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 (2016) 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 discovery 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 (2016). Claimants are required to send written notice by certified mail seventy-five days before filing an action against a construction professional and ninety days before filing an action relating to commercial property. *Id.* The construction professional, on written request, may inspect the claimant's property and the claimed defect within thirty days of receiving notice of the claim. *Id*. The statute sets forth additional deadlines for certain events following the written notice of claim. *See 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 §§ 1.1-1.2 cmts. (4th ed. 2005). The Rules Committee patterned the Colorado Rules of Civil Procedure after the Federal Rules of Civil Procedure ("FRCP"). *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.** In Colorado, instead of judicial elections, the governor appoints judges to the bench. COLO. CONST. art. 6 § 20. First, judicial nominating commissions interview applicants and submit a list of nominees to the governor for final selection. *Id*. Once appointed, the selected judge serves an initial two-year term. *Id.* After the initial term, voters must retain the judge at the general election. COLO. CONST. art. 6, § 25.

B) **Structure.** Colorado's judicial system operates on four court levels: county courts, district courts, the Court of Appeals, and the Supreme Court. *See* COLO. CONST. art. 6. County courts are limited to hearing criminal misdemeanor cases and civil cases where the amount at issue does not exceed $15,000.00. COLO. REV. STAT. §§ 13-6-104, -106 (2016). District courts retain general jurisdiction and handle large civil cases and felony criminal cases. COLO. CONST. art. 6, § 9. Additionally, district court judges handle probate and juvenile matters in all Colorado jurisdictions except for Denver County. COLO. CONST. art. 6, § 1, 9. The general assembly, through power granted by

the Colorado Constitution, created the Court of Appeals. COLO. REV. STAT. § 13-4-101 (2016). The Court of Appeals hears appeals from the district courts, probate courts, juvenile courts, and other administrative agencies. *Id*. § 13-4-102. The Supreme Court reviews decisions by the Colorado Court of Appeals. *Id.* § 13-4-108. Decisions by the Colorado Supreme Court are binding on all other Colorado state courts. COLO. CONST. art. 6, § 2.

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 (2015). Parties are required to meet and confer within fourteen days after the case is at issue. COLO. R. CIV. P. 16(b)(3). Parties must discuss settlement within forty-two days after the case is at issue. COLO. R. CIV. P. 16(b). The parties must file a proposed management order within forty-two days after the case is at issue. COLO. R. CIV. P. 16(b). The proposed management order must confirm the parties discussed settlement. *Id*.

The Colorado General Assembly passed the Dispute Resolution Act in 1983. COLO. REV. STAT. §13-22-301 to -313 (2016). 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. *Id*. § 13-22-303. Parties may choose to resolve their disputes through ODR or judges may order it in certain cases. *Id*. §§ 13-22-305, -313. ODR is equipped to resolve disputes through mediation, arbitration, and other means. *Id*. Colorado law defines mediation as "intervention in dispute negotiations by a trained neutral third party with the purpose of assisting the parties to reach their own solution." *Id*. § 13-22-302(2.4). 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.* § 13-22-302(1).

Colorado repealed its mandatory arbitration statute in 1991. *Id*. §§ 13-22-401 to -411.

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 to the person, 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).

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. COLO. R. CIV. P. 4(e)(4). 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(G).

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).

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

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). If a party is unable to accomplish service of process by personal service, and service by publication or mail is not permitted, 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 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).

Statutes of Limitations

A) **Construction and improvements to realty.** A plaintiff must bring an action against architects, contractors, builders, engineers, or inspectors for recovery of damages for design deficiency of real property improvement within two years of the date the claim arises. COLO. REV. STAT. §§ 13-80-102(1), -104(1)(a) (2016). The claim arises when the physical manifestations of the defect are discovered or when they should have been discovered by exercising reasonable due diligence. *Id.* § 13-80-104(1)(b)(I).

B) **Contract.** A three-year statute of limitations generally applies to contract actions, including personal contracts and contracts governed by the Uniform Commercial Code. COLO. REV. STAT. § 13-80-101(1)(a) (2016). However, exceptions exist. A six-year statute of limitations applies to actions to recover liquidated debt or an unliquidated but determinable amount of money and actions for the enforcement of rights set forth in any instrument securing payment or evidencing debt. *Id*. § 13-80-103.5(1)(a). Actions regarding written payoff statements for real property are subject to a one-year statute of limitations.

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 ninety days of the time the claim arises. COLO. REV. STAT. §§ 13-80-104(1)(b)(II)(B), -104(c) (2016). 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. 29 U.S.C. § 255 (2016); *Redmond v. Chains, Inc.*, 996 P.2d

759, 761 (Colo. App. 2000). The statute of limitations for a willful violation of the Fair Labor Standards Act is three-years. 29 U.S.C. § 255 (2016); *Redmond*, 996 P.2d at 761.

The statute of limitations for claims against an employer for personal injury or death is two years. COLO. REV. STAT. § 13-80-102(1) (2016).

E) **Fraud.** A three-year statute of limitations applies to actions for fraud, misrepresentation, concealment, or deceit, except private civil actions regarding the fraudulent sale of used motor vehicles. COLO. REV. STAT. § 13-80-101(1)(c) (2016).

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) (2016).

G) **Personal injury.** Tort actions for assault, battery, false imprisonment and false arrest must be commenced within one year of the cause of action. COLO. REV. STAT. § 13-80-103(1)(a) (2016). Most general negligence and strict liability claims are subject to a two-year statute of limitations. COLO. REV. STAT. §§ 13-80-102(1)(a)–(b) (2016). Tort actions for bodily injury or property damages arising out of the use or operation of a motor vehicle are subject to a three-year statute of limitations. COLO. REV. STAT. § 13-80-101(1)(n)(I) (2016).

H) **Professional liability.** In actions against licensed professionals, certificates of review must be filed within sixty days of the service of summons and complaint. COLO. REV. STAT. § 13-20-602(1)(a) (2016). This statutory requirement seeks to eliminate non-meritorious claims. *Id.* § 13-20-602(3)(a)(II). The sixty-day filing requirement runs from the date of service of process, not the date the complaint is filed. *Id.* § 13-20-602(1)(a).

Attorney malpractice cases may be based on negligence, contract, or breach of fiduciary duty. *See* 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 depends on the underlying claim. *Id.* at n. 9. A legal malpractice claim accrues for purposes of the statute of limitations when "a plaintiff learns 'facts that would put a reasonable person on notice of the general nature of the damage and the damage was caused by the wrongful conduct of an attorney.'" *Rantz v. Kaufman*, 109 P.3d 132, 136 (Colo. 2005) (quoting *Morrison v. Goff*, 91 P.3d 1050, 1053 (Colo. 2004) (emphasis removed).

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 three years. COLO. REV. STAT. § 13-80-101(1)(n)(I) (2016).

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) (2016).

J) **Survival.** The personal representative may bring an action within one year after the person's death so long as the applicable statute of limitations has not run. COLO. REV. STAT. § 13-80-112 (2016).

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) (holding that COLO. REV. STAT. § 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) (2016).

There are other circumstances when a statute of limitations may be subject to equitable tolling. *See Brodeur v. Am. Home Assur. Co.*, 169 P.3d 139, 149 (Colo. 2007). The statute of limitations may be equitably tolled when the defendant wrongfully impedes the plaintiff's ability to bring the claim or "truly extraordinary circumstances" prevent the plaintiff from filing his or her claim despite diligent efforts. *Id.* (citing *Dean Witter Reynolds, Inc. v. Hartman*, 911 P.2d 1094, 1096–97, 1099 (Colo. 1996)).

In product liability actions, if a person is under the age of eighteen, mentally incompetent, imprisoned, or absent from the United States, and the person does not have a spouse of legal guardian, the statute of limitations will toll. COLO. REV. STAT. § 13-80-106(2) (2016). When the condition tolling the action is removed, the statute of limitations begins to accrue. *Id*.

Parties may draft an agreement to toll any statute of limitations, doctrine of laches, or other time bar on a claim. *See First Interstate Bank of Denver, N.A. v. Cent. Bank & Trust Co.*, 937 P.2d 855, 857, 860–61 (Colo. App. 1996).

L) **Wrongful death.** Generally, a person bringing a wrongful death action must bring it within two years after the cause of action accrues. COLO. REV. STAT. § 13-80-102(1)(d) (2016) (A four-year statute of limitations applies if the plaintiff brings a wrongful death action against a defendant who commits vehicular homicide and flees the scene of the accident). The cause of action for wrongful death accrues on the date of death. COLO. REV. STAT. § 13-80-108(2) (2016). The two-year statutory limitation applies regardless of the claim's underlying legal theory. COLO. REV. STAT. § 13-80-102(1) (2016).

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 three years. COLO. REV. STAT. § 13-80-102.5(1) (2016). However, there are five exceptions to this rule. *Id*. § 13-80-102.5(3). First, if the person committing the act knowingly conceals it, the action may be brought within two years after the act was or should have been discovered in the exercise of reasonable diligence. *Id*. § 13-80-102.5(3)(a). Second, if the

act results in an unauthorized foreign object in the body of the patient, a person may bring the action within two years after the person discovered, or in the exercise of reasonable diligence should have discovered, the act. *Id*. § 13-80-102.5(3)(b). Third, if the physical injury and its cause are not known or could not have been known by exercising reasonable diligence, the three-year statute of repose does not apply. *Id*. 13-80-102.5(3)(c). Fourth, 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, the action may be maintained at any time before attaining eight years of age. *Id*. § 13-80-102.5(3)(d)(I). Fifth, if the person for whom the action is brought is under a disability, the three-year statute of repose does not apply. *Id.* § 13-80-102.5(3)(d)(II).

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 six-year statute of repose after substantial completion of real property improvement. COLO. REV. STAT. § 13-80-104(1)(a) (2016). If the action arises in the fifth or sixth year after substantial completion, it must then be brought within two years. *Id.* § 13-80-104(2). The statute of repose against land surveyors is ten years. COLO. REV. STAT. § 13-80-105 (2016). A seven-year statute of repose applies to products liability actions. COLO. REV. STAT. § 13-80-107(b) (2016).

Venue Rules

A) COLO. R. CIV. P. 98 sets forth the principles governing venue. Generally, actions may be tried in the county where any of defendants reside; the county where the plaintiff resides when service is made upon the defendant; or, if the defendant is not a resident of Colorado, in a county where the defendant may be found. COLO. R. CIV. P. 98(c).

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). This is not to be confused with the doctrine of *forum non conveniens*, which allows a court to dismiss the case when 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). 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

Comparative Fault/Contributory Negligence

A) **Modified comparative negligence.** Colorado follows a modified comparative negligence theory. COLO. REV. STAT. § 13-21-111 (2016). 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 (2016). The plaintiff's fault is compared with the fault of other parties and nonparties. *Id*. 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 to 8-49-209 (2016). The Act is designed to speedily provide compensation for injured workers without litigation by implementing an exclusivity rule. COLO. REV. STAT. § 8-40-102(1) (2016). Under the exclusivity rule, when an employer complies with the Act, the employee's recovery is limited to the workers' compensation claim. *Id*. § 8-41-102. The employee may not sustain other common law tort claims against the employer for injuries within the Act's purview. *Id*. Courts liberally construe injuries to allow employees to recover. *Lunsford v. Sawatsky*, 780 P.2d 76, 78 (Colo. App. 1989). However, immunity from common-law suits is also liberally construed when an injury is covered by the Act, even if the workers' compensation claim does not remunerate the employee for a particular element of damages. *Colo. Comp. Ins. Auth. v. Baker*, 995 P.2d 86 (Colo. App. 1998). The exclusivity rule also applies to actions by heirs or other dependents. *Henderson v. Bear*, 968 P.2d 144, 146 (Colo. App. 1998).

A) **Exceptions to exclusivity.** The exclusivity rule does not bar claims for retaliatory discharge or violation of the Colorado Anti-Discrimination Act. *See Lathrop v. Entemann's Inc.*, 770 P.3d 1367, 1372–73 (Colo. App. 1989); *Horodyskiyi v. Karanian*, 32 P.3d 470, 479 (Colo. 2001).

B) **Dual capacity.** The Colorado Supreme Court has recognized the validity of the dual capacity doctrine in workers' compensation claims. *Wright v. Dist. Ct., Jefferson Cty.*, 661 P.2d 1167, 1171 (Colo. 1983). The dual capacity doctrine provides that an employee may bring tort claims against an employer or co-employee with a "second identity" which creates separate legal obligations outside of the employment relationship, notwithstanding the exclusivity rule of workers' compensation claims. *Campbell v. Black Mtn. Spruce, Inc.*, 677 P.2d 379, 381 (Colo. App. 1983).

C) **Assumption of risk.** The Act provides that assumption of risk is not a defense to an action for damages against an employer or a 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) (2016).

Indemnification

A) **Distinguished from contribution.** Indemnification and contribution are two separate concepts. Contribution rests on the idea that a court should not require tortfeasors 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). A court should apportion losses between the parties liable for the harm. *Id*. Indemnification refers to a preexisting legal relationship or duty requiring one tortfeasor to hold the other harmless for injuries caused. *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 one party to fully reimburse the person who paid for the loss. *Williams v. White Mtn. Constr. Co.*, 749 P.2d 423, 426 (Colo. 1988). Contracts may provide for indemnification. *Id*.

B) **No indemnity between joint tortfeasors.** Colorado adopted the Uniform Contribution Among Tortfeasors Act in 1977. COLO. REV. STAT. §§ 8-41-101 to -106 (2016). The Act specifies the right of contribution between persons who are jointly or severally liable in tort for the same injury or wrongful death and eliminates the need for indemnification between tortfeasors. COLO. REV. STAT. § 13-50.5-102 (2016). If a defendant settles with the plaintiff, he is not entitled to recover contribution from another tortfeasor whose liability is not extinguished by the settlement. *Id*.

Joint and Several Liability

In 1986, Colorado enacted a statute which eliminates common law joint and several liability. COLO. REV. STAT. § 13-21-111.5 (2016). 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. *Id*. § 13-21-111.5(1). An exception to this rule exists for joint liability in conspiracy situations. *Id*. § 13-21-111.5(4). 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, the question is not whether individuals "conspire" to be negligent, but whether the conspirators' common plan or design results in wrongful conduct causing injury. *Id.* at 1055. If the conspiracy results in wrongful conduct causing injury, the conduct is a tortious act. *Id.*

Strict Liability

Strict liability in tort may arise even in situations where the defendant exercises reasonable care. *Lui v. Barnhart*, 987 P.2d 942, 944 (Colo. App. 1999). Colorado imposes this liability "because of the existence of circumstances which are recognized as inherently dangerous." *Id*. Strict liability aims to limit the public's exposure to dangerous situations or products. *Id*.

A) **Activities subject to strict liability.** Colorado imposes strict liability for intentionally set fires to woods or prairie, for blasting activities, for fires caused by a railroad company's operations, and for the release of nuclear material, and to keepers of wild animals. COLO. REV. STAT. § 13-21-105 (2016); *Garden of the Gods Village v. Hellman*, 294 P.2d 597, 602 (Colo. 1956); *Collins v. Otto*, 369 P.2d 564, 566 (Colo. 1962); COLO. REV. STAT. § 40-30-103 (2016); COLO. REV. STAT. § 43-6-509 (2016).

"As a general matter, a person who withdraws naturally necessary lateral support of land in another's possession is strictly liable for a subsidence of the land, as well as for harm to artificial additional resulting from the subsidence." *Vikell Inv'rs Pac., Inc. v. Kip Hampden, Ltd.*, 946 P.2d 589, 593 (Colo. Ct. App. 1997).

Vehicular homicide, felony murder, leaving the scene of an accident involving serious bodily injury, manufacturing a controlled substance in the presence of a minor, public indecency, and criminal possession of a financial device are strict liability crimes. COLO. REV. STAT. § 18-3-106 (2016); *People v. Jones*, 990 P.2d 1098, 1103 (Colo. App. 1999) (citing *People v. Hickam*, 684 P.2d 228 (Colo. 1984)); *People v. Manzo*, 144 P.3d 551 (Colo. 2006); COLO. REV. STAT. § 18-18-412.8 (2016); COLO. REV. STAT. § 18-7-301 (2016); COLO. REV. STAT. § 18-50-903 (2016).

B) **Restatement.** Colorado adopted 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. COLO. REV. STAT. §§ 13-21-401 to -406 (2016). The Colorado Supreme Court recognizes 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 and related defenses.** The learned-intermediary doctrine, the sophisticated-user doctrine, and the bulk-seller doctrine are commonly asserted defenses to a product liability claim. John W. Grund et al., *Personal Injury Practice – Torts and Insurance*, 7 COLO. PRAC. § 24.44 (2d ed. 2000). Each doctrine, though asserted as a defense, addresses a "perceived failure[] in the plaintiff's prima facie case." *Id*.

The learned-intermediary doctrine limits a drug manufacturer's duty to warn to the physician. *O'Connell v. Biomet, Inc.*, 250 P.3d 1278, 1281 (Colo. App. 2010). As a general rule, manufacturers do not have a duty to warn the patient directly because the physician is trained to assess the risks and benefits of the drug as applied to a particular patient. *Id.*

The sophisticated-user doctrine recognizes that a "knowledgeable user" cannot recover if, based on his superior knowledge, he underst[an]ds the dangers." *Lussier v. Louisville Ladder Co.*, 938 F.2d 299, 301 (1st Cir. 1991). Colorado courts recognize that the level of knowledge a user has is relevant to whether a supplier has a duty to warn. *Halter v. Waco Scaffolding & Equip. Co.*, 797 P.2d 790, 794 (Colo. App. 1990). However, Colorado courts have not recognized the sophisticated-user doctrine as a complete defense. *Id*. (noting that

the professional statute of the user is not dispositive as to whether the supplier has a duty to warn).

The bulk-supplier doctrine limits a seller's duty to warn to only "warn[ing] the intermediate distributor, and not each individual consumer, that the product is dangerous." *Little v. Liquid Air Corp.*, 952 F.2d 841, 850 (5th Cir. 1992) (citation omitted). Colorado courts have not recognized the bulk-supplier doctrine as a defense to product liability claims. John W. Grund et al., *Personal Injury Practice – Torts and Insurance*, 7 COLO. PRAC. § 24.44 (2d ed. 2000).

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) (2016). Colorado defines willful or wanton conduct 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." *Id.* § 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 of another. COLO. REV. STAT. § 13-50.5-102(3) (2016).

C) **Statutory immunity.** Willful or wanton conduct may affect statutory immunity. COLO. REV. STAT. §§ 13-21-101 to -128 (2016). 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 (2016). Also, government employees may lose immunity if their conduct is willful and wanton. COLO. REV. STAT. § 24-10-118(2)(a) (2016).

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 e-discovery.

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). The rule imposes a 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 their proposed discovery plan any issues pertaining to discovery of electronically stored information. FED. R. CIV. P. 26(f)(3)(D).

B) **Colorado Rules.** The Colorado Rules of Civil Procedure, on the other hand, require disclosures that include "a listing together with a copy or description by category of the subject matter 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). Absent from the Colorado Rules is the limitation on discovery of electronically-stored information set forth in FED. R. CIV. P 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: occupational expert, testifying expert, or non-testifying expert. Sheila K. Hyatt & Stephen A. Hess, Annotation, *Colorado Civil Rules*, COLO. PRAC. SERIES R. 26.8 (4th ed. 2005). 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.* A testifying expert is one a party expects to call as a witness. *Id.* A non-testifying expert is one retained in anticipation of litigation but who does not give testimony at trial. *Id.* The opinions of non-testifying experts do not receive 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. COLO. R. CIV. P. 26(a)(2)(B). The report must include the testifying expert's opinions, support for those opinions, exhibits, the expert's qualifications, the expert's compensation, and the expert's recent testimony. *Id.* The Colorado Rules now track the Federal Rules and require a full report prepared and signed by a testifying expert, rather than permitting a summary of the expert's opinions. COLO. R. CIV. P. 26(a)(2)(B)(I). Mandatory disclosure requirements are less stringent for occupational experts. An occupational expert's report must include the expert's qualifications and opinions, the basis for those opinions, and any exhibits to be used as a summary or in support of those opinions. COLO. R. CIV. P. 26(a)(2)(B)(II). If the occupational expert writes the report, the expert must also sign it. *Id.* If the occupational expert does not write the report, however, a party's lawyer or a self-represented party may prepare and sign a conforming statement. *Id.* Reports or opinions of non-testifying experts do not have to be disclosed and are often protected under the work product doctrine. *See* COLO. R. CIV. P. 26(a)(2)(A)–(B), 26(b)(4)(B).

C) **Rebuttal witnesses.** Rebuttal expert testimony must be disclosed seventy-seven days before the trial date. 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. COLO R. CIV. P. 26(b)(4)(A). Generally, the opinions or reports of non-testifying experts may be discovered only as provided in COLO. R. CIV. P. 35(b) (governing reports by 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. COLO. R. CIV. P. 26(b)(4)(B). Drafts of reports and disclosures by experts

under 26(a)(2), and any communications a party's attorney has with such experts, are protected from disclosure except as to the expert's compensation and the facts, data, and assumptions the attorney provided which the expert used in forming his opinions. COLO. R. CIV. P. 26(b)(4)(D).

Non-Party Discovery

Most discovery rules apply only to parties to the litigation. However, non-parties may be deposed. COLO. R. CIV. P. 30(a). 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.** COLO. R. CIV. P. 45 addresses rules governing subpoenas. A subpoena may be used to compel the attendance of witnesses. COLO. R. CIV. P. 45(a)(1)(A)(iii). There are two primary types of subpoenas. A subpoena *ad testificandum* orders a witness to appear and give live testimony at a specified time and place. *Subpoena*, Black's Law Dictionary (10th ed. 2014). A subpoena *duces tecum* orders a witness to appear and to bring specified documents, records, or tangible things. *Id.*

B) **Appearance and production.** Under COLO. R. CIV. P. 45(a)(1)(B), a deposition subpoena may be used to order a witness to appear and produce documents. The witness may serve a written objection to the subpoena upon the noticing attorney within the time specified for compliance or fourteen days after being served, whichever date is earlier. COLO. R. CIV. P. 45(c)(2)(C). Subpoenaed documents may not be produced prior to the time and place specified in the subpoena unless the requesting party confers with and obtains consent from all parties and the subpoenaed witness. *In re Wiggins*, 279 P.3d 1, 23-24 (Colo. 2012). 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. *See* COLO. R. CIV. P. 45(c)(3).

C) **Geographic limitations.** A Colorado resident may be required to attend a deposition only in the county where the resident resides or is employed or transacts business in person, or in such other convenient place as is directed by court order. COLO. R. CIV. P. 45(e)(1). A subpoena may be served, however, anywhere within the state. COLO. R. CIV. P. 45(b)(2). Nonresidents of Colorado may be required to attend only if the location of the deposition is 1) within 40 miles of the place of service; 2) in the county where they reside, are employed, or transact business in person; or 3) in such other convenient place as the court directs. COLO. R. CIV. P. 45(e)(2).

D) **Subpoenas.** Subpoenas may be issued by a clerk of the court or by an attorney who has entered an appearance in a case. COLO. R. CIV. P. 45(a)(2). Subpoenas must be personally served on the witness anywhere within the state at least 48 hours before the date on which appearance is required. COLO. R. CIV. P. 45(b)(1)–(2). The witness must receive a copy of the subpoena at the time of service. COLO. R. CIV. P. 45(b)(2). If the subpoena requires attendance, an appearance or mileage fee must be paid at the time of service or within a reasonable time thereafter prior to the appearance date. COLO. R. CIV. P. 45(b)(3).

Privileges

A) **Attorney-client privilege.** The attorney-client privilege is codified in COLO. REV. STAT. § 13-90-107(1)(b) (2016). 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 an attorney, 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, outside the presence of strangers, to secure legal advice, services, or assistance, and not for the purpose of committing a crime or tort; and (5) no waiver has occurred." *In re Grand Jury 90-1*, 758 F. Supp. 1411, 1413 (D. Colo. 1991).

1) **Exceptions.** The attorney-client privilege is not absolute. *Law Offices of Bernard D. Morley, P.C. v. MacFarlane*, 647 P.2d 1215, 1220 (Colo. 1982). The privilege will not apply if an exception exists. *Id.* For example, communications between a client and his attorney are not privileged if they are not made "for the purpose of aiding" a presently continuing or future crime. *Id.*

2) **Burden.** The burden of establishing the attorney-client 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 of privileged information claims the information falls within an exception to the attorney-client privilege, the requesting party must make a prima facie showing that the exception is applicable. *Caldwell v. Dist. Court, City & Cty. of Denver*, 644 P.2d 26, 32 (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, 1376 (Colo. 1982). Work product refers to "written statements, private memoranda, and personal recollections" prepared in anticipation of litigation or trial. COLO. R. CIV. P. 26(b)(3). Work product may be discovered only "upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means." *Id.* The court must still protect an attorney's mental impressions, conclusions, opinions, or legal theories when ordering discovery of the attorney's work product. *Id.*

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

D) **Self-critical analysis.** The self-critical analysis privilege seeks to protect internal corporate documents which may contain damaging self-criticism. Colorado has not directly recognized a self-critical analysis privilege. *Combined Commc'n Corp., Inc. v. Pub. Serv. Co. of Colo.*, 865 P.2d 893, 898 (Colo. App. 1993) ("Colorado has not, as yet, recognized any such privilege…"); *see also DeSantis v. Simon*, 2009 P.3d 1069 (Colo. 2009) (discussing the policy reasons for making hospital personnel's self-assessments privileged, but remanding the case to the trial court for further analysis). Further, the U.S. Supreme Court has cautioned that federal courts should not expansively exercise their power to recognize privileges not generally recognized at common law or created by statute. *Univ. of Pa. v. EEOC*, 493 U.S. 182 (1990). The courts that have recognized the self-critical analysis privilege limit it to information provided in peer reviews of university faculty or hospital personnel; affirmative action studies; and certain internal investigatory reports. *Combined Commc'n Corp.*, 865 F.2d at 898. As such, under Colorado state law, the self-critical analysis privilege does not currently protect against internal corporate reviews of safety regulations prior to an incident.

E) **Other privileges.** Colorado recognizes that communications with a spouse or partner in a civil union, clergy member, physician or nurse, public officer, certified public accountant, psychologist or therapist, social worker, interpreter, "confidential intermediary," victim's advocate, child's parent, and emergency medical services provider are privileged. COLO. REV. STAT. §§ 13-90-107(1)(a)–(m) (2016) (*amended in part by* 2017 Colo. HB 1032 as to the privilege applied to certain peer support services). The Colorado Supreme Court has declined 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 claim the executive or governmental privilege and 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 thirty-five days. *Id.* Parties may deny the matter, indicate the reasons they cannot admit or deny the matter, or object to the request and 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. COLO. R. CIV. P. 37(c). 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. *Id.* 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. COLO. R. CIV. P. 36(b). A party is limited to a maximum of twenty written requests for admissions. COLO. R. CIV. P. 26(b)(2)(E) (2014). The party may also serve requests for admission regarding the authenticity of up to fifty documents that the party wants to offer as evidence at trial. *Id.*

EVIDENCE, PROOFS & TRIAL ISSUES

Accident Reconstruction

As long as sufficient foundation exists, courts may allow expert testimony from a police officer based upon his or her on-the-scene investigation concerning a vehicle's speed and explanations of how an accident occurred. *People v. Jiminez*, 528 P.2d 913, 914-15 (Colo. 1974).

Appeal

Prior to appeal and within fourteen days after 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. COLO. R. CIV. P. 59(a). The court may make a motion on its own initiative. COLO. R. CIV. P. 59(c).

A) **Final judgment.** The term "judgment" includes a decree and order to or from which an appeal lies. COLO. R. CIV. P. 54(a). 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 order's legal effect rather than on its 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); *see* COLO. R. CIV. P. 54(b).

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

> 1) A final judgment of any district, probate, or juvenile court in all actions or special proceedings;
>
> 2) A judgment and decree or order 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.

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 forty-nine days of entry of judgment from which the party appeals. COLO. APP. 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. App. 1978).

"Biomechanical" Testimony

If scientific, technical, or other specialized knowledge (such as "biomechanical" testimony) will assist a trier of fact with understanding the evidence or 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.

A) **Balancing.** In determining the reliability and validity of the underlying substance of an 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. *Colwell v. Mentzer Investments, Inc.*, 973 P.2d 631, 636 (Colo. App. 1998).

B) **Applicability of *Frye* test.** Colorado courts apply the *Frye* test for admissibility of expert scientific evidence only when the proffered evidence is based on "novel scientific devices involving the evaluation of physical evidence." *Schultz v. Wells*, 13 P.3d 846, 849-50 (Colo. App. 2000); *see Frye v. United States*, 298 F. 1013 (D.C. Cir. 1923).

Collateral Source Rule

At common law, the collateral source rule provided that compensation received from a collateral source independent of a wrongdoer will not diminish the damages recoverable from the wrongdoer. *Colo. Permanente Med. Group, P.C. v. Evans*, 926 P.2d 1218, 1230 (Colo. 1996). The purpose of this rule was to prevent a defendant from receiving credit for a plaintiff's compensation from another source, such as insurance. *Id.* A version of the collateral source rule is codified in COLO. REV. STAT. § 13-21-111.6 (2016). However, the statute limits the circumstances in which a plaintiff can receive double compensation for an injury. *Id.* It 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 related to the injury sustained. *Id.* This limitation, however, does not apply to compensation the plaintiff receives from a contract made and paid for on the plaintiff's behalf. *Id.*

Convictions

A) **Criminal.** Evidence of a testifying witness's prior felony conviction which occurred more than five years before the date of his testimony is inadmissible in civil actions. COLO. REV. STAT. § 13-90-101 (2016). Colorado's statute governing admissibility of felony convictions for impeachment purposes is quite different from the Federal Rules of Evidence. *See* FED. R. EVID. 609. In Colorado, felony convictions are admissible to impeach a testifying criminal defendant without regard to balancing probative value and unfair prejudice. COLO. REV. STAT. § 13-90-101 (2016). Further, the statute does not prohibit evidence of misdemeanors or pending charges if it is offered for a permissible purpose (*e.g.*, to show motive, bias, prejudice, or interest in the outcome of trial, rather than for impeachment). *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 (2016).

Day in the Life Videos

Colorado case law is scarce regarding the admissibility of "day in the life" videos depicting an accident's effect on a plaintiff's daily life and activities. 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, the Tenth Circuit has also held that "day in the life" videos 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). Cross-examining a plaintiff about the activities depicted in the video lessens the video's prejudicial effect. *Id.* As such, in Colorado federal courts, "day in the life" videos are not categorically excluded from evidence. *Id.*

Dead Man's Statute

The Dead Man's Statute is codified in COLO. REV. STAT. § 13-90-102 (2016). The statute governs testimony about prior oral statements made by a person now incapable of testifying. *Id.* It 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 a trustworthy nature; (3) the opposing party introduces uncorroborated evidence of related communications; or (4) such party or person testifies against his or her own interests. *Id.* §13-90-102(1).

Medical Bills

Evidence of furnishing or offering to pay medical or hospital expenses for an injury is not admissible to prove liability for the injury. COLO. R. EVID. 409. Plaintiffs may recover the reasonable value of past and present medical expenses as part of a 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 such medical expenses. *Id.*

Offers of Settlement

Colorado's "offer of settlement" statute, contained in COLO. REV. STAT. § 13-17-202 (2016), replaced the offer of judgment procedure formerly governed by COLO. R. CIV. P. 68. The statute provides that if a defendant rejects a plaintiff's settlement offer made more than fourteen days before trial and the plaintiff recovers a final judgment for more than the settlement offer, the defendant must also pay the plaintiff's actual costs incurred after the settlement offer. COLO. REV. STAT. § 13-17-202(1)(a)(I) (2016). Likewise, if a plaintiff rejects a defendant's settlement offer made more than fourteen days before trial and the final judgment is less than the defendant's settlement offer, the plaintiff must pay the defendant's actual costs incurred after the settlement offer. *Id.* § 13-17-202(1)(a)(II). If a plaintiff recovers any amount at trial, however, even an amount less than a defendant's settlement offer, the plaintiff may recover actual costs incurred prior to the settlement offer. *Id.* The award of actual costs does not include an award of attorney's fees. *Id.* § 13-17-202(1)(b).

Offers of Proof

COLO. R. EVID. 103, which governs rulings on evidence, is identical to its Federal Rule analogue. *See* FED. R. CIV. P. 103. Evidentiary arguments must be conducted outside the presence of the jury. COLO. R. EVID. 103(c). Evidentiary offers of proof must inform the court of the nature and substance of proposed evidence to ensure the court may properly rule on the evidence's admissibility and to provide a basis for appellate review. *Itin v. Ungar*, 17 P.3d 129, 136 (Colo. 2000). A party may only appeal an evidentiary ruling admitting or excluding evidence if the ruling affects a substantial right of a party. COLO. R. EVID. 103(a). Unless the substance of the evidence was apparent from the context, offers of proof must be made upon an evidentiary ruling which excludes evidence in order to preserve the issue for appeal. COLO. R. EVID. 103(a)(2). Alternatively, a specific and timely objection must be made upon a ruling which admits evidence. COLO. R. EVID. 103(a)(1). An error "does not affect a substantial right of a party" only 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).

Prior Accidents

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

Seat Belt and Helmet Use Admissibility

A) **Seat belt.** Colorado's seat belt law imposes a standard of care on drivers and passengers alike. Colo. Rev. Stat. § 42-4-237(2) (2016). It provides that evidence of an injured claimant's failure to wear a seat belt is admissible to mitigate the claimant's damages for purposes of pain and suffering awards. *Id.* § 42-4-237(7). However, a claimant's failure to wear a seat belt is irrelevant to the issue of the claimant's comparative negligence. *Churning v. Staples*, 628 P.2d 180, 181 (Colo. App. 1981).

B) **Helmet.** Unlike its statutory seat belt requirement, Colorado has no statute requiring motorcyclists to wear protective helmets. *Dare v. Sobule*, 674 P.2d 960, 963 (Colo. 1984). As such, a motorcyclist's failure to wear a helmet is inadmissible either to show negligence by the motorcyclist or to mitigate 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 (Colo. App. 2008). The purpose of an adverse inference instruction is both

to deter parties from destroying evidence and to restore a 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, 1002 (Colo. 2006).

Subsequent Remedial Measures

Evidence of subsequent remedial measures is inadmissible to prove a defendant's negligence or culpable conduct. COLO. R. EVID. 407. Evidence of subsequent remedial measures may be admissible for other purposes, including impeachment, showing notice, or ownership and control. *Id.* In product liability cases, evidence of scientific advancements in technical knowledge, manufacturing, testing, labeling, risk assessment, or instructions for use, which are discovered after an allegedly defective product is sold by the manufacturer, is only admissible to show a duty to warn. COLO. REV. STAT. § 13-21-404 (2016).

Use of Photographs

Properly authenticated photographs may be admissible in evidence. See COLO. R. EVID. 1001-1004, 901. 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. *People v. Scarlett*, 985 P.2d 36, 42 (Colo. App. 1998). In light of the preference for admissibility, as long as evidence has probative value, it is generally admissible. *Id.*

DAMAGES

Caps on Damages

A) **Noneconomic loss.** For claims arising after January 1, 2008, noneconomic damages are generally capped at $468,010.00, though that number can increase to $936,030.00 if the court finds justification upon clear and convincing evidence. COLO. REV. STAT. §§ 13-21-102.5(3)(a)–(c) (2016); COLO. DEP'T OF STATE, CERTIFICATE OF ADJUSTED LIMITATIONS FOR DAMAGES (2015). 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." COLO. REV. STAT. § 13-21-102.5(2)(b) (2016). 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 $468,010.00. COLO. REV. STAT. § 13-21-102.5(3)(b) (2016); COLO. DEP'T OF STATE, CERTIFICATE OF ADJUSTED LIMITATIONS FOR DAMAGES (2015). 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." COLO. REV. STAT. §13-21-102.5(2)(a) (2016).

C) **Government entities.** Damages recoverable against public entities are limited to $350,000.00 for injury to one person in a single occurrence and $990,000.00 for injury to two or more persons in a single occurrence. COLO. REV. STAT. §§ 24-10-114(1)(a)–(b) (2016).

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) (2016). The noneconomic loss limit of $300,000.00 is also included in the $1,000,000.00 limitation. *Id.* § 13-64-302(1)(c). Upon a showing of good cause, a judge may increase the $1,000,000.00 cap. *Id.* § 13-64-302(1)(b).

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 enjoyment of life) damages.** Evidence of loss of enjoyment of life 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 enjoyment of life 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) (2016). 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 (2016). 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 (Colo. App. 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. 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). 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) (2016). 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) (2016). 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. § 24-10-114(a) (2016).

Recovery and Pre- and Post-Judgment Interest

A) **Constitutionality.** The Colorado Supreme Court held unconstitutional portions of COLO. REV. STAT. § 13-21-101 (2016), 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. App. 1988).

1) **Prejudgment interest accrual.** In cases where a plaintiff requests prejudgment interest and there is no appeal, the interest is calculated at nine percent per anum from the date the action accrued until satisfaction. *Sperry v. Field*, 186 P.3d 133, 138 (Colo. App. 2008); COLO. REV. STAT. § 13-21-101.

2) **Post-judgment interest accrual.** Post-judgment interest accrues at a rate of nine percent per anum 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 v. Schutt*, 914 P.2d 921, 928 (Colo. App. 1996); COLO. REV. STAT. § 13-21-101.

3) **Settlement.** If a personal injury plaintiff enters into a settlement, the court may not add pre-judgment interest. Pre-judgment interest is not allowed on punitive damages. *Seaward Constr. Co. v. Bradley*, 817 P.2d 971, 974 (Colo. 1991).

C) **Non-personal injury.** Pre-judgment 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) (2016). 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) (2016).

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. App. 1998). Colorado has a specific statute pertaining to attorney's fees in frivolous civil actions. COLO. REV. STAT. § 13-17-101 *et seq*. (2016). 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) (2016). 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 (2016). A conservator may be appointed to protect a minor's settlement rights. *Id.*; COLO. REV. STAT. § 15-14-425(2) (2016). The court may ratify the settlement of a minor's claims. COLO. REV. STAT. § 15-14-412(1)(b) (2016). A parent may act as the conservator for a minor child only upon appointment from the court. COLO. REV. STAT. § 15-14-413 (2016).

Taxation of Costs

A) **Recoverable costs.** COLO. REV. STAT. § 13-16-122 (2016) 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 (2016) governs when the plaintiff may recover costs. The defendant's ability to recover costs is set forth in COLO. REV. STAT. § 13-16-105 (2016). Costs are only taxable by authority of statute.

C) **Against government.** Costs against the state of Colorado or its officers or agencies shall be imposed only to the extent permitted by law. COLO. R. CIV. P. 54. 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.*

indicated, you are encouraged to contact a lawyer authorized to practice law in the state for which you are investigating and/or seeking legal advice.