FOR MORE INFORMATION

HALL & EVANS, LLC
Denver, Colorado
www.hallevans.com

Lance G. Eberhart
eberhartl@hallevans.com

Brooke Churchman
churchmanb@hallevans.com

Uriel Martinez
martinezu@hallevans.com

Paul Yarbrough
yarbroughp@hallevans.com

Colorado

1. **What are the statute of limitations for tort and contract actions as they relate to the transportation industry.**

   The statute of limitations for a tort action involving a motor vehicle expires three (3) years after the cause of action accrues. C.R.S. § 13-80-101(1)(n)(I). The statute of limitations in "[a]ll contract actions, including personal contracts and actions under the "Uniform Commercial Code", except as otherwise provided in C.R.S. § 13-80-103.5 is three (3) years. C.R.S. § 13-80-101(1)(a). A cause of action typically accrues on the date of the alleged accident.

2. **What effects, if any, has the COVID Pandemic had on tolling or extending the statute of limitation for filing a transportation suit and the number of jurors that are sat on a jury trial.**

   None. The Colorado legistlature has not extended the statute of limitations for tort actions. In fact, Judges are pushing parties harder to keep cases on schedule because of docket issues attributable to COVID-19. Further, judges are increasingly denying requests for extensions or continuances on the basis of COVID-19, and are forcing parties to prepare for trial as initially scheduled. There has been no impact on the number of jurors seated for a jury trial.

3. **Does your state recognize comparative negligence and if so, explain the law.**

   Colorado recognizes comparative negligence. See C.R.S. § 13-21-111. Under Colorado's modified comparative negligence system a plaintiff may recover damages from a defendant (offset by the percentage of negligence attributed to the plaintiff) unless the plaintiff's negligence exceeds the defendant's negligence. If a plaintiff's percentage of negligence exceeds the percentage of negligence attributed to a defendant, then the plaintiff is barred from recovering damages against the defendant.

4. **Does your state recognize joint tortfeasor liability and if so, explain the law.**

   No, under C.R.S. § 13-21-111.5, Colorado recognizes a pro rata rule based on comparative negligence for assigning liability to multiple defendants. Accordingly, a defendant is only liable for the percentage of liability assigned to the Defendant.

   However, Colorado still uses joint and several liability for defendants who acted in concert to cause the plaintiff's damages. In such cases, the Plaintiff may recover her entire damages (minus percentage attributed to Plaintiff) from any defendant found liable. Moreover, defendants who overpay beyond their percentage of liability have a right of contribution against other defendants.

5. **Are either insurers and/or insureds obligated to provide insurance limit information pre-suit and if so, what is required.**

   Yes, pursuant to C.R.S. § 10-3-1117, after a written request from an inusred or

third-party claimants, an insurer must disclose within thirty (30) days of the request, the: (1) he name of the insurer; (2) the name of each insured party, as the name appears on the declarations page of the policy; (3) the limits of the liability coverage; and (4) a copy of the policy.

6. Does your state have any monetary caps on compensatory, exemplary or punitive damages.

Yes, the amount for exemplary, and/or punitive damages "shall not exceed an amount which is equal to the amount of the actual damages awarded to the injured party." See C.R.S. § 13-21-102. However, the court has the discretion to reduce, disallow, or increase such damages depending on factors discussed in C.R.S. § 13-21-102(2)-(3).

Additionally, on January 1, 2022, new damage caps came into effect in Colorado that impact the transportation industry. These new damages caps apply only "to claims for relief that accrue on and after January 1, 2020, and before . . . January 1, 2022." The present caps for claims accruing before January 1, 2020, remain unchanged. The new caps exclude medical malpractice claims. Furthermore, non-economic damages for such matters remain capped at $300,000. See C.R.S § 13-64-302(c).

The new cap amounts for claims accruing on or before January 1, 2020, are as follows:

- **For Noneconomic Loss or Injury**: **$613,760**, which can be increased by the court upon clear and convincing evidence to a maximum of $1,227,530. See C.R.S. 13-21-102.5(3)(a)[2] (This is an increase from the previous cap of $468,010 and $936,030.)
- **For Derivative Noneconomic Loss or Injury**: **$613,760**. See C.R.S. 13-21-102.5(3)(b). (This is an increase from the previous cap of $468,010.)
- **For Noneconomic Loss in Wrongful Death Actions**: **$571,870.** See C.R.S. 12-21-203(1). (This is an increase from the previous cap of $436,070.)

Moreover, the new law requires an adjustment to the caps every two years.

7. Has your state recently implemented any tort reforms which may affect transportation lawsuits or is your state planning to, and if so explain the reforms.

Yes, see the discussions on damage caps in question No. 6 and vicarious liability in question No. 12.

8. How many months generally transpire between the filing of a transportation related complaint and a jury trial.

The Colorado Supreme Court issued a directive several year ago that requires Colorado courts to try all cases within a year of filing—if feasible. Accordingly, most courts, especially courts in the Denver area set trial dates within a year of the initial filing of the plaintiff's complaint. Courts rarely budge on trial settings. However, courts will extend trials seetings if the moving party shows exceptional circumstances.

9. When does pre-judgment interest begin accumulating and at what percent rate of interest.

In Colorado, in addition to the damages awarded by the jury, a plaintiff is entitled to pre-judgment interest, until the damages award is paid. Pursuant to C.R.S. § 13-21-101(1), a plaintiff can recover pre-judgment interest on a personal injury action at 9% per annum since the date that the plaintiff's cause of action accrued. Typically, the cause of action accrues on the date of the alleged accident.

10. What evidence at trial are the parties allowed to enter into evidence concerning medical expense related damages.

Aside from traditional forms of evidence (medical records and bills), recent holdings by the Colorado Supreme

Court further explained issues revolving around evidence from collateral sources of medical expenses.

Evidence documenting the receipt of benefits and the amounts paid by collateral sources are inadmissible and must be excluded pursuant to Colorado's collateral source rule, as established by common law and statute. Colorado's collateral source rule consists of two components: (1) a post-verdict setoff rule, codified at section 13-21-111.6, C.R.S.; and (2) a pre-verdict evidentiary component, established by common law and codified at section 10-1-135(10)(a), C.R.S. The post-verdict setoff rule requires a court to set off tort verdicts by the amount of certain collateral source payments received by the plaintiff unless the payments were made because of a contract entered into and paid for on the plaintiff's behalf. § 13-21-111.6, C.R.S. The pre-verdict evidentiary component is codified at section 10-1-135(10)(a) and bars evidence of a plaintiff's receipt or entitlement to benefits received from a collateral source—a third-party wholly independent of the tortfeasor that has not contributed—in any action against an alleged third-party tortfeasor for any purpose. See § 10-1-135, C.R.S. The purpose of the collateral source rule is to prevent a tortfeasor from reaping the benefit of a third-party source for which the tortfeasor did not contribute. Volunteers of Am. Colo. Branch v. Gardenswartz, 242 P.3d 1080, 1083 (Colo. 2010).

In 2012, the Colorado Supreme Court decided a trilogy of cases harmonizing this statutory language with Colorado's Collateral Source Statute, C.R.S. § 13-21-111.6. See Wal-Mart Stores v. Crossgrove, 276 P.3d 562 (Colo. 2012); Smith v. Jeppsen, 277 P.3d 224 (Colo. 2012); Sunahara v. State Farm Mut. Auto. Ins. Co., 280 P.3d 649 (Colo. 2012). In Crossgrove, the Supreme Court unequivocally held that "the pre-verdict evidentiary component of the collateral source rule prevails in collateral source cases to bar the admission of the amounts paid for medical services." 276 P.3d at 567. The Court explained:

> Admitting amounts paid evidence for any purpose, including the purpose of determining reasonable value, in a collateral source case carries with it an unjustifiable risk that the jury will infer the existence of a collateral source—most commonly an insurer—from the evidence, and thereby improperly diminish the plaintiff's damages award.

Id. See also Jeppsen, 277 P.3d at 228 (holding that C.R.S. 10-1-135(10)(a) unambiguously bars admission of evidence of "[t]he fact or amount of any collateral source payment or benefits."); Sunahara, 280 P.3d 649 at 654 (citing Gardenswartz, 242 P.3d at 1083-84) ("To ensure that a jury will not be misled by evidence regarding benefits that a plaintiff received from sources collateral to the tortfeasor, such evidence is inadmissible at trial.").

The collateral source rule is not limited to benefits paid by private health insurance. "A collateral source is a person or company, wholly independent of an alleged tortfeasor, that compensates an injured party for that person's injuries." Jeppsen, 277 P.3d at 228. "Colorado courts have held that benefits from Social Security, Medicaid, and public retirement plans all meet the definition of a collateral source." Forfar v. Wal-Mart Stores, Inc., 436 P.3d 580, 585 (Colo. App. 2018) (holding that the collateral source rule applies to Medicare benefits).

In 2019, a division of the court of appeals issued a published opinion holding that the collateral source rule bars evidence of the medical expenses paid by a workers' compensation insurer, and the plaintiff can present evidence of the higher medical expenses billed by his medical providers. Scholle v. Delta Air Lines, Inc., 486 P.3d 325 (Colo. App. 2019), reversed by Delta Air Lines, Inc. v. Scholle, 484 P.3d 695 (Colo. 2021). Specifically, the Scholle Court found that "the trial court erroneously admitted evidence of the medical expenses paid by the workers' compensation insurer and erroneously excluded evidence of any greater amount of past medical expenses." Id. This decision was subsequently appealed, and the Colorado Supreme Court granted certiorari on the issue of whether the collateral source rule barred evidence of medical expenses paid by a workers' compensation insurer.

The Colorado Supreme Court ultimately reversed the decision of the Court of Appeals in Scholle and remanded it for a new trial; however, it did not hold that workers' compensation benefits were no longer considered payments from a collateral source; rather, the Court based its reversal on its narrow determination that the collateral source rule did not apply to the facts of the case before it. Delta Air Lines, 484 P.3d at ¶ 12.

Specifically, the Court emphasized that if a workers' compensation insurer exercises its right of subrogation by settling a claim with the third- party tortfeasor, the employee's claims for recovery against the third-party tortfeasor are automatically extinguished. Id. at ¶ 21. Further, the Court reasoned that once the insured's claims are extinguished, the insured no longer has any reason to present evidence of either amounts paid or amounts billed for medical services and, therefore, the collateral source rule has no evidentiary application. Id. at ¶ 29.

As a result, the Delta Air Lines Court espoused a narrow holding that the collateral source rule is not implicated in situations where a workers' compensation insurer elects to resolve its subrogation claim with the tortfeasor. Id. at ¶ 1 ("We conclude that when, as here, a workers' compensation insurer settles its subrogation claim for reimbursement of medical expenses with a third-party tortfeasor, the injured employee's claim for past medical expenses is extinguished completely.") (emphasis added). Importantly, the Delta Air Lines decision did nothing to abrogate the sound determination made by the Court of Appeals characterizing workers' compensation benefit payments as a collateral source, nor did it overturn its decision from over eighty years ago holding the same. See Riss & Co. v. Anderson, 114 P.2d 278, 281 (Colo. 1941) (if a plaintiff's benefit plan is part of the plaintiff's compensation as an employee, "then he bought and paid for such insurance" and, in that case, "a tortfeasor may not plead his victim's prudence and foresight to relieve him from the consequences of his own wrong").

Accordingly, if a workers' compensation insurer elects to exercise its subrogation rights to resolve claims for past medical expenses with the third-party tortfeasor, then plaintiff's claims against the tortfeasor for those medical expenses are extinguished and the collateral source rule is not implicated. On the other hand, however, when a workers' compensation insurer does not elect to resolve its subrogation claim with the third-party tortfeasor, the amounts paid by that insurer for plaintiff's medical expenses and other benefits are considered evidence of a collateral source that remains inadmissible at trial for any purpose. Indeed, the logic behind exclusion of this evidence is highlighted by the substantially unjustifiable risk that the jury will improperly decrease its award of damages to a plaintiff simply because it erroneously believes that he or she has already been compensated.

11. Does your state recognize a self-critical analysis or similar privilege that shields internal accident investigations from discovery?

Colorado courts do not recognize self-critical analysis privilege and tend to lump the privilege in with work product protections and privileges. See Combined Communications Corp., Inc. v Public Service Co. of Colo, ***865 P2d 893*** (Colo App 1993) (stating that self-critical analysis privilege does not exist in Colorado, although applied self-critical analysis to facts of case and held that it did not apply). Further, the Court explained that a party seeking to protect self-analysis material must show that: (1) the information resulted from a "critical self-analysis undertaken by the parties seeking protection"; (2) the public must have a strong interest in preserving the free flow of the alleged privileged information; (3) the information must be of the type that its free flow would cease if the privilege is not recognized; and (4) any document produced as a result of this self-critical analysis must be produced in the expectation of confidentiality and it must actually have been kept confidential.

12. Does your state allow independent negligence claims against a motor carrier (i.e. negligent hiring, retention, training) if the motor carrier admits that it is vicariously liable for any fault or liability assigned to the driver?

Previously, in Colorado, if an employer acknowledged vicarious liability for its employee's negligence, then the plaintiff's direct claims against the employer were barred. Ferrer v. Okbamicael, 390 P.3d 836 (Colo. 2017).

However, In May 2021, Colorado Governor Jared Polis signed HB21-1188, which explicitly overturned the Colorado Supreme Court's ruling in Ferrer. Under Ferrer, plaintiffs were prohibited from asserting direct negligence claims—such as negligent hiring, supervision, retention, and training—if the defendant company admitted vicarious liability for its driver at the time of the accident, and therefore limiting or prohibiting discovery on these issues. HB21-1188, which went into effect on September 7, 2021, states: "[W]hen an employer… acknowledges vicarious liability for an employee's negligence, a plaintiff's direct negligence claims against the employer . . . are not barred. A plaintiff may bring such claims—and conduct associated discovery—in addition to claims and discovery based on respondeat superior." The bill further clarified the legislature's intent by stating that "It is the intent of the General Assembly to reverse the holding in Ferrer v. Okbamicael, 390 P.3d 836 (Colo. 2017), that an employer's admission of vicarious liability for any negligence of its employees bars a plaintiff's direct negligence claims against the employer."

13. Does your jurisdiction have an independent claim for spoliation? If not, what are the sanctions or repercussions for spoliation?

No, there is no independent claim for spoliation in Colorado. Colorado and federal case law overwhelmingly indicates that courts possess broad discretion in fashioning the appropriate sanction for spoliation. See Aloi v. Union Pac. R.R. Corp., 129 P.3d 999, 1002 (Colo. 2006); see also Vodusek, 71 F.3d at 156; Gates Rubber Co. v. Bando Chem. Indus., Ltd., 167 F.R.D. 90, 102 (D. Colo. 1996) (Because the imposition of sanctions is essentially a judgment call, courts' rulings "cannot be tied down to a fixed rule or formula. If such were the case, courts would lose their flexibility in the sanctions process, and discretion would lose its meaning."). Accordingly, in Colorado, if a court finds spoliation and chooses to impose a sanction, the fact finder has a wide variety of sanctions to choose from and may determine the severity in accordance with the state of mind of the spoliator.

It is important to note that a finding of bad faith is not required for a finding of spoliation. However, in determining what sanction is appropriate, harsher sanctions are available to the court if spoliator is found to have disposed of evidence in bad faith.