Name of Preparer:
Jamey W. Jamison
Firm:
Harris, Karstaedt, Jamison & Powers, P.C
City and State of Firm:
Englewood, Colorado

Overview of the State of Colorado Court System

A. Trial Courts

District Courts hear civil cases in any amount, as well as domestic relations, criminal, juvenile, probate, and mental health cases. District court decisions may be appealed to the Colorado Court of Appeals (in some cases directly to the Colorado Supreme Court).

County Courts handle civil cases under $15,000, misdemeanors, traffic infractions, felony complaints (which may be sent to district court), protection orders, and small claims. County court decisions may be appealed to the district court.

Water Courts have exclusive jurisdiction over cases relating to the determination of water rights, use and administration of water, and all other water matters. There are seven water courts, one in each of the major river basins in Colorado.

Denver Probate Court has exclusive jurisdiction over "all matters of probate, settlements of estates of deceased persons, appointment of guardians, conservators and administrators, and settlement of their accounts, the adjudication of the mentally ill, and such other jurisdiction as may be provided by law (Colorado Const. Article. VI § 9(3)).

Courts By District:

1st Judicial District:
Counties: Gilpin, Jefferson

2nd Judicial District:
Counties: Denver

3rd Judicial District:
Counties: Huerfano, Las Animas

4th Judicial District:
Counties: El Paso, Teller

5th Judicial District:
Counties: Clear Creek, Eagle, Lake, Summit

6th Judicial District:
Counties: Archuleta, La Plata San Juan

7th Judicial District:
Counties: Delta, Gunnison, Hinsdale, Montrose, Ouray, San Miguel

8th Judicial District:
Counties: Jackson, Larimer

9th Judicial District:
Counties: Garfield, Pitkin, Rio Blanco

10th Judicial District:
Counties: Pueblo

11th Judicial District: Counties: Chaffee, Custer, Fremont, Park	12th Judicial District: Counties: Alamosa, Conejos, Costilla Mineral, Rio Grande, Saguache
13th Judicial District: Counties: Kit Carson, Logan, Morgan, Phillips, Sedgwick, Washington, Yuma	14th Judicial District: Counties: Grand, Moffat, Routt
15th Judicial District: Counties: Baca, Cheyenne, Kiowa, Prowers	16th Judicial District: Counties: Bent, Crowley, Otero
17th Judicial District: Counties: Adams, Broomfield	18th Judicial District: Counties: Arapahoe, Douglas, Elbert Lincoln
19th Judicial District: Counties: Weld	20th Judicial District: Counties: Boulder
21st Judicial District: Counties: Mesa	22nd Judicial District: Counties: Dolores, Montezuma

B. Appellate Courts

The Colorado Court of Appeals is the state's intermediate appellate court, and is usually the first court of appeals for decisions from the district courts, Denver Probate Court, and Denver Juvenile Court. The Court of Appeals also reviews decisions of several state administrative agencies. The Colorado Court of Appeals has specific appellate jurisdiction over decisions originating from a number of state administrative boards and agencies, including the Industrial Claim Appeals Office. Reviews of the Colorado Court of Appeals' decisions are directed to the Colorado Supreme Court.

The Colorado Supreme Court is the court of last resort in Colorado's state court system. The court generally hears appeals from the Court of Appeals, although in some instances individuals can petition the Supreme Court directly regarding a lower court's decision.

Procedural

A. Venue

All actions affecting real property shall be tried in the county in which the subject of the action, or a substantial part thereof, is situated. C.R.C.P. 98.

Under C.R.C.P. 98(c)(1), tort, contract and other actions, not otherwise provided for are to be tried in the county in which the defendants, or any of them reside, may reside at the commencement of the action, or in the county where the plaintiff resides when service is made on the defendant in such county.

B. Statute of Limitations

§ 13-80-101, C.R.S. - General limitation of actions - Three years
Contract actions; breach of trust or breach of fiduciary duty; actions for fraud, misrepresentation, concealment or deceit; claims under Uniform Consumer Credit Code; replevin or for taking, detaining, or converting goods or chattels; actions including personal contracts and actions under the Uniform Commercial Code; actions under "Motor Vehicle Financial Responsibility Act"; actions of debt; actions for recovery of erroneous or excessive refunds; tort actions for bodily injury or property damage arising out of use of operation of a motor vehicle

§ 13-80-102, C.R.S. - General limitation of actions - Two years
Tort actions, including but not limited to actions for negligence, trespass, malicious abuse of process, malicious prosecution, outrageous conduct, interference with relationships, and tortious breach of contract

§ 13-80-102.5, C.R.S. - Limitation of actions - medical or health care
No action alleging negligence, breach of contract, lack of informed consent or other action arising in tort or contract to recover damages from any health care institution, or any health care professional, shall be maintained unless such action is instituted within 2 years after the date that such action accrues pursuant to section 13-80-108(1), but in no event shall an action be brought more than three years after the act or omission which gave rise to the action.

§ 13-80.103, C.R.S. - General limitation of actions - One year
Tort actions of assault, battery, false imprisonment, false arrest, libel and slander, actions for escape of prisoners, actions against sheriffs, coroners, police officers, firefighters, national guardsmen, or any other law enforcement authority, actions for any penalty or forfeiture of any penal statutes, actions under the "Motor Vehicle Repair Act of 1977", article 9 of title 42, C.R.S., actions for negligence, fraud, willful misrepresentation, deceit, or conversation of trust funds brought under second 12-61-303, C.R.S., actions against a person alleging liability for a penalty for commission of a class A or a class B traffic infraction, as defined in Second 42-4-1701, C.R.S.

§ 13-80-103.5, C.R.S.—General Limitation of Actions—Six Years
Actions to recover a liquidated debt or an unliquidated, determinable amount of money due to the person bringing the action; all actions for the enforcement of rights set forth in any instrument securing the payment of or evidencing any debt; all actions of replevin to recover the possession of personal property encumbered under any instrument securing any debt; actions for arrears of rent; actions by the public employees' retirement association to collect unpaid contributions from employers for persons who are not members or inactive members at the time the association first notifies an employer of its claim for unpaid contributions.

C. Time for Filing An Answer

A defendant shall file his answer or other response within 21 days after the service of the summons and complaint on him. If the Summons is served out of state, the answer is due within 35 days after the service upon him. C.R.C.P. 12(a)

Under Colorado's Civil Access Pilot Project, Rule, 3.2, the due date for filing the answer and all other responsive pleadings shall be 21 days following the filing of the Plaintiff's initial disclosure statement required by Pilot Project Rule 3.1.

D. Dismissal Re-Filing of Suit

Under C.R.C.P. 41(a), the Plaintiff may dismiss the action without order of the court upon payment of costs: (A) By filing a notice of dismissal at any time before filing or service by the adverse party of an answer or of a motion for summary judgment, whichever occurs first; or (B) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice except that a notice of dismissal operates as an adjudication on the merits when filed by a plaintiff who has once previously dismissed in any court an action based on or including the same claim.

Involuntary dismissal by defendant—a defendant may move for dismissal of an action or of any claim against him for failure of a plaintiff to prosecute or comply with the Colorado Rules of Civil Procedure, or any order of court

Involuntary dismissal by court—actions not prosecuted or brought to trial with due diligence may be dismissed by the court with prejudice after reasonable notice by the court and in accordance with C.R.C.P. 121, section 1-10.

Liability

A. Negligence

Common Law Negligence:

For a plaintiff to recover from a defendant on a claim of negligence, the plaintiff must prove the following by a preponderance of the evidence:

(1) Plaintiff had injuries, damages or losses;
(2) The defendant was negligent; and
(3) The defendant's negligence was a cause of the plaintiff's injuries, damages or losses.

See CJI-4th, 9:1.

"Reasonable care" is that degree of care which a reasonably careful person would use under the same or similar circumstances. See CJI-4th, 9:8.

"In negligence, the actor does not desire to bring about the consequences which follow, nor does he know that they are substantially certain to occur, or believe that they will. There is merely a risk of such consequences, sufficiently great to lead a reasonable person in his position to anticipate them, and to guard against them." *Wells Fargo Realty Advisors Funding, Inc. v. Uioli, Inc.*, 872 P.2d 1359, 1365-66 (Colo. App. 1994).

B. Negligence Defenses

§ 13-21-111, C.R.S.:

Comparative Negligence: Plaintiff may recover his damages, reduced by percentage of his comparative negligence, unless he is 50 percent or more comparatively negligent, in which case judgment will be entered for defendant C.R.S. §13-21-111(3). If Plaintiff's negligence is less than 50%, each defendant is liable for his or her percentage of negligence. *B.G. Inc. v. Gross*, 23 P.3d 691 (Colo. 2001). Comparative negligence is a defense to, but it may not be a complete defense depending on the case. CJI-4th 9:31.

Colorado statute providing for use of comparative fault as measure of damages in products liability actions relates only to damages and not to liability; it merely permits jury to consider fault in arriving at a damage figure. §13-21-406, C.R.S.; *Welch v. F.R. Stokes,* 555 F. Supp. 1054, 1055 (D. Colo. 1983).

Non-parties: Finder of fact allowed to consider degree of percentage of negligence or fault of person not party to action, if nonparty was someone with whom claimant had settled with or if defending party has given notice of identity of nonparty within 90 days following commencement of action. § 13-21-111.5(3)(b), C.R.S..

Plaintiff never has obligation to negate comparative negligence, because such negligence is an affirmative defense, defendant has burden of proving it. *Stevens v. Strauss,* 364 P.2d 382, 384 (1961).

Assumption of Risk:

A person assumes the risk of injury or damage if the person voluntarily or unreasonably himself or herself to such injury or damage with knowledge or appreciation of the danger and risk involved. CJI-4th 9:6.

In Colorado, assumption of risk is a form of contributory negligence. *Brown v. Kreuser*, 560 P.2d 105 (Colo. App. 1977).

C. Gross Negligence, Recklessness, Willful and Wanton Conduct

Willful and wanton conduct is "purposeful conduct committed recklessly with conscious disregard for the rights and safety of others." *Forman v. Brown*, 944 P.2d 559, 564 (Colo. App. 1996).

Comparative negligence is a defense to willful and wanton negligence. *White v. Hansen*, 837 P.2d 1229 (Colo. 1992).

D. Negligent Hiring and Retention

An employer has a duty to exercise reasonable care in hiring his or her employees. *See Connes v. Molalla Transp. System, Inc.*, 831 P.2d 1316, 1321 (Colo. 1992). The extent of that duty depends on the anticipated degree of contact the employee will have with other people in carrying out the employee's tasks. *Moses v. Diocese of Colorado*, 863 P.2d 310, 328 (Colo. 1993) (citing *Connes*, 831 P.2d at 1321). An employer must exercise additional care where the employer expects the employee to be in frequent contact with the public or the employment is of the type that would foster close contact between the employee and particular people. *Id.*; *see also* Restatement (Second) of Agency § 213 cmt. D (1958) (if the work is likely to subject outside persons to a significant risk of serious harm, there is a special duty to investigate the employee's background).

An employer may also be liable for negligent supervision of his or her employees. *See Moses*, 863 P.2d at 329. Negligent supervision occurs where the employer "knows or should have known that an 'employee's conduct would subject third parties to an unreasonable risk of harm…'" *Id.* (quoting *Destefano*, 763 P.2d at 288). To hold an employer liable for negligent supervision of an employee, a plaintiff must show that the employer knew that the employee "posed a risk of harm to the plaintiff and that the harm that occurred was a foreseeable manifestation of that risk." *Keller v. Koca*, 111 P.3d 445, 446 (Colo. 2005). Negligent supervision applies to acts of an employee that are *outside* of the scope of employment, however it does not extend to all tortious acts by an employee. *Id.* at 448. Instead "'[l]iability of the employer is predicated on the employer's antecedent ability to recognize a potential employee's attribute[s] of character or prior conduct which would create an undue risk of harm to those with whom the employee came in contact in executing his employment responsibilities'" *Id.* (quoting *Moses*, 863 P.2d at 327) (internal quotations omitted). The inquiry then becomes whether the "employee's acts are 'so connected with the employment in time and place' such that the employer knows that harm may result from the employee's conduct and that the employer is given the opportunity to control such conduct." *Id.* at 448-49 (quoting Fowler V. Harper & Posey M. Kime, *The Duty to Control the Conduct of Another*, 43 *Yale L.J.* 886, 896 (1934)); *see e.g. Moses*, 863 P.2d at 329 (the known risk that a priest may engage in sexual relations with parishioners receiving counseling, even though the acts fell outside of the employee's course and scope of employment, created a duty in diocese to take steps to insure that the priest was not in a position to conduct counseling).

E. Negligent Entrustment

To hold a person liable under the theory of negligent entrustment, plaintiff must prove: (1) a supplier permitting a third party to use something or to engage in an activity; (2) under the control of the supplier; and (3) the supplier gave permission either knowing, or having reason to know, that the third party intended or was likely to create an unreasonable risk of harm to others by their conduct. *See Casebolt v. Cowan*, 829 P.2d 352 (Colo. 1992).

F. Dram Shop

With regard to establishing causation under the Dram Shop Act, the Colorado Court of Appeals addressed this issue within the context of a claim made by a plaintiff directly injured by an intoxicated patron in *Strauch v. Build It*, 226 P.3d 1235 (Colo. App. 2009) ("*Strauch*"). The *Strauch* Court addressed whether section 12-47-801, C.R.S. could impose liability on a nightclub when it had served alcohol to a visibly intoxicated patron who later stabbed the plaintiff with a knife while the plaintiff was walking to a hotel room and less than two blocks away from the nightclub. The Court found that the nightclub was liable under section 12-47-801 and reasoned that "it suffices that the vendor's improper service of alcohol caused the patron's intoxication and patron's intoxication caused the plaintiff's injuries." *Strauch v. Build It*, 226 P.3d 1235, 1238 (Colo. App. 2009) ("*Strauch*"). Foreseeability is not a part of a causation analysis when assessing liability under the act. *Id*.

In Colorado, the dram shop statute serves as the exclusive remedy for a Plaintiff injured by an intoxicated person against a vendor of alcoholic beverages. Section 12-47-801, C.R.S. provides as follows:

(1) The general assembly hereby finds, determines, and declares that this section shall be interpreted so that any common law cause of action against a vendor of alcohol beverages is abolished and that in certain cases the consumption of alcohol beverages rather than the sale, service, or provision thereof is the proximate cause of injuries or damages inflicted upon another by an intoxicated person except as otherwise provided in this section.

(2) As used in this section, "licensee" means a person licensed under the provisions of this article or article 46 or 48 of this title and the agents or servants of such person.

(3)(a) No licensee is civilly liable to any injured individual or his or her estate for any injury to such individual or damage to any property suffered because of the intoxication of any person due to the sale or service of any alcohol beverage to such person, except when:

(I) It is proven that the licensee **willfully and knowingly** (emphasis added) sold or served any alcohol beverage to such person who was under the age of twenty-one years or who was **visibly intoxicated** (emphasis added); and

(II) The civil action is commenced within one year after such sale or service.

(b) No civil action may be brought pursuant to this subsection (3) by the person to whom the alcohol beverage was sold or served or by his or her estate, legal guardian, or dependent.

(c) In any civil action brought pursuant to this subsection (3), the total liability in any such action shall not exceed two hundred eighty thousand eight hundred and ten dollars ($280,810).

G. Joint and Several Liability

Section 13-21-111.5, C.R.S.--several liability applies in actions brought as a result of

death or an injury to person or property. Joint liability applies to person who consciously conspire and deliberately pursue a common plan or design to commit a tortious act.

In multiple defendant cases, joint and several liability has been abolished. In any action brought as result of death or injury to person or property, no defendant shall be liable for amount greater than that represented by degree or percentage of negligence or fault attributable to that defendant. C.R.S. § 13-21-111.5.

The legislative enactment (§ 13-21-111.5) "'rectifies the inequity' caused by the common law rule of joint and several liability whereby any one responsible could have been liable for all losses which the plaintiff incurred." See *Paries ex rel. Paris v. Dance*, 194 P.3d 404, 407 (Colo. App. 2008) (quoting *Bohrer v. DeHart*, 961 P.2d 472, 475 (Colo. 1998).

H. Wrongful Death and/or Survival Actions

Section 13-21-201, C.R.S., also known as the Wrongful Death Act, provides certain persons standing to make claims for injuries caused by the death of another. In pertinent part, section 13-21-201(1)(a) designates those who can recover as (1) the spouse of the deceased; (2) if there is no spouse, the heirs of the deceased; or (3) a designated beneficiary. In addition, section 13-21-201(1)(c) states that in the event that the decedent has no spouse, no descendants, and no designated beneficiary, the decedents parents may recover.

Section 13-21-202, allows for a person with legal standing as an heir to bring a claim against an alleged wrongdoer, as long as there is a legally recognizable liability claim that can be brought against the alleged wrongdoer. The statute reads as follows:

When the death of a person is caused by a wrongful act, neglect, or default of another, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who or the corporation which would have been liable, if death had not ensued, shall be liable in an action for damages notwithstanding the death of the party injured.

When an adult decedent is without a spouse or dependent children at the time of death, his or her parent can bring a wrongful death action

I. Vicarious Liability

"Captain of the Ship Doctrine"—holds physicians vicariously liable for the actions of others in an operating room. It's grounded in repondeat superior and imposes vicarious liability on a physician for the negligence of hospital employees under the surgeon's control and supervision during surgery. *Beadles v. Metayka*, 311 P.2d 711, 713-14 (Colo. 1957).

Where an employer, as a principal, is vicariously liable for the tort of its employee, acting as the employer's agent, a tort victim may proceed against either the principal on the basis of vicarious liability, the agent for the agent's direct liability, or against both the agent and the principal. Regardless of whom a victim decides to sue, there may be only one satisfaction of

judgment based upon the victim's injuries. *See Meredith v. Ramsdell*, 384 P.2d 941 (Colo. 1963).

While indemnity is not available between joint tortfeasors, if the employer is free from negligence, there is a right of indemnity against the employee. A principal is entitled to be reimbursed for all sums which the principal is required to pay, together with other damages the principal sustained because of the principal's vicarious liability for the agent. *See Brochner v. Western Ins. Co.*, 724 P.2d 1293 (Colo. 1986).

J. Exclusivity of Workers' Compensation

Workers' Compensation Act of Colorado:

"An injured worker's exclusive remedy for injuries that arise out of or in the course of employment is recovery under the workers' compensation statutes." See § 8-40-101, C.R.S. (2012); *Aviado v. Indust. Claim Appeals Office*, 228 P.3d 177, 180 (Colo. App. 2009)

Damages

A. Statutory Caps on Damages

In accordance with § 12-47-801, C.R.S., the adjusted limitations for damages, utilizing the "consumer price index for Denver-Boulder, all items, all urban consumers", are as follows:

For all claims for relief that accrue on and after Jan. 1, 2008:

Liability of a vendor of alcoholic beverages under § 12-47-801(3)(c), or a social host under § 12-47-801(4)(c), C.R.S.—the adjusted limitation is $280,810.

Limit on damages for noneconomic losses or injuries under § 13-21-102.5--$468,010, which may be increased by the court upon clear and convincing evidence to a maximum of $936,030.

Limit on noneconomic damages for wrongful death by negligence is $436,070.

Limit on solatium recoverable for wrongful death by negligence is $87,210.

Colorado's Health Care Availability Act--§ 13-64-302, C.R.S. (2012):

Total amount recoverable for a course of care for all defendants in any civil action for damages in tort brought against a health care professional as defined in § 13-64-202 or a health care institution, as defined in § 13-64-202, shall not exceed $1 million present value per patient, including any claim for derivative noneconomic loss or injury, of which not more than $300,000 present value per patient, including any derivative claim, shall be attributable to direct or derivative noneconomic loss or injury; except that, if, upon good cause shown, the court determines that the present value of past and future economic damages would exceed such limitation and that the application of such limitation would be unfair, the court may award in excess of the limitation the present value of additional past and future economic damages only.

B. Compensatory Damages for Bodily Injury

Damages for physical impairment or disfigurement are a separate category of compensatory damages recoverable. See *Preston v. Dupont*, 35 P.3d 433, 440 (Colo. 2001).

A plaintiff who has established liability for personal injury is entitled to compensatory damages. See *Seaward Const. Co., Inc. v. Bradley*, 817 P.2d 971 (Colo. 1991).
While compensatory damages are intended to make the plaintiff whole, punitive damages are intended to punish and therefore prejudgment interest may not be awarded on punitive damages in a personal injury action. *Bradley*, 817 P.2d at 971.

"Loss of enjoyment of life" is considered a component of "pain and suffering" included in recoverable noneconomic damages. *Pringle v. Valdez*, 171 P.3d 624, 630 (Colo. 2007).

"Loss of consortium"—damages for loss of consortium may be recovered by either spouse when there has been a personal injury to the marital partner. CJI-4th 6:5 and 6:6. Loss of consortium is itself a personal injury that gives rise to a separate cause of action belonging to the injured party's spouse. *Draper v. DeFrenchi-Gordineer*, 282 P.3d 489 (Colo. App. 2011), *cert. denied* (2012). To recover for loss of consortium, a plaintiff must prove that his or her spouse incurred injuries as a result of the defendant's negligence that concomitantly caused a loss of the affection, society, companionship, household services, aid or comfort to the party claiming loss of consortium. CJI-4th 6:6; *American Ins. Co. v. Naylor*, 87 P.2d 260 (Colo. 1939).

"Thin Skull Doctrine"—in determining the amount of a plaintiff's actual damages, a jury may not reduce the amount of damages or refuse to award damages because of any physical frailties, mental condition, illness, etc., of the plaintiff that may have made him or her more susceptible to injury, disability, or impairment than an average or normal person. CJI-4th 6:7.

C. Collateral Source

The collateral source rule prohibits a jury or trial court from ever considering payments or compensation that an injured plaintiff receives from his or her third-party insurance. This evidentiary principle controls in collateral source cases in which amounts paid evidence is offered for the purpose of determining the reasonable value of medical services. See *Wal-Mart Stores, Inc. v. Crossgrove*, 276 P.3d 562, 566 (Colo. 2012).

The pre-verdict evidentiary component of the collateral source rule prevails in collateral source cases to bar the admission of the amounts paid for medical services. Admitting amounts paid into evidence for any purpose, including the purpose of determining reasonable value, in a collateral source case carries with it an unjustifiable risk that the jury will infer the existence of a collateral source—most commonly an insurer—from the evidence, and thereby improperly diminish the plaintiff's award. *Crossgrove*, 276 P.3d at 567. Thus, evidence of amounts paid by a collateral source are excluded even to show the reasonable value of services rendered. *Crossgrove*, 276 P.3d at 568.

The purpose of the collateral source rule is to prevent the defendant from receiving credit for the compensation that the plaintiff received from another source. *Colorado Permanente Medical Group, P.C. v. Evans*, 926 P.2d 1218 (Colo.1996). Colorado has codified the collateral source rule for tort cases in C.R.S. 13-21-111.6. That section modifies the common law rule to limit the circumstances under which a plaintiff may receive double compensation for an injury. Specifically, the statute requires reduction of tort damages awards by the amount a plaintiff "has been or will be wholly or partially indemnified or compensated for his loss by any other person, corporation, insurance company, or fund in relation to the injury, damage, or death sustained. C.R.S. 13-21-111.6.

The statute, however, contains a "contract exception" provision which states that a "verdict shall not be reduced by the amount by which [the plaintiff] has been or will be wholly or partially indemnified or compensated by a benefit paid as a result of a contract entered into and paid for by or on behalf of [the plaintiff]." *Colorado Permanente Medical Group, P.C. v. Evans*, 926 P.2d 1218, (Colo.1996). For example, pursuant to the "contract exception" , the verdict will not be reduced by payments received from the state pension fund (*Van Waters & Rogers, Inc. v. Keelan*, 840 P. 2d 1070 (Colo. 1992), or by any benefits that result from the contract of employment, such as, social security benefits and workers' compensation benefits. *Combined Communications Corp. Inc. v. Public Service Company of Colorado*, 865 P.2d 893 (Colo. App. 1993).

D. Pre-Judgment/Post judgment Interest

When a plaintiff has properly requested and is awarded pre-judgment interest, such interest is incorporated into the judgment and becomes part of the judgment itself. *Sperry v. Field*, 205 P.3d 365, 368 (Colo. 2009). Interest is calculated at 9% per annum.

When a plaintiff is not entitled to prejudgment interest and the judgment debtor appeals the judgment, plaintiff is entitled to an award of postjudgment interest calculated from the date judgment was entered to the date of satisfaction, and not from the date upon which the action accrued. *Sperry, supra*; § 13-21-102(2)(a).

If a judgment for money in an action to recover damages for person injuries is appealed by a judgment debtor and the judgment is modified or reversed with a direction that a judgment for money be entered in the trial court, interest shall be payable from the date the action accrued until judgment is satisfied and payable on the amount of 3% per annum.

E. Damages for Emotional Distress

Emotional distress is the generic term for pain and suffering and is conditionally allowed in Colorado. In tort actions where there is no threat of bodily harm to anyone, emotional distress damages are generally not available. See e.g. *Matthews v. Lomas & Nettleton Co.*, 754 P.2d 791 (Colo. App. 1988).

To establish a claim for negligent infliction of emotional distress under Colorado law, the

plaintiff must show that the defendant's negligence created an unreasonable risk of physical harm and caused the plaintiff to be put in fear for his or her *own* safety, that this fear had physical consequences or resulted in long-continued emotional disturbance, and that the plaintiff's fear was the cause of the damages sought. The plaintiff must also show that he or she either suffered physical injury or was in the "zone of danger." *Draper v. DeFrenchi-Gordineer*, 282 P.3d 489, 497 (Colo. App. 2011).

Negligent infliction of emotional distress is not a derivative claim, but instead is an independent tort injury suffered by the bystander himself or herself as a result of the shock of having witnessed an extraordinary or traumatic event. *Draper*, 282 P.3d at 497.

An exception to this general rule is sometimes found in the context of interpreting specific statutes or contract terms where negligent infliction of emotional distress is included under the specific definition of a "derivative claim." *Draper*, 282 P.3d at 497.

Colorado has adopted the Restatement (Second) of Torts definition of intentional infliction of emotional distress: "One who by extreme and outrageous conduct intentionally or recklessly cuases severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." *Han Ye Lee v. Colorado Times, Inc.*, 222 P.3d 957, 963 (Colo. App. 2009).

F. Wrongful Death and/or Survival Action Damages

The Wrongful Death Act grants the surviving spouse the exclusive right to bring an action within the first year from the date of death. *See* § 13-21-201, *et seq*., C.R.S. (2011); *Campbell v. Shankle*, 680 P.2d 1352, 1353 (Colo. App. 1984). The right of the decedent's children to bring a wrongful death action hinges upon whether there is no surviving spouse, or whether the surviving spouse has elected not to sue within the statutory one year period. *See Howlett v. Greenberg*, 530 P.2d 1285, 1287 (Colo. App. 1974). The Act limits recovery to one civil action for the wrongful death of any one decedent. Section 13-21-203(1)(a), C.R.S. (2011); *see also Hahn v. Union Pac. R. Co.*, 162 F. Supp. 558, 560 (D. Colo. 1958) ("The wrongful death statute creates but one indivisible cause of action which remains the same whether enforceable by the surviving spouse, by the minor child or children, or by the others named in the statute.") (quoting *Cummins v. Kansas City Public Service Company*, 66 S.W. 2d 920 (Mo. 1933)). "The one civil action limitation reflects a legislative intent to prevent relatives of a decedent from instituting multiple, individual suits against the same defendant." *Sereff v. Steedle*, 148 P.3d 192, 197 (Colo. App. 2005), *rev'd on other grounds*, 167 P.3d 135, 141 (Colo. 2007).

Limit on noneconomic damages for wrongful death by negligence is $436,070.

Limit on solatium recoverable for wrongful death by negligence is $87,210.

§ 13-21-203.5. Alternative means of establishing damages - solatium amount

In any case arising under section 13-21-202, the persons entitled to sue under the provisions of

section 13-21-201(1) may elect in writing to sue for and recover a solatium in the amount of $87,210. Such solatium amount shall be in addition to economic damages and to reasonable funeral, burial, interment, or cremation expenses, which expenses may also be recovered in an action under this section. Such solatium amount shall be in lieu of noneconomic damages recoverable under section 13-21-203 and shall be awarded upon a finding or admission of the defendant's liability for the wrongful death.

G. Punitive Damages

Punitive or exemplary damages are available in Colorado only pursuant to statute. *See Kaitz v. District Court*, 650 P.2d 553 (Colo. 1982); § 13-21-102, C.R.S. Punitive damages may be awarded when the injury is attended by circumstances of fraud, malice or willful and wanton conduct beyond a reasonable doubt. C.R.S. §13-21-102(1)(a).

Claim for exemplary damages is made by amendment to pleadings only after exchange of initial disclosures and after plaintiff establishes prima facie proof of a triable issue of exemplary damages. §13-21-102(1.5)(a), C.R.S.

Award of exemplary damages may be increased up to three times the amount of actual damages if it is shown that the defendant has continued the behavior or repeated the action which is the subject of the claim against the defendant in a willful and wanton manner, either against the plaintiff or another person or persons, during the pendency of the case; or the defendant has acted in a willful and wanton manner during the pendency of the action in a manner which has further aggravated the damages of the plaintiff when the defendant knew or should have known such action would produce aggravation. § 13-21-102(3)(a)-(b), C.R.S.

Exemplary damages are not allowed as compensation to the injured party for the wrong done, but as a punishment of the wrongdoer as an example to others. *Ark Valley Alfalfa Mills, Inc. v. Day*, 263 P.2d 815 (Colo. 1953).

Exemplary damages are also available in claims for loss of consortium. *See Kohl v. Graham*, 202 F. Supp. 895 (D. Colo. 1962).

Exemplary damages are not available in equitable actions, only where the claim is for actual damages. *See Miller v. Kaiser*, 433 P.2d 772 (Colo. 1967).

H. Diminution in Value of Damaged Vehicle

Under Colorado law, a plaintiff may assert damages for repair costs and diminution in value. *See* CJI 6:12(2011); *Airborne, Inc. v. Denver, Inc.*, 832 P.2d 1086 (Colo. App. 1992) (court holding that if damage to property is reparable, the plaintiff is entitled to recover reasonable costs of repair together with any decrease in market value as repaired); *Trujillo v. Wilson*, 189 P.2d 147 (Colo. 1948) (holding a plaintiff was property awarded damages for an automobile's diminished value due to an accident). A plaintiff may also assert damages for loss of use of damaged property. *See Airborne, Inc., supra*.

I. Loss of Use of Motor Vehicle

"Loss-of-use damages may be measured by the reasonable rental value of a substitute vehicle, even in the absence of actual rental" *Cress v. Scott,* 117 N.M. 3, 868 P.2d 648, 651 (1994).

An owner may recover for the loss of use of personal property for the length of time reasonably required for repair. *Airborne, Inc. v. Denver Air Center, Inc.*, 832 P.2d 1086, 1089 (Colo. App. 1992).

A plaintiff cannot recover for loss of use damages unless he showed whether length of time the vehicle was out of use was necessary and whether repairs were made with reasonable promptness. *Hunter v. Quaintance,* 69 Colo. 28, 168 P. 918 (1917)

If the owner proves what length of time is reasonable for repair, he need not actually have his property repaired in order to recover loss of use damages. *Cope v. Vermeer Sales & Service,* 650 P.2d 1307 (Colo. App. 1982).

Evidentiary Issues

A. Preventability Determination

There is no Colorado case law that addresses the admissibility of a determination of preventability.

B. Traffic Citation from Accident

Section 42-4-1713, C.R.S. specifically prohibits the admission of evidence as to a person's conviction record for any violation of a traffic statute. This section has long been interpreted to similarly prohibit the admission of evidence of a traffic violation. *See Ripple v. Brack*, 286 P.2d 625 (Colo. 1955); *Lawrence v. Taylor*, 8 P.3d 607, 610 (Colo. App. 2000).

C. Failure to Wear a Seat Belt

Evidence regarding lack of seat belt use is admissible at trial, but only to reduce an award of damages for pain and suffering. *See* § 42-4-237(7), C.R.S.2002; *Churning v. Staples,* 628 P.2d 180 (Colo. App. 1981); *Wark v. McClellan*, 68 P3d 574, 579 (Colo. App. 2003). Accordingly, statements regarding how the failure to use a seat belt caused certain injuries may be admitted. *See Anderson v. Watson,* 953 P.2d 1284 (Colo. 1998) (defendant may, but is not required to prove causal relationship between lack of seat belt use and injuries, and need prove only that seat belt was not worn).

D. Failure of Motorcyclist to Wear a Helmet

Riders age 18 and over are not required to wear helmets in Colorado. However, if the motorcycle operator or passengers are under age 18, they must wear DOT-approved helmets. § 42-4-1502, C.R.S. (2012)

Under the law of comparative negligence, evidence of a motorcycle operator's failure to wear a protective helmet is inadmissible to show either negligence or a failure to mitigate damages on the part of the operator. *Lawrence v. Taylor*, 8 P.3d 607, 609 (Colo. App. 2000) (citing *Dare v. Sobule,* 674 P.2d 960 (Colo.1984)).

E. Evidence of Alcohol or Drug Intoxication

In Colorado, anyone who drives any motor vehicle upon the streets and highways and elsewhere throughout the state is deemed to have expressed consent to taking and completing of tests of the person's breath or blood for the purpose of determining the alcoholic content of the person's blood or breath when so requested and directed by a law enforcement officer having probable cause to believe that the person is driving a motor vehicle in violation of the prohibitions against DUI, DUI per se, DWAI, habitual user, or UDD. § 42-4-1301.1, C.R.S. (2012).

Evidence of self-induced intoxication is relevant to specific intent crimes, but it is not relevant for general intent crimes—i.e., those requiring the mental state of "knowingly." *People v. Roark*, 643 P.2d 756, 773 (Colo. 1982).

Results of a blood-alcohol test or blood-alcohol content is relevant in comparative negligence analysis. *See* C.R.E. 401; *Wark v. McClellan*, 68 P.3d 574, 580 (Colo. App. 2003).

Question of intoxication may be relevant for determining whether a party exercised ordinary care for their own safety in getting into the car with a driver who appeared to be intoxicated. *Martinez v. Romero*, 497 P.2d 716 (Colo. 1972).

F. Testimony of Investigating Police Officer

Police reports are generally not within the "business records exception" to the hearsay rule. Furthermore, where such reports contain hearsay, they are not admissible. *See Polster v. Griff's of America, Inc.*, 525 P.2d 1179, 1182 (Colo. App. 1974).

A police officer may only offer opinion testimony as a lay witness when the basis of that opinion arises from experiences or information common to the average lay person; however, where the officer's opinion is based in experience-based specialized knowledge unique to the witness's role as a police officer that could be likened to training or education, the officer must be qualified as an expert. *See Brooks v. People*, 975 P.2d 1005, 1115 (Colo. 1999); C.R.E. 701, 702.

G. Expert Testimony

Admissible expert testimony must be grounded in the methods and procedures of science

rather than subjective belief or unsupported speculation. *People v. Ramirez*, 155 P.3d 371 (Colo. 2007).

In *People v. Shreck*, 22 P.3d 68, 78-79 (Colo. 2001), the Colorado Supreme Court made clear that C.R.E. 702 represents the appropriate standard for determining the admissibility of scientific evidence, as opposed to the *Frye* "general acceptance" test. The trial court's inquiry should be on the reliability and relevance of such evidence. *See People v. Wilkerson*, 114 P.3d 874, 876-77 (Colo. 2005).

C.R.E. 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

H. Collateral Source

The Collateral Source Rule is codified in section 13-21-111.6, C.R.S. Section 13-21-111.6 has two contrasting clauses. The first clause partially negates the collateral source rule. It directs a trial court, following a damages verdict, to adjust the plaintiff's award by deducting compensation or benefits that the plaintiff received from collateral sources (i.e., sources other than the tortfeasor). The second clause, described as the "contract exception" or the "contract clause," retains the collateral source rule for certain benefits. *See Colo. Permanente Med. Grp.,* 926 P.2d at 1230.

Under the common law collateral source rule, making the injured plaintiff whole is solely the tortfeasor's responsibility. Any third-party benefits or gifts obtained by the injured plaintiff accrue solely to the plaintiff's benefit and are not deducted from the amount of the tortfeasor's liability. These third-party sources are "collateral" and are irrelevant in fixing the amount of the tortfeasor's liability.

The rule therefore allows double recovery by a successful plaintiff. "[C]ompensation or indemnity received by an injured party from a collateral source, wholly independent of the wrongdoer and to which [the wrongdoer] has not contributed, will not diminish the damages otherwise recoverable from the wrongdoer." *Colo. Permanente Med. Grp., P.C. v. Evans,* 926 P.2d 1218, 1230 (Colo.1996) (quoting *Kistler v. Halsey,* 173 Colo. 540, 545, 481 P.2d 722, 724 (1971)); *see also Crossgrove v. Wal-Mart Stores,* ---P.3d ----, ---- - ---- (Colo.App.2010) (selected for publication) (discussing common law origins of collateral source rule).

The rule's purpose is to prevent a tortfeasor from benefitting, in the form of reduced liability, from compensation in the form of money or services that the victim may receive from a third-party source. *See Quinones v. Pa. Gen. Ins. Co.,* 804 F.2d 1167, 1171 (10th Cir.1986) ("The rule evolved around the commonsense notion that a tortfeasor ought not be excused because the victim was compensated by another source, often by insurance."). Accordingly, the rule is somewhat punitive in nature. It prohibits the wrong-doer from enjoying the benefits procured by the injured plaintiff. If either party is to receive a windfall, the rule awards it to the

injured plaintiff who was wise enough or fortunate enough to secure compensation from an independent source, and not to the tortfeasor, who has done nothing to provide the compensation and seeks only to take advantage of third-party benefits obtained by the plaintiff. *See Van Waters & Rogers, Inc. v. Keelan,* 840 P.2d 1070, 1074 (Colo.1992) ("To the extent that either party received a windfall, it was considered more just that the benefit be realized by the plaintiff in the form of double recovery rather than by the tortfeasor in the form of reduced liability.").

Double recovery is permitted to an injured plaintiff because the plaintiff "should be made whole by the *tortfeasor,* not by a combination of compensation from the tortfeasor and collateral sources. The wrongdoer cannot reap the benefit of a contract for which the wrongdoer paid no compensation." *Acuar v. Letourneau,* 260 Va. 180, 531 S.E.2d 316, 323 (2000) (emphasis added) (holding that, under the collateral source rule, tortfeasor may not reduce a plaintiff's award by the amounts written off by plaintiff's healthcare providers).

Under this rule, the benefits received by an injured plaintiff due to the plaintiff's third-party health insurance coverage are from a collateral source, and therefore are not to be considered in determining the amount of the plaintiff's recovery.

[I]t is the position of the law that a benefit that is directed to the injured party should not be shifted so as to become a windfall for the tortfeasor. If the plaintiff was himself responsible for the benefit, as by maintaining his own insurance ... the law allows him to keep it for himself. If the benefit was a gift to the plaintiff from a third party or established for him by law, he should not be deprived of the advantage that it confers.

Restatement (Second) of Torts, § 920A, cmt.b (1979); *see Van Waters,* 840 P.2d at 1075 (citing same). The plaintiff's health insurance benefits certainly are not to be credited to the tortfeasor in reducing the plaintiff's award. *See* Dag E. Ytreberg, *Collateral Source Rule: Injured Person's Hospitalization or Medical Insurance as Affecting Damages Recoverable,* 77 A.L.R. Fed. 415 (1977).

To ensure that a jury will not be misled by evidence regarding the benefits that a plaintiff received from sources collateral to the tortfeasor, such evidence is inadmissible at trial. *Carr v. Boyd,* 123 Colo. 350, 356-57, 229 P.2d 659, 662-63 (1951). It is also inadmissible in adjusting or reducing a plaintiff's damages award. *See Crossgrove,* --- P.3d at ---- - ----. Thus, the collateral source rule prohibits a jury or trial court from ever considering payments or compensation that an injured plaintiff receives from his or her third-party insurance. *See Volunteers of America Colorado Branch v. Gardenswartz*, 242 P.3d 1080, 1083-1084 (Colo. 2010).

I. Recorded Statements

Under C.R.E. 803, a "past recollection recorded" is admissible when it appears that the witness once had knowledge concerning the matter and: (A) can identify the memorandum or record, (B) adequately recalls the making of it at or near the time of the event, either as recorded by the witness or by another, and (C) can testify to its accuracy. The memorandum or record may be read into evidence but may not itself be received unless offered by an adverse party.

Recorded statements taken by an insurance company after an accident may not be protected from discovery as being prepared in anticipation of litigation. *See Lazar v. Riggs*, 79 P.3d 105, 109 (Colo. 2003).

Section 13-21-301(1)(c), C.R.S. provides that a statement recorded or otherwise taken from an injured person within fifteen days of the date of the occurrence may not be used for impeachment or otherwise. However, this restriction only applies where "a person is injured as a result of an occurrence which might give rise to liability and said person is a patient under the care of a practitioner of the healing arts or is hospitalized...."

J. Prior Convictions

Evidence of a previous conviction of a felony where the witness testifying was convicted five years prior to the time when the witness testifies is not admissible in evidence in any civil action. Prior felony convictions may be used for impeachment purposes only if they occurred within five years prior to the witness's testimony in a civil case. *See People v. Yeager*, 513 P.2d 1057, 1059 (Colo. 1973).

C.R.E. 404(b)--Other crimes, wrongs, or acts:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

K. Driving History

Evidence of a party's driving record may be relevant to establish that he or she is a habitual offender or knowledge that their license was revoked, but not to show the party's bad character or propensity. *See* C.R.E. 404(b); *People v. Rodriguez*, 849 P.2d 799, 802 (Colo. App. 1992).

L. Fatigue

An hours of service violation may be admissible where it is alleged to be a proximate cause of the harm or that there was a connection between the individual's fatigue due to the hours of service violation and the harm alleged. *See Auslender v. Boettcher,* 242 P. 672, 673 (Colo. 1926).

M. Spoliation

In Colorado, "[t]rial courts enjoy broad discretion to impose sanctions for spoliation of evidence." *Pfantz v. Kmart Corp.*, 85 P.3d 564, 567 (Colo. App. 2003). The Court may use that power to, "impose sanctions both to punish a party that has spoiled evidence and to remediate the harm to the injured party from absence of that evidence." *Id.* However, spoliation of evidence is not a valid claim for relief; rather, it is a basis for imposing sanctions.

A trial court has inherent power to provide the jury with an adverse inference instruction as a sanction for spoliation of evidence. *See Aloi v. Union Pac. Railroad Corp.*, 129 P.3d 999, 1002 (Colo. 2006).

Settlement

A. Offer of Judgment

If a plaintiff serves an offer of settlement in writing at any time more than 14 days before the commencement of the trial that is rejected by the defendant and the plaintiff recovers a final judgment in excess of the amount offered, then the plaintiff shall be awarded actual costs accruing after the offer of settlement to be paid by the defendant. § 13-17-202, C.R.S.

If the defendant serves an offer of settlement in writing at any time more than 14 days before the commencement of the trial that is rejected by the plaintiff and the plaintiff does not recover final judgment in excess of the amount offered, then the defendant shall be awarded actual costs accruing after the offer of settlement to be paid by the plaintiff. § 13-17-202, C.R.S.

However, under section 13-16-104, If the plaintiff is the prevailing party in the action, the plaintiff's final judgment must include the amount of the plaintiff's actual costs that accrued prior to the offer of settlement. If an offer of settlement is not accepted in writing within 14 days after service of the offer, the offer is deemed rejected. "Actual costs" do not include attorney's fees, but mean costs actually paid or owed by the party or his or her attorneys or agents in connection with the case.

B. Liens

The workers' compensation insurer's subrogation interest is defined by § 8–41–203(1), C.R.S., which provides:

If such injured employee ... elect[s] to take compensation under [the Workers' Compensation Act], the payment of compensation shall operate as and be *an assignment of the cause of action against the other person* to the ... insurance carrier liable for the payment of such compensation. Said insurance carrier shall not be entitled to recover any sum in excess of the amount of compensation for which such carrier is liable under said articles to the injured employee, but to that extent said carrier *shall be subrogated to the rights of the injured employee against said third party causing the injury.* (emphasis added) *United Fire & Cas. Co. v. Armantrout*, 904 P.2d 1375, 1378-79 (Colo. App. 1995).

The supreme court explained the operation of this section in *Tate v. Industrial Claim Appeals Office,* 815 P.2d 15, 17 (Colo.1991):

> If the employee recovers from the tortfeasor, the employee must reimburse the insurer for any benefits paid.... The insurer may also offset any portion of the recovery not used to reimburse the insurer for past benefit payments against any future benefits the insurer

> may have to pay ... Under this approach the employee receives interim workers' compensation benefits, recovers from the tortfeasor, reimburses the insurer for the interim benefits, credits the insurer for potential future benefits and keeps the remainder as excess damages.

Under this rule, pursuant to § 8–41–203(1), the right of subrogation and assignment is not limited to the compensation which has been paid. Thus, the subrogees can offset its liability for future benefits against the amount of the settlement.

UM/UIM Set-Offs:

Insurers may not absolve their liability under UM/UIM provisions by reducing the amount of UM/UIM coverage they contracted to provide by payments received by insureds for separate and distinct insurance benefits. *See Barnett v. American Family Mut. Ins. Co.*, 843 P.2d 1302, 1307 (Colo. 1993).

Medicaid Liens:

In 2009, the Colorado General Assembly amended the Medicaid lien statute at Section 25.5-4-403(3), C.R.S. to provide that the lien is in the greatest amount permitted by federal law. However, Colorado statutes still require that a lien be paid out of the proceeds of a settlement directly and provides no specific methodology for how this should be accomplished. The Colorado statute has been upheld in I.P. ex. rel. Cardenas v. Henneberry, 795 F.Supp.2d 1189 (D. Colo. 2011). Colorado's Medicaid lien extends to that portion of the settlement that represents a recovery for any medical expenses, whether in the past or likely to occur in the future, although the recovery itself is limited to past medical expenses paid by Medicaid.

In *Cardenas v. Henneberry*, 795 F. Supp. 2d 1189 (D. Colo. 2011), the court held that due to the fact that the parties did not allocate the settlement, trial on that issue was necessary. It is suggested that an allocation among all types of damages through a sound methodology, such as a life care plan or from a qualified expert be done in any large Medicaid case. This allocation should be made before the settlement is finalized. In cases involving clients under the jurisdiction of probate courts, the probate court should approve of the allocation and the state should receive notice of the proceeding. In other cases, counsel should consider such strategies as declaratory judgment actions, inviting the state to mediation and/or use of qualified settlement funds. Of course, the claim should be negotiated with the state whenever possible but counsel should be wary of overpayment of claims that take away funds needed for future care.

Hospital and Doctor Liens:

A provider is entitled to recover only the fair and reasonable value of the services provided, which may or may not be the same as the amount of the provider’s bill. *See In re Estate of Reed*, 201 P.3d 1264, 1269 (Colo. App. 2008).

§ 38-27-101, C.R.S. describes liens for hospital care as follows:

Every hospital duly licensed by the department of public health and environment, pursuant to part 1 of article 3 of title 25, C.R.S., which furnishes services to any person injured as the result of the negligence or other wrongful acts of another person and not covered by the provisions of the "Workers' Compensation Act of Colorado" shall, subject to the provisions of this article, have a lien for all reasonable and necessary charges for hospital care upon the net amount payable to such injured person, his heirs, assigns, or legal representatives out of the total amount of any recovery or sum had or collected, or to be collected, whether by judgment, settlement, or compromise, by such person, his heirs, or legal representatives as damages on account of such injuries. The lien attorneys and counselors at law created by section 12-5-119, C.R.S., shall have precedence over and be senior to the lien created under this section. The provisions of this article shall not apply to any hospital charges incurred subsequent to any such judgment, settlement or compromise.

Attorney Liens:

§ 12-5-119, C.R.S. sets forth attorneys' liens for services rendered as follows:
All attorneys- and counselors-at-law shall have a lien on any money, property, choses in action, or claims and demands in their hands, on any judgment they may have obtained or assisted in obtaining, in whole or in part, and on any and all claims and demands in suit for any fees or balance of fees due or to become due from any client. In the case of demands in suit and in the case of judgments obtained in whole or in part by any attorney, such attorney may file, with the clerk of the court wherein such cause is pending, notice of his claim as lienor, setting forth specifically the agreement of compensation between such attorney and his client, which notice, duly entered of record, shall be notice to all persons and to all parties, including the judgment creditor, to all persons in the case against whom a demand exists, and to all persons claiming by, through, or under any person having a demand in suit or having obtained a judgment that the attorney whose appearance is thus entered has a first lien on such demand in suit or on such judgment for the amount of his fees. Such notice of lien shall not be presented in any manner to the jury in the case in which the same is filed. Such lien may be enforced by the proper civil action.

C. Minor Settlement

Colorado's General Assembly has granted minors a number of protections to safeguard their post-injury rights of recovery. Indeed, the Colorado Probate Code provides significant procedural protections for minors in the post-injury claim context. This legislation creates mechanisms for the appointment of a conservator to protect a minor's settlement rights. § 15–14–403, 5 C.R.S. (2001); § 15–14–425(2)(t), 5 C.R.S. (2001). It also provides minors important protections by creating means by which the court may ratify the settlement of a minor's claims. § 15–14–412(1)(b), 5 C.R.S. (2001). Importantly, a parent may not act as a minor's conservator as a matter of right, but only when appointed by the court. § 15–14–413, 5 C.R.S. (2001).

D. Negotiating Directly With Attorneys

Where a plaintiff's attorney knows that the defendant is represented by counsel, the plaintiff's lawyer must receive the prior consent of defendant's counsel before communicating with defendant's insurance adjuster. *See* Colorado Bar Ethics Opinion 73.

E. Confidentiality Agreements

Colorado's Dispute Resolution Act, § 13–22–301, et seq., C.R.S. (2006), sets out the requirements for a settlement agreement to be judicially enforceable. Section 13–22–308(1), C.R.S., provides:

If the parties involved in a dispute reach a full or partial agreement, the agreement upon request of the parties shall be reduced to writing and approved by the parties and their attorneys, if any. If reduced to writing and signed by the parties, the agreement may be presented to the court by any party or their attorneys, if any, as a stipulation and, if approved by the court, shall be enforceable as an order of the court.

See Yaekle v. Andrews, 169 P.3d 196 (Colo. App. 2007).

Parties to a lawsuit may enter into a settlement agreement pursuant to which they agree to keep the terms of such agreement confidential; they may even privately agree not to disclose voluntarily information gained during the course of preparation for trial. However, such private agreement cannot be used to prevent some other party from discovering information that a later court may determine to be discoverable under C.R.C.P. 26(b). *See Hock v. New York Life Insurance Co.,* 876 P.2d 1242 (Colo.1994) (court properly allowed Lewis to be cross-examined on some aspects of the case that is the subject of the limited access order here). And, if the parties elect to file a copy of such an agreement with the court, the burden will be upon them to demonstrate that C.R.C.P. 121 § 1-5 authorizes the court to restrict the public's access to it. *See In re Marriage of Purcell, supra.*; *Anderson v. Home Ins. Co.*, 924 P.2d 1123, 1128 (Colo. App. 1996).

F. Releases

The distinction between a release and a covenant not to sue arose because of the harshness of the common law joint tortfeasor release rule. Where the document included a reservation of the right to sue other joint tortfeasors, evidencing a clear-cut manifestation that the plaintiffs were not receiving full compensation, the document was considered a covenant not to sue rather than an absolute release. *See Cox v. Pearl Inv. Co.*, 450 P.2d 60 (Colo. 1969). Such a covenant does not release joint tortfeasors if the right to sue those tortfeasors is expressly reserved. *See id.* Before the abrogation of the common law rule that the release of one tortfeasor released all, the distinction between a release and a covenant not to sue was significant. *See* §§ 13-50.5-101, *et seq.*, C.R.S. Now, however, the distinction is a technical one of little importance.

A settlement agreement between an employer and an employee may reserve an employee's right to sue his supervisor for any claim, including those claims arising from his employment, where there is specific language in the release to that effect. *See Truong v. Smith*, 28 F. Supp. 626 (D. Colo. 1998). Similarly, a party suing either principal and agent or an employee and

employer may settle with one and reserve the right to maintain the claim against the other. *See Ochoa v. Vered*, 212 P.3d 963 (Colo. App. 2009). However, where no reservation is made in the agreement, both the employer and the employee are released since liability for one defendant is derivative of the liability of the other defendant. *See Arnold v. Colorado State Hosp.*, 910 P.2d 104 (Colo. App. 1995).

G. Voidable Releases

Click to enter – Discuss responsibility; medical v. comp; duty to notify.

A release, like a contract, that is made under duress is not void, but voidable. *See Miller v. Davis' Estate,* 52 Colo. 485, 494, 122 P. 793, 796 (1912); *Restatement (Second) of Contracts* § 175 (1981). Similarly, a release that is induced by way of fraud may also render a release voidable. *See Upson v. Goodland State Bank & Trust Co.*, 823 P.2d 704, 705 (Colo. 1992).

Transportation Law

A. State DOT Regulatory Requirements

Colorado's DOT regulatory information can be found at www.coloradodot.info/. Colorado's "uniform traffic code" can also be found at § 42-4-102, C.R.S., *et seq.*

B. State Speed Limits

Colorado's speed limits are set forth, *inter alia*, in § 42-4-1101, C.R.S. as follows:

(1) No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing.
(2) Except when a special hazard exists that requires a lower speed, the following speeds shall be lawful:
(a) Twenty miles per hour on narrow, winding mountain highways or on blind curves;

(b) Twenty-five miles per hour in any business district as defined in § 41-1-102(11);

(c) Thirty miles per hour in any residence district as defined in § 41-1-102(80);

(d) Forty miles per hour on open mountain highways;

(e) Forty-five miles per hour for all single rear axle vehicles in the business of transporting trash that exceed twenty thousand pounds where higher speeds are posted...

(f) Fifty-five miles per hour on other open highways which are not on the interstate system, as defined in § 43-2-101(2), and are not surfaced, four-lane freeways or expressways;

(g) Sixty-five miles per hour on surfaced, four-lane highways which are on the interstate system, as defined in § 43-2-101(2), or are freeways or expressways;

(h) Any speed not in excess of a speed limit designated by an official traffic control device.

C. Overview of State CDL Requirements

Colorado's Commercial Driver's License Act is § 42-2-401, *et seq.*

The fee for issuance of a commercial driver's license is $34.40. *See* § 42-2-406, C.R.S. Colorado's Commercial Driver's License Manual can be viewed at:

A valid CDL license is required to operate:

1) Any motor vehicle with a Gross Vehicle Weight Rating (GVWR) of 26,001 lbs. or more.
2) Any vehicle that is designed to transport 16 or more passengers including the driver.
3) Any vehicle transporting hazardous material and is required to be placarded in accordance with 49 C.F.R. 172(F).

Under section 42-2-404(1), C.R.S, no person may operate a motor vehicle upon the highways unless that person is 21 years of age and has been issued and is in immediate possession of a commercial driver's license.

No person who drives a commercial motor vehicle may have more than one driver's license. § 42-2-404(2).

Insurance Issues

A. State Minimum Limits of Financial Responsibility

Colorado's minimum liability coverage for bodily injury or death arising out of the use of the motor vehicle is $25,000 to any one person in any one accident and $50,000 to all persons in any one accident and for property damages arising out of the use of a motor vehicle to a limit of $15,000 in any one accident. (Dollar amounts are exclusive of interest and costs). § 10-4-620, C.R.S. (2012).

No insurer may surcharge, refuse to write, cancel, or nonrenew a complying policy of auto insurance based solely on the method of compliance or level of coverage chosen as long as the requirements are met under section 42-3-105(1)(d)(I) or (1)(f), C.R.S.

B. Uninsured Motorist Coverage

Colorado's uninsured motorist coverage is address in section 10-4-609, C.R.S.--Insurance protection against uninsured motorists—applicability, which provides, *inter alia*:

(1)(a) No automobile liability or motor vehicle liability policy insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle shall be delivered or issued for delivery in this

state with respect to any motor vehicle licensed for highway use in this state unless coverage is provided therein or supplemental thereto, in limits for bodily injury or death set forth in section 42-7-103(2), C.R.S., under provisions approved by the commissioner, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness, or disease, including death, resulting therefrom; except that the named insured may reject such coverage in writing.

Motor vehicle rental agreements are excluded from subsection (1)(a).

The coverage in subsection (1)(a) is in addition to any legal liability coverage and shall cover the difference, if any, between the amount of the limits of any legal liability coverage and the amount of the damages sustained, excluding exemplary damages, up to the maximum amount of the coverage obtained pursuant to this section. A single policy or endorsement for uninsured or underinsured motor vehicle coverage issued for a single premium covering multiple vehicles may be limited to applying once per accident. The amount of the coverage available pursuant to this section shall not be reduced by a setoff from any other coverage, including, but not limited to, legal liability insurance, medical payments coverage, health insurance, or other uninsured or underinsured motor vehicle insurance.

Before an auto policy is issued or renewed, the insurer must offer the named insured the right to obtain UM/UIM coverage in an amount equal to the insured's coverage in bodily injury liability limits, but the insurer is *not* required to offer limits higher than the insured's bodily injury liability limits.

Uninsured motorist coverage shall include coverage for damage for bodily injury or death that an insured is legally entitled to collect from the owner or driver of an underinsured motor vehicle. An underinsured motor vehicle is a land motor vehicle, the ownership, maintenance, or use of which is insured or bonded for bodily injury or death at the time of the accident.

An alleged tortfeasor is deemed to be uninsured solely for the purpose of allowing the insured party to receive payment under uninsured motorist coverage, regardless of whether the alleged tortfeasor was actually insured, if:

(a) The alleged tortfeasor cannot be located for service of process after a reasonable attempt to serve the alleged tortfeasor; and

(b)(I) Service of process on the insurance carrier as authorized by section 42-7-414(3), C.R.S., is determined by a court to be insufficient or ineffective after reasonable effort has failed; or

(II)(A) The report of a law enforcement agency investigating the motor vehicle accident fails to disclose the insurance company covering the alleged tortfeasor's motor vehicle; and

(B) The alleged tortfeasor's insurance coverage when the incident occurred is not actually known by the person attempting to serve process.

However, nothing in the above-cited provisions voids the alleged tortfeasor's policy if the alleged

tortfeasor was actually insured.

C. No Fault Insurance

Colorado's No-Fault Insurance statute was repealed in 2003.

D. Disclosure of Limits and Layers of Coverage

Under section 10-4-636, C.R.S.,

(1)(a) An insurer or producer issuing automobile insurance policies shall, as a condition of doing business in Colorado, have on file for public inspection at the division a summary disclosure form that contains an explanation of the major coverages and exclusions of such policies of insurance together with a recitation of general factors considered in cancellation, nonrenewal, and increase-in-premium situations. Each summary disclosure form shall provide notice in bold-faced letters that the policyholder should read the policy for complete details, and such disclosure form shall not be construed to replace any provision of the policy itself.

(b) Every insurer and producer shall update disclosure forms periodically to reflect changes in major coverages and exclusions of such policies of insurance and changes in factors considered in cancellation, nonrenewal, and increase-in-premium situations.

(c) Every insurer and producer or his or her designated agent shall furnish the required disclosure form to applicants for insurance coverage at the time of the initial insurance purchase and thereafter on any renewal when there are changes in major coverages and exclusions or changes in factors considered in cancellation, nonrenewal, and increase-in-premium situations.

(d) An insurer or producer who violates these disclosure requirements is deemed to have engaged in unfair or deceptive acts or practices prohibited by section 10-3-1104 (1)(a)(I) and shall be subject to the penalties provided in sections 10-3-1108 and 10-3-1109.

In litigation, disclosure of policy limits and the policy is required in a parties C.R.C.P. disclosure statement.

E. Unfair Claims Practices

Section 10-3-1104, C.R.S. sets forth the acts or omissions which are considered to be unfair methods of competition or unfair or deceptive acts or practices in the business of insurance. It is a lengthy list of conduct, but includes:
(a) Misrepresentations and false advertising of insurance policies: Making, issuing, circulating, or causing to be made, issued, or circulated, any estimate, circular, statement, sales presentation, omission, or comparison which:

(I) Misrepresents the benefits, advantages, conditions, or terms of any insurance policy; or

(II) Misrepresents the dividends or share of the surplus to be received on any insurance policy; or

(III) Makes any false or misleading statements as to the dividends or share of surplus previously paid on any insurance policy; or

(IV) Is misleading or is a misrepresentation as to the financial condition of any person, or as to the legal reserve system upon which any life insurer operates; or

(V) Uses any name or title of any insurance policy or class of insurance policies misrepresenting the true nature thereof; or

(VI) Is a misrepresentation for the purpose of inducing or tending to induce the lapse, forfeiture, exchange, conversion, or surrender of any insurance policy; or

(VII) Is a misrepresentation for the purpose of effecting a pledge or assignment of or effecting a loan against any insurance policy; or

(VIII) Misrepresents any insurance policy as being a security; or

(b) False information and advertising generally...

F. Bad Faith Claims

Due to the "special nature of the insurance contract and the relationship which exists between the insurer and the insured," an insurer's breach of the duty of good faith and fair dealing gives rise to a separate cause of action arising in tort. *Car v. United Omaha Life Ins. Co.,* 68 P.3d 462, 466 (Colo. 2003) (citing *Farmers Group, Inc. v. Trimble*, 691 P.2d 1138, 1141 (Colo. 1984) ("*Trimble II*"). The basis for tort liability is the insurer's conduct in unreasonably refusing to pay a claim and failing to act in good faith, not the insured's ultimate financial liability. *Trimble II,* 691 P.2d at 1142. Therefore, the fact that an insurer eventually pays an insured's claims will not prevent the insured from filing suit against the insurer based on its conduct prior to the time of payment.

Claims for bad faith breach of insurance contract arise in first-party and third-party contexts. *See Goodson v. American Standard Ins. Co. of Wisconsin*, 89 P.3d 409, 414 (Colo. 2004). First-party bad faith cases involve an insurance company refusing to make or delaying payments owed directly to its insured under a first-party policy such as life, health, disability, property, fire, or no-fault auto insurance. *Farmers Group, Inc. v. Williams,* 805 P.2d 419, 421 (Colo.1991); John H. Bauman, *Emotional Distress Damages and the Tort of Insurance Bad Faith,* 46 Drake L.Rev. 717, 739 (1998). The insurer's actions expose the insured to being personally liable for the monetary obligations underlying the insured's claims.

Third-party bad faith arises when an insurance company acts unreasonably in investigating, defending, or settling a claim brought by a third person against its insured under a liability policy. *Williams,* 805 P.2d at 421; Bauman, *supra,* at 746–47. The insurance company's duty of good faith and fair dealing extends only to the insured, not to the third-party. *Lazar v. Riggs,* 79 P.3d 105, 107 (Colo.2003). In the third-party context, an insurance company stands in a position of trust with regard to its insured; a quasi-fiduciary relationship exists between the

insurer and the insured. *Trimble II,* 691 P.2d at 1141.

An insurer's liability for bad faith breach of insurance contract depends on whether its conduct was appropriate under the circumstances. *Trimble II,* 691 P.2d at 1142; Bauman, supra, at 739. Because of the quasi-fiduciary nature of the insurance relationship in a third-party context, the standard of conduct required of the insurer is characterized by general principles of negligence. *Trimble II,* 691 P.2d at 1142. To establish that the insurer breached its duties of good faith and fair dealing, the insured must show that a reasonable insurer under the circumstances would have paid or otherwise settled the third-party claim. *Trimble II,* 691 P.2d at 1142.

In a first-party context, where the insured has not ceded to the insurer the right to represent his or her interests, there is no quasi-fiduciary duty. *Travelers Ins. Co. v. Savio,* 706 P.2d 1258, 1274 (Colo.1985). Therefore, the standard of conduct is different. In addition to proving that the insurer acted unreasonably under the circumstances, a first-party claimant must prove that the insurer either knowingly or recklessly disregarded the validity of the insured's claim. *Id.* at 1275. This standard of care "reflects a reasonable balance between the right of an insurance carrier to reject a non-compensable claim submitted by its insured and the obligation of such carrier to investigate and ultimately approve a valid claim." *Id.*

The reasonableness of the insurer's conduct must be determined objectively, based on proof of industry standards. *Id.* The aid of expert witnesses is often required in order to establish objective evidence of industry standards. *See Redden v. SCI Colorado Funeral Services, Inc.,* 38 P.3d 75, 81 (Colo.2001) (stating that in most cases of professional negligence the applicable standard must be established by expert testimony because it is not within the common knowledge and experience of ordinary persons).

G. Coverage – Duty of Insured

Insureds have a duty to read their insurance policy. Thus the doctrine of reasonable expectations is inapplicable where the policy's terms are clear and unambiguous. *See Spaur v. Allstate Ins. Co.*, 942 P.2d 1261, 1266 (Colo. App. 1996).

The right to recover under an insurance policy may be forfeited only when, in violation of a policy provision, the insured fails to cooperate with the insurer in some material and substantial respect. *State Farm Mut. Auto. Ins. Co. v. Secrist*, 33 P.3d 1272, 1275 (Colo. App. 2001). The failure to cooperate is abreach only if material and substantial disadvantage to the insurer is proved. *Ahmadi v. Allstate Ins. Co.*, 22 P.3d 576 (Colo. App. 2001).

The purpose of a cooperation clause is to protect the insurer in its defense of claims by obligating the insured not to take any action intentionally and deliberately that would have a substantial, adverse effect on the insurer's defense, settlement, or other handling of the claim. *See Secrist, supra.*

H. Fellow Employee Exclusions

Fellow employee exclusions exempt from liability coverage any bodily injury to an employee of the insured arising out of and in the course of employment by the insured. These exclusions in an automobile liability policy are generally not held to be contrary to Colorado public policy. *See Canal Ins. Co. v. Nix*, 7 P.3d 1038 (Colo. App. 1999) (upholding an employee exclusion in the context of the since-repealed No-Fault Act).