

West Virginia

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

Property damage; two years – exception. Contract actions – 10 years for a written contract; five years for an oral contract.

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.**

No longer. See Supreme Court of Appeals of West Virginia Administrative Order (May 6, 2020).

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

Yes. In any action based on tort or any other legal theory seeking damages for personal injury, property damage, or wrongful death, recovery shall be predicated upon principles of comparative fault and the liability of each person, including plaintiffs, defendants and nonparties who proximately caused the damages, shall be allocated to each applicable person in direct proportion to that person's percentage of fault.

In any action for damages, the liability of each defendant for compensatory damages shall be several only and may not be joint. Each defendant shall be liable only for the amount of compensatory damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against each defendant for his or her share of that amount.

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

West Virginia no longer recognizes “pure” joint tortfeasor liability. Joint liability is limited where two or more defendants who consciously conspire and deliberately pursue a common plan or design to commit a tortious act or omission. Any person held jointly liable under this section shall have a right of contribution from other defendants that acted in concert.

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

Yes. W. Va. Code 33-6F-2 requires an insurer to disclose within 30 days. No application to suit. Penalty \$500 fine. Question if self-retained limitation results in “insurer” under statute.

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

An award of punitive damages may only occur in a civil action against a defendant if a plaintiff establishes by clear and convincing evidence that the damages suffered were the result of the conduct that was carried out by the defendant with actual malice toward the plaintiff or a conscious, reckless and outrageous indifference to the health, safety and welfare of others.

The amount of punitive damages that may be awarded in a civil action may not exceed the greater of four times the amount of compensatory damages or \$500,000, whichever is greater.

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, not since May 2015.

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

West Virginia Trial Court Rule 16.05(c) has an aspirational requirement of cases being completed within 18 months. Practically speaking, courts enter scheduling orders for about 12 months.

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

Prejudgment interest accrues on special damages from the date of the right to bring the action shall have occurred. The rate of the prejudgment interest may not exceed nine percent per annum or be less than four percent per annum. However, the Administrative Office of the Supreme Court of Appeals of West Virginia has set the interest rate at 4 percent for judgments and decree entered during the 2022 calendar year.

Notwithstanding the provisions of section five, article six, chapter forty-seven of this code, the rate of prejudgment interest is two percentage points above the Fifth Federal Reserve District secondary discount rate in effect on January 2, of the year in which the right to bring the action has accrued, as determined by the court and that established rate shall remain constant from that date until the date of the judgment or decree, notwithstanding changes in the federal reserve district discount rate in effect in subsequent years prior to the date of the judgment or decree.

In any judgment or decree that contains special damages, as defined below, or for liquidated damages, the court may award prejudgment interest on all or some of the amount of the special or liquidated damages, as calculated after the amount of any settlements. Any such amounts of special or liquidated damages shall bear simple, not compounding, interest. Special damages include lost wages and income, medical expenses, damages to tangible personal property and similar out-of-pocket expenditures, as determined by the court. If an obligation is based upon a written agreement, the obligation bears prejudgment interest at the rate and terms set forth in the written agreement until the date the judgment or decree is entered and, after that, the judgment interest is the same rate as provided for below in subsection (c) of this section.

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

A plaintiff can recover the full amount charged by medical providers regardless of whether the plaintiff actually paid the bills himself or herself or whether some or all of such bills were paid by insurance under the

“collateral source rule.” *Kenney v. Listen*, 760 S.E.2d 434 (W. Va. 2014). A plaintiff may also recover the value of services which were gratuitously provided or later written off by the medical provider. *Id.* A Court may reduce or off-set medical bills if it determines they are not “reasonable and necessary.” *Id.*

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

West Virginia does not appear to recognize the self-critical analysis privilege.

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?

The Supreme Court of Appeals of West Virginia does not appear to have ruled directly on the issue of federally-mandated testing for Independent Contractors, Borrowed Servants, or Additional Insureds other than to note that where an employee’s job responsibilities involve public safety or the safety of others, random drug testing is permissible. *See, e.g., Syl. Pt. 2, Twigg v. Hercules Corp.*, 406 S.E.2d 52 (W.Va. 1990).

However, the Supreme Court of Appeals of West Virginia has held that the fact that the name of the motor carrier, the International Commerce Commission certificate number, and various state regulatory permit numbers were “prominently displayed” on a leased tractor-trailer contributed to the existence of an employer-employee relationship between the owner/driver and motor carrier, despite a clause in the contract specifically stating that the relationship was that of an independent contractor, and that, therefore, negligence of the owner/driver could be imputed to the motor carrier. *Griffith v. George Transfer & Rigging, Inc.*, 201 S.E.2d 281 (W.Va. 1973).

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

West Virginia does not recognize spoliation of evidence as a stand-alone tort when the spoliation is the result of the negligence of a party to a civil action. West Virginia recognizes spoliation of evidence as a stand-alone tort when the spoliation is the result of the negligence of a third party, and the third party had a special duty to preserve the evidence.

Although there does not appear to be any case law in West Virginia which specifically addresses the retention and spoliation of in-cab videos, in West Virginia, a party who reasonably anticipates litigation has an affirmative duty to preserve relevant evidence. *Hannah v. Heeter*, 584 S.E.2d 560, 566-67 (W.Va. 2003) (quoting *Tracey v. Cottrell*, 524 S.E.2d 879 (W.Va. 1999)). Intentional spoliation of evidence is recognized as a cause of action against parties to a civil action. *Id.* at 571. A party to a suit that causes spoliation of evidence may be subject to Rule 37 sanctions or an adverse jury instruction. *See Syl. Pt. 2, Tracey v. Cottrell*, 524 S.E.2d 879.

With respect to third parties, “there is no general duty to preserve evidence.” *Hannah*, 584 S.E.2d at 568. However, intentional spoliation of evidence is recognized as a cause of action against third parties, and negligent spoliation of evidence is recognized as a cause of action against third parties having a special duty to preserve evidence. *Syl. Pts. 5 and 9, Id.*

West Virginia has not addressed spoliation of evidence relating directly to electronic data. It also does not appear that West Virginia has a law or regulation which directly addresses the retention of telematics data. Therefore, the law of spoliation, as discussed above, would likely apply generally to these circumstances.

A post-accident investigation that was generated prior to litigation is generally discoverable. *State ex rel. Allstate Ins. Co. v. Gaughan*, 508 S.E.2d 75, 90 (W.Va. 1998). See, also, *State ex. rel. State Farm Mut. Auto. Ins. Co v. Bedell*, 697 S.E.2d 730 (W.Va. 2010). Similarly, documents in an insured's claim file that were generated prior to litigation are generally discoverable. *State ex rel. Allstate Ins. Co. v. Gaughan*, 508 S.E.2d 75, 90 (W.Va. 1998).

Further, West Virginia has no specific disclosure rule for surveillance/social media investigations. Disclosure would be pursuant to discovery served upon a defendant or by scheduling order imposed by a trial court requiring disclosure of witnesses and/or exhibits at a particular date in discovery.

There are not any cases (federal or state) specifically addressing the discovery and admissibility of preventability determinations in West Virginia. Therefore, preventability determinations might arguably be excluded on grounds that they constitute evidence of subsequent remedial measures under W.Va.R.Evid. 407 or that the probative value is substantially outweighed by a danger of unfair prejudice under W.Va.R.Evid. 403.

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