

**STATE LAW SUMMARY**  
**Overview of the State of Colorado**  
**Updated 2013**

**Preparers:**

John P. Craver, Esq. & Adam Goldstein, Esq.  
White and Steele, P.C.  
Denver, CO

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## **I. Overview of the State of Colorado Court System**

### **A. Trial Courts**

Colorado has various state court civil jurisdictions. The main state trial courts of general jurisdiction are the Colorado District Courts. Colorado County Courts have concurrent original jurisdiction over civil matters where the amount in controversy is less than \$15,000. Colorado's County Courts also each have a small claims division which has concurrent original jurisdiction over civil matters where the amount in controversy is less than \$7,500. With the exception of cases filed in the small claims division, civil jury trials are available in both County and District Courts, and there are typically six (6) jurors in Colorado civil cases.

Most venues within the state are generally considered somewhat conservative in civil matters as compared to national averages. While the City and County of Denver is considered more liberal than most of Colorado's other jurisdictions, Denver is considered rather conservative as compared to most other large U.S. cities. The Denver suburban counties (Arapahoe, Jefferson, Adams, Douglas, Broomfield) are typically more conservative than Denver and generally more conservative than most U.S. suburban metropolitan jurisdictions. Most other jurisdictions in Colorado are thought to be somewhat conservative, with the exception of Boulder County, which is quite liberal, mountain jurisdictions with large ski resorts such as Eagle County (Vail/Beaver Creek), Pitkin (Aspen) and San Miguel (Telluride), which are rather liberal, and El Paso County (Colorado Springs), which is rather unpredictable.

Courts in Colorado have the authority to mandate mediation, and most Colorado civil cases are mediated prior to trial.

### **B. Appellate Courts**

Colorado civil cases are appealable as a matter of right to the Colorado Court of Appeals. Thereafter, certiorari to the Colorado Supreme Court is discretionary. The Colorado Supreme Court has original appellate jurisdiction in certain specified matters.

The Colorado Supreme Court consists of seven justices. In most situations, appellants are required to post a bond upon appeal. The usual post-judgment interest rate in Colorado is 8%.

## **II. Procedural**

### **A. Venue**

Venue in Colorado state courts is governed by C.R.C.P. 98. Typically, venue in tort cases is proper where the tort occurred or where one of the Defendants reside. If none of the Defendants reside in the state, the case may be tried in the county designated by Plaintiff in the complaint.

### **B. Statute of Limitations**

There is a two year statute of limitations for most negligence and other tort actions in Colorado. However, actions for bodily injury or property damage arising out of the use or operation of a motor vehicle are subject to a three year statute of limitations. A three year statute of limitations applies to most contract actions. There is a two year statute of limitations on wrongful death claims, even if the wrongful death arises out of the use or operation of a motor vehicle.

A cause of action for injury to person or property accrues, thus starting the statute of limitations, on the date both the injury and its cause are known or should have been known by the exercise of reasonable diligence. However, actions for bodily injury or property damage arising out of the use or operation of a motor vehicle accrue on the date that both the existence of the injury or damage and the cause of the injury or damage are known or should have been known by the exercise of reasonable diligence. Case law has not yet established how these two accrual statutes differ in practice, if at all.

Statutes of limitations do not apply or run against a person under a disability, defined as a minor under the age of 18 years of age, a mental incompetent or a person under other legal disability who does not have a legal guardian. If a person under disability is without a "legal representative," the statute of limitation does not run against the disabled person. Also, the statute of limitation does not run during the time a defendant is out of the state and not subject to service of process.

### **C. Time for Filing An Answer**

Typically, a defendant must file a responsive pleading within 21 days of formal service of the summons and complaint if served within Colorado, and within 35 days if served outside of Colorado.

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

Dismissal of actions in Colorado is governed by C.R.C.P. 41. A plaintiff can voluntarily dismiss its suit before the adverse party files an answer or motion for summary judgment, whichever occurs first. Thereafter, a case can only be dismissed by stipulation of all parties or by order of the court. Dismissals in Colorado are considered to be "without prejudice" unless otherwise indicated in the dismissal paperwork.

## **II. Liability**

## **A. Negligence**

### **1. Negligence**

A plaintiff may claim that injuries were caused by the negligence of the truck driver, which is imputed to the driver's employer under the theory of *respondeat superior* (see below), or due to an independent act of negligence on the part of the employer (see below). In either case, the plaintiff must prove the common law elements of the tort of negligence: the existence of a duty on the part of the defendant; breach of that duty or the failure of the defendant to perform that duty as a reasonable person would have under the same or similar circumstances; the defendant's conduct was the legal cause of the plaintiff's injuries; and the plaintiff suffered compensable damages.

A defendant is required to be the cause of the plaintiff's injury. The "but for" test is followed when analyzing the proximate cause issue. Thus, but for the defendant's negligence, the plaintiff's injury would not have occurred. Likewise, the proximate cause of a plaintiff's injury occurs when in the natural and continued sequence, unbroken by any efficient intervening cause, the defendant causes the plaintiff's claimed injury, and had it not been for the defendant's actions the injury would not have occurred. Under Colorado law, an act is a proximate cause when it substantially contributes to the plaintiff's injury.

Foreseeability is the cornerstone of proximate cause. "The duty to exercise reasonable care extends only to foreseeable damage and injuries that occur to foreseeable plaintiffs." Thus, remote damages and injuries to unexpected persons will not constitute proximate cause.

### **2. Negligence per se**

Violation by the defendant of a state statute, a city ordinance or a federal law or regulation such as those dealing with driving hours, rest periods or the transportation of hazardous materials may constitute negligence *per se* in Colorado. The advantage to a plaintiff who pleads negligence *per se* is that he or she only needs to prove violation of the statute and not the other elements of negligence. The plaintiff must still have sustained damages as a result of the violation of the statute. Plaintiff must also show that one of the purposes of the statute or ordinance was to protect against the type of injuries or losses the plaintiff sustained, and that he or she was a member of the group of persons the statute was intended to protect.

### **3. Respondeat Superior**

An employer is liable for an employee's acts or omissions constituting negligence if those acts are committed during the course and scope of the employee's employment. An issue which may arise when the plaintiff claims that a trucking company is liable for the actions of the driver under this theory is whether the driver was actually in the

course and scope of employment, or whether the driver was on a “detour or frolic” (i.e., acting entirely outside the scope of employment and for personal purposes).

#### **4. Contributory Negligence / Comparative Fault**

Colorado has adopted a system of modified comparative fault. Under this system, a plaintiff will be barred from recovery if the plaintiff is 50% or more at fault. If the trier of fact assigns less than 50% fault to the plaintiff, he or she may still recover, but the amount of damages recoverable is reduced by his or her percentage of fault. In cases where there are multiple defendants who cause plaintiff's injury, each defendant will be liable for its respective percentage of fault, assuming the plaintiff is not 50% or more at fault.

A trier of fact in Colorado can also consider the fault of nonparties and parties that have settled with Plaintiff prior to trial. The negligence or fault of such nonparties may be considered if the claimant entered into a settlement agreement with the nonparty, or if the defending party gives notice that a nonparty was wholly or partially at fault within 90 days following commencement of the action. Colorado courts permit the designation of immune nonparties at fault, such as government entities and employers who have covered the plaintiff under a worker's compensation insurance policy. If nonparties are properly and timely designated, the trier of fact assigns percentages of fault to the nonparties, as well as to the plaintiff and the defendants. The plaintiff cannot recover to the extent of the nonparties' and settled parties' assigned percentages of fault, and the plaintiff cannot recover at all if his or her fault equals or exceeds 50%.

#### **B. Negligence Defenses**

Affirmative defenses, when applicable, must be pled specifically. These include: accord and satisfaction; arbitration and award; assumption of risk; contributory (and comparative) negligence; discharge in bankruptcy; duress; estoppel; failure of consideration; fraud; illegality; injury by fellow servant; laches; license; payment; release; *res judicata*; statute of limitations; waiver; and any other matter constituting an avoidance or affirmative defense.

A plaintiff has a duty to mitigate damages. However, failure of a plaintiff to wear a seat belt is not a defense for purposes of determining the degree of plaintiff's comparative fault. Similarly, because there is no mandatory helmet law in Colorado, a motorcycle-riding plaintiff's failure to wear a helmet is not a defense for purposes of determining the degree of plaintiff's comparative fault. Plaintiff's failure to wear a seat belt can be considered as evidence of a plaintiff's failure to mitigate noneconomic “pain and suffering” damages, but a plaintiff's failure to wear a seat belt cannot be considered as evidence of a plaintiff's failure to mitigate medical expenses or other economic damages. A defendant is not required to present medical evidence on this issue of failure to mitigate pain and suffering damages. However, testimony by a competent medical expert that plaintiff's injuries would not have been as severe as they were if he or she had worn a seat belt should be admissible.

Intoxication of the plaintiff or defendant in a vehicular accident is admissible, if relevant.

Another defense that may be asserted is the “unavoidable accident defense.” An “unavoidable act” is one that happens unexpectedly and suddenly. A defendant is not liable for injuries that result from an unavoidable accident. The “Act of God” defense is also available only to defendants that can prove a plaintiff’s injury resulted entirely from an act of God.

Summary judgment motions are frequently filed in Colorado, and most Colorado courts do not shy away from granting summary judgment where it is clear there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law.

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

Punitive or “exemplary” damages may be awarded in Colorado where the injury complained of is attended by circumstances of fraud, malice, or willful and wanton conduct. Willful and wanton conduct is defined as conduct purposely committed which the actor must have realized was dangerous, done heedlessly and recklessly, without regard to consequences, or of the rights and safety of others, particularly the plaintiff. In order to recover exemplary damages, a plaintiff must prove his or her entitlement to exemplary damages beyond a reasonable doubt (the highest standard of proof). Further, a plaintiff may not include a claim for exemplary damages in his or her initial claim for relief. Instead, a claim for exemplary damages may be allowed only by amendment of the pleadings after the exchange of initial disclosures and only after the plaintiff establishes prima facie proof of a triable issue.

Prima facie evidence is evidence that, unless rebutted, is sufficient to establish a fact. Prima facie proof of a triable issue of exemplary damages is established by showing a reasonable likelihood that the issue will ultimately be submitted to a jury for resolution. Such proof may be established through discovery, by evidentiary means, or by an offer of proof. In Colorado, a plaintiff must present more than mere allegations in order to obtain leave to amend to seek exemplary damages.

The purpose of exemplary damages in Colorado is to punish the defendant, not to compensate the plaintiff. That said, evidence of the income or net worth of a party shall not be considered in determining the appropriateness or amount of exemplary damages. Unless otherwise provided by law, exemplary damages shall not be awarded in administrative or arbitration proceedings.

The reasonableness of exemplary damages is determined by reference to the actual damages awarded. Exemplary damages can only be awarded when there has been an award of actual damages, and the amount of exemplary damages typically cannot exceed the amount of actual damages awarded. That said, the court may increase the award of exemplary damages to a sum not exceeding three times the amount of actual damages if it is shown that the defendant has continued the egregious behavior or

acted in a willful and wanton manner during the pendency of the action in a manner which has further aggravated the plaintiff's damages.

Colorado prohibits an insurance carrier from providing insurance coverage for punitive damages. Accordingly, an insured may not bring a bad faith claim based solely on the insurance company's failure to pay punitive damages. An insurance company has no duty to try to settle a claim within the policy limits so the insured may avoid punitive damages.

#### **D. Negligent Hiring and Retention**

Causes of action for negligent hiring and/or retention in Colorado may be alleged directly against the trucking company and are independent of other causes of action based on *respondeat superior*. An employer may be held directly liable for negligent hiring and retention of an employee where the employer knew or should have known, had the employer done a thorough job of interviewing and screening the employee, that the driver had a bad driving record, lacked the requisite licenses, had a medical condition which would probably affect his ability to drive, or similar circumstances. Often times, plaintiffs point to shortcomings in a driver's qualification file as evidence of the trucking company's negligent hiring.

In addition, the failure to properly train or supervise the employee may give rise to a claim for negligent retention, especially under circumstances where, due to previous accidents, the employer was aware, or should have been aware of the need for training or closer supervision. Often times, plaintiffs point to a driver's prior or current traffic convictions, log violations, hours of service violations or other like violations as evidence of a trucking company's negligent retention. However, it has been held that a defendant trucking company owes a plaintiff no duty to investigate the employed driver's non-vehicle criminal record. This holding was in the context of a case involving alleged sexual assault by a long-haul driver.

Recently, Colorado Courts have shown a willingness to dismiss claims of negligent hiring, supervision, retention and entrustment where there is no evidence to support exemplary damages and where the motor carrier concedes that the driver was acting within the course and scope of his employment and that respondeat superior liability applies. The case law in this regard, however, is still developing.

#### **E. Negligent Entrustment**

The trucking company may be found liable under this theory where the company had actual knowledge of the driver's previous history or pattern of recklessness or incompetence, or at least the facts from which such knowledge could be reasonably inferred. Often times, plaintiffs point to a driver's prior or current traffic convictions, log violations, hours of service violations or other like violations as evidence of a trucking company's negligent entrustment.

## **F. Dram Shop**

Dram shop actions are recognized in Colorado. For such liability to attach, the alleged tortfeasor must have provided alcohol to a visibly intoxicated person.

## **G. Joint and Several Liability**

Under most circumstances, Colorado has abolished the doctrine of joint and several liability in favor of a system of comparative fault. Colorado has replaced the common law of joint and several liability with a statute which provides that no defendant shall be liable for an amount greater than that represented by the degree or percentage of the negligence or fault attributable to such defendant. Joint liability may still be imposed on two or more persons who consciously conspire and deliberately pursue a common plan or design to commit a tortious act. In all other cases, *pro rata* liability is the rule.

Colorado has adopted a system of modified comparative fault. Under this system, a plaintiff will be barred from recovery if the plaintiff is 50% or more at fault. If the trier of fact assigns less than 50% fault to the plaintiff, he or she may still recover, but the amount of damages recoverable is reduced by his or her percentage of fault. In cases where there are multiple defendants who cause plaintiff's injury, each defendant will be liable for its respective percentage of fault, assuming the plaintiff is not 50% or more at fault. In proper circumstances and/or if properly designated, a trier of fact in Colorado can also consider the fault of nonparties and parties that have settled with Plaintiff prior to trial. If nonparties are properly and timely designated, the trier of fact assigns percentages of fault to the nonparties, as well as to the plaintiff and the defendants. The plaintiff cannot recover to the extent of the nonparties' and settled parties' assigned percentages of fault, and the plaintiff cannot recover at all if his or her fault equals or exceeds 50%.

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

Noneconomic damages in wrongful death cases focus on the damage to the decedent's heirs. Wrongful death plaintiffs cannot recover for the decedent's alleged pain and suffering. Instead, wrongful death plaintiffs can recover for their own grief, suffering, loss of companionship and other noneconomic damages suffered as a result of the wrongful death. Thus, the noneconomic damages inquiry in wrongful death cases focuses on the pain, suffering and loss to the plaintiff/heirs entitled to sue.

Noneconomic damages for wrongful death are limited by statute. The limitation on recovery of noneconomic damages for wrongful death adjusts periodically for inflation, and the cap is currently set at \$436,070. This limitation applies on a per claim basis rather than a per defendant basis. This limitation, however, does not apply in the case of a "felonious killing." A "felonious killing" is established if the tortfeasor is convicted of or pleads guilty or *nolo contendere* to the crime of murder or manslaughter. Alternatively, a court of competent jurisdiction, upon application, shall determine whether, by a preponderance of the evidence, "each of the elements of a felonious

killing have been established.” In other words, a wrongful death plaintiff can ask the civil court to determine whether the tortfeasor’s conduct amounts to “manslaughter” by a preponderance of the evidence and, if so, the wrongful death noneconomic damages caps would not apply.

The wrongful death statute also provides an alternative measure of noneconomic damages where a proper plaintiff may elect in writing to sue for “solatium.” The “solatium” amount adjusts periodically for inflation and the adjusted solatium amount is currently set at \$87,210. In proper circumstances, exemplary (*i.e.*, punitive) damages are also recoverable.

There is a two year statute of limitations on wrongful death claims, even if the wrongful death arises out of the use or operation of a motor vehicle.

Survival actions are available in Colorado on behalf of the deceased’s estate to pursue economic damages claims. Damages for the deceased “pain and suffering” and other noneconomic damages are not recoverable in a survival action.

### **I. Vicarious Liability**

An employer is liable for an employee's acts or omissions constituting negligence if those acts are committed during the course and scope of the employee’s employment.

An issue which may arise when the plaintiff claims that a trucking company is liable for the actions of the driver under this theory is whether the driver was actually in the course and scope of employment, or whether the driver was on a “detour or frolic” (*i.e.*, acting entirely outside the scope of employment and for personal purposes).

For liability purposes, an owner/operator of leased equipment is treated as an employee of the carrier during the term of the lease. ICC regulations governing trip leases eliminate the defense of independent contractor by making the owner/operator of the equipment the “statutory employee” of the carrier. In the Colorado case adopting these principles, the appellate court affirmed that, for liability purposes, an owner-operator of leased equipment is treated as an employee of the carrier during the term of the lease.

### **J. Exclusivity of Workers’ Compensation**

Colorado holds a strong position with respect to workers’ compensation exclusivity and immunity. In Colorado, workers’ compensation provides the exclusive remedy against an employer for an employee injured on the job. As long as proper workers’ compensation insurance is in place and in the absence of extreme/intentional acts, a commercial driver typically is barred from suing his employer and his exclusive remedy lies in workers’ compensation. Colorado also provides co-employee immunity in the absence of intentional conduct. An employee injured on the job may still pursue tort claims against third parties, but the injured employee’s recovery is usually subject to a lien held by the workers’ compensation carrier.

### **III. Damages**

#### **A. Statutory Caps on Damages**

A plaintiff in a personal injury action may recover compensatory damages for physical impairment, disfigurement, economic damages (including loss of earnings, impaired earning capacity, medical, hospital and care expenses (both past and future), and out-of-pocket expenses), and noneconomic damages for such things as pain and suffering, inconvenience, emotional stress, and impairment of quality of life. Interest on personal injury damages may be claimed from the date the action accrued.

There is no cap in Colorado for economic damages, and there is no cap in Colorado for noneconomic damages for physical impairment or disfigurement. There is, however, a cap on noneconomic “pain and suffering” damages for which any one defendant may be liable. The limitation on noneconomic damages adjusts periodically for inflation. The noneconomic damages cap is currently set at \$468,010, but this cap can be adjusted by the court upon clear and convincing evidence (a high standard) to \$936,030. Unlike in wrongful death cases, the noneconomic damages cap in personal injury cases applies on a per defendant rather than a per claim basis. Further, in cases of comparative fault where a defendant is liable for only a percentage of a plaintiff’s total noneconomic damages, the court takes the total noneconomic damages award, reduces it by the defendant’s percentage of fault and then applies the cap, rather than first applying the cap to the total damages award and then further reducing the award by the defendant’s percentage of fault. Thus, for example, if a plaintiff suffers \$1,000,000 in noneconomic damages and a defendant is 60% at fault, the defendant owes \$468,010 ( $1,000,000 \times 60\% = \$600,000$ , then the cap is applied), rather than \$280,806 ( $\$1,000,000$  reduced by cap to \$468,010, then  $\times 60\%$ ).

#### **B. Compensatory Damages for Bodily Injury**

In Colorado personal injury cases, the plaintiff can recover economic and noneconomic compensatory damages as outlined above.

#### **C. Collateral Source**

Colorado follows the collateral source rule, but Colorado’s collateral source rule contains a broad exception that makes the rule rarely applicable. Typically, a plaintiff can recover for economic losses that have already been paid and/or reduced by health insurance, Medicare/Medicaid and most other collateral sources (subject to the subrogation rights of the lien holders). In only the rarest of cases, wherein the collateral source payment truly constitutes a gratuitous payment, is the collateral source rule applied to reduce a verdict award.

#### **D. Pre-Judgment/Post judgment Interest**

Pre-judgment and post-judgment interest are typically recoverable in personal injury actions in Colorado. Pre-judgment interest in personal injury actions starts to run from the date the cause of action accrues. The statutory rate of interest in Colorado is 8% per annum.

### **E. Damages for Emotional Distress**

Damages for emotional distress are typically available as an element of noneconomic “pain and suffering” damages in Colorado. Typically, damages for emotional distress are not recoverable in the absence of actual injury or in circumstances where the plaintiff was in the “zone of danger.”

### **F. Wrongful Death and/or Survival Action Damages**

A wrongful death plaintiff can seek to recover both economic and noneconomic damages. Economic damages can include funeral expenses. The most significant potential category of economic damages is recovery for the plaintiff/heirs’ “net pecuniary loss” caused by the alleged wrongful death. “Net pecuniary loss” is defined as “the financial benefit, if any, that the plaintiff might reasonably have expected to receive from the decedent had he or she lived.”

Noneconomic damages in wrongful death cases focus on the damage to the decedent’s heirs. Wrongful death plaintiffs cannot recover for the decedent’s alleged pain and suffering. Instead, wrongful death plaintiffs can recover for their own grief, suffering, loss of companionship and other noneconomic damages suffered as a result of the wrongful death. Thus, the noneconomic damages inquiry in wrongful death cases focuses on the pain, suffering and loss to the plaintiff/heirs entitled to sue. Noneconomic damages for wrongful death are limited by statute. The limitation on recovery of noneconomic damages for wrongful death adjusts periodically for inflation, and the cap is currently set at \$436,070. This limitation applies on a per claim basis rather than a per defendant basis. This limitation, however, does not apply in the case of a “felonious killing.” A “felonious killing” is established if the tortfeasor is convicted of or pleads guilty or *nolo contendere* to the crime of murder or manslaughter. Alternatively, a court of competent jurisdiction, upon application, shall determine whether, by a preponderance of the evidence, “each of the elements of a felonious killing have been established.” In other words, a wrongful death plaintiff can ask the civil court to determine whether the tortfeasor’s conduct amounts to “manslaughter” by a preponderance of the evidence and, if so, the wrongful death noneconomic damages caps would not apply. The wrongful death statute also provides an alternative measure of noneconomic damages where a proper plaintiff may elect in writing to sue for “solatium.” The “solatium” amount adjusts periodically for inflation and the adjusted solatium amount is currently set at \$87,210. In proper circumstances, exemplary (*i.e.*, punitive) damages are also recoverable (see Section C.3. below).

There is a two year statute of limitations on wrongful death claims, even if the wrongful death arises out of the use or operation of a motor vehicle.

Survival actions are available in Colorado on behalf of the deceased's estate to pursue economic damages claims. Damages for the deceased "pain and suffering" and other noneconomic damages are not recoverable in a survival action.

### **G. Punitive Damages**

Punitive or "exemplary" damages may be awarded in Colorado where the injury complained of is attended by circumstances of fraud, malice, or willful and wanton conduct. Willful and wanton conduct is defined as conduct purposely committed which the actor must have realized was dangerous, done heedlessly and recklessly, without regard to consequences, or of the rights and safety of others, particularly the plaintiff. In order to recover exemplary damages, a plaintiff must prove his or her entitlement to exemplary damages beyond a reasonable doubt (the highest standard of proof). Further, a plaintiff may not include a claim for exemplary damages in his or her initial claim for relief. Instead, a claim for exemplary damages may be allowed only by amendment of the pleadings after the exchange of initial disclosures, and only after the plaintiff establishes prima facie proof of a triable issue.

The purpose of exemplary damages in Colorado is to punish the defendant, not to compensate the plaintiff. That said, evidence of the income or net worth of a party shall not be considered in determining the appropriateness or amount of exemplary damages. Unless otherwise provided by law, exemplary damages shall not be awarded in administrative or arbitration proceedings.

The reasonableness of exemplary damages are determined by reference to the actual damages awarded. Exemplary damages can only be awarded when there has been an award of actual damages, and the amount of exemplary damages typically cannot exceed the amount of actual damages awarded. That said, the court may increase the award of exemplary damages to a sum not exceeding three times the amount of actual damages if it is shown that the defendant has continued the egregious behavior or acted in a willful and wanton manner during the pendency of the action in a manner which has further aggravated the plaintiff's damages.

Colorado prohibits an insurance carrier from providing insurance coverage for punitive damages. Accordingly, an insured may not bring a bad faith claim based solely on the insurance company's failure to pay punitive damages. An insurance company has no duty to try to settle a claim within the policy limits so the insured may avoid punitive damages.

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

Diminished value damages are available for loss or damage to personal property. If the personal property at issue is totally or substantially destroyed, the appropriate measure of damages is the difference between the market value immediately before the loss and immediately after the loss. If the personal property at issue has been damaged but

repairs are feasible, the appropriate measure of damages is the reasonable cost of repairing the property plus the decrease in value of the property as repaired. That said, if the cost of repairs and the decrease in market value exceed the pre-loss market value of the property, the plaintiff can only recover the pre-loss market value. A plaintiff cannot recover for the sentimental or emotional value of damaged personal property. Similar but slightly different standards apply in the context of damage to real property.

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

In addition to damages for diminution in value or repair costs, an injured plaintiff is entitled to recover for the loss of use of the personal property during the time reasonably required to make repairs (or the time required to find replacement property in the case of total destruction). Case law has confirmed that these “loss of use” damages should reflect the reasonable time required for the repair/replacement, and not the actual time that it took for the plaintiff to effectuate the repair/replacement. These damages are recoverable regardless of whether the plaintiff actually procures temporary replacement measures during the time of the loss of use.

### **IV. Evidentiary Issues**

#### **A. Preventability Determination**

There are no Colorado state court decisions to date discussing the admissibility or inadmissibility of “preventability determinations” by motor carriers.

#### **B. Traffic Citation from Accident**

Evidence that a traffic citation was or was not issued is generally not admissible in a negligence case.

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

Failure of a plaintiff to wear a seat belt is not a defense for purposes of determining the degree of plaintiff's comparative fault. Although a plaintiff's failure to wear a seat belt cannot be considered as evidence of a plaintiff's failure to mitigate physical injuries, medical expenses or other economic damages, a plaintiff's failure to wear a seat belt can be considered as evidence of a plaintiff's failure to mitigate pain and suffering damages.

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

Because there is no mandatory helmet law in Colorado, a motorcycle-riding plaintiff's failure to wear a helmet is not a defense for purposes of determining the degree of plaintiff's comparative fault. Although unclear, it is doubtful that a plaintiff's failure to wear a helmet can be considered as evidence of a plaintiff's failure to mitigate pain and

suffering damages in light of the fact that there is not a mandatory helmet law in Colorado.

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

Intoxication of the plaintiff or defendant in a vehicular accident is admissible, if relevant.

#### **F. Testimony of Investigating Police Officer**

If a proper foundation is laid and if the investigating officer has sufficient training, education and experience, the investigating officer can typically be qualified to testify as a non-retained expert. If so qualified, investigating officers are typically allowed to express opinions.

#### **G. Expert Testimony**

Admissibility of expert testimony in Colorado State Court is principally governed by C.R.E. 702, C.R.E. 703 and C.R.E. 403. Although Colorado has developed its own case law concerning the standards and procedures for the admissibility of expert opinion testimony, the standards and procedures implemented in Colorado are similar to the federal standards set forth in Daubert and its progeny. In Colorado, the cornerstones for the admissibility of expert testimony are reliability and relevance.

#### **H. Collateral Source**

Colorado follows the collateral source rule, but Colorado's collateral source rule contains a broad exception making the rule rarely applied. Typically, a plaintiff can recover for economic losses that have already been paid and/or reduced by health insurance, Medicare/Medicaid and most other collateral sources (subject to the subrogation rights of the lien holders). In only the rarest of cases, wherein the collateral source payment truly constitutes a gratuitous payment, is the collateral source rule applied to reduce a verdict award.

The correct measure of compensable damages for medical expenses is the necessary and reasonable value of the services rendered, and not necessarily the amount that may have been paid for such services. The testimony of the plaintiff as to what he or she incurred in medical bills is admissible as evidence of the reasonable value of the medical services rendered. Expert testimony is not required to establish that medical expenses are reasonable and necessary.

In Colorado, evidence of the "amount billed" by medical provider for their services constitutes admissible evidence of the reasonable value of the medical services. In Colorado, however, evidence of lesser "amounts paid" by health insurers, med pay insurers, Medicare, Medicaid or other third party payors on behalf of a plaintiff is not admissible at trial for any purposes. In light of this, expert analysis and testimony may

be necessary when challenging the reasonableness of the value of a Plaintiff's claimed medical expenses.

Future medical expenses must be based upon "substantial evidence which establishes the probability that such expenses will necessarily be incurred." Damages for loss of future earnings are compensable even if such damages may be uncertain in respect to the amount. A party seeking recovery for impairment of future earnings is not required to introduce evidence of an intention to return to his or her place of employment. A plaintiff is not required to show that, but for the injury he or she could have earned more money if there is evidence of permanent injury. If there is permanent injury, evidence that a plaintiff is earning more after the injury does not preclude an award of diminished earning capacity.

### **I. Recorded Statements**

Statements made by an insured to the insurer may be protected from discovery if "prepared or obtained in contemplation of specific litigation" by a representative or agent of the insurer. Likewise, a claim representative's notes, investigative reports and witness statements may be protected under the work product doctrine. The test for both is whether the statement was made or obtained in anticipation of specific litigation, which is not simply a question of whether the action has been commenced, but whether in light of the nature of the document and the factual situation the party resisting discovery demonstrates it was obtained in contemplation of specific litigation. Only statements obtained in contemplation of specific litigation are protected.

In practice, initial post-accident investigations, statements and other work product obtained by claim representatives or self-insured in the normal course of their business are generally discoverable and not privileged in Colorado.

In Colorado, there is a statute prohibiting attempts to negotiate a settlement with an injured party and limiting the use of any statement taken from such a person which is under the care of a practitioner of the healing arts or is hospitalized. No attempt to negotiate a settlement or to obtain a general release shall occur within 30 days from the date of the occurrence causing the injury. No attempt to obtain a statement is to occur within 15 days from the date of the occurrence causing the injury. Any settlement agreement entered into in violation of this statute is void and any statement taken may not be admitted into evidence.

### **J. Prior Convictions**

In Colorado, evidence of prior convictions is inadmissible as evidence of fault in the subsequent incident. Prior convictions, however, may be admissible for other purposes such as claims for negligent hiring, retention, supervision and entrustment. Additionally, evidence of prior felony convictions may be admissible as evidence bearing on the credibility of the witness.

## **K. Driving History**

In Colorado, evidence of a driver's motor vehicle record and accident history are generally inadmissible as evidence of fault in the subsequent incident. Prior driving issues, however, may be admissible for other purposes such as claims for negligent hiring, retention, supervision and entrustment. Additionally, evidence of prior felony convictions may be admissible as evidence bearing on the credibility of the witness.

## **L. Fatigue**

Case law in Colorado is undeveloped regarding the admissibility of evidence of HOS violations and the need for expert testimony/proof of proximate cause in cases alleging driver fatigue. That said, evidence of HOS violations would likely be admissible if a proper foundation establishes their relevancy to the facts and circumstances of the subject accident, and expert testimony would likely not be required.

## **M. Spoliation**

An "adverse inference instruction" that the missing evidence would be harmful to the spoliating party is the typical spoliation sanction imposed by Colorado courts. In order to be entitled to an adverse inference instruction, it must first appear that the evidence would have been relevant to an issue at trial and otherwise would naturally have been introduced into evidence. Next, the court must determine whether the party was under an obligation to preserve the item at issue at the time it was destroyed. Finally, the non-spoliating party must prove that the item was destroyed with something "more than negligence." The conduct at issue must be "more than mere negligence," or "more than negligent and less than intentional" and which amounts to recklessness or gross negligence before a court will impose a punitive sanction against a party.

While an "adverse inference instruction" is the typical sanction implemented by Courts in Colorado for spoliation, different, additional and more severe sanctions, up to and including dismissal/default, can be imposed in egregious situations.

## **V. Settlement**

### **A. Offer of Judgment**

A party can make a "Statutory Offer of Settlement" any time prior to fourteen days prior to the commencement of the trial. The offer of settlement shall remain open for at least fourteen days. If the offer is accepted, the offer shall constitute a binding settlement agreement, fully enforceable by the court in which the action is pending. This is a helpful distinction from the federal "offer of judgment" rule, as an accepted statutory offer in Colorado results in a binding settlement rather than a judgment. If the statutory offer is not accepted within fourteen days, it is deemed rejected. If the plaintiff makes a statutory offer of settlement which is rejected and a final judgment is entered for the plaintiff in excess of the amount offered, the plaintiff will be awarded actual costs from

the date of the offer forward. Defendant is entitled to actual costs from the date of the offer forward when the defendant makes a statutory offer of settlement, the plaintiff rejects it, and the plaintiff does not recover a final judgment in excess of the amount offered. "Actual costs" do not include attorney's fees. Any interest on the final judgment subsequent to the date of the offer shall not be calculated as part of the amount of final judgment to be compared to the settlement offer.

## **B. Liens**

Any judgment in Colorado automatically becomes a lien on all real property of the debtor upon subsequent filing of the judgment. An employee who obtains a judgment for workers' compensation benefits is entitled to assert a lien against the employer. A workers' compensation award can be enforced by a lien against the assets of the employer or the employer's insurer.

A hospital is entitled to assert a lien although a judgment has not been entered. A hospital or other medical provider which furnishes services to any person injured as a result of negligence or wrongful act of another person may have a lien against the tortfeasor for all reasonable and necessary charges for hospital/medical care. A hospital is not entitled to a lien for charges incurred subsequent to any judgment, settlement or compromise between the parties to the injury.

## **C. Minor Settlement**

Small minor settlements (under \$10,000) can be entered without obtaining probate court approval. More substantial settlements with minors need to be approved by the probate court. A minor settlement that is not approved through probate is unenforceable against the minor child, leaving the defendant at risk of suit after the minor reaches the age of majority.

## **D. Negotiating Directly With Attorneys**

Claims professionals in Colorado are permitted to negotiate settlements directly with attorneys.

## **E. Confidentiality Agreements**

Confidentiality agreements are generally enforceable in Colorado, although the confidentiality needs to be supported by consideration.

## **F. Releases**

Releases and settlement agreements in Colorado are examined and applied in the same way as any other contract. Where the parties have agreed upon all material terms of a settlement, the settlement is binding and enforceable. Whether the parties

reached a binding contract of settlement is a mixed question of law and fact. The parties' intent to reduce a less formal settlement agreement into a more formal written document does not render the agreement unenforceable. If a trial court determines that the parties entered into a binding settlement agreement, the Court may enforce the settlement pursuant to the agreed-upon terms.

### **G. Voidable Releases**

In Colorado, there is a statute prohibiting attempts to negotiate a settlement with an injured party and limiting the use of any statement taken from such a person which is under the care of a practitioner of the healing arts or is hospitalized. No attempt to negotiate a settlement or to obtain a general release shall occur within 30 days from the date of the occurrence causing the injury. No attempt to obtain a statement is to occur within 15 days from the date of the occurrence causing the injury. Any settlement agreement entered into in violation of this statute is void and any statement taken may not be admitted into evidence.

## **VI. Transportation Law**

### **A. State DOT Regulatory Requirements**

Colorado regulates the transportation of hazardous materials – those materials listed in Tables 1 and 2 of 49 C.F.R. 172.504, excluding: highway route controlled quantities of radioactive materials as defined in 49 C.F.R. 173.403(1); ores, the products from mining, smelting and similar processing of ores, and the wastes entailing therefrom; and special fireworks as defined in 49 C.F.R. 173.88(d) when the aggregate amount of flash powder does not exceed fifty pounds.

When necessary, the Colorado Department of Transportation may restrict the use of state highways to those motor vehicles equipped with tire chains, four-wheel drive with adequate tires, or snow tires sufficient for the existing conditions. "Tire chains" required must consist of two circular metal loops, one on each side of the tire, connected by not less than nine evenly spaced chains capable of providing traction equal to or exceeding that of such metal chains under similar conditions. When chains are required, a commercial vehicle with four or more drive wheels, other than a bus, must put tire chains on at least four or more drive wheels. A trucker will be fined \$100, with a \$12 surcharge, for failing to use chains when required by the Colorado Department of Transportation. If the failure to use chains results in closure of one or more traffic lanes, the fine is \$500 with a \$60 surcharge.

A driver of a vehicle involved in a traffic accident resulting in injury to, serious bodily injury to, or death to any person shall give immediate notice of the location of such accident to the nearest officer of the duly authorized police authority, and if directed by the police, shall without delay return to and remain at the scene of the accident until the police arrive at the scene and complete their investigation.

Minimum safety belt standards are prescribed for commercial vehicles. Also, drivers are prohibited from using “earphones” while driving.

Colorado has adopted the Vehicle Equipment Safety Compact.

### **B. State Speed Limits**

As posted. There is nothing particularly unique or unusual about Colorado’s speed limits. The maximum speed limit in Colorado is up to 75 miles per hour.

### **C. Overview of State CDL Requirements**

Commercial driver’s licenses in Colorado are issued in accordance with the requirements of the federal Commercial Motor Vehicle Safety Act of 1986. Interstate Commercial drivers must be at least 21 years old. Drivers between the age of 18 and 21 can be issued a CDL for intrastate driving only.

## **VII. Insurance Issues**

### **A. State Minimum Limits of Financial Responsibility**

The statutory limits for automobile liability insurance coverage for private citizens in Colorado is \$25,000 per person, \$50,000 per occurrence.

### **B. Uninsured Motorist Coverage**

Insurance companies issuing policies on motor vehicles licensed for highway use in Colorado must offer uninsured motorist coverage. While such coverage can be waived, the insurer must explicitly waive such coverage to do so. The policy contract specifies those who are entitled to uninsured motorist damages which usually includes the same persons eligible for other injury coverages under the policy, such as “named insured” and “occupants” of the vehicle described in the policy contract. Since the purpose of the statute requiring uninsured motorist coverage is to provide insurance coverage against injuries and damages caused by financially irresponsible motorists, this requirement is arguably applicable to employee drivers.

The maximum liability of the insurer under the uninsured motorist coverage is the full amount of the uninsured motorist coverage, but the uninsured motorist coverage does not come into play until after the liability insurance coverage of the legally liable party is exhausted. In other words, the full amount of uninsured motorist coverage “floats” above the policy limits of the at-fault party.

An employee is barred from bringing an uninsured motorist claim if an employee is insured for workers' compensation benefits, or if the employee chooses to pursue workers' compensation benefits. Additionally, the employee must reimburse the employer's workers' compensation insurance carrier for any benefits paid to the

employee if the employee subsequently recovers damages under uninsured motorist coverage from a third party tortfeasor

### **C. No Fault Insurance**

Colorado does not maintain a system of no-fault insurance.

### **D. Disclosure of Limits and Layers of Coverage**

In Colorado, Defendants are required to disclose, at the time of initial disclosures, any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment, making such agreement available for inspection and copying. There is no obligation to provide insurance information prior to suit.

### **E. Unfair Claims Practices**

See below, regarding bad faith.

### **F. Bad Faith Claims**

When a third party brings a claim against an insured party, the insurer's handling of the case might expose the insurer to a claim of bad faith. Typical claims are based on excess judgments against the insured resulting from the insurer's failure to settle with the third party, or the insurer's failure to timely pay claims. Reasonableness under the circumstances is the standard used to determine if an insurance company has acted in bad faith. In Colorado, only the insured or party assigned the insured's bad faith claim may bring such an action.

### **G. Coverage – Duty of Insured**

Duties of insureds in Colorado is generally controlled by the terms of the insurance policy. These contractual duties typically include the duty to give prompt notice of a claim and a duty to cooperate in the handling of the claim. A delay in notice does not relieve the insurer of its duty to defend and indemnify unless the delay materially prejudices the insurer's ability to investigate and defend the claim.

### **H. Fellow Employee Exclusions**

An insured is not legally entitled to recover under the uninsured or underinsured motorist provisions of an insurance policy if the exclusivity provisions of Colorado's worker's compensation statute would bar an action against the fellow employee tortfeasor.

