STATE OF COLORADO COMPENDIUM OF LAW

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PRE-SUIT AND INITIAL CONSIDERATIONS

Pre-Suit Notice Requirements

A) **Public entities.** COLO. REV. STAT. § 24-10-109 (2015) governs the notice requirements for any person who claims an injury by a public entity or an employee of a public entity. The claimant must file written notice within 182 days after the date of the injury, even if the cause of action is unknown. Failure to comply with this notice requirement bars any action. *Id.*

B) **Construction Defect Action Reform Act.** The Construction Defect Action Reform Act sets forth notice requirements for actions against construction professionals. COLO. REV. STAT. § 13-20-803.5 (2015). Claimants are required to send written notice by certified mail 75 days before filing an action against a construction professional and 90 days before filing an action relating to commercial property. *Id.* The statute sets forth additional deadlines for certain events following the written notice of claim.

Relationship to the Federal Rules of Civil Procedure

In 1938, the Colorado Bar Association formed a committee to establish the Colorado Rules of Civil Procedure. Sheila K. Hyatt & Stephen A. Hess, Annotation, *Colorado Civil Rules*, COLO. PRAC. SERIES §§ 1.1-1.2 cmts. (4th ed. 2005). The Colorado Rules of Civil Procedure are patterned after the Federal Rules of Civil Procedure. *Id.* Although the Colorado Rules generally track the Federal Rules, they are not precisely parallel in all instances. *Id.* For example, pre-trial procedures encompassed in FRCP Rule 16 are vastly different from the analogous Colorado Rules. *Id.*

Description of the Organization of the State Court System

A) **Judicial selection.** Colorado judges are appointed rather than elected on a political ticket. *See*http://www.courts.state.co.us/Courts/Education/Index.cfm (last visited March 2, 2015). Judicial nominating commissions interview applicants and submit a list of nominees to the governor for final selection. *Id*. The selected judge serves an initial two-year term. *Id.* After the initial term, the judge must be retained by voters at the general election. *Id.*

B) **Structure.** Colorado's judicial system operates on four court levels: County Courts, District Courts, the Court of Appeals, and the Supreme Court. *Id.* County Courts are limited to hearing criminal misdemeanor cases and civil cases where the amount at issue does not exceed $15,000.00. *Id.* District Courts retain unlimited jurisdiction and handle large civil cases and felony criminal cases. *Id.* Additionally, district court judges handle probate and juvenile matters in all Colorado jurisdictions other than Denver County. *Id.* The general assembly, through power granted by the Colorado Constitution, created the Court of Appeals. COLO. REV. STAT. § 13-4-101 *et seq.* (2015). The Court of Appeals hears appeals from the districts courts, probate court, juvenile court, and other administrative agencies. Colorado Judicial Branch, http://www.courts.state.co.us/Courts/Court_Of_Appeals (last visited March 2, 2015).

The Supreme Court reviews decisions by the Colorado Court of Appeals. *Id.* Decisions by the Colorado Supreme Court are binding on all other Colorado state courts. Colorado Judicial Branch, http://www.courts.state.co.us/Courts/Supreme_Court (last visited March 2, 2015).

C) **Alternative dispute resolution.** Attorneys should advise clients of alternative forms of dispute resolution that might reasonably be pursued to attempt to resolve the legal dispute. COLO. R. PROF'L CONDUCT 2.1 (2014). Parties are required to meet and confer within 14 days after the case is at issue and to discuss settlement within 35 days. COLO. R. CIV. P. 16(b)(3), (6) (2014).

The Colorado General Assembly passed the Dispute Resolution Act in 1983, which is found in COLO. REV. STAT. §13-22-301 *et seq.* (2014). The Act conclusively establishes the Office of Dispute Resolution (ODR) within the judicial department and grants to the chief justice the power to appoint an ODR director. Parties may choose to resolve their disputes through ODR or judges may order it in certain cases. ODR is equipped to resolve disputes through mediation, arbitration, and other means. Mediation is defined as intervention in dispute negotiations by a trained neutral third party with the purpose of assisting the parties to reach their own solution. COLO. REV. STAT. § 13-22-302(2.4) (2014). Arbitration means the referral of a dispute to one or more neutral third parties for a decision based on evidence and testimony by the disputants. *Id.*

Colorado repealed the mandatory arbitration statute in 1991. COLO. REV. STAT. § 13-22-401 *et seq.* (2014).

Service of Summons

A) **Person.** A summons may be served on a natural person who is above the age of eighteen years by delivering a copy at the person's usual place of abode, at their place of business, or with the person's family member or authorized agent. COLO. R. CIV. P. 4(e)(1) (2014).

B) **Any corporation.** For service of summons to any form of corporation, partnership, association, cooperative, limited liability company, limited partnership association, trust, organization, or other form of entity that is recognized under the laws of this state or of any other jurisdiction, a copy must be delivered to one of the enumerated agents. If an agent cannot be found, a copy may be delivered to a stockholder, agent, member or principal employee, of the entity, found within the state. COLO. R. CIV. P. 4(e)(4) (2014).

C) **Municipal corporation.** To issue a summons to a public corporation such as a municipal corporation, a copy must be delivered to the mayor, city manager, clerk, or deputy clerk. COLO. R. CIV. P. 4(e)(6) (2014).

D) **State.** Service upon the state must be delivered to the attorney general. COLO. R. CIV. P. 4(e)(9) (2014).

E) **Substitute service.** Service by mail or publication is allowed only in actions affecting specific property or *in rem* proceedings. COLO. R. CIV. P. 4(g) (2014). However, if a party is unable to accomplish service of process by personal service, the party may file a motion for an order of substituted service. COLO. R. CIV. P. 4(f) (2014). The court may order the process to be mailed if it finds that the party has used due diligence to attempt personal service and that further attempts would be to no avail. *Id.*

F) **Waiver.** A defendant who waives service of summons does not waive an objection to venue or jurisdiction. COLO. R. CIV. P. 4(i) (2014).

Statutes of Limitations

A) **Construction and improvements to realty.** Actions against architects, contractors, builders, engineers or inspectors for recovery of damages for design deficiency of real property improvement must be brought within 2 years of the date the claim arises. COLO. REV. STAT. § 13-80-104(1)(a) (2014). The claim begins to accrue when the physical manifestations of the defect are discovered or when these should have been discovered by exercising reasonable due diligence. . *Id.* § 13-80-104(1)(b)(I).

B) **Contract.** All contract actions, including personal contracts and contracts governed by the Uniform Commercial Code, are subject to a 3-year statute of limitations. COLO. REV. STAT. § 13-80-101(1)(a) (2014). However, actions to recover liquidated debt or an unliquidated determinable amount of money, and actions for the enforcement of rights set forth in any instrument securing payment or evidencing debt are subject to a 6-year statute of limitations. COLO. REV. STAT. § 13-80-103.5(1)(a) (2014).

C) **Contribution or indemnity.** Contribution or indemnity actions for a deficiency in the design, planning, supervision, inspection, construction, or observation of construction of any improvement to real property, injury to real or personal property from the deficiency, and injury or wrongful death caused by the deficiency must be brought within 90 days of the time the claim arises. COLO. REV. STAT. § 13-80-104(1)(b)(II)(B) (2014). A claim arises when the third party's claim against the claimant is settled or when final judgment is entered on the third person's claim, whichever comes first. *Id.*§ 13-80-104(1)(b)(II)(A).

D) **Employment.** The statute of limitations for a non-willful violation of the Fair Labor Standards Act is two years. *Redmond v. Chains, Inc.*, 996 P.2d 759, 761 (Colo. App. 2000). A willful violation of the Fair Labor Standards Act is subject to a 3-year statute of limitations. *Id.*

Claims against an employer for personal injury or death must be brought within two years. *See* COLO. REV. STAT. § 13-80-102 (2014).

E) **Fraud.** COLO. REV. STAT. § 13-80-101(1)(c) (2014) governs the statute of limitations for fraud. Fraud actions are subject to a 3-year limitation period, except actions brought under COLO. REV. STAT. § 13-80-102(1)(j) (2014) (referring to private civil actions brought under COLO. REV. STAT. § 42-6-204 (2014)) or 13-80-103(1)(g) (2014) (referring to actions for

negligence, fraud, willful misrepresentation, deceit, or conversion of trust funds brought under Colo. Rev. Stat. § 12-61-303 (Colorado repealed § 12-61-303 in 2013)).

F) **Governmental entities.** Claims against governmental entities are generally subject to a two-year statute of limitations. COLO. REV. STAT. § 13-80-102(1)(h) (2014).

G) **Personal injury.** Tort actions for assault, battery, false imprisonment and false arrest must be commenced within 1 year of the cause of action. COLO. REV. STAT. § 13-80-103(1)(a) (2014). Most general negligence and strict liability claims are subject to a 2-year statute of limitations. COLO. REV. STAT. § 13-80-102(1)(a) (2014).

H) **Professional liability.** In actions against licensed professionals, certificates of review must be filed within 60 days of the service of summons and complaint. COLO. REV. STAT. § 13-20-602(1)(a) (2014). This statutory requirement seeks to eliminate non-meritorious claims. *Id.* at 3(a)(II). The 60-day requirement begins to run from the date of service of process rather than the date the complaint is filed. *Id.* at 1(a).

Attorney malpractice cases may be based on negligence, contract, or breach of fiduciary duty. John W. Grund *et al*., *Personal Injury Practice- Torts and Insurance*, 7 COLO. PRAC. SERIES § 22.9 (2d ed. 2000). The statute of limitations for claims against attorneys will depend on the underlying claim. *Id.* A legal malpractice claim accrues for purposes of the statute of limitations when, "the client discovers, or through use of reasonable diligence should have discovered, the negligent conduct and damage." *Morrison v. Goff*, 74 P.3d 409, 411 (Colo. App. 2003).

I) **Property damage.** Tort actions for property damage arising from motor vehicle use, except for strict liability or failure to warn, must be brought within 3 years. COLO. REV. STAT. § 13-80-101(1)(n)(I) (2014).

Actions against manufacturers or sellers for property damage caused by the manufacture, construction, design, formula, installation, preparation, assembly, testing, packaging, labeling, or sale of any product shall be brought within two years after the claim arises. COLO. REV. STAT. § 13-80-106(1) (2014).

J) **Survival.** The personal representative may bring an action within 1 year after the person's death or before the expiration of the applicable statute of limitations, whichever is greater. COLO. REV. STAT. § 13-80-112 (2014).

K) **Tolling.** The statute of limitations and statute of repose (see below) are tolled if the defendant is under a disability. *Southard By and Through Southard v. Miles*, 714 P.2d 891 (Colo. 1986) (C.R.S. 13-81-103(1)(a) is intended to toll applicable statute of limitations during period of disability, even though it speaks in terms of running applicable statute of limitations and not in terms of tolling it). A person is under a disability if the person is a minor under the age of eighteen, a mental incompetent, or a person under other legal disabilities who does not have a legal guardian. COLO. REV. STAT. § 13-81-101(3) (2014).

There are other circumstances when a statute of limitations may be subject to equitable tolling. *Brodeur v. Am. Home Assur. Co.*, 169 P.3d 139, 149 (Colo. 2007) (determined that, "'[E]quitable tolling of a statute of limitations is limited to situations in which either the defendant has wrongfully impeded the plaintiff's ability to bring the claim or truly extraordinary circumstances prevented the plaintiff from filing his or her claim despite diligent efforts.'")(quoting *Dean Witter Reynolds, Inc. v. Hartman,* 911 P.2d 1094, 1099 (Colo. 1996)).

In product liability actions, the same disabilities will toll the statute of limitations only if the person does not have a spouse or a natural guardian. COLO. REV. STAT. § 13-80-106(2) (2014).

Proper tolling agreements may be drafted as an alternative to statutory requirements for the sole purpose of waiving the statute of repose bar. *First Interstate Bank of Denver, N.A. v. Cent. Bank & Trust Co.*, 937 P.2d 855, 860-61 (Colo. App. 1996).

L) **Wrongful death.** Wrongful death actions must be brought within 2 years after the cause of action accrues. COLO. REV. STAT. § 13-80-102(1)(d) (2014). The cause of action for wrongful death accrues on the date of death. COLO. REV. STAT. § 13-80-108(2) (2014). The 2-year limitation applies regardless of the underlying legal theory. COLO. REV. STAT. § 13-80-102(1) (2014).

Statutes of Repose

A statute of repose bars action after a certain date regardless of when the injury was discovered.

A) **Medical providers.** The statute of repose in Colorado against medical providers is 3 years. COLO. REV. STAT. § 13-80-102.5(1) (2014). However, there are four exceptions to this rule: (1) for known concealment; (2) for unauthorized foreign object in the body; (3) when the physical injury and its cause are not known or could not have been known by exercising reasonable diligence; and (4) when the action is brought by or on behalf of a minor under eight years of age who was under six years of age on the date of the act or omission for which the action is brought, in which case the action may be maintained at any time before attaining eight years of age; or a person otherwise under a disability. *Id.* at 3(a),(c).

B) **Construction and products claims.** Actions for personal or property damage against architects, contractors, builders, engineers or inspectors for recovery of damages for design deficiency are subject to a 6-year statute of repose after substantial completion of real property improvement. COLO. REV. STAT. § 13-80-104(1)(a) (2014). Actions arising in the fifth or sixth year after substantial completion must then be brought within 2 years. *Id.* § 13-80-104(2). The statute of repose against land surveyors is 10 years. COLO. REV. STAT. § 13-80-105 (2014). A 7-year statute of repose applies to products liability actions. COLO. REV. STAT. § 13-80-107(b) (2014).

Venue Rules

A) Principles governing venue are set forth primarily in COLO. R. CIV. P. 98 (2014). Generally, actions may be tried in the county where the defendant resides, where the plaintiff resides when service is made upon the defendant in such county, or in a county where the defendant may be found. COLO. R. CIV. P. 98(c) (2014).

B) The court may change the place of trial if it is inconvenient for the witnesses or if existing circumstances make trial in that county inappropriate. COLO. R. CIV. P. 98(f)(2) (2014). This is not to be confused with the doctrine of *forum non conveniens*, which allows a court to refuse taking jurisdiction when there is a more appropriate forum exists. *State, Dep't of Highways v. Dist. Court, City & Cty. of Denver*, 635 P.2d 889, 891 (Colo. 1981).

C) If there are multiple parties on one side of the case, consent from the other parties must be obtained before a motion for change of venue can be granted. COLO. R. CIV. P. 98(j) (2014). Motions for venue change must be made in the time specified in COLO. R. CIV. P. 12(a) (2014) to avoid waiving the right to change venue. COLO. R. CIV. P. 98(e)(1) (2014).

NEGLIGENCE

Comparative Fault/Contributory Negligence

A) **Modified comparative negligence.** Colorado follows a modified comparative negligence theory. COLO. REV. STAT. § 13-21-111 (2014). A plaintiff's recovery is reduced but not barred if the plaintiff's negligence was not as great as the negligence of the defendant. *Id.* A plaintiff may also recover against a co-defendant if the plaintiff's negligence is less than fifty percent. *Id.*

B) **Product liability.** Product liability actions are governed by a pure comparative fault statute. COLO. REV. STAT. § 13-21-406 (2014). The plaintiff's fault is compared with the fault of other parties and nonparties. The plaintiff's recovery is not barred so long as the plaintiff is not entirely at fault, but the damage award may be reduced in accordance with the degree of fault attributed to the plaintiff. *Id.*

Exclusive Remedy: Worker's Compensation Protections

The Workers' Compensation Act of Colorado is set forth in COLO. REV. STAT. § 8-40-101 *et seq.* (2014). The Act is designed to speedily provide compensation for injured workers without litigation. This is achieved through the Act's exclusivity rule. When an employer has complied with the Act, the employee is limited to recovery under the workers' compensation claim and may not sustain other common law tort claims against the employer for injuries within the purview of the Act. Courts liberally construe injuries to allow employees to recover. *Lunsford v. Sawatsky*, 780 P.2d 76, 78 (Colo. App. 1989). The opposite is true for employees seeking to avoid the exclusivity rule in order to bring a common law tort claim against the employer. *Wright v. Dist. Court, Jefferson Cty.*, 661 P.2d 1167, 1169 (Colo. 1983).

A) **Exclusivity.** Actions by heirs or other dependents are subject to the exclusivity provisions as well. *Henderson v. Bear*, 968 P.2d 144, 146 (Colo. App. 1998). Claims for wrongful discharge or violation of the Colorado Anti-Discrimination Act are not barred by the exclusivity rule.

B) **Dual capacity.** The dual capacity doctrine, which allows tort claims to be brought against an employer who was acting outside of its capacity as an employer, has been adopted by the Colorado Supreme Court. *Wright*, 661 P.2d at 1171.

C) **Assumption of risk.** The Act provides that assumption of risk is not a defense to an action for damages against the employer of servant of the employer for personal injuries or death sustained by an employee while engaged in the line of duty. COLO. REV. STAT. § 8-41-101(1) (2014).

Indemnification

A) **Distinguished from contribution.** Indemnification and contribution are two separate concepts. Contribution rests on the idea that tortfeasors should not be required to pay more than their share of responsibility for damages. *See Daybreak Const. Specialties, Inc. v. Saghatoleslami*, 712 P.2d 1028, 1034 (Colo. App. 1985). Indemnification refers to a preexisting legal relationship or duty of one tortfeasor to hold the other harmless for the injuries. *Pub. Serv. Co. v. Dist. Court, City & Cty. of Denver*, 638 P.2d 772, 776 (Colo. 1981). While contribution will distribute the loss between tortfeasors, indemnification requires another to fully reimburse the person who paid for the loss. Contracts may provide for indemnification. *Williams v. White Mtn. Constr. Co.*, 749 P.2d 423, 426 (Colo. 1988).

B) **No indemnity between joint tortfeasors.** Colorado adopted the Uniform Contribution Among Tortfeasors Act in 1977, which specified the right of contribution in certain situations and thus eliminated the need for indemnity between joint tortfeasors. Absent a contractual agreement, indemnification does not exist between joint tortfeasors. *Brochner v. Western Ins. Co.*, 724 P.2d 1293, 1299 (Colo. 1986). Indemnification is still recognized in vicarious liability situations when liability has been imputed. Contribution is available among joint tortfeasors who are co-conspirators and is also available when a defendant settles with the plaintiff and does not designate another tortfeasor as a nonparty.

Joint and Several Liability

In 1986, Colorado enacted a new statute which eliminated common law joint and several liability. COLO. REV. STAT. § 13-21-111.5 (2014). The statute creates pro-rata liability between joint tortfeasors, but no tortfeasor can be liable for an amount greater than the fault attributed to that defendant. An exception to this rule exists for joint liability in conspiracy situations. COLO. REV. STAT. § 13-21-111.5(4) (2014). In conspiracy situations, joint liability is limited to the defendants who engaged in the conspiracy. *Resolution Trust Corp. v. Heiserman*, 898 P.2d 1049, 1054 (Colo. 1995). Additionally, the court held that for purposes of joint and several liability, an individual may "conspire" to be negligent. *Id.* at 1055-56.

Strict Liability

Strict liability may be imposed even in situations where the defendant exercised a standard of reasonable care. *Lui v. Barnhart*, 987 P.2d 942, 944 (Colo. App. 1999). Colorado imposes strict liability in certain situations in order to limit the public's exposure to dangerous situations or products. *Bradford v. Bendix-Westinghouse Automotive Air Brake Co.,* 517 P.2d 406 (Colo. App. 1973) (focus of strict liability in tort is not on conduct of defendant, but rather on the product itself). For example, railroad companies are held strictly liable for any fire caused by their operations. COLO. REV. STAT. § 40-30-103 (2014). A person who keeps a wild animal may be strictly liable for any injuries caused by the animal. *Collins v. Otto*, 369 P.2d 564, 566 (Colo. 1962).

A) **Activities subject to strict liability.** Colorado classified blasting activities as inherently dangerous and subject to strict liability. *Garden of the Gods Village v. Hellman*, 294 P.2d 597, 602 (Colo. 1956).

A person may be held strictly liable for removing lateral support to the property of another, that results in subsidence of the land, if the injured party can prove that the weight of the buildings and artificial additions did not materially increase the pressure and, thus, were not the proximate cause of the damage. *Vikell Investors Pac., Inc. v. Kip Hampden, Ltd.*, 946 P.2d 589, 593 (Colo. Ct. App. 1997).

B) **Restatement.** Colorado adopts the strict liability rules found in RESTATEMENT (SECOND) OF TORTS § 402A. *Hiigel v. Gen. Motors Corp.*, 544 P.2d 983, 987 (Colo. 1975). Colorado modified RESTATEMENT § 402A by passing the 1977 Product Liability Act. The Colorado Supreme Court has adopted RESTATEMENT (SECOND) OF TORTS § 402B to recognize strict liability for misrepresentation, to the extent the rule does not conflict with Colorado's Product Liability Act. *Am. Safety Equip. Corp. v. Winkler*, 640 P.2d 216, 222 (Colo. 1982).

C) **Learned intermediary doctrine.** In contrast to other jurisdictions, Colorado courts have given little attention to the learned intermediary doctrine. John W. Grund et al., *Personal Injury Practice- Torts and Insurance*, 7 COLO. PRAC. § 24.46 (2d ed. 2000). The learned intermediary doctrine is a defense to a products liability claim that provides that a drug manufacturer has a duty to provide adequate warnings to the physician. *Id.* Generally, manufacturers do not have a duty to warn the patient directly. *Id.*

Willful and Wanton Conduct

A) **Definition.** Exemplary damages may be recovered upon a showing of willful or wanton conduct. COLO. REV. STAT. § 13-21-102(1)(a) (2014). Willful or wanton conduct is defined as "conduct purposefully committed which the actor must have realized as dangerous, done heedlessly and recklessly, without regard to consequences, or of the rights and safety of others, particularly the plaintiff." COLO. REV. STAT. § 13-21-102(1)(b) (2014).

B) **No contribution.** In Colorado, no right to contribution exists for a tortfeasor who intentionally, willfully, or wantonly caused or contributed to injury or death of another. COLO. REV. STAT. § 13-50.5-102(3) (2014).

C) **Statutory immunity.** Willful or wanton conduct may affect statutory immunity. For example, individuals who discharge hazardous materials willfully and wantonly are not granted immunity from civil liability that arises from providing assistance related to the discharge of the hazardous materials. COLO. REV. STAT. § 13-21-108.5 *et seq.* (2014). Also, government employees may lose immunity if their conduct is willful and wanton. COLO. REV. STAT. § 24-10-118(2)(a) (2014).

DISCOVERY

Electronic Discovery Rules

Colorado does not have a specific statute governing electronic discovery. However, both the Federal and Colorado Rules of Civil Procedure have been revised in various ways to accommodate the emergent field of eDiscovery.

A) **Federal Rules.** The Federal Rules of Civil Procedure require that lawyers provide in their initial disclosures a description of all electronically-stored information that the disclosing party has in its possession. FED. R. CIV. P. 26(a)(1)(A)(ii) (2014). The rule places the specific limitation that a party need not provide discovery of electronically-stored information from sources it identifies as not reasonably accessible because of undue burden or cost. FED. R. CIV. P. 26(b)(2)(B). Lastly, the rule requires that the parties state in the discovery plan any issues pertaining to discovery of electronically stored information. *Id.*

B) **Colorado Rules.** The Colorado Rules of Civil Procedure, on the other hand, require disclosures that include "…a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party…" COLO. R. CIV. P. 26(a)(1)(B) (2014). Absent from the Colorado rules is the limitation on discovery of electronically-stored information set forth in the FRCP Rule 26. The Colorado Rules also lack a specific requirement that parties state electronic discovery issues in the discovery plan.

Expert Witnesses

A) **Forms of disclosure—reports required.** Generally, experts fall into one of three categories: testifying expert, occupational expert, or non-testifying expert. Sheila K. Hyatt & Stephen A. Hess, *Colorado Civil Rules*, 4 COLO. PRAC. SERIES R. 26 (4th ed. 2005). A testifying expert is one who a party expects to call as a witness. *Id.* An occupational expert is one who observed the events giving rise to litigation and may be called to testify, but their testimony is based on normal occupational duties rather than on opinions formulated in preparation of litigation. *Id.* Non-testifying experts are those retained in anticipation of litigation but who do not give testimony at trial. *Id.* The opinions of non-testifying experts are not given the same degree of work product protection as that of testifying experts. *Id.*

Disclosure. Colorado law mandates pre-trial disclosure of the identity of every potential expert who may be called as a witness. COLO. R. CIV. P. 26(a)(2) (2014). The disclosing party must also submit a report concerning testifying experts. COLO. R. CIV. P. 26(a)(2)(B) (2014). The report must include the expert's opinions, support for those opinions, exhibits, the expert's qualifications, the expert's compensation, and the expert's recent testimony. *Id.* Unlike the Federal Rules, which requires a full report prepared and signed by the testifying expert, the Colorado Rules allow for a summary report prepared by someone other than the expert and signed by the attorney. COLO. R. CIV. P. 26 (2012). Mandated disclosure requirements are less stringent for occupational experts. The report must state the qualifications and opinions of the witness and the basis for those opinions. Reports or opinions of non-testifying experts do not have to be disclosed and are often protected under the work product doctrine.

B) **Rebuttal witnesses.** Rebuttal expert testimony must be disclosed 77 days before the trial date. COLO. R. CIV. P. 26(a)(2)(C)(III) (2014).

C) **Discovery of expert work product.** A party may depose a testifying expert after proper disclosures have been made. Generally, the opinions or reports of non-testifying experts may be discovered only as provided in COLO. R. CIV. P. 35(b) (2014) (report of an examining physician) or upon a showing of exceptional circumstances, which make it impracticable for the opposing party to obtain the information by other means.

Non-Party Discovery

Most discovery rules apply only to parties to the litigation. However, non-parties may be deposed. COLO. R. CIV. P. 30 (2014). Non-parties also may be ordered to produce documents or allow inspection of land. COLO. R. CIV. P. 34(c) (2014).

A) **Subpoenas, respondents, and time frames.** Most of the rules governing subpoenas are contained in COLO. R. CIV. P. 45 (2014). A subpoena may be used to compel the attendance of witnesses. There are two primary types of subpoenas. The subpoena *ad testificandum* orders a witness to show up and give live testimony at a specified time and place. The subpoena *duces tecum* orders a witness to produce documents and give live testimony.

B) **Appearance and production.** Under COLO. R. CIV. P. 45(a)-(b) (2014), a deposition subpoena may be used to order a witness to appear and produce documents. The witness receiving the subpoena request may, within 14 days, serve a written objection to the attorney. *Id.* 45(d)(1). In practice, once the witness produces the documents requested in the subpoena, a motion to quash the subpoena may be made if there is no need for the witness to appear for a deposition.

C) **Geographic limitations.** A Colorado resident may be required to attend a deposition only in the county where he or she resides, is employed or transacts business in person, or such other convenient place as directed by court order. COLO. R. CIV. P. 45(e)(1) (2014). The subpoena may be served, however, anywhere within the state. COLO. R. CIV. P. 45(b)(2) (2014). Nonresidents of Colorado may be required to attend if within 40 miles of place of

service or in county where they reside, are employed, or transact business in person, or such other convenient place as the court directs. COLO. R. CIV. P. 45(e)(2) (2014).

D) Subpoenas may be issued by the clerk of the court or by an attorney who has entered an appearance in the case. COLO. R. CIV. P. 45(a)(2) (2014). Subpoenas must be personally served on the witness anywhere within the state, at least 48 hours before the date on which appearance is required, and the witness must receive a copy of the subpoena as well as the attendance fee and mileage fee. COLO. R. CIV. P. 45(b)(1)(A) (2014).

Privileges

A) **Attorney-client privilege.** The attorney-client privilege is codified in COLO. REV. STAT. § 13-90-107(1)(b) (2011). The elements of attorney-client privilege include: (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made is a member of the bar of a court, or his subordinate; (3) the communication is made in connection with the person's role as an attorney; (4) the communication relates to a fact of which the attorney was informed by his client, without the presence of strangers, for the purpose of securing primarily either an opinion on law or legal services or assistance in some legal proceeding, and not for the purpose of committing a crime or tort; and (5) the privilege has been claimed and not waived by the client. *In re Grand Jury 90-1*, 758 F. Supp. 1411, 1413 (D. Colo. 1991).

1) **Exceptions.** The attorney-client privilege is not absolute. The privilege will not apply if there is an applicable exception such as crime-fraud. *Law Offices of Bernard D. Morley, P.C. v. MacFarlane*, 647 P.2d 1215, 1220 (Colo. 1982).

2) **Burden.** The burden of establishing the privilege rests with the person claiming the privilege. *People v. Dist. Court, Cty. of Adams*, 797 P.2d 1259, 1262 (Colo. 1990). If the party seeking discovery claims the information falls within an exception to the attorney-client privilege, the party must make a prima facie showing that the exception is applicable. *Caldwell v. Dist. Court, City & Cty. of Denver*, 644 P.2d 26, 33 (Colo. 1982).

B) **Statements.** Statements of fact are not protected by attorney-client privilege. *People v. Trujillo*, 144 P.3d 539, 545 (Colo. 2006). Unprivileged facts cannot become privileged merely by incorporating those facts into a communication with an attorney. *Gordon v. Boyles*, 9 P.3d 1106, 1124 (Colo. 2000). Moreover, the privilege does not protect any underlying or unprivileged facts that are incorporated into a client's communication to his attorney. *Id.* at 1123.

C) **Work product.** In 1970, Colorado adopted a work product rule which parallels the leading U.S. Supreme Court decision of *Hickman v. Taylor*, a decision later codified in the Federal Rules of Civil Procedure. *Hawkins v. Dist. Court, Fourth Judicial Dist.*, 638 P.2d 1372 (Colo. 1982). Work product refers to documents prepared in anticipation of litigation. These materials are protected from discovery in most cases. Work product may be discovered only "upon a showing that the party seeking discovery has substantial need of

the materials in preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means." COLO. R. CIV. P. 26(b)(3) (2014). The court may still protect against the mental impressions, conclusions, opinions, or legal theories of an attorney when ordering discovery of work product. *Id*.

Work product may be prepared by someone other than the attorney, but must be something more than documents prepared in the ordinary course of business. *Hawkins*, 638 P.2d at 1379.

D) **Self-critical analysis.** Self-critical privilege seeks to protect internal corporate documents which may contain damaging self-criticism. Colorado has recognized a self-critical analysis privilege, but only given in peer reviews of university faculty or of hospital personnel, affirmative action studies, and certain internal investigatory reports. *Combined Commc'n Corp., Inc. v. Pub. Serv. Co. of Colo.*, 865 P.2d 893, 898 (Colo. App. 1993). Therefore, the self-critical analysis does not protect against internal corporate reviews of safety regulations prior to an incident. *Id*.

E) **Other privileges.** Colorado recognizes that communications with a spouse, clergyman, physician or nurse, certified public accountant, psychologist, and social worker are privileged. COLO. REV. STAT. § 13-90-107 *et seq.* (2014). The Colorado Supreme Court has refused to recognize a privilege for news reporters. *Gagnon v. Dist. Court, Cty. of Freemont*, 632 P.2d 567, 569 (Colo. 1981). However, government agencies may withhold information when disclosure would be harmful to the public interest. *Martinelli v. Dist. Court, City & Cty. of Denver*, 612 P.2d 1083, 1088 (Colo. 1983).

Requests to Admit

A request for admission is a device designed to expedite the trial process by eliminating the need to prove uncontested matters through the admissions of an opposing party. Requests for admissions may extend to any matter within the scope of discovery. COLO. R. CIV. P. 36(a) (2014). The party who has been served with a request will be deemed to admit the matter unless the party provides a written answer or objection within 35 days. *Id.* Parties may deny the matter, indicate the reasons they cannot admit or deny the matter, or state the reasons for their objections. *Id.* A party will not be penalized for denying the matter, if the denial is made in good faith. If the denial is not made in good faith, the other party is entitled to reasonable expenses, including attorney's fees, resulting from litigation on this matter. COLO. R. CIV. P. 37(c) (2014). Admissions made pursuant to COLO. R. CIV. P. 36 constitute admissions for the pending action only and may not be used in other proceedings. A party is limited to a maximum of 20 written requests for admissions. COLO. R. CIV. P. 26(b)(2)(E) (2014).

EVIDENCE, PROOFS & TRIAL ISSUES

Accident Reconstruction

As long as sufficient foundation exists, courts may allow expert testimony from police officers concerning the speed of a vehicle and explanations of how the accident occurred, based upon his or her on-the-scene investigation. *People v. Jiminez,* 528 P.2d 913, 914 (Colo. 1974).

Appeal

Prior to appeal and within 14 days a judgment is entered, a party may move for: (1) a new trial; (2) judgment notwithstanding the verdict; (3) amendment of findings; or (4) amendment of judgment. The court may make a motion on its own initiative. COLO. R. CIV. P. 59 (2014).

A) **Final judgment.** The term "judgment" includes a decree and order to or from which an appeal lies. COLO. R. CIV. P. 54 (2014). A judgment is final when it disposes of the entire litigation on the merits. *Hierath-Prout v. Bradley*, 982 P.2d 329, 330 (Colo. App. 1999). To determine if an order is a final judgment for purposes of appeal, the focus should be on the legal effect of the order rather than on the form. *Levine v. Empire Sav. & Loan Ass'n,* 557 P.2d 386, 387 (Colo. 1976). A ruling on an interlocutory question of law cannot be certified as a final judgment for appeal. *State ex rel. Salazar v. Gen. Steel Domestic Sales, LLC,* 129 P.3d 1047, 1050 (Colo. App. 2005).

B) **Appealable actions.** The Colorado Appellate Rules specify the actions which may be appealed. Colo. App. R. 1(a) (2014). The rule provides for appellate review of the following actions:

> 1) A final judgment of any district, superior, probate, or juvenile court in all actions or special proceedings;
>
> 2) A judgment and decree in a proceeding concerning water rights;
>
> 3) An order granting or denying a temporary injunction; and/or
>
> 4) An order appointing or denying the appointment of, or sustaining or overruling a motion to discharge, a receiver.

Id. 1(a)(1)-(4) (2014).

C) **Notice of Appeal.** In civil cases, where appeal is permitted by law as of right from a trial court to the appellate court, notice of appeal must be filed with the appellate court and a copy served upon the trial court within 49 days of entry of judgment. Colo. App. R. 4(a) (2014). Moreover, the filing of notice of appeal is mandatory for appellate review of a lower court decision. *Bosworth Data Servs., Inc. v. Gloss*, 587 P.2d 1201, 1202 (Colo. App. 1978).

"Biomechanical" Testimony

If scientific, technical, or other specialized knowledge (such as "biomechanical" testimony) will assist the trier of fact with understanding the evidence or with determining 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. COLO. R. EVID. 702 (2014).

A) **Balancing.** In determining reliability and validity of the underlying substance of the expert's opinion, the trial court must balance the reliability of the scientific principles upon which the testimony rests with the likelihood that admission of the evidence may overwhelm or mislead the jury. COLO. R. EVID. 703 (2014).

B) **Applicability of *Frye* test.** In Colorado, the *Frye* test for admissibility of expert scientific evidence has been used only when the evidence sought to be introduced is based on novel scientific devices involving the evaluation of physical evidence. *Schultz v. Wells*, 13 P.3d 846, 849 (Colo. App. 2000).

Collateral Source Rule

At common law, the collateral source rule provided that compensation received from a collateral source did not diminish the damages recoverable from the wrongdoer. The purpose of this rule was to prevent the defendant from receiving credit for the plaintiff's compensation from another source, such as insurance. *Colo. Permanente Med. Group, P.C. v. Evans*, 926 P.2d 1218, 1230 (Colo. 1996). The collateral source rule is codified in COLO. REV. STAT. § 13-21-111.6 (2014). However, the statute limits the circumstances in which a plaintiff can receive double compensation for an injury. *Id.* The statute provides that damage awards must be reduced by the amount the plaintiff has been or will be compensated by another person, corporation, insurance company, or fund. *Id.* This limitation, however, does not apply if the plaintiff is being compensated as a result of a contract entered into. *Id.*

Convictions

A) **Criminal.** 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 inadmissible in civil actions. COLO. REV. STAT. § 13-90-101 (2014). Colorado's statute governing admissibility of felony convictions for impeachment purposes is quite different from the Federal Rules of Evidence. In Colorado, felony convictions are admissible to impeach a testifying criminal defendant without regard to balancing the probative value and unfair prejudice. *Id.* The statute does not prohibit evidence of misdemeanors or pending charges from being admitted if they are offered for a permissible purpose. *People v. Bowman*, 669 P.2d 1369, 1375 (Colo. 1983).

B) **Traffic.** Convictions for traffic violations are not admissible in civil cases. COLO. REV. STAT. § 42-4-1713 (2014).

Day in the Life Videos

Colorado case law is scarce regarding the admissibility of day in the life videos. Therefore, it is instructive to examine federal law. According to the Tenth Circuit, admissibility of a videotape of a person's behavior must be determined on a case-by-case basis. *Durflinger v. Artiles*, 727 F.2d 888, 894 (10th Cir. 1984). Moreover, Colorado federal courts have held that day in the life films should be examined outside the presence of the jury to determine if the probative value outweighs any prejudicial effect under FED. R. EVID. 403 (2014). *Bannister v. Town of Noble, Okla.*, 812 F.2d 1265, 1270 (10th Cir. 1987).

Dead Man's Statute

The Dead Man's Statute is codified in COLO. REV. STAT. § 13-90-102 (2014). The statute governs testimony about prior oral statements made by a person now incapable of testifying. *Id.* The statute permits such testimony in four situations: (1) if the statement was made under oath at a time when such person was competent to testify; (2) if the statement is corroborated by material evidence of independent and trustworthy nature; (3) the opposing party introduces evidence of related communications.; or (4) such party or person testifies against his or her own interests. *Id.* § 13-90-102(1)(a)-(c).

Medical Bills

Evidence of furnishing or offering to pay medical or hospital expenses is not admissible to prove liability for the injury. COLO. R. EVID. 409 (2014). However, plaintiffs may recover the reasonable value of past and present medical expenses as part of the damages award. *Palmer Park Gardens, Inc. v. Potter*, 425 P.2d 268, 272 (Colo. 1967). Out of pocket expenditures may provide some evidence of the reasonable value of the medical expenses. *Id.*

Offers of Judgment

Offers of judgment, formerly governed by COLO. R. CIV. P. 68, are no longer available. Colorado's Offer of Settlement statute, contained in COLO. REV. STAT. § 13-17-202 (2014), replaced the offer of judgment procedure in 1990. The statute provides, that a plaintiff may, at any time more than 14 days prior to the commencement of trial, serve an offer of settlement on defendant. *Id.* If the final judgment in favor of plaintiff exceeds the amount of the offer of settlement, the plaintiff shall be awarded actual costs accruing after the offer of settlement. *Id.* Similarly, a defendant can make an offer of settlement and, if the amount of the judgment is less than the offer of settlement, the defendant shall be awarded actual costs accruing after the offer of settlement. *Id.* The award of actual costs does not include an award of attorney's fees.

Offers of Proof

An offer of proof must be made upon an evidentiary ruling which affects a substantial right in order to preserve the issue for appeal, unless the substance of the evidence was apparent from the context. COLO. R. EVID. 103(a)(2) (2014). A specific and timely objection must be made upon a ruling which admits evidence. *Id.* 103(a)(1). Colorado Rule 103 is identical to its Federal Rule

analogue. The standard for substantiality is if the reviewing court "can say with fair assurance that, in light of the entire record of the trial, the error did not substantially influence the verdict or impair the fairness of the trial." *People v. Gaffney*, 769 P.2d 1081, 1088 (Colo. 1989). Harmless errors may not serve as the basis for appeal. *People v. Caldwell*, 43 P.3d 663, 671 (Colo. App. 2001). Evidentiary arguments must be conducted outside the presence of the jury. COLO. R. EVID. 103(c) (2014).

Prior Accidents

Evidence of a person's prior similar accidents is not admissible to prove the character of a person in order to show he or she acted in conformity with those acts. COLO. R. EVID. 404(b) (2014). Evidence of prior similar accidents may be admissible for other purposes when the probative value outweighs any prejudicial effect. *Jacobs v. Commonweath Highland Theaters, Inc.*, 738 P.2d 6, 9 (Colo. Ct. App. 1986). Prior accidents may be relevant to show notice or for purposes of exemplary damages. *Id.*

Seat Belt and Helmet Use Admissibility

A) **Seat belt.** Colorado's seat belt law imposes a standard of care and provides that evidence showing the failure to wear a seat belt may be evidence of a claimant's failure to mitigate damages for purposes of pain and suffering. COLO. REV. STAT. § 42-4-237(7) (2014). A plaintiff may not rebut by claiming the failure to wear a seat belt was reasonable. CJI-Civ.4th 5:2 (2014).

B) **Helmet.** In a comparative negligence case, the Colorado Supreme Court disallowed evidence of a motorcyclist's failure to wear a helmet. Colorado does not have a mandatory helmet law. *Dare v. Sobule*, 674 P.2d 960, 963 (Colo. 1984).

Spoliation

If a party intentionally or negligently destroys evidence in a civil case, the trial court may provide the jury with an adverse inference instruction as a sanction for the spoliation. *People ex rel. A.E.L.*, 181 P.3d 1186, 1197 (Colo. App. 2008). The purpose of adverse inference instructions is to deter parties from destroying evidence and to restore the prejudiced party to the position it would have been in had no spoliation occurred. *Aloi v. Union Pac. R.R. Corp.*, 129 P.3d 999, 1003 (Colo. 2006).

Subsequent Remedial Measures

Evidence of subsequent remedial measures is inadmissible to prove the defendant's negligence. COLO. REV. STAT. § 13-21-404 (2014). Evidence of subsequent remedial measures may be admissible for other purposes such as impeachment, showing notice, or ownership and control. COLO. R. EVID. 407 (2014).

Use of Photographs

Properly authenticated photographs may be admissible in evidence. Photographs may be authenticated by testimony that offers a fair and accurate representation of the scene. *People v. Taylor*, 804 P.2d 196, 201 (Colo. App. 1990). Merely proffering photographs without authenticating testimony, on the other hand, is insufficient to admit photographs into evidence. *People v. Thiery*, 780 P.2d 8, 10 (Colo. App. 1989).

Gruesome photographs of a crime or tort victim are subject to the balancing test under COLO. R. EVID. 403 (2014). In light of the preference for admissibility, as long as evidence has probative value, it is generally admissible. *People v. Scarlett*, 985 P.2d 36, 42 (Colo. App. 1998).

DAMAGES

Caps on Damages

A) **Noneconomic loss.** For claims arising after January 1, 2008, noneconomic damages are generally capped at $250,000.00, though that number can increase to $500,000.00 if the court finds justification upon clear and convincing evidence. COLO. REV. STAT. § 13-21-102.5(3)(a)-(c) (2014). Noneconomic loss or injury is defined as, "non-pecuniary harm for which damages are recoverable by the person suffering the direct or primary loss or injury, including pain and suffering, inconvenience, emotional stress, and impairment of the quality of life." *Id.* § 13-21-102.5(2)(b). Compensatory damages for physical impairment or disfigurement are not limited by this statute. *Id.* § 13-21-102.5(5).

B) **Derivative noneconomic loss.** Derivative noneconomic loss recovery is limited to $250,000.00. COLO. REV. STAT. § 13-21-102.5(3)(b) (2014). Derivative noneconomic loss is defined as, "non-pecuniary harm or emotional stress to persons other than the person suffering the direct or primary loss or injury." *Id.* §13-21-102.5(2)(a).

C) **Government entities.** Damages recoverable against governmental entities are limited to $350,000.00 for injury to one person in a single occurrence and $960,000 for injury to two or more persons in a single occurrence. COLO. REV. STAT. § 24-10-114(1)(a)-(b) (2014).

D) **Health Care Availability Act.** The Health Care Availability Act limits damage recovery against health care professionals and institutions to a total of $1,000,000.00, which includes punitive damages. COLO. REV. STAT. § 13-64-101, *et seq*. (2014). The noneconomic loss limit of $250,000.00 is also included in the $1,000,000.00 limitation. *Id.* Upon a showing of good cause, a judge may increase the $1,000,000.00 cap. *Id.*

Calculation of Damages

A) **Contract actions.** The Colorado Supreme Court adopts the standard set forth in RESTATEMENT (SECOND) OF CONTRACTS § 347 (1981) to measure damages for breach of contract cases. *Transamerica Premier Ins. Co. v. Brighton Sch. Dist.*, 940 P.2d 348, 356 (Colo. 1997). Damages for breach of contract are measured by the loss in value to the

injured party plus incidental loss caused by the breach, less other loss avoided by not having to perform the contract. *Id.* Special damages may be recovered when the defendant could have reasonably anticipated that special damages would result if the contract was breached. *Id.*

B) **Tort.** In tort actions, an injured party is generally permitted to recover damages for the natural and probable consequences of the tort. *Vanderbeek v. Vernon Corp.*, 25 P.3d 1242, 1244 (Colo. App. 2000). This includes economic and noneconomic losses. The actual measure of damages differs for each specific tort. *Id.*

C) **Certainty.** Generally, a plaintiff must prove damages with some certainty in order to recover. *Irish v. Mtn. States Tel. & Tel. Co.*, 500 P.2d 151, 154 (Colo. App. 1972). The rule does not require damages to be proven with mathematical certainty. *Pomeranz v. McDonald's Corp.*, 843 P.2d 1378, 1382 (Colo. 1993). The plaintiff, however, must prove the fact of damages and provide evidence to support a reasonable estimation of the loss sustained. *Hoff & Leigh, Inc. v. Byler*, 62 P.3d 1077, 1079 (Colo. App. 2002). So long as competent proof of damages exists, the determination of the amount of damages is decided by the trier of fact. *Jones v. Cruzan*, 33 P.3d 1262, 1265 (Colo. App. 2001).

Available Items of Personal Injury Damages

A) **Past, present, and future medical bills.** Past and present medical expenses may be recovered by the plaintiff. Damages awards should be measured by the reasonable value of medical expenses rather than the actual amount paid. Actual expenditures may be admissible to show evidence of reasonable value. *Kendall v. Hargrave*, 349 P.2d 993, 994-95 (Colo. 1960).

B) **Hedonic (loss of life enjoyment) damages.** Evidence of loss of life enjoyment must be specific to the plaintiff. *Scharrel v. Wal-Mart Stores, Inc.*, 949 P.2d 89, 92 (Colo. App. 1997). Hedonic damage awards do not require expert testimony. *Id.* Loss of life enjoyment must be specifically pled to be considered a separate element of damages. *Rodriguez v. Denver & R. G. W. R. Co.*, 512 P.2d 652, 654 (Colo. App. 1973).

C) **Increased risk of harm.** Colorado recognizes increased risk of harm as an element of damages which may be recovered. However, the plaintiff must show by reasonable medical probability that future harm may occur. *Sharp v. Kaiser Found. Health Plan*, 710 P.2d 1153, 1156 (Colo. App. 1985).

D) **Disfigurement and physical impairment.** Physical impairment and disfigurement are included in the definition of "[d]irect noneconomic loss or injury" in COLO. REV. STAT § 13-64-302(1)(a)(II)(A) (2014). Thus, damage awards for physical impairment and disfigurement are subject to the $1,000,000.00 statutory limitation on total damages recoverable in medical malpractice actions. *Wallbank v. Rothenberg*, 74 P.3d 413, 417-18 (Colo. App. 2003).

E) **Past and future pain and suffering.** Pain and suffering awards are considered a compensable element of damages and by definition, are noneconomic damages. Past and future pain and suffering awards may only be recovered by the person who sustains them. *See* COLO. REV. STAT. § 13-20-101 (2014). Medical experts are not required in order to prove future pain. In arriving at a monetary figure, attorneys are not permitted to ask the jury to award an amount acceptable to them if they suffered the pain of the plaintiff. Instead, attorneys may ask the jury to assign a dollar amount to each day of pain and suffering and multiply it by the number of past and future days of suffering. *Rodriguez v. Hausman*, 519 P.2d 1216, 1217 (Colo. App. 1974).

F) **Loss of society/consortium.** A claim for loss of consortium (or society) by parents is cognizable under Colorado's Wrongful Death Act, COLO. REV. STAT. § 13-21-203 (2014). But parents may not recover damages for loss of consortium when that claim arises solely from injury to child. *Bartlett v. Elgin*, 973 P.2d 694, 698 (Colo. App. 1998).

1) **Standard.** To recover for loss of consortium, a plaintiff must prove that the defendant's negligence caused injuries to the spouse, resulting in loss of society, companionship, and household services. *Am. Ins. Co. v. Naylor*, 87 P.2d 260, 265 (Colo. 1939). Loss of consortium is an injury that gives rise to a separate right of recovery, but is considered a derivative claim. *Lee v. State Dep't of Health*, 718 P.2d 221, 230 (Colo. 1986).

G) **Past and future lost income, wages, and earnings.** Lost income attributed from the time of injury and the time of trial is an available element of damages.

1) **Earning capacity**. Even without actual lost earnings, a plaintiff may still recover loss of earning capacity. *Colo. AFL-CIO v. Donlon*, 914 P.2d 396, 404 (Colo. App. 1995). The test for earning capacity is what one's earning capacity would have been in the future if the defendant had not interfered. *Moyer v. Merrick*, 392 P.2d 653, 656 (Colo. 1964). Loss of earning capacity may be awarded even if the amount of damages is uncertain. *Brittis v. Freemon*, 527 P.2d 1175, 1179 (1974).

2) **Future earnings**. Lost future earnings are recoverable in Colorado. *Thompson v. Tartler*, 443 P.2d 365, 369 (Colo. 1968). In claims of loss anticipated profits, it is generally necessary to present evidence of past business profits and past experience, because lost future profits may not be recovered if they are based on speculation. *Terrones v. Tapia*, 967 P.2d 216, 218 (Colo. Ct. App. 1998). Damages for lost profits are measured by the loss of net profits rather than lost gross profits or gross sales revenue. *Lee v. Durango Music*, 355 P.2d 1083, 1088 (Colo. 1960).

Lost Opportunity Doctrine

To establish damages for lost profits of an anticipated business venture, the plaintiff must establish the fact of damages. *Emp't Television Enter., LLC v. Barocas*, 100 P.3d 37, 44 (Colo. App. 2004). For business ventures, the fundamental question is whether the business venture was a likely possibility or whether it was merely an anticipated opportunity. *Cope v. Vermeer Sales & Serv. of*

Colo., Inc., 650 P.2d 1307, 1309 (Colo. App. 1982). One factor is whether the business opportunity was "real, tangible and one which was founded on the actual activities or past experience of the plaintiff's particular business." *Cities Broad., Inc. v. Schueller*, 849 P.2d 44, 50 (Colo. 1993).

Mitigation

Failure to mitigate damages is an affirmative defense which must be pleaded and proven by a defendant. COLO. R. CIV. P. 8(c) (2014). Evidence that a driver or front-seat passenger failed to use a seat belt is admissible in civil action to reduce damages recoverable for pain and suffering resulting from injuries sustained in an accident. *Wark v. McClellan*, 68 P.3d 574, 579 (Colo.App. 2003).

Punitive Damages

Punitive damages are designed to punish the defendant for wrongful conduct. *Seaward Constr. Co. v. Bradley*, 817 P.2d 971, 973 (Colo. 1991).

A) **Circumstances.** Punitive or exemplary damages may be brought when, "the injury complained of is attended by circumstances of fraud, malice, or willful and wanton conduct." COLO. REV. STAT. § 13-21-102(1)(a) (2014). Generally, punitive damages may be recovered when the underlying claim lies in tort. The plaintiff must first successfully prove the underlying claim before punitive damages may be awarded. *Harding Glass Co., Inc. v. Jones*, 640 P.2d 1123, 1127 (Colo. 1982).

B) **Limits.** Generally, a plaintiff's punitive damage recovery may not exceed the amount of actual damages unless applicable statutory exceptions apply. *See* COLO. REV. STAT. § 13-21-102(3)(a)-(b) (2014). If the exceptions apply, then the trial court has discretion to increase exemplary damages up to three times the actual damages. *Id.*

C) **Government exception.** Punitive damages cannot be recovered against governmental entities. COLO. REV. STAT. § 24-10-110 (2014).

Recovery and Pre- and Post-Judgment Interest

A) **Constitutionality.** The Colorado Supreme Court held unconstitutional portions of COLO. REV. STAT. § 13-21-101 (2014), the statute governing interest on damage awards. *Rodriguez v. Schutt*, 914 P.2d 921, 930 (Colo. 1996). Specifically, the court held that, "the provision in section 13-21-101 relating to prejudgment interest on personal injury money judgments which the judgment debtor appeals violates equal protection." *Id.*

B) **Personal injury.** Pre- and post-judgment interest may be recovered in personal injury actions. Plaintiffs must request interest in the complaint in order to recover. *Clark v. Buhring*, 761 P.2d 266, 268 (Colo. Ct. App. 1988).

1) **Prejudgment interest accrual.** In cases where a plaintiff requests prejudgment interest and there is no appeal, the interest is calculated at 9 percent from the date the action accrued until satisfaction. *Sperry v. Field,* 186 P.3d 133, 138 (Colo. App. 2008).

2) **Post-judgment interest accrual.** Post-judgment interest accrues at a rate of nine percent on judgments which the judgment debtor does not appeal. Post judgment interest for appealed judgments is set at a market rate so that a decision to appeal a judgment is based on merit rather than financial interest. *Rodriguez*, 914 P.2d at 928.

3) **Settlement.** If a personal injury plaintiff enters into a settlement, the court may not add prejudgment interest. Prejudgment interest is not allowed on punitive damages. *Seaward Constr. Co.,* 817 P.2d at 974.

C) **Non-personal injury.** Prejudgment interest is recoverable in non-personal injury cases as well. The claimant may recover by enforcing an agreement which states a prejudgment rate. COLO. REV. STAT. § 5-12-102(4)(a) (2014). Moratory interest rates may be used if money or property has been wrongly withheld. *E.B. Jones Constr. Co. v. City & Cnty. of Denver*, 717 P.2d 1009, 1015 (Colo. App. 1986). Also if property was wrongfully withheld, the claimant may recover prejudgment interest at a rate of eight percent annually compounded from the date the money was due. COLO. REV. STAT. § 5-12-102(1)(b) (2014).

Recovery of Attorney Fees

Colorado disallows recovery of attorney fees absent contractual agreement, statute, or court rule in either a contract or tort action. *Adams v. Farmers Ins. Group*, 983 P.2d 797, 801 (Colo. 1999). Trial courts retain power to award attorney fees when a party engages in fraud, files frivolous pleadings, or tries to exhaust the opposing party through harassment or oppression. *Lauren Corp. v. Century Geophysical Corp.*, 953 P.2d 200, 204 (Colo. Ct. App. 1998). Colorado has a specific statute pertaining to attorney's fees in frivolous civil actions. COLO. REV. STAT. § 13-17-101 *et seq*. (2014). Subject to limitations, the court shall award reasonable attorney fees against any attorney or party who has brought or defended a civil action that the court determines lacks substantial justification. COLO. REV. STAT. § 13-17-102(2) (2014). Colo. R. Civ. P. 11 also provides that if a pleading is filed that is not well grounded in fact or warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, the court may sanction the attorney or party causing the pleading to be filed, including an award of the reasonable expenses incurred because of the filing, including reasonable attorney's fees.

Settlements Involving Minors

The Colorado General Assembly has granted protections in the Colorado Probate Code to safeguard the post-injury recovery rights of minors. COLO. REV. STAT. § 15-14-403 (2014). A conservator may be appointed to protect a minor's settlement rights. COLO. REV. STAT. §§ 15-14-403, 15-14-425(2) (2014). The court may ratify the settlement of a minor's claims. COLO. REV.

STAT. § 15-14-412(1)(b) (2014). A parent may act as the conservator for a minor child only upon appointment from the court. COLO. REV. STAT. § 15-14-413 (2014).

Taxation of Costs

A) **Recoverable costs.** COLO. REV. STAT. § 13-16-122 (2014) governs the items which may be includable as costs. It includes items such as court fees, jury fees, expert witness fees, and travel fees. *Id.* The statutory list is illustrative rather than exclusive. *Roget v. Grand Pontiac, Inc.*, 5 P.3d 341, 348 (Colo. App. 1999).

B) **When recovery allowable.** COLO. REV. STAT. § 13-16-104 (2014) governs when the plaintiff may recover costs. The defendant's ability to recover costs is set forth in COLO. REV. STAT. § 13-16-105 (2014). Costs are only taxable by authority of statute.

C) **Against government.** Costs against the state of Colorado, its officers or agencies, shall be imposed only to the extent permitted by law. COLO. R. CIV. P. 54 (2014). Except as otherwise provided by statute or these rules, costs shall be allowed as of course to the prevailing party. *Id.* Costs may be taxed by the clerk on one day's notice. *Id.*