New Mexico employs the doctrine of pure comparative negligence. *See Tipton v. Texaco, Inc.*, 1985-NMSC-108, ¶27, 103 N.M. 689 ("in our comparative negligence jurisdiction, any violation of duty is to be compared with the concurrent negligence of other tortfeasors and liability is to be apportioned accordingly."). In New Mexico, each concurrent tortfeasor is solely responsible for its own percentage of fault in causing the accident or injury. In adopting pure comparative fault, New Mexico also judicially abolished joint and several liability and contribution among concurrent tortfeasors in negligence cases.

4. **Does your state recognize joint tortfeasor liability and if so, explain the law.**

   New Mexico adopted pure comparative fault in 1981, which largely abolished joint and several liability between concurrent tortfeasors. The New Mexico Legislature has, however, reinstated joint and several liability with rights of contribution or indemnification in certain circumstances. These circumstances include: (1) intentional tortfeasors; (2) parties who are vicariously liable for the conduct of another, such as a trucking company for its employee driver; (3) parties in the chain of distribution of a defective product; (4) where such an outcome serves public policy, such as parties engaged in inherently dangerous activities; and (5) successive tortfeasors. *See* NMSA 1978, § 41-3A-1; *Saiz v. Belen School Dist.*, 1992-NMSC-018, 113 N.M. 387; *Lujan v. HealthSouth Rehabilitation Corp*, 1995-NMSC-057, 120 N.M. 422.

5. **Are either insurers and/or insureds obligated to provide insurance limit information pre-suit and if so, what is required.**

In New Mexico state courts, no.

6. **Does your state have any monetary caps on compensatory, exemplary or punitive damages.**

In the context of transportation related cases, no. The only caps on any form of damages in New Mexico arises in select medical malpractice cases (where a provider or hospital has qualified under the New Mexico Medical Malpractice Act), or where the State of New Mexico is the defendant.

7. **Has your state recently implemented any tort reforms which may affect transportation lawsuits or is your state planning to, and if so explain the reforms.**

There are no tort reforms implemented or proposed to be implemented by our State's Legislature. New Mexico's Legislature is unique, in that all of its members are non-salaried volunteers. Accordingly, a large swath of those legislators are plaintiff's attorneys or are funded by the plaintiff's bar, so any hope of tort reform in favor of the transportation industry in New Mexico is unrealistic at this time.

8. **How many months generally transpire between the filing of a transportation related complaint and a jury trial.**

Prior to COVID and depending on the complexity of the case and number of parties, approximately 24 months. Post-COVID, approximately 36 months or more.

9. **When does pre-judgment interest begin accumulating and at what percent rate of interest.**

Prejudgment interest is permitted on a narrow basis in New Mexico: "the Court in its discretion may allow interest of up to ten percent from the date the complaint is served upon the defendant after considering, among other things: (1) if the plaintiff was the cause of unreasonable delay in the adjudication of the plaintiff's claims, and (2) if the defendant had previously made a reasonable and timely offer of settlement to the plaintiff. NMSA 1978, § 56-8-4(B). "The obligation to pay prejudgment interest under Section 56–8–3 arises by operation of law and constitutes an obligation to pay damages to compensate a claimant for the lost opportunity to use money owed the claimant and retained by the obligor *between the time the claimant's claim accrues and the time of judgment*…." *See Sunwest Bank of Albuquerque, N.A. v. Colucci*, 1994-NMSC-027, ¶18, 117 N.M. 373 (emphasis added).

10. **What evidence at trial are the parties allowed to enter into evidence concerning medical expense related damages.**

This remains an undecided issue and it is argued in every case. New Mexico still retains the collateral source rule, which provides that payments made to, or benefits conferred on, an injured party from a collateral source are not credited against the tortfeasor's liability. *See Prager v. Campbell County Mem. Hosp.*, 731 F.3d 1046, 1058–59 (10th Cir. 2013). As recently as 2013, the New Mexico Supreme Court held that the "collateral source is an exception to the rule against double recovery." *See Sunnyland Farms, Inc. v. Central New Mexico Elec. Co-op.*, Inc., 2013-NMSC-017, ¶48, 301 P.3d 387.

The Tenth Circuit somewhat recently held that hospital defendants in a medical malpractice case could not benefit from discounts or write-offs of reduced medical bills that came as a direct result of negotiations between the plaintiff's medical providers and Worker's Compensation. *See Prager*, 731 F.3d at 1058–59. The court in this case quoted the Restatement (Second) of Torts, Section 920A, comment b, in stating that "[t]he law does not differentiate between the nature of the benefits, so long as they did not come from the defendant

or a person acting for him." *Id.* at 1059. This does not bode well for defendants hoping to rely on the amount actually paid, at least as far as federal cases in New Mexico go. Indeed, in 2018, a New Mexico federal court sitting in diversity quoted the *Prager* opinion when it ruled that evidence of write-offs should be excluded "so as to safeguard the collateral source doctrine and avoid jury confusion." *Williamson v. Metro. Prop. & Cas. Ins. Co.*, No. 1:15-CV-958 JCH/LF, 2018 WL 1787510 (Apr. 12, 2018 D.N.M.). The court stated that it predicted New Mexico appellate courts would apply the collateral source rule, but optimistically, it did acknowledge that New Mexico appellate courts "have yet to address whether the collateral source rule bars evidence of the amount the Plaintiff's medical provider wrote off of the medical bills pursuant to an agreement with Plaintiff's health insurer." *Id.* Also of note is that the court explicitly ruled that the defendant could still introduce evidence of the reasonable value of medical services and could question the records custodian about the practice of inflating medical invoices.

New Mexico does not have a definitive ruling on this matter and there are conflicting state court rulings. In 2013, a court in Taos, NM, held that the amount of medical bills actually paid was the appropriate amount to be submitted to the jury. *See De Anne Santistevan v. Taos Municipal School Dist.*, No. D-820-CV-2011-00156 (Eighth Judicial Dist., Taos County). In 2009, a court in the Sixth Judicial District granted defendant's motion to limit evidence of plaintiff's medical expenses to the amounts actually paid by the insurer. *See Daniel Flores v. Prasad Podila, M.D.*, No. CV-2009-00144 (Sixth Judicial Dist., Grant County).

In every case, plaintiffs argue for the amount billed and defendants argue for the amount actually paid. Most often, the amount billed is what a jury sees.

11. Does your state recognize a self-critical analysis or similar privilege that shields internal accident investigations from discovery?

New Mexico does not, as the self-critical analysis privilege does not exist in the context of trucking and transportation. *But see* NMSA 1978, § 41-9-1 to -7 (2011) (the self-critical analysis privilege is applicable in the context of medical malpractice litigation).

12. Does your state allow independent negligence claims against a motor carrier (i.e. negligent hiring, retention, training) if the motor carrier admits that it is vicariously liable for any fault or liability assigned to the driver?

By admitting that a driver was in the "course and scope" of employment, liability may be imputed to the employer under the doctrine of respondeat superior, as function of New Mexico law. A plaintiff may still pursue a claim for negligent hiring/supervision/training against the motor carrier, even if the motor carrier admits to course and scope. *See Lessard v. Coronado Paint & Decorating Ctr., Inc.*, 2007-NMCA-122, ¶¶40–42, 142 N.M. 583.

13. Does your jurisdiction have an independent claim for spoliation? If not, what are the sanctions or repercussions for spoliation?

There are two recognized actions for spoliation: intentional, and negligent. Intentional spoliation is an independent claim, and requires a Plaintiff to prove that:

> (1) there was the potential for a lawsuit; (2) the defendant knew there was the potential for a lawsuit; (3) the defendant disposed of, destroyed, mutilated or significantly altered potential evidence; (4) by [its] conduct the defendant's sole intent was to disrupt or defeat a potential lawsuit; (5) the destruction or alteration of the evidence resulted in the plaintiff's inability to prove his case; and (6) the plaintiff suffered damages as a result of the destruction or alteration.

See UJI 13-1650 NMRA (with alterations). For purposes of intentional spoliation, the plaintiff must "present evidence from which a reasonable jury, upon finding in favor of the defendant on the underlying claim, could conclude that the intentional spoliation of evidence caused the plaintiff's failure to satisfy the burden of proof

in the underlying claim." In this instance, the jury is instructed as indicated above, and permitted to award damages they deem appropriate. More, "the trial court may *independently* impose sanctions for destruction of evidence ranging from dismissal, or imposition of liability to instructing the jury regarding an inference arising from spoliation." *See Segura v. K-Mart Corporation*, 2003-NMCA-013, 133 N.M. 192.

Negligent spoliation is not an independent claim, and its sanctions range from monetary fines to a jury instruction in which the jury may consider the spoliated evidence unfavorable to the party responsible for the spoliation. The jury instruction provides that: "[the movant] says that evidence within the control of [the nonmovant] was lost, destroyed or altered. If you find that this happened, without a reasonable explanation, you may, but are not required to, conclude that the lost, destroyed or altered evidence would be unfavorable to [the nonmovant]." UJI 13-1651 NMRA.