COLORADO

Lance G. Eberhart
Paul T. Yarbrough
Mamie Ling
Leviy P. Johnson
HALL & EVANS, LLC
1001 Seventeenth Street, Suite 300
Denver, CO 80202
Phone: (303) 628-3300
Fax: (303) 628-3368
E-Mail: eberhartl@hallevans.com
E-Mail: yarbroughp@hallevans.com
E-Mail: lingm@hallevans.com
E-Mail: johnsonl@hallevans.com

1. What are the venues/areas in Colorado that are considered dangerous or liberal?

   Boulder, Denver, Pitken, Pueblo, and Routt.

2. Identify any significant trucking verdicts in your State during 2017-2018, both favorable and unfavorable from the trucking company's perspective.

In 2017, the Colorado Supreme Court adopted the "*McHaffie* rule," holding that where an employer acknowledges vicarious liability for the negligence of it's' employee, the Plaintiff's direct negligence claims against that employer are barred. *See Ferrer v. Okbamicael*, 2017 CO 14, ¶ 19 (providing that the *McHaffie* rule is still consistent with comparative negligence principals effective in Colorado); *see also State ex rel. McHaffie v. Bunch*, 891 S.W.2d 822, 827, 829 (Mo. 1995) (preventing the fault of a single party from being assessed twice in an effort to avoid a "plainly illogical" result). The Court reasoned that in the case where an employer has conceded their exposure to respondeat superior liability for an employee's negligence, direct negligence claims against that employer "still tethered" to the employee's acts of negligence, are wasteful, superfluous and repetitive. *Ferrer,* 2017 CO at ¶¶ 26, 28. Furthermore, *Ferrer* held that discovery regarding a driver's history and qualifications is "redundant and wasteful." *Id.*

3. Are accident animations and/or computer-generated evidence admissible in your State?

Yes. *Dolan v. Mitchell*, 502 P.2d 72, 76 (Colo. 1972); but *see*, *Schultz v. Wells*, 13 P.3d 846 (Colo. App. 2000).

4. Identify any significant decisions or trends in your State in the past two (2) years regarding (a) retention and spoliation of in-cab videos and (b) admissibility of in-cab videos.

   None.

5. What is your State's applicable law and/or regulation regarding the retention of telematics data, including but not limited to, any identification of the time frames and/or scope for retention of telematics data and any requirement that third party vendors be placed on notice of spoliation/retention letters.

To ensure discovery is carried out according to C.R.C.P. 26(b)(1), litigants have a duty to preserve documents that may be relevant to pending or imminent litigation. *Cache La Poudre Feeds, LLC v. Land O'Lakes Farmland Feed*, LLC, 244 F.R.D. 614, 620 (D. Colo. 2007) (citing *Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003)); *Paul v. USIS Commer. Servs*., 2007 U.S. Dist. LEXIS 68474, (D. Colo. 2007). The duty to preserve electronic data is triggered by the party's receipt of actual notice of pending or potential litigation. In *Cache La Poudre* the Colorado Court determined that a demand letter, absent a threat of actual litigation was not sufficient to trigger the duty to preserve evidence. *Cache La Poudre*, 244 F.R.D. at 621. As to remedies for spoliation, Colorado courts recognize sanctions for the spoliation of evidence for actions ranging from intentional to negligent. I*n re A.E.L. and K.C.M*, 181 P.3d 1186, 1196 (Colo. App. 2008) (imposing sanctions for intentional spoliation and spoliation based upon mere negligence permissible).

DriveCam and other onboard equipment capable of documenting evidence are treated as any other relevant evidence would be treated. If you can reasonably anticipate litigation you have a duty to preserve. Based on the inherent relevancy of this type of evidence, in a transportation litigation case, it is crucial that this evidence be preserved. While the most common form of sanction for spoliation is an adverse instruction to the jury, sanctions can be much more severe, ranging from suppression of evidence, imposition of attorney fees and costs, and in the most egregious cases, default or dismissal. There are no reported Colorado opinions on point.

There is no requirement that third party vendors be placed on notice of spoliation or retention letters. However, there is an obligation of parties to notify third party vendors upon receiving a spoliation/retention letter as it asks the party to preserve all data, which arguably could include those that are in the control of a third party vendor which the party has contracted with.

6. Is a positive post-accident toxicology result admissible in a civil action?

Yes.

7. Is post-accident investigation discoverable by adverse counsel?

Claims files not prepared in contemplation of specific litigation are ordinarily considered relevant and discoverable. C.R.C.P. Rule 26(b)(3) shields from disclosure attorney work product prepared "in anticipation of litigation" absent a showing of "substantial need" and "undue hardship." Rule 26 does not protect materials prepared in the ordinary course of business, and the standard is whether the party resisting discovery demonstrates the document was prepared in contemplation of specific litigation. *Hawkins v. Dist. Ct.*, 638 P.2d 1372, 1377 (Colo. 1982). Rule 26(b)(3) does not insulate insurers' investigations merely because they deal with potential claims. *Id*. In fact, because a substantial part of an insurer's business is investigation of claims, it

is presumed that such investigations are part of the normal business activity of the company and that they are ordinary business records as distinguished from trial preparation materials. *Lazar v. Riggs*, 79 P.3d 105, 107 (Colo. 2003). Insurance adjuster's investigative reports are prepared in the ordinary course of business, and are, therefore, discoverable. *Id*.; see also, *Western Nat'l Bank v. Employers Ins. Of Wausau*, 109 F.R.D. 55, 57 (D. Colo. 1985). Claims files not prepared in contemplation of specific litigation are ordinarily considered relevant and discoverable and the insurer has the burden of demonstrating that a document was prepared in order to defend the specific claim, and that there was a substantial probability of imminent litigation over the claim or a lawsuit had already been filed. *Lazar*, 79 P.3d at 107; Hawkins, 638 P.2d 1379. However, information in claims files related to reserves, settlement authority, liability assessments, and fault evaluations are generally protected from discovery. *Silva v. Basin W., Inc.*, 47 P.3d 1184, 1187 (Colo. 2002); *Sunahara v. State Farm*, 280 P.3d 649 (Colo. 2012)

The scope of discovery of insurance information, such as claims files, is considerably broader in an action by an insured against its insurer for bad faith in contrast to a claim by a third party against the insured. *Lazar*, 79 P.3d at 107. For instance, insurance information may be relevant in an action by an insured against its insurer for bad faith even though the same information might not be relevant in a personal injury claim by a third-party against the insured. *Lazar*, 79 P.3d at 107; *Silva,* 47 P.3d at 1187.

Whether surveillance/social media investigation must be disclosed is dependent on whether the investigation is "relevant to the disputed facts alleged with particularity in the pleadings." See Committee Notes on Rule 26(a)(1)(A) & (B). This limits what is required to be disclosed to information that goes to facts that are disputed and to what is relevant. However, it is important to note that in Colorado "relevant" for purposes of what is required to be disclosed does not necessarily mean admissible at trial. Relevant means reasonably calculated to lead to the discovery of admissible evidence. *See* Rule 26(b)(1). This is a broader definition of "relevance" than that used as an evidentiary term. It is likely that any surveillance/social media investigation completed would lead either to relevant evidence or evidence that goes to the disputed facts. However, this is not always true, and if the information gathered is not relevant or go to disputed facts then there is no requirement that it be disclosed.

There may be an argument to be made that, because social media is on open platform, publicly available, and the results of a social media investigation are readily available to all parties, that there is no duty to disclose. In *Averyt v. Wal-Mart Stores, Inc*. the Court found discovery is not required for public documents that are equally available to all parties. 265 P. 3d 456 (Colo. 2011). The court went on to find that this concept has been applied in the context of disclosures. *Id.* This may be a stronger argument when the social media investigation is of the party requesting the disclosure. See generally *Id.* quoting *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991).

If surveillance/social media investigations are not turned over as part of disclosures they still may be required to be turned over as part of opposing counsel's request for discovery. In making this determination a balancing test is usually performed, taking into consideration the policy in favor of broad disclosure with the party's right to keep personal information private and with whether the discovery requested is disproportionate thus unfairly increasing the cost of

litigation, harassing the opponent, or delaying a fair just determination of the legal issues. *Silva v. Basin Western, Inc*., 47 P.3d 1184 (Colo. 2002); *Gateway Logistics, Inc. v. Smay*, 302 P.3d 235 (Colo. 2013). Whether a surveillance/social media investigation has to be disclosed and how much of an investigation that has to be disclosed is fact specific to each case and should be carefully analyzed before a decision is made.

8. Describe any laws in your State which regulate automated driving systems (autonomous vehicles) or platooning.

   None.

9. Describe any laws or Court decisions in your State which would preclude a commercial driver from using a hands-free device to have a conversation over a cell phone.

Colorado bans all cell phone use (handheld and hands-free) for those persons under the age of 18. C.R.S. § 42-4-239. Persons over the age of 18 may use a cell phone while driving. *Id*. Texting while driving is banned for drivers of all ages. *Id*. However, in emergency situations, C.R.S. § 42-4-239 does allow persons of all ages to use their cell phone devices. *Id*. No person may operate a motor vehicle while wearing earphones. *See* C.R.S. § 42-4-1411. Exceptions to this prohibition include built-in listening devices in protective headgear or types of headset/headgear that cover one ear and connect to a wireless phone. *See id*. The Federal Motor Carrier Safety Administration ("FMCSA") created a rule that prohibits commercial motor vehicle ("CMV") drivers from texting or holding a mobile phone while operating in interstate commerce and establishes corresponding civil penalties for drivers who fail to comply. *See* 49 C.F.R. § 392.80-82. Motor carriers are prohibited from requiring or allowing their drivers to text while driving. A driver, including a school bus driver, could lose their commercial driver's license if convicted of texting while operating a CMV. *Id*.

10. Identify any Court decisions in your State precluding Golden Rule and/or Reptile style arguments by Plaintiffs' counsel**.**

Both the Golden Rule argument, as well as the Reptilian Theory, are disfavored in Colorado. *See, e.g. Hopper v. Ruta*, 2013 Colo. Dist. LEXIS 249 (Oct. 29, 2013) (granting Motion in Limine to exclude plaintiffs from arguing or soliciting testimony based on the reptile theory). The Golden Rule of trial work is that counsel cannot urge jurors, either implicitly or explicitly, to place themselves in the position of the plaintiff and to award damages as they themselves would hope to be awarded. *See People v. Rodriguez*, 794 P.2d 965, 973 (Colo. 1990) ("The 'golden rule' argument . . . is improper in a civil case."). The Reptilian Theory may not specifically ask jurors to put themselves in the shoes of the grieving Plaintiffs in violation of the Golden Rule, but the intent is the same: it asks jurors to decide a case not on the evidence, not on the defendants' actions, but on the fear that if an adverse verdict is not rendered, the jurors themselves may soon become grieving family members (or even a decedent) in a similar situation because they failed to protect their community.

11. Compare and contrast the advantage and disadvantages of Federal Court versus State Court in your State.

State Court moves faster than Federal Court, therefore if one is interested in keeping a steady pace with no delays in a case, it should remain in State Court. A case in Federal Court can be significantly delayed with a trial date that could be more than a year and a half away. The advantages and disadvantages of each depend on the venue and judge. If a case is removable, and in a current liberal or dangerous county or with a judge that may negatively impact a case, then it is advantageous to remove the case. Another advantage of Federal Court is the increased sophistication of the jury pool. Additionally, judges in Federal Court are more likely to consider motions for summary judgment and other issues that may be ignored at the State Court level until the eve of trial. While many State Court panels, *e.g.* Denver, have become increasingly more educated, Federal Court remains the standard. Federal juries are, in theory, made up of individuals from the entire state. Federal Court seats up to eight jurors, as opposed to six in state court. Federal court juries tend to be more conservative, and therefore removal is generally favored.

12. How does your State handle the admissibility of traffic citations (guilty plea, pleas of no contest, etc.) in subsequent civil litigation?

Traffic citations are not admissible in civil litigation. Colorado law specifically prohibits the admission of evidence as to a person's conviction record for any violation of a traffic statute. C.R.S § 42-4-1713. This section has been interpreted to similarly exclude the admission of evidence of a traffic violation. See *Ripple v. Brack*, 286 P.2d 625 (Colo. 1955); *Lawrence v. Taylor*, 8 P.3d 607, 610 (Colo. App. 2000); C.R.S. §§ 42-2-201- 208. However, in the recent Colorado Supreme Court case *Alhilo v. Kliem*, the Court found that the defendant's two prior driving while intoxicated (DWI) offenses were admissible during civil litigation to support an award of exemplary damages arising under C.R.S. § 13-21-102(1)(a). *Alhilo v. Kliem*, 2016 COA 142; see also C.R.S. § 13-21-102(1)(a) (indicating that that "in all civil actions in which damages are assessed by a jury for a wrong done to the person . . . and the injury complained of is attended by circumstances of fraud, malice, or willful and wanton conduct, the jury, in addition to the actual damages sustained by such party, may award him reasonable exemplary damages") *Id*. The Court acknowledged that other courts have admitted evidence of prior alcohol offenses only in a separate proceeding due to the highly prejudicial effect on the issue of the defendant's liability. *Alhilo*, 2016 COA at ¶¶ 35–36 (citing *Webster v. Boyett*, 269 Ga. 191, 496 S.E.2d 459, 462 (Ga. 1998).

The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by C.R.E. 410. See also C.R.C.P. 11. While plea discussions, and withdrawn guilty pleas are inadmissible, an outright guilty plea is admissible in a subsequent civil case against the defendant who entered the plea. C.R.E. 410. However, if a defendant enters a nolo contendere plea, a rare and generally opposed plea, the plea may not be used against the defendant as an admission of guilt in a later civil suit for the same acts. See *Id*. at 410(2). Guilty pleas are not admissible for any violation of any offense listed in C.R.S. § 42-4-1713 (excluding felony charges). C.R.S. § 42-4-1714 implicitly states that traffic violations "less than a felony shall not effect or impair the credibility" of a witness. Conversely, by their specific statutory exclusion,

felony traffic violations are admissible to attack a driver's credibility (excluding felony convictions from its statutory language).

13. Describe the laws in your State which regulate whether medical bills stemming from an accident are recoupable. In other words, can a plaintiff seek to recover the amount charged by the medical provider or the amount paid to the medical provider? Is there a basis for post-verdict reductions or offsets?

In Colorado, a Plaintiff can seek to recover the amount charged by the medical providers. Under, C.R.S. § 13-21-111.6, Colorado's collateral source rule, there exist two components: 1) a post-verdict set off rule under C.R.S. § 13-21-111.6 and a pre-verdict evidentiary component under C.R.S. 10-1-135(10)(a). In *In re Smith v. Jeppsen* the Colorado Supreme Court held that C.R.S. § 10-1-135(10)(a) codifies the common law pre-verdict component of the collateral source rule, effectively prohibiting the admission at trial of evidence of the amount paid by a tort plaintiff's insurance company pursuant to the plaintiff's medical expense coverage. See *In re Smith*, 277 P.3d 224, 228 (Colo. 2012). To reach its holding the Court explained that, at common law, trial courts were required to exclude from evidence amounts paid by a collateral source to cover a plaintiff's medical bills. *Id at 228*; see also *Carr v. Boyd*, 229 P.2d 659, 663 (1951) (indicating that "[b]enefits received by the plaintiff from a source other than the defendant and to which he has not contributed are not to be considered in assessing the damages."). The Court further held that the court must apply C.R.S. § 10-1- 135(10)(a) prospectively to exclude evidence of the amount paid by a collateral source. *In re Smith,* 277 P.3d at 228. Essentially, the collateral source doctrine, as applied in Colorado, specifies that medical damages recoverable by the injured party are not reduced because the injured party has been partially or wholly indemnified by insurance, to which the wrongdoer did not contribute. See *Van Waters & Rogers, Inc. v Keelan,* 840 P.2d 1070, 1075 (Colo. 1992); e.g. *Powell v. Brady*, 496 P.2d 328, 332-33 (Colo. App. 1972).

Illustrative of the Colorado collateral source rule is *Wal-Mart Stores, Inc. v. Larry Crossgrove*, that was released concurrently with the *Smith* opinion. *Wal-Mart,* 276 P.3d 562 (Colo. 2012); see *Smith*, 277 P.3d at 228 (citing to *Wal-Mart* for support of common law principals). In *Wal-Mart*, Crossgrove was hit on the head by a manually operated overhead garage door while delivering cookies to a Wal-Mart store in Trinidad, Colorado. Crossgrove sued Wal-Mart, asserting a claim sounding in negligence with nearly $250,000 in billed medical expenses. *Id*. Crossgrove's healthcare providers accepted $40,000 in full satisfaction of the billed amount. *Id*. At trial, Crossgrove testified that his healthcare providers billed nearly $250,000 for their services and requested an award of $340,000, representing the fully billed medical expenses as well as lost income. *Id*. at 564. The trial court instructed the jury to consider Crossgrove's past and future losses including his "reasonable and necessary medical, hospital, and other expenses" in order to determine economic damages. *Id*. The jury returned a verdict for Crossgrove, awarding $50,000 in economic damages and $27,375 in noneconomic damages, finding Crossgrove 20 percent at vault. *Id*. In post-trial motions, Wal-Mart moved to reduce Crossgrove's $77,375 award based upon Crossgrove's respective 20 percent fault and for $40,000 in payments made by third parties in full satisfaction of his medical bills. *Id*. The trial court entered judgment for Crossgrove in the amount of $21,900. *Id*. (including interest amounts). Crossgrove appealed. *Id*. The Court of Appeals reversed the trial court's ruling and

remanded the case for a new trial. *Id*. Wal-Mart petitioned for certiorari, which was granted. *Id*. On review the Colorado Supreme Court examined whether the collateral source rule prohibited Wal-Mart from submitting to the jury evidence of the discounted amount paid by third parties in satisfaction of Crossgrove's medical bills. *Id*. at 564- 70. The Court held that collateral source evidence may not be introduced before the jury, however, after the entry of the verdict the trial court is then required to reduce the amount of damages by the amount of all collateral sources. See *Id*. Judgment of the trial court was vacated, and the case remanded on the issue of damages. *Id.*

14. Describe any statutory caps in your State dealing with damage awards.

Punitive Damages: Colorado effectively caps the amount of punitive damages that a jury can award. *See* C.R.S. § 13-21-102. Punitive damages, in excess of actual damages, may be awarded by the jury when the injury is attended by circumstances of fraud, malice or willful and wanton conduct beyond a reasonable doubt. *Id*. However, the amount of reasonable exemplary damages may not exceed the amount awarded by the jury for actual damages. *Id*. For instance, if a jury were to award $300,000 in punitive damages and award $100,000 in actual damages, the punitive award will be reduced by the Court to $100,000. *See id*. (detailing that the amount of punitive damages awarded my not exceed the amount awarded for actual damages). Even still, the Court may increase any award of punitive damages, up to three times the amount of actual damages if it is shown that: (1) the defendant has continued the behavior and repeated the action which is the subject of the claim against the defendant in a willful and wanton manner, either against the plaintiff or another person or persons, during the pendency of the case, or (2) the defendant has acted in a willful and wanton manner during the pendency of the action in a manner which has further aggravated the damages of the plaintiff when the defendant knew or should have known such action would produce aggravation. C.R.S. § 13-21-102(3)(a)-(b).

Non-economic Damages: "In any civil action other than medical malpractice actions in which damages for noneconomic loss or injury may be awarded, the total of such damages shall not exceed the sum of four hundred sixty-eight thousand ten dollars ($468,010.00), unless the court finds justification by clear and convincing evidence therefore. In no case shall the amount of noneconomic loss or injury damages exceed nine hundred thirty-six thousand thirty dollars ($936,030.00) . . . In any civil action, no damages for derivative noneconomic loss or injury may be awarded unless the court finds justification by clear and convincing evidence therefore. In no case shall the amount of such damages exceed four hundred sixty-eight thousand ten dollars ($468,010.00)." C.R.S. § 13-21-102.5(3)(a)-(b).

Wrongful Death: In cases where the decedent dies with a spouse or heirs, the plaintiffs in a wrongful death action may recover economic damages, without any limitation, and non-economic damages for grief, sorrow and loss of companionship, currently subject to a limitation of four hundred thirty-six thousand seventy dollars ($436,070.00). C.R.S. § 13-21-201, -203. If the deceased dies without a spouse or heirs, or without dependent parents, the total amount of damages, both economic and non-economic, recoverable under § 13-21-203(1), is currently limited to four hundred thirty-six thousand seventy dollars ($436,070.00). However, C.R.S. § 13-21-203(1) contains an exception to these limitations if the decedent dies as the result of a "felonious killing".

Exemplary Damages: "In all civil actions in which damages are assessed by a jury for a wrong done to the person or to personal or real property, and the injury complained of is attended by circumstances of fraud, malice, or willful and wanton conduct, the jury, in addition to the actual damages sustained by such party, may award him reasonable exemplary damages. The amount of such reasonable exemplary damages shall not exceed an amount which is equal to the amount of the actual damages awarded to the injured party." C.R.S. § 13-21-102.