

COLORADO

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1. Provide an update on current black box technology and simulations in your State and the legal issues surrounding these advancements.

A. Accident Animations and Simulations

i. Legal Principles

Accident animations and/or computer-generated evidence are admissible (accident reconstruction data). *Dolan v. Mitchell*, 502 P.2d 72, 76 (Colo. 1972); but see, *Schultz v. Wells*, 13 P.3d 846 (Colo. App. 2000). Computer-generated video depictions of events fall into two categories: animations and simulations. *People v. Cauley*, 32 P.3d 602, 606–07 (Colo. App. 2001). There are different foundational elements for the admission of videos based on the category in which they belong.

On the one hand, courts view animations as demonstrative evidence. *Cauley*, 32 P.3d at 607. The proponent of an animation must (1) authenticate it; (2) show that it is relevant; (3) show that it is a “fair and accurate representation of the evidence to which it relates”; and (4) show that its probative value is not substantially outweighed by the danger of unfair prejudice. *Id.*; see also *People v. Douglas*, 411 P.3d 1026 (Colo. App. 2016)

On the other hand, courts consider simulations to be scientific evidence. *Cauley*, 32 P.3d at 607. Simulations are offered as substantive, not demonstrative, evidence. *Bullock v. Daimler Trucks N. Am., LLC*, 819 F.Supp.2d 1172, 1176 (D. Colo. 2011). A simulation depends on the proper application of scientific principles, so its admissibility hinges on whether it meets the foundational requirements of scientific evidence. *Cauley*, 32 P.3d at 606–07.

There are some similarities between animations and simulations. They can both require someone to input data into a computer program. See *Bullock*, 819 F.Supp.2d at 1175–

1177 (data input not determinative of categorization as simulation or animation). They can both depict recreations of events. *Cauley*, 32 P.3d at 607. They can both use scientific principles to recreate those events. *Douglas*, 411 P.3d at 1031.

ii. Use at Trial

When a computer-generated depiction does not supply missing information—meaning that an expert has arrived at an opinion without using the computer—the evidence only functions demonstratively. *Douglas*, 411 P.3d at 1032. The depiction is demonstrative because it mirrors a witness’s testimony. *Id.* A depiction that satisfies these criteria is an animation. An animation is not subject to the more rigorous scientific evidence standard found in CRE 702 and *People v. Shreck*, 22 P.3d 68. It functions as, and the jury understands it to be, a visual depiction of the expert’s theory about how an accident occurred, as opposed to a computer’s recreation of the actual event. *Douglas*, 411 P.3d at 1033. The opinions depicted in the animation are the expert’s, so they can then be explored and cross-examined through testimony. *Id.* The foundational requirements adopted in *Cauley* mitigate any unduly persuasive power that a video depiction might have. 32 P.3d at 607. Courts are also encouraged to give a limiting instruction that explains that an animation is “only a re-creation of the proponent’s version of the event.” *See Bullock*, 819 F.Supp.2d at 1176; *Douglas*, 411 P.3d at 1033.

If the computer-generated evidence is used to supply missing information to prove a disputed material fact in a case, it functions as substantive scientific evidence. *Douglas*, 411 P.3d at 1033. So the validity of the conclusions that the computer drew depends on the computer’s proper application of scientific principles. *Cauley*, 32 P.3d at 606. A computer that uses such principles to reach a scientific conclusion is a simulation. Simulations are subject to the admissibility standards for scientific evidence because (1) they function as recreations of the actual event; (2) the “extreme vividness,” and persuasive power of a video can create an “exaggerated aura of computer infallibility,” and (3) unlike a witness, an attorney cannot cross-examine a computer about its conclusions. *Douglas*, 411 P.3d at 1031.

Even inaccurate depictions of an accident may be admissible at trial for various purposes, including “if they are meant to illustrate general physical principles rather than re-create the accident.” *Montag by Montag v. Honda Motor Co., Ltd.*, 75 F.3d 1313, 1420 (10th Cir. 1996). In addition, even inaccurate re-creations may be admissible so long as they are subject to the opposing party’s vigorous cross-examination, and the Court properly instructs the jury on the precise evidentiary purpose(s) for which the re-creations are admitted. *Id.* In *Robinson v. Mo. Pac. R.R. Co.*, 16 F.3d 1083, 1086-89 (10th Cir. 1994), the Tenth Circuit affirmed the district court’s decision to allow the jury to watch an animated video of a train accident even though the defendant objected that certain aspects of the video were inaccurate or misleading. In that case the purpose of the exhibit was demonstrative, to illustrate an expert’s testimony, which the Tenth Circuit found proper despite the alleged problems. *See id.* at 1087-88 (“Given the limited, solely illustrative purpose for introducing the exhibit, the cautionary instruction to the jury, and the opportunity for vigorous cross-examination, we do not believe the district court abused

its discretion in admitting the [collision video].”). On the other hand, if offered as an actual “re-creation” of an accident, the creation of a video must be conducted “under conditions similar to that accident.” *Id.* at 1087 (citing *Gilbert v. Cosco, Inc.*, 989 F.2d 399, 401 (10th Cir. 1993)); *Lewis v. Powers*, Civil Action No. 15-cv-02692-MEH, at *6-7 (D. Colo. Nov. 16, 2018).

B. Event Data Recorder (EDR) Laws

Colorado has a strong EDR law. Colo. Rev. Stat. § 42-4-2402. The Colorado statute makes event data the personal information of the driver and prohibits collection and distribution of that data except (1) with consent, (2) for service, (3) for litigation, or (4) by court order. Violation of the law carries criminal penalties, including fines and up to eighteen months in prison. As far as litigation is concerned, the statute specifically provides EDR data is discoverable in civil proceedings concerning a motor vehicle accident. Colo. Rev. Stat. § 42-4-2402(2).

C. Automated Driving Systems

Colorado law defines an “automated driving system” as a Level 4 or 5 automation system that is collectively capable, without any intervention or supervision by a human operator, of performing driving tasks. Colo. Rev. Stat. §42-1-102 (7.7). The state legislature created a framework for autonomous vehicles in 2017. The Colorado State Patrol and the Colorado Department of Transportation must approve all automated driving systems for testing and use in Colorado that do not yet comply with all applicable state and federal laws. Colo. Rev. Stat. § 42-4-242(3)(a). A violation of this requirement is a class B traffic infraction. Additionally, liability for a crash involving an automated driving system that is not under human control is determined in accordance with applicable state, federal, or common law. Colo. Rev. Stat. § 42-4-242(5).

Furthermore, the regulation of automated driving systems is a matter of statewide concern. Colo. Rev. Stat. § 42-4-110(6)(a). Therefore, a state agency or a political subdivision of the state cannot adopt or enforce a policy, rule, or ordinance that sets standards for an automated driving system that are different from the standards set for a human driver. Colo. Rev. Stat. § 42-4-110(6)(b). There no reported cases interpreting this statute.

2. **Besides black box data, what other sources of technological evidence can be used in evaluating accidents and describe the legal issues in your State involving the use of such evidence.**

There are no reported Colorado opinions on point concerning retention of accident data, elogs, or data concerning any other technological driving aid. All such data retention policies are governed by the litigants traditional duty to preserve relevant evidence under the state and federal rules of civil procedure.

A. Cell Phones

In *Clay v. Lambert*, Plaintiffs subpoenaed cell phone records for the day before and the day of the accident underlying that case. Plaintiffs intended to use this information to demonstrate that Defendants failed to take sufficient rest stops and were fatigued at the time of the accident. Civil Action No. 17-cv-00085-PAB-MEH, at *2 (D. Colo. Oct. 20, 2017). The court held Plaintiffs were entitled to data showing the cell towers that Defendants' phones accessed when they made calls and sent messages, because that information would allow Plaintiffs to determine Defendants' trip itinerary leading up to the accident. Plaintiffs could then hire an expert to review the data and pinpoint where Defendants were during the subject trip. The court further opined Plaintiffs could potentially use the itinerary to demonstrate that Defendants were fatigued, as they had been driving for significant time without rest. *Id.* at *6.

B. GPS Data

In *Young v. Global 3, Inc.*, 2005 U.S. Dist. LEXIS 46417, Plaintiff stated she was prejudiced by Defendant truck driver's failure to preserve GPS records reflecting communications between the Defendants immediately after an auto accident. 2005 U.S. Dist. LEXIS 46417 at *33 (D. Colo.). The court found Global 3, Inc. failed to take appropriate steps to preserve evidence that it knew or should have known was relevant to reasonably foreseeable litigation. However, the court did not find that Global 3 acted willfully or in bad faith, therefore, Plaintiff's request for a default judgment or an adverse inference instruction was denied. The court did find Defendants should be sanctioned for failing to comply with their discovery obligations under the Federal Rules of Civil Procedure. *Id.* at *39. Furthermore, Defendants and their counsel were jointly and severally liable for the reasonable fees and costs incurred by Plaintiff in litigating the spoliation issue and obtaining from other sources relevant documents concerning Global 3's operations and Mr. Edwards' employment and driving history. *Id.* at *40.

3. Describe the legal issues in your State involving the handling of post-accident claims with an emphasis on preservation / spoliation of evidence, claims documents, dealing with law enforcement early and social media?

A. Insurance Adjuster Claim Notes and Post-Accident Investigation

Generally, claim files that are created and prepared not in contemplation of specific litigation are ordinarily considered relevant and discoverable. However, there are exceptions to this rule. C.R.C.P. 26(b)(3) shields from disclosure attorney work product prepared "in anticipation of litigation" absent a showing of "substantial need" and "undue hardship." However, 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). 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. 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).

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 v. Basin W., Inc.*, 47 P.3d 1184, 1187 (Colo. 2002).

B. Surveillance/Social Media

Whether a 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 whether the discovery requested is disproportionate, thus unfairly increasing the cost of litigation, harassing the opponent, or delaying a fair and 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.

C. Spoliation of Evidence

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. 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. *In 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).

In *Pfantz v. Kmart Corp*, the court held that "[w]e are persuaded by Colorado cases involving discovery violations, as well as by more recent federal precedent, that conduct between negligent and intentional which results in spoliation of evidence may warrant a punitive sanction as a discretionary exercise of inherent power." *Pfantz v. Kmart Corp*, 85 P.3d 564, 568-69 (Colo. App. 2003). Prior to imposing sanctions, the burden is placed upon the prejudiced party to prove that the destroyed evidence is relevant to its claim. See *Gates Rubber Co. v. Bando Chm. Ind.*, 167 F.R.D. 90, 104 (D. Colo. 1996). If the missing documents would be relevant, the court must then determine whether the non-moving party was under an obligation to preserve the records at issue. *Cache La Poudre*, 244 F.R.D. at 621. Last, if the duty to preserve existed, the court must weigh what sanction, if any, is appropriate. *Id.* (discussing the considerations of the non-moving party's degree of culpability, the degree of any prejudice to the moving party, and the purposes to be served by exercising the court's power to sanction). *Id.*

The duty to preserve evidence applies to the duty to preserve electronic information. In *Grabenstein*, the issue was whether the defendants had a duty to preserve e-mail correspondence between the parties. *Grabenstein v. Arrow Elecs., Inc.*, 2012 U.S. Dist.

LEXIS 56204 (D. Colo. 2012). The courts held that spoliation applies to e-mails if “(1) a party has a duty to preserve evidence because it knew, or should have known, that litigation was imminent, and (2) the adverse party was prejudiced by the destruction of the evidence.” *Id.*; *See also, Partminer Worldwide, Inc. v. Siliconexpert Techs. Inc.*, No. 09-cv-00586-MSK-MJW, 2010 U.S. Dist. LEXIS 111647, at *5 (D. Colo. September 23, 2010) (where the court held defendants “had an obligation to preserve nonprivileged materials concerning potential trade secrets, whether such materials were in hard copy or in electronically stored information (“ESI”) format.”).

4. Describe the legal considerations in your State when defending an action involving truck drivers who may be considered Independent Contractors, Borrowed Servants or Additional Insureds?

There are no legal considerations in Colorado when defending an action involving truck drivers who may be considered independent contractors or borrowed servants. The carrier is still liable for the actions of a truck driver who may be an independent contractor or borrowed servant, who are considered an employee.

In 2017, the Colorado Supreme Court held in *Ferrer v. Okbamicael*, 390 P.3d 836 (Colo 2017), that a plaintiff cannot maintain direct negligence claims against an employer once an employer acknowledges its liability for its employee’s negligence under a *respondeat superior* theory. “Direct negligence claims provide an alternative means of recovery when vicarious liability is unavailable against an employer because the tortfeasor-employee was not acting within the scope of his employment at the time of his alleged negligence.” *Ferrer*, 390 P.3d at 844. “But where the employer has already conceded it is subject to respondeat superior liability for any negligence of its employee, direct negligence claims become superfluous.” *Id.*

Regarding additional insureds, Colorado courts will look to the language of the contract and the definition of “insured” to determine whether coverage would apply. *See generally, Royal Indem. Co. v. Markley*, 178 P.2d 672 (Colo. 1947). “An insurance policy is a contract that courts should interpret in line with well-settled principles of contract interpretation.” *First Fin. Ins. Co. v. Albertson’s Inc.*, 91 P.3d 470, 472 (Colo. App. 2004); *see Cyprus Amax Minerals Co. v. Lexington, Ins. Co.*, 74 P.3d 294, 299 (Colo. 2003). “In interpreting an insurance policy, the starting point is the plain language of the contract and the intent of the parties as expressed in that language. Courts should read the provisions of the policy as a whole, rather than reading them in isolation.” *Id.* “Any ambiguities in the contract are construed against the insurer as its drafter.” *Id.*; *see State Farm Mut. Auto. Ins. Co. v. Nissen*, 851 P.2d 165, 166 (Colo. 1993). “Included among the statutory factors indicating that an individual is engaged in an independent business are whether the putative employer does not require the individual to work exclusively for it, and whether the putative employer does not pay the individual personally but rather by payment to a trade or business man for the individual.” *Id.*; at 1184; *see C.R.S. § 8-70-115(1)(c)(I), (1)(c)(VII).*

5. What is the legal standard in your state for allowing expert testimony on mild traumatic brain injury (mTBI) claims and in what instances have you had success

striking experts or claims?

Experts, including those that testify as to mTBI are subject to the four-part test provided in *People v. Shreck*, 22 P.3d 68 (Colo. 2001) and C.R.E. 702. Under C.R.E. 702, “[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine 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 or otherwise.” *See People v. Shreck*, 22 P.3d 68, 70 (Colo. 2001). C.R.E. 702 imposes upon a trial court the duty to act as “evidentiary gatekeeper” to assure that scientific evidence and expert testimony is sufficiently reliable and relevant. *Shreck*, 22 P.3d at 74.

The Colorado Supreme Court explained in *Shreck* that to fulfill its gatekeeping duties, a trial court should conduct an inquiry considering the “totality of the circumstances of the case.” *Id.* at 77. The Court declined to adopt “any particular set of factors” for determining reliability. *Shreck*, 22 P.3d at 77 (quoting *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 592-93 (1993)).

Trial courts are vested with broad discretion in making *Shreck* determinations regarding the admissibility of expert testimony. *Id.*; *Masters v. People*, 58 P.3d 979, 988 (Colo. 2002). A C.R.E. 702 analysis “should focus on the reliability and relevance of the proffered evidence.” *Shreck*, 22 P.3d at 70. Expert testimony is admissible under C.R.E. 702 only when (1) the principles at issue are *reasonably reliable*; (2) the witness is qualified to opine on such principles; and (3) the testimony will be *useful to the jury*. *Shreck*, 22 P.3d at 79; *see Masters*, 58 P.3d at 988.

As the court evaluates an expert’s proposed testimony in light of the above factors, it should seek to determine whether the evidence is reasonably reliable information that will assist the trier of fact. *Id.* at 78 (*citing Brooks v. People*, 975 P.2d 1105, 1114 (Colo. 1999)). In assessing the reliability of proposed expert testimony, courts examine the underlying methodology of the witness, considering the totality of the circumstances. *People v. Ramirez*, 155 P.3d 371, 378 (Colo. 2007). An expert’s opinions cannot be mere subjective belief or unsupported speculation; rather, they must be rooted in scientific methods and procedures. *See Id.* (“speculative testimony that would be unreliable and therefore inadmissible under C.R.E. 702 is opinion testimony that has no analytically sound basis.”). “The danger of . . . speculative testimony, i.e., opinion testimony that has no sound scientific basis, is that what appears to be scientific testimony but is really not may carry more weight with the jury than it deserves.” *Id.* at 379 (citation omitted); *see also Daubert*, 509 U.S. at 592-93. Expert testimony that relies on bare assertions, subjective belief, or unsupported speculation will not satisfy the reliability requirement of C.R.E. 702. *Estate of Ford v. Eicher*, 250 P.3d 262, 267 (Colo. 2011) (quoting *Ramirez*, 155 P.3d at 378).

When determining whether the proposed expert testimony would be useful to the jury, this Court must consider both relevance and the risk of unfair prejudice. *Salcedo v. People*, 999 P.2d 833, 838 (Colo. 2000). At this point, the C.R.E. 702 analysis merges with a C.R.E. 403 evaluation. *See Shreck*, 22 P.3d at 78. Lack of evidence in the record indicating that the expert’s technique produces reliable results implicates both the C.R.E. 702 requirement that the evidence assist the jury and the C.R.E. 403 requirement that the evidence not be unfairly

prejudicial or misleading. *See Salcedo*, 999 P.2d at 839.

Attempts to limit or strike experts testifying on mTBI have generally not been successful. We have had some success in limiting mTBI experts when they attempt to offer opinions on causation from “objective testing.”

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

Yes

7. What are some considerations for federally-mandated testing when drivers are Independent Contractors, Borrowed Servants, or Additional Insureds?

Colorado law speaks to an agreement between independent contractors and motor carriers or contract carriers in C.R.S. § 40-11.5-102. Specifically, C.R.S. § 40-11.5-102 states the following, in pertinent part regarding federal mandated testing:

(b) The lease may require the independent contractor to be instructed in the method of the carrier's operation, and to be familiar with federal, state, and municipal statutes, ordinances, and regulations. The lease may further require the certificated carrier or contract carrier to enforce compliance with such federal, state, and municipal statutes, ordinances, and regulations by the independent contractor. Compliance with the provisions of this paragraph (b) shall not affect the status of the independent contractor as an independent contractor for purposes of this article.

(e) The lease may provide for periodic driver safety training.

(f) The lease may provide for some control over any assistant working with the independent contractor relating to the enforcement of, and compliance with, federal, state, and municipal statutes, ordinances, and regulations.

Pursuant to C.R.S. § 42-4-235(4)(a)(I), the Colorado State Patrol has the authority to promulgate rules and regulations for the minimum standards for operation of commercial vehicles within the State of Colorado. Pursuant to 8 Colorado Code of Regulations 1507-1, whether independent contractor, borrowed servant, or additional insured, [a]ll intrastate and interstate motor carriers, commercial vehicles and drivers thereof operating within the state of Colorado shall operate in compliance with the safety regulations, including mandating testing. *See* 8 CCR 1507-1(V).

8. Is there a mandatory ADR requirement in your State and are any local jurisdictions mandating cases to binding or non-binding arbitration?

There is no global rule mandating participation in mediation or other forms of ADR imposed under Colorado's statutes or procedural rules. However, under C.R.S. § 13-22-313(1), Colorado trial courts are empowered to impose orders mandating participation in alternative dispute resolution. Further, Judges, District Courts, and Federal Magistrates also may impose mandatory ADR participation on a case-by-case basis.

9. Can corporate deposition testimony be used in support of a motion for summary judgment or other dispositive motion?

All forms of deposition testimony, including testimony offered by a corporate representative under C.R.C.P. 30(b)(6), is admissible in support of a motion for summary judgment under C.R.C.P. 56. "Summary judgment is appropriate when the pleadings, affidavits, depositions, or admissions establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Vigil v. Franklin*, 81 P.3d 1084, 1086 (Colo. App. 2003).

However, Motions to Dismiss filed under C.R.C.P. 12(b), with the exception of C.R.C.P. 12(b)(1) regarding subject matter jurisdiction, are limited to the facts and allegations set forth in the pleadings. *Trip v. Parga*, 846 P.2d 165 (Colo. App. 1992). If any affidavit or deposition testimony is referenced or attached as an exhibit to the pleading, Colorado Courts are to consider the motion under the summary judgment rule, C.R.C.P. 56(c). *Van Schaack v. Phipps*, 558 P.2d 581 (Colo. App. 1976).

10. What are the rules in your State for contribution claims and does the doctrine of joint and several liability apply?

The doctrine of joint and several liability is applicable. The common-law doctrine of joint and several liability is not inconsistent with this section's system of comparative negligence, but rather, the doctrine of joint and several liability in the context of comparative negligence continues to ensure that negligently injured persons will be able to obtain adequate compensation for their injuries from those tortfeasors who have negligently inflicted the harm. *Martinez v. Stefanich*, 577 P.2d 1099, 1101 (1978); *see also* C.R.S. § 13-21-111.

"Joint liability shall be imposed on two or more persons who consciously conspire and deliberately pursue a common plan or design to commit a tortious act. Any person held jointly liable under this subsection (4) shall have a right of contribution from his fellow defendants acting in concert. A defendant shall be held responsible under this subsection (4) only for the degree or percentage of fault assessed to those persons who are held jointly liable pursuant to this subsection (4)." C.R.S. § 13-21-111.5.

11. What are the most dangerous/plaintiff-friendly venues in your State?

Adams, Boulder, Denver, Pitkin, Pueblo, and Routt.

12. Is there a cap on punitive damages in your State?

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.*; *see also Lira v. Davis*, 832 P.2d 240 (Colo. 1992). 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 may 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).

Further, Colorado Courts can reduce exemplary damage awards if they are deemed excessive. *Malandris v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 703 F.2d 1152 (10th Cir. 1981). If the award is so excessive that it “shocks the judicial conscience” or supports “an inescapable inference that [the award] resulted from improper passion or prejudice on the part of the jury,” the Court can order the award reduced. *Malandris*, 703 F.2d 1152; *Wegner v. Rodeo Cowboys Ass’n*, 290 F.Supp. 269 (D. Colo. 1968). Finally, plaintiffs are not entitled to prejudgment interest on any exemplary damage award. *Seward Const. Co. v. Bradley*, 817 P.2d 971 (Colo. 1991).

13. Admissible evidence regarding medical damages – can the plaintiff seek to recover the amount charged or the amount paid?

In Colorado, a Plaintiff can seek to recover the amount charged by the medical providers. Colorado has codified its collateral source rules at C.R.S. § 13-21-111.6, the post-verdict set off rule, and a pre-verdict evidentiary component in 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 244, 228 (Colo. 2012). To reach its holding, the Court explained, under common law principles, 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).

In sum, evidence of amounts paid by an insurance company are not admissible at trial, but C.R.S. § 13-21-111.6, the post-verdict rule, allows for reduction of jury awards based on payments made by a collateral source to plaintiff which compensates for injuries on which the award is based. However, Colorado courts have applied the contractual exception in the statute to avoid such reductions in cases where Medicare/Medicaid, workers' compensation insurance, and other third-parties with whom plaintiff did not directly contract with compensated the plaintiff for injuries and damages.

Illustrative of this broad application of Colorado's post-verdict 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 fault. *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.*

In summary, Colorado Courts will not allow admission of amounts paid by insurers under C.R.S. § 10-1-135, and reductions or demurrers are difficult to obtain even where the plaintiff does not directly contract with the purported collateral source under the contract exception in C.R.S. § 13-21-111.6