FOR MORE INFORMATION

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New Mexico

Are preventability determinations and internal accident reports discoverable or admissible in your state? What factors determine discoverability or admissibility?

Preventability determinations and internal accident reports are discoverable in New Mexico. The question of admissibility, however, is more difficult and is decided on a case-by-case basis, depending on the facts of the case, the nature of the determination/report, and the underlying foundation behind the determination/report.

That said, if the preventability determination or internal accident report was completely unrelated to a routine policy or procedure, but rather created solely in anticipation of litigation, the determination or report is generally not discoverable or admissible. *See* Rule 1-026(B)(4) NMRA and *Hartman v. Texaco Inc*., 1997-NMCA-032, ¶19, 123 N.M. 220, 225, 937 P.2d 979, 984. The critical factor that determines discoverability or admissibility is whether the document was prepared "in anticipation of litigation or for trial" within the meaning of NMRA 1–026(B)(4). *See Hartman*, 1997-NMCA-032, ¶21. Courts in New Mexico have not established a "neat general formula" to determine whether documents are prepared in anticipation of litigation. Rather, the party challenging whether a document is discoverable must demonstrate that litigation was "the driving force" behind the preparation of each challenged document.

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?

New Mexico does allow third party litigation funding, and there are currently no established rules, regulations, or case law in New Mexico addressing same. The issue has not yet been challenged in New Mexico.

What is the procedure for the resolution of a claim for injuries to a minor in your state? Does the minor's age affect the statute of limitations for a personal injury claim?

New Mexico law requires the appointment of a Guardian ad Litem and Court approval of the settlement in all cases brought on behalf of minors. Once the parties have reached a settlement, the Court must be petitioned to appoint a Guardian ad Litem, who once appointed, conducts an investigation, provides a report to the Court, and offers testimony largely concerning whether the settlement is in the best interests of the minor. *See Collins ex rel. Collins v. Tabet,* 1991–NMSC–013, ¶¶30–31, 111 N.M. 391, 806 P.2d 40 ("[I]t is the general practice in New Mexico for a guardian ad litem to be appointed to represent the interests of a minor in any proceeding to secure court approval of a settlement involving the minor.... The guardian ad litem thus may fulfill the dual role of providing information to the court to enable it to pass on the reasonableness of a settlement, while at the same time protecting the ward's interests by zealous advocacy and thorough, competent

representation.").

A minor's age affects the statute of limitations for a personal injury claim. Generally, all personal injury claims must be filed within three years of the date of the incident. NMSA 1978 § 37-1-8. New Mexico has minority tolling provisions for children 18 years and younger which extend the statute of limitations for personal injury actions. Section 37–1–10 allows the minor one year from his or her eighteenth birthday within which to file suit.

What are the advantages or disadvantages in your State of admitting that a motor carrier is vicariously liable for the fault of its driver in the context of direct negligence claims?

There is no statutory or rule-related advantage in New Mexico when a carrier admits it is vicariously liable for the actions of its driver. Rather, the advantages and disadvantages are practical. 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. The obvious advantage is the carrier gains credibility with the jury by admitting facts that are not reasonably in dispute. This admission is also beneficial in terms of cohesion between the driver and the carrier. The disadvantage in admitting same arises when the admission is made too soon in the litigation, when all relevant facts have not yet been reasonably established.

What is the standard applied for spoliation of physical and/or documentary evidence in your state?

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.

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.

Is the amount of medical expenses actually paid by insurance or others (as opposed to the amounts billed) discoverable or admissible in your State?

This remains an undecided issue and hotly disputed in virtually all cases. New Mexico does not have a definitive ruling on this matter and there are conflicting state court rulings. The issue is currently dependent on the trial

judge and their inclination on the issue.

New Mexico 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.

What is the legal standard in your state for obtaining event data recorder ("EDR") data from a vehicle not owned by your client?

Generally, New Mexico's discovery rules require that the party responding to a discovery request make reasonable efforts to obtain possession of the vehicle to retrieve the EDR data. The owner of the vehicle must give consent for access to an EDR. In situations where the owner of the vehicle is reluctant or refuses to provide same, preservation/spoliation letters are the first avenue in attempting to secure the EDR data. If the matter is in litigation, a subpoena to the owner for the EDR data is the second avenue.

In litigation, parties are obligated to make reasonable and diligent efforts to obtain and provide the requested information or to otherwise explain why it cannot reasonably be provided at this time. *See United Nuclear*, 1980-NMSC-094, ¶58 ("[i]t is immaterial under Rules 33 and 34 that the party subject to the discovery orders does not own the documents, or that it did not prepare or direct the production of the documents, or that it does not have actual physical possession of them. It is also clear that the mere fact that the documents are in the possession of an individual or entity which is different or separate from that of the named party is not determinative of the question of availability or control."). The critical inquiry concerns only whether the party from whom the materials are sought has the practical ability to obtain those materials. *Id. See also Landry v. Swire Oilfield Services, L.L.C.,* 323 F.R.D. 360, 397 (D.N.M. 2018) (responding party had "control" over the requested records insofar as they had the legal or practical ability to obtain it), citing *United States v. 2121 Celeste Road SW, Albuquerque, N.M., 307* F.R.D. 572, 590 (D.N.M. 2015)(Browning, J.) ("[C]ourts have broadly construed control as 'the legal right, authority, or practical ability to obtain the materials sought upon demand' ... [I]f a person, corporation, or a person's attorney or agent can pick up a telephone and secure the document, that individual or entity controls it."), quoting S.E.C. v. Credit Bancorp, Ltd., 194 F.R.D. 469, 471 (S.D.N.Y. 2000)(Sweet, J.));

What is your state's current standard to prove punitive or exemplary damages against a motor carrier or broker and is there any cap on same?

To recover on a claim for punitive damages, New Mexico law requires plaintiffs to prove the defendant's conduct rose to the level of willful, wanton, malicious, reckless, oppressive, or fraudulent conduct, and that the defendant possessed an evil motive, culpable mental state, or indifference or conscious disregard for plaintiff's safety. *See Clay v. Ferrellgas*, 1994-NMSC-080, ¶12, 118 N.M. 266; *Paiz v. State Farm Fire and Casualty Co*., 1994-NMSC-079, ¶25, 118 N.M. 203; *Grassie v. Roswell Hosp. Corp.*, 2011-NMCA-024, ¶33, 150 N.M. 283.

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.").

Has your state had any noteworthy recent punitive damages verdicts? If so, what evidence was admitted supporting issuance of a punitive damages instruction? Finally, are any such verdicts currently on appeal?

In December 2022, a Santa Fe County jury awarded an injured cameraman $66,000,000 in damages, with $36,000,000 of total verdict accounting for punitive damages. The underlying case involved the filming of Only the Brave (a film about an elite group of hotshot firefighters), wherein the plaintiff was required to use a mobile camera crane. The scene at issue was shot on the peak of a mountain with rough and difficult terrain. The plaintiff was asked for about three hours to install tank treads on the camera unit and to scope different paths to the peak, both of which were denied because the shot needed to be completely before the light changed.

The plaintiff started to ascend the mountain on the mobile camera crane while following an escort vehicle. When the escort and the plaintiff reached a fork in the road, no one was directing traffic, and the escort vehicle began to lead the plaintiff up a steeper route than had been initially planned. While ascending, the mobile camera crane lost traction, started to slide, and eventually became inverted, trapping the plaintiff under its weight. The plaintiff suffered myriad crush injuries as well as brain and spinal cord injuries. By the time of trial, the plaintiff was again walking.

The belief that safety is a problem on movie sets, and that safety meetings, "time outs" to address safety concerns, and the idea that the lighting/shot should control the day fueled the $36,000,000 award. Denying the plaintiff's request to equip his vehicle with tank treads for traction, and the scope routes, was found to have been reckless. While this case obviously did not involve the transportation industry, there are similarities as it pertains to a jury's view about safety. The plaintiff's attorney spent much time talking about the need for robust safety guidelines, training, and mandatory protocols, which the jury ultimately believed were lacking.

No known punitive verdicts are presently on appeal.

Does your state permit an expert to testify as to content of the FMCSRs or the applicability of the FMCSRs to a certain set of facts?

Yes, provided the expert has the necessary qualifications and background to offer an opinion as to the applicability of the FMCSR to a particular set of facts. This most often occurs by way of accident reconstructionists discussing what FMCSRs they believe were not followed which they contend led to or caused the subject accident.

Does your state consider a broker or shipper to be in a "joint venture" or similar agency relationship with a motor carrier for purposes of personal injury or wrongful death claims?

Generally, no. While there is not binding case law on the question of whether a broker is in a joint venture with a motor carrier for purposes of personal injury or wrongful death claims, the answer is nearly always "no." However, the analysis is fact-dependent. "As a general rule, in order to constitute a joint venture there must be a community of interest in the performance of a common purpose, a joint proprietary interest in the subject matter, a mutual right to control, a right to share in the profits, and a duty to share in any losses which may be sustained." Cooper v. *Curry*, 1978-NMCA-104, ¶22, 92 N.M. 417.

Provide your state's comparative/contributory/pure negligence rule.

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.

Provide your state's statute of limitations for personal injury and wrongful death claims.

The statute of limitations for both personal injury and wrongful death claims is three years. For personal injury claims, it is three years from the date of the accident. For wrongful death claims, it is three years from the date of death.

In your state, who has the authority to file, negotiate, and settle a wrongful death claim and what must that person's relationship to the decedent be?

The New Mexico Wrongful Death Act ("NMWDA") requires a Court's appointment of a personal representative of the estate in order to file, negotiate, and settle a wrongful death claim. This personal representative is distinct from a personal representative appointed over the probate estate. The NMWDA does not define who can or cannot serve as the personal representative of the wrongful death estate, and there are occasions where a beneficiary of the estate serves in that role. However, this happens in the minority, because the NMWDA and corresponding case law do not require the personal representative to have residence in the same county as the deceased, nor does the law require the NMWDA claim be filed in the county where the loss occurred. As such, in nearly every wrongful death case, the Plaintiff will hire a third party (usually an attorney) who resides in the most advantageous county / plaintiff's friendly venue to serve as the personal representative of the wrongful death estate. Once that personal representative is appointed, suit is filed in the county the personal representative resides, and venue advantageous to the plaintiff is established.

Is a plaintiff's failure to wear a seatbelt admissible at trial?

A plaintiff's failure to wear a seatbelt is not admissible at trial. In *Thomas v. Henson*, the New Mexico Supreme Court struck down the creation of the "seat belt defense," despite the acknowledgment that the defense was "well-reasoned, carefully thought out, and logical in its conclusion," on the ground that the matter was wholly for the Legislature to consider, rather the courts. 1985-NMSC-010, 102 N.M. 326. To date, the Legislature has not raised the "seat belt defense" back to life, but it has considered it. In analyzing an argument regarding the "seat belt defense," Judge Campos stated that the intent of the Legislature in rejecting the creation of the defense was

based on their "undoubted[] conclu[sion] that seat belt use was desirable, and that although the enactment of a law providing for small fines would encourage people to wear their seat belts, an injured plaintiff should nevertheless not be denied recovery when involved in a collision with a negligent tortfeasor." *Armijo v. Atchison, Topeka & Santa Fe Ry., Co.*, 754 F. Supp. 1526, 1534 (D.N.M. 1990).

In your state, are there any limitations on damages recoverable for plaintiffs who do not have insurance coverage on the vehicle they were operating at the time of the accident? If so, describe the limitation.

There are not limitations on damages recoverable for plaintiffs who do not have insurance coverage on the vehicle they were operating at the time of the subject accident.

How does your state determine applicable law/choice of law questions in motor vehicle accident cases?

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.