STATE OF COLORADO
RETAIL COMPENDIUM OF LAW

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PRE-SUIT AND INITIAL CONSIDERATIONS

Pre-Suit Notice Requirements

Generally, pre-suit notice is not required to commence a civil lawsuit in Colorado, with a few limited exceptions:

A. **Public Entities.** The Colorado Governmental Immunity Act governs the notice requirements for any person who claims an injury by a public entity or an employee of a public entity. Colo Rev. Stat. § 24-10-109 *et seq.* The claimant must file written notice within 180 days after the date of the injury, even if the cause of action is unknown. *Id.* Failure to comply with this notice requirement bars any action. *Id.*

B. **Construction Defect Action Reform Act.** The Construction Defect Reform Act sets forth notice requirements for actions against construction professionals. Colo Rev. Stat. § 13-20-803.5. 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 a claim. *Id.*

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 (4th ed. 2005). The Colorado Rules of Civil Procedure are patterned after the Federal Rules of Civil Procedure. *Id.* Although the Colorado Rules generally follow the Federal Rules, they do not conform precisely in all instances. *Id.* For example, pre-trial procedures encompassed in Federal Rule 16 are vastly different from the Colorado Rules. *Id.*

Description of the Organization of the State Court System

A. **Judicial Selection.** Colorado justices and judges are not appointed by election on a political ticket. Colorado Judicial Branch, http://www.courts.state.co.us (last visited February 15, 2016). Rather, nominating commissions interview applicants and submit a list of nominees to the governor for final selection. *Id.* The selected justice or judge then serves an initial two-year term, after which the justice or judge must be retained by voters at the general election. *Id.* If retained, Colorado Supreme Court justices serve ten year terms, while Colorado Court of Appeals judges serve eight year terms. *Id.* At the end of the term, the justice or judge can stand for retention to another term. *Id.* No judicial officer may serve in office past his or her 72nd birthday. *Id.*

B. **Structure.** Colorado's judicial structure is composed of three court levels: trial court, Court of Appeals, and Colorado Supreme Court. *Id.* The trial level consists of Country Courts, District Courts, and Water Courts. *Id.* County Courts and District Courts handle virtually all personal injury actions filed in state court. *Id.* County Courts determine civil cases under $15,000, while District Courts hear civil cases on any dollar amount. *Id.* The

state is divided into twenty-two judicial districts, each encompassing one or more of Colorado's 64 counties. *Id.*

The Colorado Court of Appeals is the first court of appeals for decisions from the district courts in the twenty-two judicial districts, as well as probate court, juvenile court, and other administrative agency decisions. *Id.* A Colorado Court of Appeal's determination of an appeal is final unless the Colorado Supreme Court agrees to review the matter. *Id.*

The Colorado Supreme Court is the court of last resort. *Id.* The court generally hears appeals from the Court of Appeals, although in some instances individuals can petition the Supreme Court directly regarding a District or County Court decision. *Id.* Decisions by the Colorado Supreme Court are binding on other Colorado Courts. *Id.*

C. Alternative Dispute Resolution. Attorneys must advice clients of alternative forms of dispute resolution that might reasonable be pursued to attempt to resolve the legal dispute. Colorado Rules of Professional Conduct 2.1. Parties are required to meet within 15 days after the case is at issue and to discuss settlement within 35 days. Colo. R. Civ. P.16.

The Colorado Dispute Resolution Act establishes the Office of Dispute Resolution ("ODR") within the judicial department and grants the Chief Justice of the Colorado Supreme Court the power to appoint the Director of the ODR. Colo Rev. Stat. § 13-22-301 *et seq.* 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 services. 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. 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 its mandatory arbitration statute in 1991. See Colo Rev. Stat. § 13-22-401 *et seq.*

Service of Summons

A. Person. The 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 a family member or authorized agent of the person. Colo. R. Civ. P. 4(e)(1).

B. Private Corporation. For service of summons to a private corporation, a copy must be delivered to the registered agent for service, or that agent's secretary or assistant, as set forth in the most recently filed document in the records of the Colorado Secretary of State, or of any other jurisdiction. If such an agent cannot be found, service of summons may be delivered to an officer, a manager of a limited liability company in which management is vested in managers rather than members, or said officer's or manager's assistant or secretary. If such an individual cannot be found, a copy may be delivered to a stockholder, member, or any other person having an ownership interest in the entity, or any director, agent, or principal employee of the entity that can be found in the state. Colo. R. Civ. P. 4(e)(4).

C. Public Corporation. To issue a summons to a public corporation such as a municipal corporation, a copy must be delivered to the mayor, city manager, or clerk of that corporation. Colo. R. Civ. P. 4(e)(6).

D. State. Service upon the state must be delivered to the attorney general or an authorized employee in the office. Colo. R. Civ. P. 4(e)(9).

E. Substitute Service. Service by mail or publication is allowed only in actions affecting certain property or in rem proceedings. Colo. R. Civ. P. 4(g). However, if a party is unsuccessful accomplishing service of process by personal service, the party may file a motion for an order of substituted service. Colo. R. Civ. P. 4(f). The court may order the process to be mailed if the court finds that due diligence has been used and that further attempts of personal service 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).

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. The claim begins to accrue when the physical defect manifests even if the cause of the defect is not known. Colo. Rev. Stat. § 13-80-104(1)(a).

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). 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.

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. 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. Colo. Rev. Stat.. § 13-80-104(1)(b)(II).

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. Ct. 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. Colo. Rev. Stat. § 8-2-204.

E. **Fraud.** Colo. Rev. Stat. § 13-80-101(1)(c) 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) (referring to private civil actions brought under Colo. Rev. Stat. § 42-6-204 or 13-80-103(1)(g) (referring to actions for negligence, fraud, willful misrepresentation, deceit, or conversion of trust funds brought under Colo. Rev. Stat. § 12-61-303).

F. **Governmental Entities.** Claims against governmental entities are generally subject to a two-year statute of limitations. Colo. Rev. Stat. § 13-80-102(h).

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

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. This statutory requirement seeks to eliminate non-meritorious claims. The 60-day requirement begins to run from the date of service of process rather than the date of filing the complaint. *Id.*

Attorney malpractice cases may be based on negligence, contract, or breach of fiduciary duty. Grund, Miller, and Werber, 7 Colo. Prac, Personal Injury Torts and Insurance § 22.9 (3d ed. 2014). 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. Ct. 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).

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)(a).

J. **Survival.** The personal representative may bring an action within one (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.

K. **Tolling.** The statutes of limitations and statutes of repose (see below) are tolled if the defendant is under a disability. 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).

There are other circumstances when a statute of limitations may be subject to equitable tolling. "[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." *Brodeur v. American Home Assur. Co*., 169 P.3d 139, 149 (Colo. 2007).

If any person entitled to bring a products liability action is under the age of eighteen years, mentally incompetent, imprisoned, or absent from the United States at the time the cause of action accrues and is without a spouse or legal guardian, the statute of limitations is tolled until the disability is removed. Colo. Rev. Stat. § 13-80-106(2) (2008).

In most circumstances, proper tolling agreements may be drafted as an alternative to filing a lawsuit for the sole purpose of avoiding the statute of repose bar. *Compare First Interstate Bank v. Central Bank & Trust Co.*, 937 P.2d 855, 863 (Colo. Ct. App. 1996) *with Lewis v. Taylor*, 2014 WL 974893 at *1 (Colo. Ct. App. 2014).

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

Statute 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 three years. Colo. Rev. Stat. § 13-80-102.5. 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) if the action is brought on behalf of a minor who is under eight years of age when the action is brought and was under six years of age on the date of the injury, or a person otherwise under disability as defined by Colo. Rev. Stat. § 13-81-101. Colo. Rev. Stat. § 13-80-102.5(3).

B. **Other 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 six-year statute of repose after substantial completion of real property improvement. Colo. Rev. Stat. § 13-80-104(1)(a). Actions arising in the fifth or sixth year after substantial completion must then be brought within two years. Colo. Rev. Stat. § 13-80-104(2). The statute of limitations against land surveyors is three (3) years, while the statute of repose is 10 years. Colo. Rev. Stat. § 13-80-105. A seven-year statute of repose applies to products liability actions related to manufacturing equipment arising more than seven (7) years after such equipment was first used for its intended purpose by someone not engaged in the business of manufacturing, selling, or leasing such equipment. The statute of repose does not apply if the claim arises due to a hidden defect or prolonged exposure to hazardous material, or from the intentional misrepresentation or fraudulent concealment of any material fact concerning the product that was the proximate cause of injury. Colo. Rev. Stat. § 13-80-107.

Venue Rules

A. Principles governing venue are set forth primarily in Colo. R. Civ. P. 98. Generally, actions may be tried in the county where any or all of the defendant reside, where the plaintiff resides when service is made upon the defendant in such county, or in a county where the defendant may be found if the defendant is a nonresident of the state. Colo. R. Civ. P. 98(c).

B. The court may, on good cause shown, change the place of trial if the county designated in the complaint is not the proper county, or if the convenience of witnesses and the ends of justice would be promoted by the change. Colo. R. Civ. P. 98(f). This is not to be confused with the doctrine of *forum non conveniens*, which is a common law doctrine providing for a court to decline jurisdiction and dismiss a case when another location would be more appropriate. *See State, Dep't of Highways v. District Court*, 635 P.2d 889, 891 (Colo. 1981).

C. If there are multiple plaintiffs or defendants in the case, one of which seeks a change of venue, consent from that party's co-defendants or co-plaintiffs must be obtained before a motion for change of venue will be granted. Colo. R. Civ. P. 98(j). Motions for venue change must be made in the time specified in Colo. R. Civ. P. 12(a) to avoid waiving the right to change venue. Colo. R. Civ. P. 98(e)(1).

NEGLIGENCE

Elements of Negligence

A. Premises Liability

In Colorado, premises liability claims are governed by the Premises Liability Statute. Colo Rev. Stat. §13-21-115. Colorado's Premises Liability Statute applies to injuries occurring while on the real property of another. Colo Rev. Stat. § 13-21-115(2).

The statute applies to conditions, activities, and circumstances on the property that the landowner is liable for in its legal capacity as a landowner. *Larrieu v. Best Buy Stores, L.P.*, 303 P.3d 558, 559 (Colo. 2013). The statute, however, is not limited to activities and circumstances that are directly or inherently related to the land. *Larrieu v. Best Buy Stores, L.P.*, 303 P.3d 558, 559 (Colo. 2013).

By enacting the Premises Liability Statute, Colorado's General Assembly intended to "establish a comprehensive and exclusive specification of the duties landowners owe to those injured on their property." *Vigil v. Franklin*, 103 P.3d 322, 323 (Colo. 2004). The Premises Liability Statute is thus the exclusive remedy for injuries or damage suffered on the real property of another and reflects the legislature's intent to occupy the field completely. *See Union Pacific R.R. v. Martin*, 209 P.3d 185, 188 (Colo. 2009). Common law tort duties no longer apply to those injured on the real property of another, and a plaintiff my not recover against a landowner under any other theory of negligence. *See Vigil v. Franklin*, 103 P.3d 322, 323 (Colo. 2004); *Sofford v. Schindler Elevator Corp.*, 954 F. Supp. 1459, 1461 (D. Colo. 1997).

The duties a landowner owes an entrant depend on the status of the entrant, and liability is thus contingent on the classification of the entrant. The Premises Liability classifies entrants as (1) invitees, (2) licensees, or (3) trespassers. Colo Rev. Stat. § 13-21-115(3).

Classifications of Entrants

A. Invitees

An "invitee" is a person who is on the land of another to transact mutually beneficial business *or* who is on the land of a person who has expressly or implicitly represented that the land is open to the public. Colo Rev. Stat. § 13-21-115(5)(a); *Lakeview Assocs., Ltd. v. Maes*, 907 P.2d 580, 582 (Colo. 1995). Employees are considered invitees on their employer's land. *Henderson v. Master Klean Janitorial, Inc.*, 70 P.3d 612 (Colo. App. 2003). Tenants in a landlord-tenant relationship also may be considered invitees. *Lakeview Assocs., Ltd. v. Maes*, 907 P.2d 580, 585 (Colo. 1995).

An "invitee" must prove the (1) landowner actually knew or should have known of the danger on the premises (2) landowner unreasonably failed to exercise reasonable care to protect against those dangers. Colo Rev. Stat. § 13-21-115-(3)(c)(I); *Sofford v. Schindler Elevator Corp*., 954 F. Supp. 1459, 1461 (D. Colo. 1997).

Whether a landowner "knew or should have known" of the danger may be satisfied by either actual or constructive knowledge. *Lombard v. Colo. Outdoor Educ. Ctr., Inc.*, 187 P.3d 565, 568 (Colo. 2008). Proof of *actual* notice may be established by showing that the property owner had previous knowledge or experience with the dangerous condition. Colo Rev. Stat. § 13-21-115(3); *Martinez v. Weld Cnty. Sch. Dist. RE-1*, 60 P.3d 736, 741 (Colo. App. 2002).

Constructive knowledge is the knowledge that one exercising reasonable due diligence should have. *Lombard v. Colo. Outdoor Educ. Ctr., Inc.*, 187 P.3d 565, 571 (Colo. 2008). Constructive knowledge may be inferred if knowledge of the prohibited conduct could have been obtained through the exercise of reasonable care and diligence. *See Full Moon Saloon, Inc. v. Loveland*, 111 P.3d 568, 570 (Colo. App. 2005). Violation of an ordinance can establish constructive knowledge in certain circumstances. *Giblin v. Sliemers*, -- F. Supp.3d --, 2015 WL 7568107, *4 (D. Colo. Nov. 24, 2015) (*citing Lombard v. Colo. Outdoor Educ. Ctr., Inc.*, 187 P.3d 565, 571 (Colo. 2008)).

The foreseeability of an injury is inherent in the determination of constructive knowledge. *See Traynom v. Cinemark USA, Inc.*, 940 F. Supp. 2d 1339, 1344 (D. Colo. 2013). To establish foreseeability, a landowner does not need to be "able to ascertain precisely when or how an incident will occur" but whether it "is likely enough *in the setting of modern life* that a reasonably thoughtful person would take account of it in guiding practical conduct." *Axelrod v. Cinemark Holdings, Inc.*, 65 F. Supp. 3d 1093, 1100 (D. Colo. 2014) (*quoting Taco Bell Inc., v. Lannon*, 744 P.2d 43, 48 (Colo. 1987)).

It is not knowledge of the condition, activities, or circumstances that gives rise to liability but the particular dangers of which the owner actually knew or should have known. *McIntire v. Trammell Crow, Inc.*, 172 P.3d 977, 980 (Colo. App. 2007).

B. Licensees

A "licensee" is someone who enters the land of another for his or her own convenience or to advance his or her own interests with a landowner's permission or consent. Colo Rev. Stat. § 13-21-115-(5)(b). A "licensee" includes a social guest. Colo Rev. Stat. § 13-21-115-(5)(b).

An licensee must prove (1) the landowner actually knew of dangers on the premises and (2) either (a) the landowner unreasonably failed to exercise reasonable care with respect to those dangers or (b) the landowner unreasonably failed to warn of dangers not created by it which are not ordinarily present on property of the type involved and of which the landowner actually knew. Colo Rev. Stat. § 13-21-115-(3)(b)(I), (II).

A landowner may be liable to a licensee only for actual knowledge, that is "dangers of which he actually knew." *Lombard v. Colo. Outdoor Educ. Ctr., Inc.*, 187 P.3d 565, 571 (Colo. 2008); *Wilson v. Marchiondo*, 124 P.3d 837, 841 (Colo. App. 2005).

C. Trespassers

A "trespasser" is someone who enters or remains on the land of another without the landowner's consent. Colo Rev. Stat. § 13-21-115-(5)(c).

Trespassers may only recover for damages willfully or deliberately caused by the landowner. Colo Rev. Stat. § 13-21-115(3)(a). Landowners thus have no duty to make the premises safe to trespassers, though they must not intentionally cause them harm.

Statutory Meaning of Landowners

The Premises Liability Statute defines "landowners" broadly. A "landowner" is (1) an authorized agent or a person in possession of real property, (2) a person legally responsible for the condition of real property, or (3) a person legally responsible for the activities conducted or circumstances existing on real property. *See* Colo Rev. Stat. § 13-21-115(1).

A. "Person in Possession"

The exercise of control determines whether a person is sufficiently in possession of real property to qualify as a "landowner" under the premises liability statute. *Jordan v. Panorama Orthopedics & Spine Ctr.*, 346 P.3d 1035, 1041 (Colo. 2015). Although a person need not possess property to the exclusion of all others to qualify as a landowner, possession connotes the right to exclude at least some others and the right to control the property. *Jordan v. Panorama Orthopedics & Spine Ctr.*, 346 P.3d 1035, 1042 (Colo. 2015); *Pierson v. Black Canyon Aggregates, Inc.*, 48 P.3d 1215, 1220 (Colo. 2002).

The titled owner of land is not automatically a "landowner" for the purposes of the Premises Liability Act. *Flaming v. Colo. Spring Props. Fund*, 33 F. App'x 467, 468 (Colo. 2002). For example, a lessor who has transferred possession and control over the leased premises to a lessee is no longer a "person in possession" and thus a landowner for purposes of determining liability. *Flaming v. Colo. Spring Props. Fund*, 33 F. App'x 467, 468 (Colo. 2002). *Pierson v. Black Canyon Aggregates, Inc.*, 48 P.3d 1215, 1220 (Colo. 2002); *Perez v. Grovert*, 962 P.2d 996, 999 (Colo. App. 1998).

Specifically, in a landlord-tenant situation, a landlord who has transferred control of the premises to its tenant is no longer a "person in possession." *Wilson v. Marchiondo*, 124 P.3d 837, 840 (Colo. App. 2005). But if the tenants have surrendered their right to exclusive possession and share control with the landlord—who has also reserved the power to manage or direct repairs on the premises—the landlord may qualify as a "landowner." *See Nordin v. Madden*, 148 P.3d 218, 221 (Colo. App. 2006).

An independent contractor may be considered a landowner depending on the degree of possession. *Pierson v. Black Canyon Aggregates, Inc.*, 48 P.3d 1215, 1221 (Colo. 2002).

Under the statutory definition, even if a person is not sufficiently "in possession" of the property, a person may be still liable under the statute if he or she is legally responsible for creating a condition or conducting an activity on the property that allegedly injured the plaintiff. *Henderson*

v. Master Klean Janitorial, Inc., 70 P.3d 612, 615 (Colo. App. 2003). A cleaner who has a legal responsibility for a condition thus could be a landowner. *Henderson v. Master Klean Janitorial, Inc.*, 70 P.3d 612, 615 (Colo. App. 2003).

Promising to indemnify another party for liability on the property does not transform a person into a "landowner" under the statute. *Jordan v. Panorama Orthopedics & Spine Ctr.*, 346 P.3d 1035, 1043 (Colo. 2015).

Negligence Per Se

A party may no longer bring a negligence *per se* claim against a landowner to recover for damages caused on the premises. *Lombard v. Colo. Outdoor Educ. Ctr., Inc.*, 187 P.3d 565, 573 (Colo. 2008). A party may argue, however, that the violation of certain statutes and ordinances are relevant to establishing the failure to exercise reasonable care. *Lombard v. Colo. Outdoor Educ. Ctr., Inc.*, 187 P.3d 565, 573 (Colo. 2008) (but clarifying that plaintiff must still present evidence regarding knowledge of the danger, proximate cause, and damages).

Common Law Defenses

The General Assembly abrogated the common law defenses when it passed the Premises Liability Statute. *Vigil v. Franklin*, 103 P.3d 322, 329 (Colo. 2004). A landowner may only raise a common law defense if explicitly provided for in the statute.

A. Open and Obvious Danger

Because the Premises Liability Act does not refer to the open and obvious danger doctrine, the common law defense of open and obvious is unavailable. *Vigil v. Franklin*, 103 P.3d 322, 331 (Colo. 2004).

B. Attractive Nuisance

The doctrine of attractive nuisance is available to children under the age of 14. Colo Rev. Stat. § 13-21-111(2). Any child can assert a claim for attractive nuisance; it does not matter whether the child is classified as a trespasser, licensee, or invitee. *S.W. v. Towers Boat Club, Inc.*, 315 P.3d 1257, 1261 (Colo. 2013).

C. Comparative Negligence/Pro-rata Liability

The affirmative defenses of comparative negligence and pro-rata liability are available under the Premises Liability Statute. Colo Rev. Stat. §§ 13-21-111; 13-21-111.5(1); 13-21-115(2); *Union Pacific R.R. v. Martin*, 209 P.3d 185, 190 (Colo. 2009); *Reid v. Berkowitz*, 315 P.3d 185, 190–91 (Colo. App. 2013). The fact finder may consider the degree of fault of a nonparty to the action in apportioning liability. Colo Rev. Stat. § 13-21-111.5(3)(a).

Colorado is a modified comparative fault state. Contributory negligence does not bar recovery in an action for negligence resulting in death or injury to persons or property. Colo Rev. Stat. § 13-21-111(1); *Harris v. Ark*, 810 P.2d 226, 228 (Colo. 1991). Although a plaintiff is not barred from

recovery if he or she is at fault, his or her damages will be reduced in proportion to the degree of his or her own negligence. § 13-21-111(1).

If the plaintiff's percentage of fault is greater than 50%, the plaintiff will be barred from recovery. Colo Rev. Stat. § 13-21-111(1). In apportioning fault, assumption of risk may be considered. Colo Rev. Stat. § 13-21-111.7 ("For the purposes of this section, a person assumes the risk of injury or damage if he voluntarily or unreasonably exposes himself to injury or damage with knowledge or appreciation of the danger and risk involved."); *Tucker v. Volunteers of Am. Colo. Branch*, 211 P.3d 708, 711 (Colo. App. 2008)

Nondelegable Duties

If the owner of the premises retains some possession of the property, the owner cannot delegate its statutory duties. *Jules v. Embassy Props., Inc.*, 905 P.2d 13, 15 (Colo. App. 1995). Ownership and the right to collect rents and manage the property—even if a property manager has exclusive authority to manage the property—indicate possession. *Jules v. Embassy Props., Inc.*, 905 P.2d 13, 15 (Colo. App. 1995).

A landowner has a nondelegable duty to independent contractors. *Springer v. City & County of Denver*, 13 P.3d 794 (Colo. 2000). A landowner thus may not delegate its duty to exercise reasonable care to an independent contractor or to an independent property manager. *Springer v. City & County of Denver*, 13 P.3d 794 (Colo. 2000); *Kidwell v. K-Mart Corp.*, 942 P.2d 1280, 1282 (Colo. App. 1996); *Jules v. Embassy Props., Inc.*, 905 P.2d 13, 15 (Colo. App. 1995). A landowner in possession remains responsible for the entire degree or amount of fault existing between independent contractors and himself. *Reid v. Berkowitz*, 316 P.3d 185, 192 (Colo App. 2013).

Comparative Fault/Contributory Negligence

A. **Modified Comparative Negligence.** Colorado follows a modified comparative negligence theory. Colo Rev. Stat. § 13-21-111 (2009). 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 50%. *Id.*

B. **Product Liability.** Product liability actions are governed by a pure comparative fault statute. Colo Rev. Stat. § 13-21-406 (2009). 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: Workers' Compensation Protections

The Workers' Compensation Act of Colorado is set forth in Colo Rev. Stat. § 8-40-101, *et seq.* The Act is designed to quickly provide compensation to 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. District Court*, 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. Ct. 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 Colorado Supreme court has adopted the dual capacity doctrine, which allows tort claims to be brought against an employer who was acting outside of its capacity as employer. *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 or 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 (2009).

Indemnification

A. **Distinguishing 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. Indemnification refers to a preexisting legal duty of one tortfeasor to hold the other harmless for the damages. *Public Serv. Co. v. District Court*, 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, including oral ones, may provide for indemnification. *Williams v. White Mtn. Constr. Co.*, 749 P.2d 423, 426 (Colo. 1988). The word "indemnity" is not required and its presence does not guarantee that an indemnity contract was created because "indemnity contracts holding indemnitees harmless for their own negligent acts must contain clear and unequivocal language to that effect." *Id.*

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 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 non-party.

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. 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). In conspiracy situations, joint liability is limited to the defendants who engaged in the co-conspiracy. Additionally, the court held that for purposes of joint and several liability, an individual may "conspire" to be negligent. *Resolution Trust Corp. v. Heiserman*, 898 P.2d 1049, 1054–56 (Colo. 1995).

Strict Liability

Strict liability may be imposed in certain situations even when the defendant exercised a reasonable standard of care. *Lui v. Barnhart*, 987 P.2d 942, 944 (Colo. Ct. App. 1999). Colorado imposes strict liability in certain situations in order to limit the public's exposure to dangerous situations. For example, railroad companies that cause fires are also strictly liable. Colo Rev. Stat. § 40-30-103. A person who keeps a wild animal may be strictly liable for 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 defendant may be strictly liable for removing lateral support to the plaintiff's property if the plaintiff can prove that the weight of the buildings and artificial additions did not materially increase the pressure. *Vikell Investors Pac., Inc. v. Kip Hampden, Ltd.*, 946 P.2d 589, 593 (Colo. Ct. App. 1997).

B. **Restatements.** Colorado adopts the strict liability rules found in Restatement (Second) of Torts § 402A. *Hiigel v. General 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. *American 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. Grund, Miller, and Jackson, *Personal Injury Practice-Torts and Insurance*, 7 Colo. Prac., § 24.46 (2d ed. 2000). The learned intermediary doctrine is a defense to a product 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). 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).

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. Colo Rev. Stat. § 13-50.5-102(3).

C. **Statutory Immunity.** Willful or wanton conduct may affect statutory immunity. For example, individuals who discharge hazardous materials willfully and wantonly are not exempt from civil liability. Colo Rev. Stat. § 13-21-108.5, *et seq*. Also, government employees may lose immunity if their conduct is willful and wanton. Colo Rev. Stat. § 24-10-118(2).

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 certain aspects to accommodate electronic discovery.

A. **Federal Rules.** The Federal Rules of Civil Procedure require lawyers to initially disclose to opposing counsel a description of all electronically-stored information that the disclosing party has in its possession. Fed. R. Civ. P. 26. The rule places several limitations on the discovery of electronically-stored information. A party need not provide discovery of electronically-stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. *Id.* Lastly, the Federal Rules require the parties to state in the discovery plan any issues pertaining to discovery of electronically-stored information. *Id.* The Federal Rules also provide special document production rules governing electronic discovery. *See* Fed. R. Civ. P. 34(b)(1)(C), (2)(D)–(E).

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. Absent from the Colorado Rules is the limitation on discovery of electronically-stored information set forth in the Federal Rules. 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, Annotated, *Colorado Civil Rules*, 4 Colo. Prac. Series R 26 (4th ed. 2005). A testifying expert is the expert 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 forming opinions in preparation of litigation. *Id.* Non-testifying experts are retained in

anticipation of litigation but 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.*

B. **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). The disclosing party must also submit a report concerning testifying experts. 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. Colo. R. Civ. P. 26(a)(2)(B). Unlike the Federal Rules, which require 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. 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.

C. **Rebuttal Witnesses.** Rebuttal expert testimony must be disclosed 20 days after disclosure of the expert evidence which it is meant to rebut. Colo. R. Civ. P. 26(a)(2)(C)(III).

D. **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) (report of an examining physician) or only upon a showing of exceptional circumstances in which it is 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. Non-parties also may be ordered to produce documents or allow inspection of land. Colo. R. Civ. P. 34(c).

A. **Subpoenas, Respondents, and Time Frames.** Most of the rules governing subpoenas are contained in Colo. R. Civ. P. 45. A subpoena may be used to compel witness's attendance. There are two primary types of subpoenas. The subpoena *ad testificandum* orders a witness to show up and give live testimony at a certain time and place. The subpoena *duces tecum* orders a witness to produce documents and live testimony.

B. **Appearance and Production.** Under Colo. R. Civ. P. 45(a)–(b), a deposition subpoena may be used to order a witness to appear and produce documents. The witness receiving the subpoena request may, within 10 days, serve a written objection to the attorney. 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(d)(2). The subpoena may be served, however, anywhere within the state. Colo. R. Civ. P. 45(e). Non-residents of Colorado may be required to attend within 40 miles of the place of service or in the 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(d)(2).

D. **Subpoenas**. 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(e). 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(c).

Privileges

A. **Attorney-Client Privilege.** The attorney-client privilege is codified under Colorado law at Colo. Rev. Stat. § 13-90-107(1)(b). 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). The attorney-client privilege survives death. *Wesp v. Everson*, 33 P.3d 191, 200 (Colo. 2001).

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. District Court*, 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. District Court*, 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 in *Hickman v. Taylor*, a decision later codified in the Federal Rules of Civil Procedure. *Hawkins v. District Court*, 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). 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 it is 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 Colorado*, 865 P.2d 893, 898 (Colo. Ct. App. 1993). Therefore, the self-critical analysis does not protect against internal corporate reviews of safety 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*. The Colorado Supreme Court has refused to recognize a privilege for news reporters. *Gagnon v. District Court*, 632 P.2d 567, 569 (Colo. 1981). However, government agencies may withhold information when disclosure would be harmful to the public interest. *Martinelli v. District Court*, 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 admission may extend to any matter within the scope of discovery. Colo. R. Civ. P. 36(a). 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 30 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. Colo. R. Civ. P. 37(c). 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 admission.

EVIDENCE, PROOFS & TRIAL ISSUES

Appeal

Prior to appeal and within 15 days of entry of judgment, 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.

A. **Final Judgment.** The term "judgment" includes a decree and order to or from which an appeal lies. Colo. R. Civ. P. 54. A judgment is final when it disposes of the entire litigation on the merits. *Hierath-Prout v. Bradley*, 982 P.2d 329, 330 (Colo. Ct. App. 1999). To determine if an order is a final judgment for appealability, the focus should be on the legal effect of the order rather than the form. *Levine v. Empire Sav. and 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 to the appellate court. C.A.R. 1(a). 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.

Colo. C.A.R. 1(a).

C. **Notice of Appeal.** In civil cases where appeal is permitted by law as of right, notice of appeal must be filed with the appellate court, and a copy of this notice must be served upon the clerk of the trial court within 49 days of entry of judgment. C.A.R. 4(a). 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. Ct. App. 1978).

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. *Colorado Permanente Med. Group, P.C. v. Evans*, 926 P.2d 1218, 1230 (Colo. 1996). The collateral source rule is codified in Colorado statute. Colo. Rev. Stat. § 13-21-111.6. The statute limits the circumstances in which a plaintiff can receive double compensation for an injury. *Id.* The statute provides that damages 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 and paid for by or on behalf of the plaintiff. *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 not admissible evidence in civil actions. Colo. Rev. Stat. § 13-90-101. Colorado's statute governing admissibility of felony convictions for impeachment purpose 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 from unfair prejudice. *Id.* The statute does not prohibit evidence of misdemeanors or pending charges if they are offered for a purpose other than a witness's general credibility. *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.

Day in the Life Videos

Admissibility of a videotape of a person's behavior is to be judged on a case-by-case basis. *Durflinger v. Artiles*, 727 F.2d 888, 894 (10th Cir. 1984). Moreover, the Tenth Circuit has 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. *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. The statute governs testimony about prior oral statements made by a person now incapable of testifying. 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) the person testifies against his or her own interests. *Id.*

The purpose behind the statute is to protect deceased individual's estates from unjust claims by living witnesses. *National State Bank v. Brayman*, 497 P.2d 710 (Colo. Ct. App. 1972).

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. Plaintiffs may recover, however, the reasonable value of past and present medical expenses as part of the damage 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.*; *see also Dedmon v. Continental Airlines, Inc.*, 2016 WL 471199 at *7 (D. Colo. February 8, 2016).

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, replaced the offer of judgment procedure in 1990. However, legislative action amending the offer of settlement statute is currently in progress.

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. A specific and timely objection must be made upon a ruling which admits evidence. Colo. R. Evid. 103(a)(1). Colorado Rule 103 is identical to the Federal Rules. 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. Ct. App. 2001). Evidentiary arguments must be conducted outside the presence of the jury. Colo. R. Evid. 103(c).

Prior Accidents

Evidence of prior similar accidents is not admissible to prove negligence. Colo. R. Evid. 404(b). Evidence of prior similar accidents may be admissible for other purposes when the probative value does not substantially outweigh the prejudicial effect. *Jacobs v. Commonwealth Highland Theaters, Inc.*, 738 P.2d 6, 9 (Colo. Ct. App. 1986), cert. denied (1987). Prior accidents may be relevant to show notice or for purposes of exemplary damages. *Id.*

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, 1196-97 (Colo. Ct. 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 held if no spoliation occurred. *Aloi v. Union Pacific 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, but may be admissible to prove a duty to warn. Colo. Rev. Stat. § 13-21-404. Evidence of subsequent remedial measures may also be admissible for other purposes such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment. Colo. R. Evid. 407.

Use of Photographs

Properly authenticated photographs may be admissible in evidence. Photographs may be authenticated by testimony that it is a fair and accurate representation of the scene. *People v. Taylor*, 804 P.2d 196, 202 (Colo. Ct. 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. Ct. App. 1989).

Gruesome photographs of a crime or tort victim are subject to the balancing test under COLO. R. EVID. 403. *See People v. Herrera*, 272 P.3d 1158, 1164 (Colo. Ct. App. 2012). In light of the preference for admissibility, most courts are willing to admit gruesome photographs. *People v. Scarlett*, 985 P.2d 36, 42 (Colo. Ct. App. 1998).

DAMAGES

Caps on Damages

A. **Noneconomic Loss.** Noneconomic loss damages are capped at $250,000, but may be awarded up to $500,000 if there is clear and convincing evidence that justifies the increase, where both amounts are adjusted for inflation. Colo. Rev. Stat. § 13-21-102.5(3)(a)–(c). Noneconomic loss or injury is defined as, "nonpecuniary harm for which damages 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." Colo. Rev. Stat. § 13-21-102.5(2)(b). Compensatory damages for physical impairment or disfigurement are not limited by this statute. Colo. Rev. Stat. § 13-21-102.5(5).

B. **Derivative Noneconomic Loss.** Derivative noneconomic loss recovery is limited to $250,000, adjusted for inflation. Colo. Rev. Stat. § 13-21-102.5(3)(b). Derivative noneconomic loss is defined as, "nonpecuniary harm or emotional stress to persons other than the persons suffering the direct or primary loss or injury." Colo. Rev. Stat. §13-21-102.5(2)(a). Derivative noneconomic loss damages may not be awarded unless the court finds clear and convincing evidence justifying the award. Colo. Rev. Stat. § 13-21-102.5(3)(b).

C. **Government Entities.** Damages recoverable against governmental entities are limited to $350,000.00 for injury to one person in a single occurrence and $900,000 for injury to two or more persons in a single occurrence Colo. Rev. Stat. § 24-10-114(1).

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. § 13-64-302(1)(b). 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 as it relates to additional past and future economic damages. *Id.*

Calculation of Damages

A. **Contract Actions.** The Colorado Supreme Court adopts the standard set forth in Restatment (Second) of Contracts § 347, to measure damages for breach of contract cases. *Transamerica Premier Ins. Co. v. Brighton School 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. Ct. 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. Mountain States Tel. & Tel. Co.*, 500 P.2d 151, 154 (Colo. Ct. 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. Ct. 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. Ct. 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 (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. Ct. App. 1997), cert. denied (1998). 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.R.*, 512 P.2d 652, 654 (Colo. Ct. 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 is more likely than not to occur. *Sharp v. Kaiser Found. Health Plan*, 710 P.2d 1153, 1156 (Colo. Ct. App. 1985).

D. **Disfigurement and Physical Impairment.** Physical impairment and disfigurement are included in the definition of "direct noneconomic loss or injury" in Colo. Rev. Stat. § 13-

64-302(1)(a)(II)(A). Thus, damage awards for physical impairment and disfigurement are subject to the $1,000,000 statutory limitation on total damages recoverable in medical malpractice actions. *Wallbank v. Rothenberg*, 74 P.3d 413, 418 (Colo. Ct. 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. Colo. Rev. Stat. § 13-20-101. 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. Ct. App. 1974).

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

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 the spouse's affection, society, companionship, household services, and aid or comfort. *American 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. *Colorado AFL-CIO v. Donlon*, 914 P.2d 396 (Colo. Ct. 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 (Colo. St. App. 1975), cert. denied (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. *Employment Television Enter., LLC v. Barocas*, 100 P.3d 37, 44 (Colo. Ct. 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. Ct. 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." *See Cities Broad., Inc. v. Schueller*, 849 P.2d 44, 50 (Colo. 1993).

Mitigation

Failure to mitigate damages is affirmative defense which must be pleaded and proven by a defendant. Colo. R. Civ. P. 8(c). 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 accident. *Wark v. McClellan*, 68 P.3d 574, 579 (Colo. Ct. App. 2003).

Punitive Damages

Punitive damages are designed to punish the defendant for wrongful conduct. *Seaward Constr. Co. v. Bradley*, 817 P.2d 971, 975 (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). Generally, punitive damages may be recovered when the underlying claim lies in tort, and are unavailable for an ordinary breach of contract. *Hensley v. Tri-QSI Denver Corp*, 98 P.3d 965, 967 (Colo. Ct. App. 2004). 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). A claim for punitive damages may not be included in the initial claim for relief, but rather, such a claim may be allowed by amendment after the exchange of initial disclosures pursuant to Colo. R. Civ. P. 26 and the plaintiff establishes prima facie proof of a triable issue. Colo. Rev. Stat. § 13-21-102(1.5)(a).

B. **Limits.** Generally, a plaintiff's punitive damage recovery may not exceed the amount of actual damages unless extraordinary circumstances are present. Colo. Rev. Stat. § 13-21-102(3)(a). The trial court has discretion to enhance the compensatory award under certain conditions, not to exceed three times the amount of actual damages. *Id.*

C. **Government Exception.** Punitive damages are not available for damage awards against governmental entities. Colo. Rev. Stat. § 24-10-114(4)(a).

Pre- and Post-Judgment Interest

A. **Constitutionality.** The Colorado Supreme Court has held unconstitutional portions of Colo. Rev. Stat. § 13-21-101, the statute governing interest on damage awards. *Rodriguez*

v. Schutt, 914 P.2d 921, 930 (Colo. 1996). Specifically, the court held, "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. Pre-Judgment 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. Ct. App. 2008).

2. Post-Judgment Interest Accrual. Post-judgment interest accrues at a rate of 9 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 is precluded from adding prejudgment interest. *Parker v. USAA*, 216 P.3d 7 (Colo. Ct. App. 2007). Prejudgment interest is not allowed on punitive damages. *Seaward Constr. Co. v. Bradley,* 817 P.2d 971, 974 (Colo. 1991).

C. Non-Personal Injury. Prejudgment interest is recoverable in non-personal injury cases as well. *Stemple v. Phillips Petroleum Co.,* 430 F.2d 178 (10th Cir. 1970). The claimant may recover by enforcing an agreement which states a prejudgment rate. Colo. Rev. Stat § 5-12-102(3)(a). Moratory interest rates may be used if money or property has been wrongly withheld. *E.B. Jones Constr. Co. v. City & County of Denver,* 717 P.2d 1009, 1015 (Colo. Ct. App. 1986). If property was wrongfully withheld, the claimant may recover prejudgment interest at a rate of 8 percent annually compounded from the date the money was due. Colo. Rev. Stat. § 5-12-102(1)(b).

Recovery of Attorney Fees

Colorado disallows recovery of attorney fees absent contractual agreement, statute, or court rule. *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 (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.* 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).

Settlements Involving Minors

The Colorado General Assembly has granted protections in the Colorado Probate Code to safeguard the post-injury recovery rights of minors. *See* Colo. Rev. Stat. § 15-14-403. A conservator may be appointed to protect a minor's settlement rights. Colo. Rev. Stat. §§ 15-14-403, 15-14-425(2)(t). The court may ratify the settlement of a minor's claims. Colo. Rev. Stat. § 15-14-412(1)(b). A parent may act as the conservator for a minor child only upon appointment from the court. Colo. Rev. Stat. § 15-14-413.

Taxation of Costs

A. **Recoverable Costs.** Colo. Rev. Stat.§ 13-16-122 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. Ct. App. 1999).

B. **When Recovery Is Allowable.** Colo. Rev. Stat. § 13-16-104 governs when the plaintiff may recover costs. The defendant's ability to recover costs is set forth in Colo. Rev. Stat. § 13-16-105. Costs are only taxable by authority of statute. *Leadville Water Co. v. Parkville Water Dist.,* 436 P.2d 659, 660 (Colo. 1967).

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(d). Except as otherwise provided by statute or these rules, costs shall be allowed as of course to the prevailing party considering any relevant factors such as the needs and complexity of the case and the amount in controversy. *Id.*

INSURANCE

Additional Insureds

Generally, additional insureds are added by an amendment to the "Who is An Insured" provision in an insurance policy. Colo. Practice Series § 53:6. The "added insureds may or may not be treated like the named insureds for application of the omnibus-insureds provisision." *Id.* Courts examine the exact language used in adding "additional insureds" when determining which persons constitute "additional insureds" under the insurance policy. *See e.g., Chacon v. American Family Mut. Ins. Co.,* 788 P.2d 748, 750 (Colo. 1990); *Weitz Co., LLC v. Mid-Century Ins. Co.,* 181 P.3d 309, 313–15 (Colo. App. 2007) (construing additional insureds language in insurance policy and concluding that language did not include "completed operations" and insurer had no duty to indemnify general contractor). This framework applies to all general liability insurance policies.

Bad Faith Standard, Damages

Colorado recognizes a cause of action for common law first-party and third-party bad faith tort liability. "First-party bad faith occurs when an insurance company delays or refuses to make payments 'owed directly to its insured under a first-party policy such as life, health, disability, property, fire, or no-fault auto insurance.'" *Nunn v. Mid-Century Ins. Co.*, 244 P.3d 116, 119 (Colo. 2010) (quoting *Goodson v. Am. Standard Ins. Co.*, 89 P.3d 409, 414 (Colo. 2004)). Third-party bad faith arises when a liability insurer acts unreasonably in investigating, defending, or settling a claim brought by a third party against its insured. *Id.* With respect to third-party bad faith claims, "the insurer's duty of good faith and fair dealing extends only to its insured, not the third party" and therefore, "the insured must make a formal assignment of its bad faith claims to the third party before the third party can assert such a claim directly against the insurer." *Id.* (citing *Tivoli Ventures, Inc. v. Bumann*, 870 P.2d 1244, 1248 (Colo. 1994)).

Proof of actual damages is an essential element of a bad faith breach of an insurance contract claim because "[t]raditional tort principles govern claims for" bad faith common law claims. *Id.* at 121. The Colorado Supreme Court adopted the "judgment rule," which provides that the entry of judgment in excess of policy limits alone is sufficient to establish actual damages as an element of the bad faith breach of an insurance contract claim. *Id.* at 121, 123.

Colorado recognizes a first party statutory bad faith claim. Under Colo. Rev. Stat. § 10-3-1115(1)(a), a "person engaged in the business of insurance shall not unreasonably delay or deny payment of a claim for benefits owed to or on behalf of any first-party claimant." Colo. Rev. Stat. § 10-3-1115(2) provides that "an insurer's delay or denial was unreasonable if the insurer delayed or denied authorizing payment of a covered benefit without a reasonable basis for that action." A first-party claimant who brings a claim under Colo. Rev. Stat. § 10-3-1115 "may bring an action in a district court to recover reasonable attorney fees and court costs and two times the covered benefit." Colo. Rev. Stat. § 10-3-1116(1).

Coverage Limits

A. **Rental Vehicles** – Colorado's laws governing automobile and motor vehicle liability insurance policies generally does not apply to motor vehicle rental agreements or motor vehicle rental companies. Colo. Rev. Stat. § 10-4-609(1)(b). However, the Colorado Supreme Court has held that a rental vehicle contract, which offers coverage options for particular losses at specified rates, changes the rental agreement's status from one of bailment to one of an automobile insurance policy and that, as a result, Colo. Rev. Stat. § 10-4-609(1) requires the car rental agency to provide uninsured motorist coverage to the renter. *Passamano v. Travelers Indem. Co.*, 882 P.2d 1312, 1319–22. If the car rental agency fails to offer such coverage, such failure provides a basis for reformation of the agreement so as to provide uninsured motorist coverage. *Id.*

Underinsured Motorist/Uninsured Motorist Insurance

In Colorado, every automobile or motor vehicle liability policy includes coverage for damages for bodily injuries caused by owners or operators of uninsured and underinsured motor vehicles unless the named insured rejects the coverage in writing. Colo. Rev. Stat. § 10-4-

609(1)(a), (4). The maximum amount of uninsured/underinsured motor vehicle coverage ("UM/UIM") insurance that an insurance company must offer an insured that is required by Colo. Rev. Stat. §10-6-609(2) is "up to $100,000 per person and $300,000 per accident." *Kaercher v. Sater*, 155 P.3d 437, 440 (Colo. App. 2006) (quoting *Allstate Ins. Co. v. Parfrey*, 830 P.2d 905, 914 (Colo. 1992)).

Duty to Cooperate and Report Claims & Statute of Limitations

UM/UIM claims must be filed or "arbitration demanded" within three years after the cause of action accrues. Colo. Rev. Stat. § 13-80-107.5(1)(a)–(b). If the insured brings an underlying UM/UIM claim against the UM/UIM motorist and the insured discovers that the motorist is uninsured or underinsured, the insured may commence a UM/UIM claim within two years of receiving payment of settlement or discovering the motorist was uninsured. *Id.*

Discovery of Claim Files

A liability insurer's un-redacted claim file, including reserves and settlement authority, are generally not discoverable in insurance claims under Colo. R. Civ. P. 26(a)(1), (b)(6) because they are not reasonably calculated to lead to the discovery of admissible evidence and do not "reflect an admission by the insurance company that a claim is worth a particular amount of money." *Sunahara v. State Farm Mut. Ins. Co.*, 280 P.3d 649, 656, 2012 CO 30M, at ¶ 20 (Colo. 2012) (quoting *Silva v. Basin Western, Inc.*, 47 P.3d 1184, 1193 (Colo. 2002)). This discovery restriction also applies to information used to develop reserves and settlement authority. *Id.* at 657, 2012 CO 30M, at ¶ 25. However, the Colorado Supreme Court also recognized that in "bad faith and declaratory judgment actions, evidence of reserves and settlement authority could shed light on whether the insurance company adjusted a claim in good faith, or promptly investigated, assessed, or settled an underlying claim. *Id.* at 657–58, 2012 CO 30M, at ¶ 29.

Duty to Defend/Duty to Indemnify

"An insurer's duty to defend arises when the underlying complaint against the insurer alleges any facts that might fall within the coverage of the policy." *Hecla Min. Co. v. New Hampshire Ins. Co.*, 811 P.2d 1083, 1089 (Colo. 1991). The Colorado Supreme Court has reasoned that the "actual liability of the insured to the claimant is not the criterion which places upon the insurance company the obligation to defend[,]" but rather, "the obligation to defend arises from allegations in the complaint, which if sustained, impose a liability covered by the policy." *Id.* The *Hecla* court adopted the Ohio Supreme Court's reasoning and articulated that "where the insurer's duty to defend is not apparent from the pleadings in the case against the insured, but the allegations do state a claim which is potentially or arguably within the policy coverage, or there is some doubt as to whether a theory of recovery within the policy coverage has been pleaded, the insurer must accept the defense of the claim." *Id.* (quoting *City of Willoughby Hills v. Cincinnati Ins. Co.*, 9 Ohio St. 3d 177, 459 N.E.2d 555, 558 (1984)).

The duty to indemnify arises from the insurer's duty to satisfy a judgment entered against the insured. *Cyprus Amax Minerals Co. v. Lexington Ins. Co.*, 74 P.3d 294, 299 (Colo. 2003). Because the Colorado Supreme Court considers the duty to defend as broader than the duty to indemnify, "where no duty to defend exists, there can be no duty to indemnify." *Id.* The duty to

indemnify "is only triggered where the policy actually covers the alleged harm" and "typically cannot be determined until the resolution of the underlying claims." *Id.* at 300–01. *See Employers' Fire Ins. Co. v. W. Guar. Fund. Svcs.*, 924 P.2d 1107, 1110 (Colo. App. 1996) (holding that issue of indemnification was not ripe until liability was actually determined).

Waiver

As a general rule, insurance coverage will not be created by waiver in Colorado. *Compass Ins. Co. v. City of Littleton*, 984 P.2d 606, 620 (Colo. 1999) (reasoning that a waiver "cannot have created liability where none existed under the policy"). Estoppel likewise will not defeat "forfeiture or coverage or trigger coverage of policy risks that were not included or contemplated by the insurance contract's terms." Colo. Practice Series § 47:2; *Empire Cas. Co. v. St. Paul Fire and Marine Ins. Co.*, 764 P.2d 1191, 1198 (Colo. 1988) (quoting *Hartford Live Stock Ins. Co. v. Phillips*, 150 Colo. 349, 372 P.2d 740, 742 (Colo. 1962)). However, several Colorado courts have found exceptions to this general rule. A division of the Colorado Court of Appeals recognized the "rationale that an insurer would be estopped to deny coverage if an insurer assumed insured's defense without any reservation of rights, and the insured relied on the insurer's defense to the insured's detriment and was prejudiced by it." Colo. Practice Series § 47:2; *Management Specialists, Inc. v. Northfield Ins. Co.*, 117 P.3d 32, 38 (Colo. App. 2004). Another division determined that an "insurer who fails to notify the insured of limitations regarding coverage may be precluded from relying on the existence of such limitations to avoid liability." *Jarnagin v. Banker's Life and Cas. Co.*, 824 P.2d 11, 13 (Colo. App. 1991). Finally, the Colorado Supreme Court warned that an "insurer should raise (or at least reserve) all defenses within a reasonable time after learning of such defenses, or those defenses may be deemed waived or the insurer may be estopped from raising them." *U.S. Fidelity & Guar. v. Budget Rent-A-Car Sys., Inc.*, 842 P.2d 208, 210 n.3 (Colo. 1992).

DRAM SHOP AND SOCIAL HOST LIABILITY

Dram Shop Liability

Colorado's Dram Shop Statute provides that vendors of alcohol may be liable, under certain circumstances, if they serve alcohol to a visibly intoxicated or under twenty-one year old ("minor") person who subsequently causes damage to property or injury to another person. Colo. Rev. Stat. § 12-47-801. (hereinafter "the Dram Shop Statute").

Proximate cause and foreseeability are two elements that must be established to prove a tort claim and attach liability to the defendant. Generally, the consumption of alcohol, rather than the sale, service, or provision of alcohol, is considered the proximate cause of injuries or damages inflicted upon another by an intoxicated person. However, the Dram Shop Statute eliminated all common law tort claims against a vendor of alcoholic beverages so that the Dram Shop Statute is the exclusive remedy for any person wishing to bring a claim against a vendor of alcoholic beverages for Dram Shop liability. *See Westin Operator, LLC v. Groh*, 347 P.3d 606, 617, 2015 CO 25, ¶ 49 (Colo. 2015) (stating that the Dram Shop Statute "abolishes common law actions against liquor licensees and social hosts who sell or serve alcoholic beverages and makes the liability of alcohol vendors a creature of statute").

The Dram Shop Statute provides narrow exceptions for when the sale, service or provision of alcohol is considered the proximate cause of injuries or damages. Colo. Rev. Stat. § 12-47-801(3)(a)(I), (II). To establish liability under the Dram Shop Statute, there is no requirement that the plaintiff's injury be a foreseeable consequence of the sale or service of alcohol. *Build It and They Will Drink, Inc. v. Strauch*, 253 P.3d 302, 307 (Colo. 2011) (citing West's COLO. REV. STAT. § 12-47-801(1), (3)(a)(I)). A vendor of alcoholic beverages may be liable under the Dram Shop Statute if he willfully and knowingly serves a visibly intoxicated person or a person under the age of twenty-one years and another is injured because of the intoxication. *Id.* at 305.

Social Host Liability

A social host is generally defined as a person who provides alcohol to guests as an act of hospitality rather than as a commercial activity for monetary gain. Social hosts therefore cannot be held liable for the negligent conduct of adult (over twenty-one years old) guests. *Charlton v. Kimata*, 815 P.2d 946, 949 (Colo. 1991). A social host may be liable if he serves alcohol to a minor or knowingly provides a minor with a place to consume an alcoholic beverage and that minor subsequently damages property or causes injury to another person. Colo. Rev. Stat. §12-47-801(4); *Charlton v. Kimata*, 815 P.2d 946, 949 (Colo. 1991) (holding that social hosts were not liable where they provided alcoholic beverages to a forty-one year old guest who subsequently crashed her car and killed another passenger).

A. **Employer Acting as Social Host.** Occasionally employers who are not in the business of selling alcoholic beverages will provide alcohol to employees as part of an event or party. The Dram Shop Statute does not provide a cause of action based on an employer-employee relationship, but the Colorado Court of Appeals held that the Statute applies to an employer who acts as a social host. *Rojas v. Engineered Plastic Designs, Inc.*, 68 P.3d 591, 593 (Colo. App. 2003). Therefore, an employer may be liable if the employer willfully and knowingly provides alcoholic beverages to a minor and the minor subsequently causes damage or injury to another because of the intoxication. An employer acting as social host is not liable for an adult (over twenty-one years old) employee's consumption of alcoholic beverages on employer's premises. *Id.*

B. **Social Host Ordinances.** Colorado criminal statutes do not address Social Host liability, but some communities have current or proposed local ordinances that can impose fines and other penalties on social hosts who are in control of premises where underage drinking occurs. Fort Collins, Colo. Code § 17-161 (proposed amendment 2015). These ordinances aim to hold social hosts strictly liable when they are present and have control and access or use of the premises where underage drinking is occurring. *Id.* These ordinances are generally civil infractions with the potential of turning into a criminal offense for repeat offenders. *Id.*

Prohibition on First Party Claims

No civil action may be brought against a vendor of alcoholic beverages or against a social host by the person to whom the alcoholic beverage was sold or served. Colo. Rev. Stat. §12-47-801(3)(b); *Sigman v. Seafood Limited P'ship*, 817 P.2d 527, 531 (Colo. 1991) (quoting *Lyons v.*

Nasby, 770 P.2d 1250, 1253 (Colo. 1989), *superseded by statute in Westin Operator, LLC v. Groh*, 347 P.3d 606, 2015 CO 25 (Colo. 2015)).

Wrongful Death

The Statute specifically eliminates any wrongful death claim against a vendor of alcoholic beverages by prohibiting any Dram Shop liability claim to be brought by any first party, or by his estate, legal guardian, or dependent. Colo. Rev. Stat. §12-47-801(3)(b).

Social hosts may be liable for wrongful death if they provide alcohol to a minor and that same minor subsequently causes the death of another. *Sigman v. Seafood Limited Partnership*, 817 P.2d 527, 531 (1991). In a wrongful death action against a social host, heirs may maintain an action only if the deceased could have done so had his injuries not been fatal. *Id.* Because there is a prohibition on first party claims, this precludes any wrongful death action brought by the heirs of an intoxicated minor. *See id.* However, this reasoning does not preclude a wrongful death action brought by the heirs of a person whose death was caused by the intoxicated minor. *Id.*

Statute of Limitations

Any civil action arising from Dram Shop liability or Social Host liability must be commenced within one year after the sale or service of alcoholic beverages giving rise to the claim. Colo. Rev. Stat. § 12-47-801(3)(a)(II), (4)(a)(II).

Cap on Damages

Damages are capped at $150,000 in any civil action brought under either subsection (3) – Dram Shop liability, or subsection (4) – Social Host liability. Colo. Rev. Stat. § 12-47-801(3)(c), (4)(c).