FOR MORE INFORMATION

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Vermont

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

A. Tort Actions

The statute of limitations for tort actions in Vermont is three (3) years for injuries to persons (12 V.S.A. § 512(1) and§ 512(4), and injuries to personal property (12 V.S.A. § 512(5). Products liability actions sounding in warranty have a four (4) year statute of limitations under the Uniform Commercial Code, 9A V.S.A. § 2-725.

B. Contract Actions

Generally, the Vermont statute of limitations for contracts, either written or oral, is six (6) years. 12 V.S.A. § 511. If a contract is under seal, the statute of limitations is eight (8) years (12 V.S.A. § 507), and if the contract in question is a contract for sale that falls under the Uniform Commercial Code, the statute of limitations is four (4) years. 9A V.S.A. § 2-725.

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?

A. Statute of Limitations

During the COVID-19 pandemic, the governor declared a state of emergency on March 13, 2020; it was officially lifted on June 15, 2021. According to Act 95, signed by the governor on April 28, 2020, "[a]ll statutes of limitations or statutes of repose for commencing a civil action in Vermont that would otherwise expire during the duration of any state of emergency declared by the Governor arising from the spread of COVID-19 are tolled until 60 days after the Governor terminates the state of emergency by declaration." Thus, any statutes of limitations that would have expired during the period between March 13, 2020 and June 15, 2021 did not expire until August 13, 2021.

B. Number of Jurors

While there have been no statutory changes or requirements to accept fewer than twelve persons on a jury, some judges in Vermont have seated six person juries with the consent of the parties.

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

Vermont follows a modified comparative negligence rule. If the plaintiff is more than 50% negligent, the plaintiff recovers nothing. Otherwise, an award for the plaintiff is proportionally reduced by the percentage of negligence of the plaintiff, as determined by the trier of fact.

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

Yes. In Vermont, joint tortfeaseors are jointly and severally liable. *Levine v. Wyeth,* 2006 *VT* 107 (citing *Zaleskie v. Joyce,* 133 Vt. 150, 158 (1975) ("[T]he law of this state ... permits a plaintiff to pursue all, or any part, of his recovery from either joint tortfeasor.")) Moreover, there is no right of contribution among joint tortfeasors in Vermont. *Murray v. J & B Int'l Trucks*, 146 Vt. 458, 468 (1986). This means that the deep pocket defendant determined to be 1% at fault could be liable for the full amount of the judgment if a more-at-fault co-defendant is uninsured.

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

A. Insurers

Yes; insurers are obligated to provide insurance limit information pre-suit. Specifically, Vt. Stat. Ann. tit. 23, § 941(g) provides:

> Within 30 days of receipt of a written request by a person reasonably claiming the right to recover damages after a crash involving owners or operators of motor vehicles for bodily injury, sickness, or disease, including death, or for property damages resulting from the ownership, maintenance, or use of a motor vehicle, an insurer that may be liable to satisfy part or all of the claim under a policy subject to this chapter shall provide a statement, by a duly authorized agent of the insurer, setting forth the names of the insurer and insured, and the limits of liability coverage.

23 V.S.A. § 941(g).

B. Insureds

No; there is no similar requirement for insureds.

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

No. However, it should be noted that most venues in Vermont would be considered moderate/conservative on a national scale as regards awarding damages to plaintiffs, with large punitive awards and "runaway juries" being rare in Vermont.

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.**

No.

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

While this can vary widely based on the venue and facts of the case, the pre-COVID average was 18-36 months. However, COVID has slowed down the process considerably and there remains a case backlog, so the wait time is currently longer, and is predicted to be 36-48 months over the next few years.

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

In tort liability cases, prejudgment interest begins to accumulate from the date the action accrues at a rate of 12 percent per annum. 9 V.S.A. § 41a. See also *Russel v. Hernon, et. al.*, 2017 VT 45.

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

A. Full Recovery

Applying Vermont's collateral source rule, the state's trial courts generally allow plaintiffs to recover the full, undiscounted value medical services, rather than the amount actually paid to satisfy the medical bills. See *Buker v. King*, WL 7414616 (Vt. Super. Ct. Jun.23, 2008)(refusing to limit the reasonable value of plaintiff's medical services to the amounts plaintiff's medical providers agreed to accept as a recipient of Medicaid funds). This can result in a considerable windfall for a plaintiff, but courts in Vermont consider that more just than a perceived "discount" for a tortfeasor because a plaintiff was prudent enough to maintain health insurance. No off-sets are available, other than for the percentage of plaintiff's own comparative negligence.

B. Collateral Source Rule

Vermont's collateral source rule bars evidence of the amount received by an insured party from a collateral source (e .g., plaintiff's health insurer) not connected with the tortfeasor from being introduced at trial. *Sherman v. Ducharme*, WL 6565300 (Vt. Super. Ct. Nov. 10, 2009)(citing *Hall v. Miller*, 143 Vt. 135, (1983)).

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

A. *Lawson* and the Wigmore Factors

The Vermont Supreme Court has not yet had occasion to determine directly whether Vermont recognizes the self-critical analysis privilege. However, Federal courts applying state law have predicted that it will not. *Lawson v. Fisher Price, Inc.*, 191 F.R.D. 381, 382 (D. Vt. 1999). *Lawson* noted that the Vermont Supreme Court has consistently used the four-part test in Dean Wigmore's treatise, Wigmore on Evidence, to determine whether a privilege should be recognized. *Id*. The Wigmore factors are:

> (1) The communications must originate in a confidence that they will not be disclosed.
>
> (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
>
> (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

Douglas v. Windham Superior Court, 157 Vt. 34, 40, 597 A.2d 774, 777-78 (1991), quoting 8 Wigmore on Evidence § 2285, at 527 (McNaughton ed. 1961).

Applying the Wigmore factors in Lawson, the federal court concluded that the self-critical analysis

privilege did not meet the Wigmore standard, and therefore the Vermont Supreme Court would likely not recognize the self-critical analysis privilege as it has been laid out in other states. *Lawson* at 386. However, it should be noted that the communications in *Lawson* involved communications between the defendant corporation and the Consumer Product Safety Commission, and the Court concluded that because such communications are mandatory, the facts in *Lawson* did not require confidentiality to maintain the relation between the parties. However, *Weatherly v. Gravel & Shea, P.C.*, 2012 WL 12991459 (Vt. Super. Ct.) (Trial Order), a law firm partnership/employment dispute, cited *Lawson* as "rejecting creation of 'self-critical analysis' privilege" in Vermont regardless of the particular facts. *Weatherly* at n. 2.

B. Other Factors

Two other points need to be considered in predicting whether the Vermont Supreme Court may recognize the self-critical analysis privilege. The first is that while the Court has not had the opportunity to address the issue directly, it did do so indirectly in *Wheeler v. Central Vermont Medical Center, Inc*., 155 Vt. 85 (1989). In *Wheeler*, the Court - while addressing a separate issue - cited with approval a note from the Harvard Law Review stating "[n]either should factual materials that are otherwise discoverable be protected merely because they also happen to be contained in a critical self-analysis." *Wheeler* at 90-91, citing Note, The Privilege of Self-Critical Analysis, 96 Harv.L.Rev. 1083, 1095 (1983).

Similarly, the *Lawson* decision concluded in dicta that "even if self-critical analysis privilege had been adopted in this case, it would have exclusively protected subjective or conclusory materials." *Lawson* at 386. Therefore, even if the Vermont Supreme Court did recognize this privilege, it would be unlikely to extend it beyond the limits placed in *Lawson*.

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?

Yes. The Vermont Supreme Court has established that "[a] principal may, in addition to being found vicariously liable for tortious conduct of its agents, be found directly liable for damages resulting from negligent supervision of its agents' activities. *Brueckner v. Norwich University*, 169 Vt. 118 (1999). According to the Court, "direct liability for negligent supervision of employees or agents constitutes an entirely separate and distinct type of liability from vicarious liability under respond eat superior. *Id*. Thus, if the motor carrier admits that it is vicariously liable for fault and/or liability of its agent, the driver, a plaintiff may still bring independent negligence claims against the motor carrier.

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

The Vermont Supreme Court has not ruled on this topic. However, the federal court for the District of Vermont has determined that Vermont does not recognize a separate cause of action for spoliation of evidence. See *Nashef v. AADCO Med., Inc.*, No. 5:12-cv-243, 2013 WL 2338109 (D. Vt., Apr. 29, 2013); *Naylor v. Rotech Healthcare, Inc.*, 679 F. Supp. 2d 505, 511 (D. Vt. 2009).

The Vermont Supreme Court has used the “traditional approach” of discovery sanctions to punish a spoliator of evidence. See *Naylor v. Rotech Healthcare, Inc.*, 679 F. Supp. 2d 505, 511 (D. Vt. 2009) collecting the following cases: *Lavalette v. Noyes*, 124 Vt. 353 (1964) (considering whether to apply a presumption of falsity, as a sanction for destruction of evidence); *In re Campbell's Will*, 102 Vt. 294, (1929) (applying sanctions for spoliating evidence); *Ellis J. Gomez & Co. v. Hartwell*, 97 Vt. 147 (1923) (noting the rule that willful destruction

of evidence gives rise to rise to an inference that the contents would be injurious to the one who destroys it); and *Judevine v. Weaks*, 57 Vt. 278 (1884) (noting a deposition is presumed to contain evidence against a party who suppresses it).