

# **STATE LAW SUMMARY**

## **Overview of the State of New Mexico**

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#### **Overview of the State of New Mexico Court System**

- A. Trial Courts

**STATE COURT OVERVIEW:** All district courts have jurisdiction to review the action of any executive branch, agency or department in those cases in which a statute provides for judicial review.<sup>1</sup> Depending on the entity sued, venue is dictated by N.M.S.A. § 1978, § 38-3-1(2010). Corporate Venue may lie in the county where the statutory agent for

service resides. Generally, it is best to avoid appointing a statutory/registered agent in Santa Fe county, New Mexico. Santa Fe is New Mexico's most liberal jurisdiction and is the venue with the highest jury verdicts against Defendants. In New Mexico, a jury of either six or twelve persons may be demanded.<sup>ii</sup> The Rules of Civil Procedure are found at NMRA 1-001-1-127. The New Mexico Rules of Evidence are found at NMRA 11-101-11-1102.

When possible, removal to Federal Court is advised.

#### B. Appellate Courts

New Mexico State Appellate courts are known to be very liberal. The 10<sup>th</sup> Circuit is known to be more moderate.

### **Procedural**

#### A. Venue

Venue is determined by the residency of the parties at the time of removal.

#### B. Statute of Limitations

Written Contracts

6 years

NMSA 37-1-3

Property Damage

Unwritten Contracts

Conversion of Personal Property

4 years

NMSA 37-1-4

Bodily Injury (including libel and slander)

3 years

NMSA 37-1-8

Wrongful Death

3 years

NMSA 41-2-2

Contracts with Government Entities

2 years

NMSA 37-1-23

#### C. Time for Filing An Answer

30 days

#### D. Dismissal Re-Filing of Suit

### **Liability**

#### A. Negligence

New Mexico has adopted pure comparative negligence. Fault may be compared with non-parties or parties who are not able to respond in damages. Parties who settle may be listed on the verdict form; however, the result does not affect their settlement in any fashion. The defendant against whom a judgment is rendered is responsible only for his or her assessed portion of the negligence.

#### B. Negligence Defenses

The normal defenses asserted in motor vehicle accidents dealt with the comparative negligence of others, acts of God, comparative negligence of the plaintiff, independent intervening cause, and failure to mitigate damages. Failure to wear a seat belt cannot be considered to show fault or apportion damages.

#### C. Gross Negligence, Recklessness, Willful and Wanton Conduct

Punitive damages may be awarded where the acts of the defendant were malicious, willful, reckless, wanton, or fraudulent. Only one must be proved.<sup>iii</sup> There is no cap for punitive damages in the State of New Mexico. However, the United States Supreme Court has recognized that punitive damage awards which exceed a single digit ratio between punitive and compensatory damages may not satisfy due process.<sup>iv</sup> In addition, there must be a nexus between the specific harm suffered by the Plaintiff and the act giving rise to punitive damages. An award of punitive damages cannot be used to punish and deter conduct which bore no relationship to the Plaintiff's harm.

#### D. Negligent Hiring and Retention

The cause of action for negligent hiring and retention differs from that of being responsible for the acts of the employee for the employee's specific negligence. If the employee was shown to have a criminal record and placed in a position whereby future criminal activities could be undertaken because of the position that the employee occupies with the employer, the employer may be liable. Furthermore, if the employer fails to properly train the employee, such failure creates a separate cause of action. An employee who is retained on the job, despite evidence that his activities were inappropriate or unqualified for the job at hand, can create an independent act of negligence on the employer.

#### E. Negligent Entrustment

Negligent entrustment is recognized as a separate tort in the State of New Mexico. To state a claim for negligent entrustment, a plaintiff must demonstrate that the employer knew, or reasonably should have known, of the potentially dangerous condition of his employee. That is, if the employee was intoxicated or otherwise incapacitated from doing his job, the employer must have notice and the opportunity to preclude him from continuing in his work and injuring someone.

#### F. Dram Shop

#### G. Joint and Several Liability

Joint and several liability is not ordinarily permitted to be considered in the State of New Mexico. The state's statute provides for joint and several liability only in very narrow cases. None of those cases is typical of what will be found with motor vehicle carriers.

#### H. Wrongful Death and/or Survival Actions

New Mexico provides for damages for wrongful death. The personal representative who brings the action may be different from the personal representative appointed in the probate proceeding.

#### I. Vicarious Liability

An employer is liable for the acts of the employee, committed within the course and scope of employment. Generally, it is required that the act of

the employee be fairly and naturally incidental to the employer's business assigned to the employee and that the act was done while the employee was engaged in the employer's business with the view of furthering the employer's interest and did not arise entirely from some external, independent and personal motive on the part of the employee.<sup>v</sup>

A Tenth Circuit Court of appeals decision holds an interstate carrier liable for injuries, resulting from head-on collision between automobile and tractor-trailer, even though truck driver was not on mission for carrier and even though carrier was unaware of fact that vehicle was being used in way that it was. The court concluded that liability followed the placards, and did not cease when the trucker sought to quit the lease by writing to the carrier. The case holds that the carrier must physically remove the placards from the vehicle in order to be absolved from negligence.

J. Exclusivity of Workers' Compensation

## **Damages**

A. Statutory Caps on Damages

B. Compensatory Damages for Bodily Injury

C. Collateral Source

Evidence of collateral source of income or payments is not permitted in evidence. Liens may be asserted by hospitals only, and the Workers' Compensation Act has been interpreted to provide a cause of action for reimbursement by the worker to the workers' compensation carrier and no direct right of action by the Workers' Compensation Act against the tort-feasor.

D. Pre-Judgment/Post judgment Interest

Judgments and decrees; basis of computing interest: rate of 15% for tortious conduct, bad faith, intentional and willful acts from the date the complaint is served. The trial court has discretion in other instances to award pre and post judgment interest. The rates are discretionary and the Court is not compelled to award pre-judgment interest.

E. Damages for Emotional Distress

F. Wrongful Death and/or Survival Action Damages

Wrongful death damages are established by the pain and suffering experienced by decedent prior to death, funeral expenses, medical expenses, earning capacity and the value of life.<sup>vi</sup> Hedonic damages are recoverable as an item of damages.<sup>vii</sup> An injured party can recover for economic damages, such as lost wages and lost earning capacity. A person with no known income, such as a student, housewife or retired person, may recover their capacity to earn income.<sup>viii</sup> There are no caps on wrongful death damages.

G. Punitive Damages

#### H. Diminution in Value of Damaged Vehicle

In New Mexico, assuming the property has been repaired, a jury may award the reasonable expense of necessary repairs to the property, plus the decrease, if any, in the fair market value of the repaired property as compared to its fair market value before the occurrence. Repairs are recoverable, even if the repairs were more than the actual value, at least in situations where the personal property was unique or almost irreplaceable. Should it be necessary to move damaged property to another location for repairs, the tort-feasor should pay such expense.<sup>ix</sup>

#### I. Loss of Use of Motor Vehicle

In New Mexico, loss of use is defined as the reasonable rental value of similar property during the period reasonably required for the repair of the damaged property. Damages for loss of use of damaged property are recoverable, even if the plaintiff does not actually rent substitute property during period required for repairs.<sup>x</sup>

### **Evidentiary Issues**

#### A. Preventability Determination

#### B. Traffic Citation from Accident

Evidence of traffic citations being issued or not issued is ordinarily not admissible. Pleas of guilty will be admissible against the party making that plea. However, he is entitled to explain why he pled guilty.

#### C. Failure to Wear a Seat Belt

#### D. Failure of Motorcyclist to Wear a Helmet

Failure by a passenger or driver to use a safety helmet while on an off-highway motor vehicle shall not in any instance constitute fault or negligence and shall not limit or apportion damages.<sup>xi</sup>

#### E. Evidence of Alcohol or Drug Intoxication

#### F. Testimony of Investigating Police Officer

#### G. Expert Testimony

#### H. Collateral Source

Evidence of collateral source of income or payments is not permitted in evidence. Liens may be asserted by hospitals only, and the Workers' Compensation Act has been interpreted to provide a cause of action for reimbursement by the worker to the workers' compensation carrier and no direct right of action by the Workers' Compensation Act against the tort-feasor.

I. Recorded Statements

. New Mexico judges generally are very liberal with discovery. There is no hard-and-fast rule about what may be discovered. Statements taken by an attorney, or at his or her specific direction, will often be protected. Statements taken in the course of a safety investigation or in the course of an investigation by an adjuster may ordinarily be discovered. There are exceptions to both rules, depending upon numerous factors and the proclivity of the judges to basically open discovery.

J. Prior Convictions

K. Driving History

L. Fatigue

M. Spoliation

New Mexico provides for spoliation. In order to prove intentional spoliation of evidence, the party with the burden of proof must prove each of the following: 1. There was a lawsuit or the potential for a lawsuit; the spoliating party knew there was a lawsuit or the potential for a lawsuit; the spoliating party disposed of, destroyed, mutilated or significantly altered potential evidence; by its conduct the spoliating party's sole intent was to disrupt or defeat a potential lawsuit; the destruction or alteration of the evidence resulted in non-spoliating party's inability to prove their case; the non-spoliating party suffered damages as a result of the destruction or alteration.<sup>xii</sup> 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. Document retention is not addressed in New Mexico as a separate issue.

## **Settlement**

A. Offer of Judgment

During litigation, the New Mexico Rules of Civil Procedure allow a plaintiff or a defendant to make an "offer of settlement."<sup>xiii</sup> If an offer of settlement made by a plaintiff is not accepted and the judgment finally obtained by the claimant is more favorable than the offer, the defending party must pay the claimant's costs, excluding attorney's fees, including double the amount of costs incurred after the making of the offer. If an offer of settlement made by a defending party is not accepted and the judgment finally obtained by the claimant is not more favorable than the offer, the claimant must pay the costs, excluding attorney's fees, incurred by the defending party after the making of the offer and shall not recover costs incurred thereafter. The fact that an offer has been made but not accepted does not preclude a subsequent offer.

B. Liens

C. Minor Settlement

D. Negotiating Directly With Attorneys

E. Confidentiality Agreements

F. Releases

## G. Voidable Releases

### **Transportation Law**

- A. State DOT Regulatory Requirements
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- A. State Minimum Limits of Financial Responsibility
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- D. Disclosure of Limits and Layers of Coverage
- E. Unfair Claims Practices

The following actions, if knowingly committed or performed with such frequency as to indicate a general business practice, are considered unfair and deceptive practices and are prohibited:

1. misrepresenting to insureds pertinent facts or policy provisions relating to coverages at issue;
2. failing to acknowledge and act reasonably promptly upon communications with respect to claims;
3. failing to adopt and implement reasonable standards for the prompt investigation and processing of claims;
4. failing to affirm or deny coverage within a reasonable time after proof of loss requirements have been completed and submitted by the insured;
5. not attempting in good faith to effectuate prompt, fair and equitable settlements of an insured's claim in which liability has become reasonably clear;
6. failing to settle all catastrophic claims within a 90-day period after assignment of a catastrophic claim number when a catastrophic claim has been declared;
7. compelling insureds to institute litigation to recover amount due under a policy by offering substantially less than the amounts recovered by the insured in the litigation when the insureds had made a claim for amounts reasonably similar to the amount actually recovered in the litigation;
8. attempting to settle a claim by an insured for less than the amount a reasonable person would have believed he was entitled by reference to written or printed advertising material accompanying or made part of an application;
9. attempting to settle claims on the basis of an application that was altered without notice to, or knowledge or consent of, the insured;
10. failing, after payment of a claim, to inform insureds or beneficiaries, upon request, of the coverage under which payment has been made;
11. making known to insureds or claimants a practice of the insurer of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlement or compromises less than the amount awarded in arbitration;

12. delaying the investigation or payment of claims by requiring an insured, claimant or the physician of either to submit a preliminary claim report and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information;
13. failing to settle an insured's claims promptly where liability has become apparent under one portion of the policy coverage in order to influence settlement under other portions of the policy coverage;
14. failing to promptly provide an insured a reasonable explanation of the basis relied on in the policy in relation to the facts or applicable law for denial of a claim or form the offer of a compromise settlement; or
15. violating a provision of the Domestic Abuse Insurance Protection Act.

#### F. Bad Faith Claims

. New Mexico recognizes the tort of first-party bad faith.<sup>xiv</sup> While New Mexico does not yet recognize a common law tort for third party bad faith, an insurer can be in violation of the Unfair Claims Practices Act. A violation of the UCPA provides for a first party violation and, under limited circumstances, allows for recovery by a third party. This statutory right of action is known in New Mexico as a *Hovet* claim.<sup>xv</sup>

#### G. Coverage – Duty of Insured

#### H. Fellow Employee Exclusions

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<sup>i</sup> N.M.S.A. § 1978, § 38-3-1.1 (2009).

<sup>ii</sup> Rule 1-038 NMRA;

<sup>iii</sup> UJI 13-1827 NMRA.

<sup>iv</sup> State Farm Mutual Automobile Ins. Company v. Campbell, 538 U.S. 408 (2003).

<sup>v</sup> UJI 13-407 NMRA.

<sup>vi</sup> UJI 13-1830 NMRA.

<sup>vii</sup> Romero v. Byers, 117 N.M. 422, 872 P.2d 840 (1994).

<sup>viii</sup> Stang v. Hertz, 81 N.M. 348, 467 P.2d 14 (1970).

<sup>ix</sup> N.M. UJI 13-1817, Curtis v. Schwartzman Packing Co., 61 N.M. 305; DePalma v. Weinman, 15 N.M. 68

<sup>x</sup> N.M. UJI 13-1818, Cress v. Scott, 117 N.M. 3, 868 P.2d 648 (1994).

<sup>xi</sup> N.M.S.A. § 1978, § 66-3-1010.4 (2009).

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- xii Coleman v. Eddy Potash, Inc., 120 N.M. 645, 905 P.2d 185 (1995).
- xiii Rule 1-068 NMRA. Consult rule for timing restrictions and service requirements.
- xiv UJI 13-1702 NMRA.
- xv Hovet v. Allstate Ins. Co., 135 N.M. 397, 89 P.3d 69 (2004).