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NEW MEXICO

1. **What are the legal considerations in your State governing the admissibility or preventability in utilizing the self-critical analysis privilege and how successful have those efforts been?**

   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).

2. **Does your State permit discovery of 3rd Party Litigation Funding files and, if so, what are the rules and regulations governing 3rd Party Litigation Funding?**

   Third Party Litigation Funding is not a practice in New Mexico. New Mexico case law has not had the opportunity to address it. However, Rule 16-108(E) NMRA broadly prohibits lawyers from providing financial assistance to clients in connection with pending or contemplated litigation.

3. **Who travels in your State with respect to a Rule 30(b)(6) witness deposition; the witness or the attorney and why?**

   Generally, the established practice in New Mexico is for the attorney to travel to the witness. However, an exception to this general practice exists. Rule 1-045(B)(3) NMRA allows for a party to subpoena a witness and compel attendance at a deposition, so long as the deposition is to take place within 100 miles of where the person resides or is employed. Further, Rule 1-045(B)(2)(b) requires that the person issued a subpoena for their attendance be reimbursed per diem and mileage in accordance with NMSA 1978, § 10-8-4 (2009).

4. **What are the benefits or detriments in your State by admitting a driver was in the "course and scope" of employment for direct negligence claims?**

   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. A plaintiff may still pursue a claim for negligent hiring/supervision/training against the employer, even if the employer admits to course and scope. *See Lessard v. Coronado Paint & Decorating Ctr., Inc.*, 2007-NMCA-122, ¶ 40, 142 N.M. 583, 597, 168 P.3d 155, 169.

5. **Please describe any noteworthy nuclear verdicts in your State?**

   On February 6, 2018, the New Mexico Court of Appeals upheld the $165,533,000 jury verdict and all decisions of the trial court in *Morga v. Fedex Ground Package Sys., Inc. See* 2018-NMCA-039, 420 P.3d 586, *cert. granted* (June 4, 2018). The case pertained to a catastrophic automobile accident. *Id.* ¶ 1. Plaintiffs in the case brought causes of action of wrongful death, personal injury, and loss of consortium. *Id.* The total jury verdict did not include any punitive damages. *Id.* ¶ 5. The matter remains pending before the New Mexico Supreme Court.

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In the case, a tractor-trailer owned by a contractor for FedEx crashed into the rear of a pickup truck being driven by 22-year old Morga. *Id.* ¶¶ 1, 2. Morga had her 4-year old daughter and 19-month old son in the vehicle. *Id.* ¶ 2. Mother and daughter were killed in the crash, along with the driver of the tractor-trailer, and the son survived. ¶ 2.

6. What are the current legal considerations in terms of obtaining discovery of the amounts actually billed or paid?

This remains an undecided issue and it is argued in every case. New Mexico still retains the collateral source rule. The collateral source rule 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." *Sunnyland Farms, Inc. v. Central New Mexico Elec. Co-op.*, Inc., 2013-NMSC-017, ¶ 48, 301 P.3d 387.

The Tenth Circuit 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.

7. How successful have efforts been to obtain the amounts actually charged and accepted by a healthcare provider for certain procedures outside of a personal injury? (e.g. insurance contracts with major providers)

Generally, the response provided above is applicable here. New Mexico case law is limited on this subject and there is not specific authority on point to this question. However, the matter of *Romero v. Mervyn's* may be

helpful. *See* 1989-NMSC-081, 109 N.M. 249, 784 P.2d 992. There, the New Mexico Supreme Court acknowledged that within the context of worker's compensation matters, the introduction of medical bills is in a hearing was prima facie evidence of both the reasonableness and necessity of the charges but that this principle is not necessarily applicable outside of worker's compensation matters. *Id.* ¶¶ 38–40. Therefore, in civil litigation in New Mexico, it is common practice to retain an expert (typically, a medical doctor) to testify to the reasonableness of charges for medical services. By retaining such an expert, evidence regarding reasonable costs for services within the geographic region can be introduced. This can provide opportunities to dispute a plaintiff's accounting of damages without directly entering into the "billed v. paid" argument referenced above. Similar to the discussion above, this method is not always successful but it has been accepted by judges in New Mexico.

8. What legal considerations does your State have in determining which jurisdiction applies when an employee is injured in your State?

Broadly, New Mexico follows the Restatement (First) when confronted with Conflict of Laws issues. See *Ferrell v. Allstate Ins. Co.*, 2008-NMSC-042, ¶ 50, 144 N.M. 405, 420, 188 P.3d 1156, 1171. For tort claims, New Mexico courts follow the doctrine of *lex loci delecti commissi* (the substantive rights of the parties are governed by the law of the place where the wrong occurred). *See First Nat. Bank in Albuquerque v. Benson*, 1976-NMCA-072, ¶ 3, 89 N.M. 481, 481, 553 P.2d 1288, 1289. To determine the place where the wrong occurred, one looks to "where the force impinge[d] upon [the plaintiff's] body." *Terrazas v. Garland & Loman, Inc*., 2006-NMCA-111, ¶ 12, 140 N.M. 293, 296, 142 P.3d 374, 377.

9. What is your State's current position and standard in regards to taking pre-suit depositions?

New Mexico allows for depositions before litigation. *See* Rule 1-027 NMRA. A verified petition must be filed in the district court in the county of residence of the expected adverse party. *Id.* The petition must identify the expected party and the reasons for perpetuating testimony at the present time and that the petitioner is presently unable to bring the case. Rule 1-027(a)(1) to (e). The court must then be "satisfied that the perpetuation of the testimony [sought] may prevent a failure or delay of justice, in order to grant the petitioner's request. Rule 1-027(a)(3).

10. Does your State have any legal considerations regarding how long a vehicle/tractor-trailer must be held prior to release?

New Mexico case law and statutes do not impose any specific requirements for holding vehicles prior to release. However, each party has a duty to preserve information or evidence when it reasonably anticipates litigation. According to the New Mexico 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, 987 P.2d 386, 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.*, 1995-NMSC-063, ¶ 13, 120 N.M. 645, 905 P.2d 185 (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).

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, 1995-NMSC-063, ¶ 16. In order to recover based on the negligent destruction of property, a party would have to show a duty, breach, proximate causation, and damages. *Id.* ¶ 17. Absent special circumstances, such as the existence of a contract or voluntary assumption of a duty, property owners do

not have a duty to preserve or safeguard property for the benefit of individuals in a potential lawsuit. *Id.* ¶ 19.

Courts may use their inherent powers to impose sanctions for spoliation. Prior to imposing sanctions, a court should consider: (1) the degree of fault of the party who altered or destroyed evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party, and where the offending party is seriously at fault, will serve to deter such conduct by others in the future. *Rest Mgmt. Co. v. Kidde Fenwal, Inc.*, 1999-NMCA-101, ¶ 13, 127 N.M. 708, 986 P.2d 504.

If evidence has been spoliated (lost, destroyed, or altered) the court may give an adverse instruction to the jury:

> [Plaintiff or defendant] says that evidence within the control of [other party] 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 [other party].

Rule 13-1651 NMRA.

The court may also provide different remedies for the spoliation other than an adverse instruction including, exclusion of the spoliator's evidence, dismissal of the spoliator's case, barring claims or defenses, or designating facts as established. *Rest. Mgmt. Co.*, 1999-NMCA-101, ¶ 20.

11. What is your state's current standard to prove punitive or exemplary damages and is there any cap on same?

To recover punitive damages, a plaintiff must demonstrate that the alleged conduct was malicious, reckless, wanton, oppressive, or fraudulent. *See* Rules 13-861, 13-1827 NMRA; *Akins v. United Steel Workers of America, AFL-CIO, CLC, Local 187*, 2010-NMSC-031, ¶ 8, 148 N.M. 442, 445, 237 P.3d 744, 747. There is not a statutory limit on punitive damages. *See, e.g., Aken v. Plains Elec. Generation & Transmission Co-op, Inc.*, 2002-NMSC-021, ¶ 17, 132 N.M. 401, 407, 49 P.3d 662, 668 ("In New Mexico, the rule has been that a punitive damages award will be upheld if substantial evidence supports the jury's finding.").

12. Has your state mandated Zoom trials? If so, what have the results been and have there been any appeals.

New Mexico has not mandated Zoom trials. Supreme Court Order No. 20-8500-025, effective July 6, 2020, provided that each judicial district shall submit a plan for to resume in-person civil and criminal trials.

13. Has your state had any noteworthy verdicts premised on punitive damages? If so, what kind of evidence has been used to establish the need for punitive damages? Finally, are any such verdicts currently up on appeal?

In March 2013, in the matter of *Estate of Udy v. Standard E&S LLC, et. al.*, Case No. D-101-CV-2011-00751, a Santa Fe County jury awarded $58.6 million to the family of a man in a lawsuit against companies that operated a tanker truck involved in a fatal crash three years prior. In that case, the tanker made a left turn in front of a pickup truck driven by the decedent, Kevin Udy, which then struck the tanker's trailer. The estate's complaint asserted that the driver of the tanker made a "sudden and unexpected" left turn across Mr. Udy's lane, putting him in the way of Mr. Udy's truck and causing Mr. Udy to hit the back of the truck. Mr. Udy died en route to the hospital.

The jury's verdict broke down as follows: $8 million in damages suffered by the estate; $2 million for the emotional distress and loss of companionship suffered by Mr. Udy's wife; and $500,000 each for three of Mr. Udy's children for the similar damages. The driver was found to be only 1% negligent while the defendant companies, all owned by one man, were hit with the remaining 99%. Punitive damages of $28 million were found against one defendant-company, $5 million against the second and $14 million against the third, totaling $47 million.

New Mexico "appl[ies] the guideposts laid out by the United States Supreme Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574–75 (1996): (1) the reprehensibility of the defendant's conduct . . .; (2) the relationship between the harm suffered and the punitive damages award; and (3) the difference between the punitive damages award and the civil and criminal penalties authorized or imposed in comparable cases." *Akins v. United Steelworkers of America, AFL-CIO, CLC, Local 187*, ¶ 31, 146 N.M. 237, 208 P.3d 457.

The severity or reprehensibility of the defendant's conduct is the most important guidepost for punitive damages awards. *Id.* ¶ 32. Relevant factors include: "(1) the type of harm inflicted; (2) whether the conduct was repeated or isolated; and (3) whether the harm was intentionally malicious, misleading, or deceitful, or merely accidental in nature." *Id.*

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