

DIGEST OF INSURANCE LAW

COLORADO

Courtesy of
Hall & Evans, L.L.C.
Denver, Colorado

CIVIL JUDICIAL SYSTEM

Courts of Original Jurisdiction

Small Claims Courts. Small Claims Courts handle claims that do not exceed \$7,500. C.R.S. §13-6-403(1). Small Claims Courts do not have jurisdiction over actions of defamation by libel or slander, actions of forcible entry, forcible detainer, or unlawful detainer, class actions, specific performance over \$7,500.00, injunctions, traffic violations, criminal matters and other related areas. C.R.S. §13-6-403(2). No lawyer shall appear or take part in filing, prosecution or defense of any matter in Small Claims Court. If attorney appears, as permitted, opposing party may also be represented by counsel. C.R.S. §13-6-407. Small claim actions may be transferred to county court by motion. Further information and procedural details at C.R.S. §§13-6-401-417 and C.R.C.P. 501-21.

County Courts. County courts have original jurisdiction with District Court in actions, suits, and proceedings in which amount claimed does not exceed \$15,000. C.R.S. §13-6-104(1). County Court has original jurisdiction to issue temporary and permanent civil restraining orders. C.R.S. §13-6-104(5). County Court also has original jurisdiction in hearings concerning impoundment of motor vehicles, C.R.S. §13-6-104(8), or jurisdiction where title or boundaries to real property are involved. C.R.S. §13-6-104(2). Further information and procedural details at C.R.S. §§13-6-101-107 and C.R.C.P. 301-83.

Juvenile Courts. There is juvenile court in City and County of Denver. C.R.S. §13-8-101. Outside Denver each district court has juvenile division. Exclusive jurisdiction in all juvenile cases, including but not limited to child delinquent act, child neglect, and legal parent-child relationships. C.R.S. §19-1-104. Child is defined as one under 18 years of age. C.R.S. §19-1-103(18).

District Courts. Original jurisdiction is granted to district courts of all civil, probate and criminal cases except as otherwise provided to county or juvenile courts. Colo. Const., Art. 6, §9.

Appellate Courts

Court of Appeals. Appellate jurisdiction from final judgments of any District, Probate or Juvenile Court. C.R.S. §13-4-102. Appeal is by Notice of Appeal rather than writ of error.

Supreme Court. Original jurisdiction is granted to Supreme Court giving it power to issue writs of habeas corpus, mandamus, quo warranto, certiorari, injunction, and other original and remedial writs, with authority to hear and determine same; and each Justice of Supreme Court shall have like power and authority as to writs of habeas corpus. Colo. Const., Art. 6, §3.

The validity of any order of Insurance Commissioner suspending or revoking authority of any foreign or domestic insurance company may be tested in any court of competent jurisdiction, through injunction, appeal, or other proper process. C.R.S. §10-1-111.

Notice of appeal and appeals go to Court of Appeals for every final judgment, decree or order of any District Court in all civil actions, suits and proceedings, and by writ of certiorari issued in discretion of Supreme Court as to all final determinations of Court of Appeals.

Supreme Court retains jurisdiction on all cases involving constitutionality of statutes and ordinances, public utilities, water rights, appeals from County Courts to District Courts.

LAW

Abbreviations

CJI Civ. – Colorado Civil Jury Instructions.
Colo. – Colorado Reports.
Colo. App. – Colorado Court of Appeals Reports.
Colo. Const. – Constitution of Colorado.
C.R.S. – Colorado Revised Statutes (2005).
C.R.C.P. – Colorado Rules of Civil Procedure.
HB – House Bill.
P. or Pac. – Pacific Reporter.
P.2d – Pacific Reporter, Second Series.
P.3d – Pacific Reporter, Third Series
SB – Senate Bill.



ACCIDENT AND HEALTH INSURANCE

Contract Law. “Policy of sickness and accident insurance” means any policy of contract of insurance against loss or expense resulting from sickness of insured, or from bodily injury or death of insured by accident, or both. C.R.S. §10-16-102(30). “Sickness and accident insurance policy” does not include short-term, accident, fixed indemnity, specified disease policies or disability income contracts, and limited benefit or credit disability insurance, Medicare supplement insurance, or as is defined by commissioner. C.R.S. §10-16-104(4)(c). Term does not include insurance arising out of “Workers’ Compensation Act of Colorado,” automobile medical payment insurance, or insurance under which benefits are payable with or without regard to fault and which is required by law to be contained in any liability insurance policy or equivalent self-insurance. *Id.*

Cancellation. Insurance policy may be canceled only by compliance with terms of policy, by operation of law, or by mutual agreement of parties to the contract. *Omni Development v. Atlas Assur. Co.*, 956 P.2d 665, 668 (Colo. App. 1998). Public policy considerations require strict compliance with cancellation provisions of insurance policy. *Geiger v. American Std. Ins. Co.*, 117 P.3d 16 (Colo. App. 2004). In Colorado, the term “cancellation” in insurance context has not been used to refer to voiding of endorsement, alteration in policy, or any change other than complete cancellation of entire policy. *First Fin. Ins. Co. v. Albertson’s, Inc.*, 91 P.3d 470 (Colo. App. 2004). The term “cancellation” in insurance policy refers to abrogation of entire policy or that portion of policy that remains unperformed at time of cancellation. *Id.*

Renewal. Insurer can reserve right to refuse to renew individual sickness and accident policy if so stated in policy and if 30 days written notice is provided of intention not to renew. C.R.S. §10-16-202(4)(b). However, carrier providing coverage under health benefit plan cannot discontinue coverage or refuse to renew such plan except for the following reasons: nonpayment of required premium; fraud or intentional misrepresentation of material fact; carrier elects to discontinue offering and nonrenewal all of its individual, small group, or large group health benefit plans delivered or issued for delivery in Colorado; with respect to individual health benefit plans, insurance commissioner finds that continuation of coverage would not be in best interest of policyholders or certificate holders, plan is obsolete, or would impair carrier’s ability to meet its contractual obligations; with respect to group health benefit plans, policyholder fails to comply with participation or contribution rules; with respect to carrier that offers group health benefit plans in market through managed care plan, there is no longer

any enrollee in connection with such plan that lives, resides, or works in service area of carrier; with respect to small group health benefit plans, employer is no longer actively engaged in business in which it was engaged on effective date of plan; or with respect to coverage of employer that is made available only through one or more bona fide associations, membership of employer ceases. C.R.S. §10-16-201.5. Additionally, insurers must comply with strict notice and market withdrawal procedures set out in insurance statutes and regulations. *Id.*

Disease Induced by Accident. In action under health and accident policy, disease induced by accident is compensable. *Clarke v. Equitable*, 39 P.2d 785 (Colo. 1934). Terms “infection” and “disease” when used in policies of insurance are given their “commonly accepted meaning.” Botulism is bacterial infection within policy exception which excludes death from any bacterial infection. *New York Life v. Mariano*, 76 P.2d 417 (Colo. 1938); *Reed v. U.S. Fidelity*, 491 P.2d 1377 (Colo. 1971). “Bodily injury” for purposes of accident policy is injury to any part of body, regardless of whether injury was internal or external. *Pirkheim v. First UNUM*, 50 F. Supp. 2d 1018 (D. Colo. 1999), *aff’d*, 229 F.3d 1008 (10th Cir. 2000).

Excepted Risks. When limited coverage clause requires that death or injury occur “directly and independently of all other causes,” coverage is provided when accidental injury is predominant cause of disability or loss. *Carroll v. CUNA*, 894 P.2d 746, 755 (Colo. 1995). Exclusionary clauses, more restrictive than limited coverage clauses, deny coverage when injury caused “wholly or in part, directly or indirectly” by certain actions. *Id.* 754, n. 10. Insurer must establish causal connection between use of alcohol and death to satisfy exclusionary clause for injuries occurring while under influence of alcohol. *Sylvester v. Liberty Life*, 42 P.3d 38, 40 (Colo. App. 2001).

Notice and Proof of Loss. Individual sickness and accident policies must contain the following or similar provision: “Notice of claim: Written notice of claim must be given to the insurer within twenty days after the occurrence or commencement of any loss covered by the policy or as soon thereafter as is reasonably possible.” C.R.S. §10-16-202(6)(a). Regarding notice for loss-of-time benefit, *see* C.R.S. §10-16-202(6)(b). Further required is “Proofs of loss: Written proof of loss must be furnished to the insurer at its said office in case of claim for loss for which this policy provides any periodic payment contingent upon continuing loss within ninety days after the termination of the period for which the insurer is liable and in case of claim for any other loss within ninety days after the date of such loss. Failure to furnish such proof within the time required shall not in-



validate nor reduce any claim if it was not reasonably possible to give proof within such time, if such proof is furnished as soon as reasonably possible and in no event, except in the absence of legal capacity, later than one year from the time proof is otherwise required.” C.R.S. §10-16-202(8). Group sickness and accident policies must contain following or similar provision: “Written notice of claim must be given to the insurer within twenty days after the occurrence or commencement of any loss covered by the policy. Failure to give notice within such time shall not invalidate nor reduce any claim if it is shown not to have been reasonably possible to give such notice and that notice was given as soon as was reasonably possible.” C.R.S. §10-16-214(3)(a)(VIII).

Generally, where undue delay in notifying insurer of claim for which it is allegedly liable is unexcused, insurer not required to show prejudice as result of such delay. *United Services v. Allstate*, 662 P.2d 1102 (1983). If insured unreasonably provided delayed notice to insurer, insurer bears burden to prove by preponderance of evidence that it was prejudiced by delay; delay does not create presumption of prejudice. *Clementi v. Nationwide*, 16 P.3d 223 (Colo. 2001) (UM/UIM policy); *Friedland v. Travelers Indem. Co.*, 105 P.3d 639 (Colo. 2005) (extending notice-prejudice rule to all liability policies).

Statute of Limitations. Three years for all contract actions, including personal contracts. C.R.S. §13-80-101(1)(a). All actions for personal injury or property damage based upon negligence must be commenced within two years after cause of action accrues. C.R.S. §13-80-102(1)(a). Medical malpractice actions must be instituted within two years after date that such action accrues, but in no event shall action be brought more than three years after act or omission which gave rise to action. C.R.S. §13-80-102.5(1).

Double Indemnity. Death due to violation of law - beneficiary cannot collect on double indemnity clause in life policy where insured met his death as proximate result of his own violation of law. “A promise to indemnify another for doing a private wrong or for committing a public crime is against public policy, and is void in law.” *Metropolitan v. Roma*, 50 P.2d 1142, 1143 (Colo. 1935); *Yeager v. Travelers*, 515 P.2d 117 (Colo. 1973) (Public policy did not preclude recovery where it was found that insured was in course of committing unlawful act when former wife shot him in self-defense). *But see, Penn Mut. v. Gibson*, 418 P.2d 50 (Colo. 1966) (recovery under double indemnity where insured was killed while driving under influence of alcohol, which was not felony under statute at time of accident). *See also, Continental Cas. v. Maguire*, 471 P.2d 636 (Colo. 1971) (rule held not applicable where insured was insane at

time he was injured and not accountable for his actions). Poison exceptions to double indemnity clauses are determined based on “poison’s” popular use and only includes substances which, in small doses, destroys life. *Equitable Life v. Hemenover*, 67 P.2d 80 (1937). Death by accident in Colorado is not restricted to cases in which injury is initially incurred through accidental means. *Bobier v. Beneficial Standard Life Ins. Co.*, 570 P.2d 1094, 1096 (Colo. App. 1977). Rather, it applies as well to those situations in which unusual or unanticipated result flows from commonplace cause. *Id.*

Colorado Division of Insurance states that insurance policies that provide coverage for sickness, accidents and illness may not deny coverage for intentional acts committed while insane. *Insurance Bulletin B-4.5*. Suicide, attempted suicide or other acts of self-destruction committed while insane are accident. *Id.* Those performing above acts while insane are incapable of formulating intent necessary to categorize act as intentional. *Id.* See “ACCIDENTAL MEANS.”

ACCIDENTAL MEANS

Definition. Voluntary act causing unforeseeable, unintended, or unexpected result can be considered an accident. *Carroll v. CUNA Mut. Ins. Soc’y*, 894 P.2d 746 (Colo. 1995) (“Under the accidental means test, precipitating cause of injury must be accidental or unintended.”).

Beneficiary under wife’s accidental death policy brought suit against insurer seeking determination that her death from massive intracranial hemorrhage during sexual intercourse was covered event under policy. Supreme Court held policy required death result from accident “directly and independently of all other causes”. Accident must be predominant cause of injury for injury to be compensable and policy did not cover insured’s death resulting from ruptured aneurysm during intercourse where death was predominately caused by insured’s preexisting aneurysm and hypertension. *Carroll, supra*.

An effect which is not the natural or probable consequence of the means which produced it, an effect which does not ordinarily follow and cannot be reasonably anticipated from the use of those means, an effect which the actor did not intend to produce and which he cannot be charged with the design of producing...is produced by accidental means. *Reed v. United States Fidelity & Guaranty Co.*, 491 P.2d 1377, 1380 (Colo. 1971). *See also Equitable Life Assurance Soc. v. Hemenover*, 67 P.2d 80 (Colo. 1937) and *New York Life Ins. Co. v. Mariano*, 76 P.2d 417 (Colo. 1938).



See Preferred Acc. Ins. Co. v. Fielding, 83 P. 1013 (Colo. 1905); *Travelers v. Murray*, 26 P. 774 (Colo. 1891). Where it is shown that death was caused by unexplained violent external means presumption is that injuries were accidental. In suit on accident insurance policy, plaintiff's claim is prima facie established without direct or positive proof on this point, even though insured stated before death that injuries resulted from natural causes. *Preferred Acc. Ins. Co. v. Fielding*, 83 P. 1013 (Colo. 1905). It is within the province of the jury under the settled rules of evidence, from the testimony, the facts and circumstances, to determine whether or not the injuries were [are] accidental, when the testimony elicited on that subject was [is] consistent with the theory of an accident. *Preferred Acc. Ins. Co. v. Fielding*, 83 P. 1013, 1015 (Colo. 1905) citing to *Travelers Ins. Co. v. McConkey*, 127 U.S. 661 (1888); *Stephenson v. Bankers Life Ass'n*, 79 N.W. 459 (Iowa 1899); *Standard Life & Acc. L. & S. Co. v. Thornton*, 40 C.C.A. 564, *Ib.* 49 L.R.A. 116; *Fidelity & Cas. Co. v. Love*, 111 Fed. 773 (5th Cir. 1901); *Jenkins v. Pac. Etc. Ins. Co.*, 63 P. 180 (Cal. 1900); and *Guldenkirch v. U.S. Mut. Acc. Ass'n*, 5 N.Y. Supp. 429 (1889). Each individual case must be judged by its own facts and circumstances. *Preferred Acc. Ins. Co. v. Fielding*, 83 P. 1013, 1015 (Colo. 1905).

Breach of Contract. Breach of contract not generally considered accident constituting a covered occurrence. *Union Ins. Co. v. Hottenstein*, 83 P.3d 1196 (Colo. Ct. App. 2003). Additionally, a claim for damages arising from poor workmanship, standing alone, does not allege an accident that constitutes a covered occurrence, regardless of underlying legal theory pled. *General Sec. Indem. Co. v. Mt. States Mut. Cas. Co.*, 205 P.3d 529 (Colo. Ct. App. 2009).

Suicide. C.R.S. §10-7-109. Provides that although suicide is no defense to life insurance policy after one year, it is defense to accident insurance policies and to accidental death provisions in life insurance policies. There is generally recognized presumption that violent and unexplained death from external causes is accidental, and not suicide. *Simonton v. Continental Cas. Co.*, 507 P.2d 1132 (Colo. Ct. App. 1973).

Insured's blindness caused by fragments from tear gas shells which had been fired after insured had fired upon officers who had been attempting to persuade him to leave his house was caused by accident and insured's pre-existing mental illness was not another cause of accident precluding his recovery. *Continental Cas. Co. v. Maguire*, 471 P.2d 636 (Colo. Ct. App. 1970).

Death by accident, as regards accidental death policy, is not restricted to cases in which injury is initially incurred through accidental means; rather, it applies as

well to those situations in which unusual or unanticipated result flows from commonplace cause. *Bobier v. Beneficial Standard Life*, 570 P.2d 1094 (Colo. Ct. App. 1977).

In life insurance case, beneficiary has burden of proving policy and fact of death. While company must prove existence of exclusion such as suicide, where fact that death was accidental is challenged, plaintiff must also prove by preponderance of evidence that death was accidental rather than suicide. *Capitol Life Ins. Co. v. Roth*, 553 P.2d 390 (Colo. 1976).

In deciding when "accident" occurred, for purposes of determining what constitutes "occurrence," supreme court, in *Samuelson v. Chutich*, 529 P.2d 631 (Colo. 1974) (involving an explosion six years after a gas line was improperly laid), held: "The 'accident' causing injury in this case occurred at the time of the explosion, not when the allegedly wrongful act was committed."

Colorado Court of Appeals applied reasoning set forth in *Samuelson* in determining "where" an accident took place in *Pike v. Am. States Preferred Ins. Co.*, 55 P.3d 212 (Colo. Ct. App. 2002). In *Pike*, 15 year old child was struck and killed by pick up while driving a friend's go-cart on public roadway some distance from friend's house. Parents of deceased sued owners of go-cart and issue arose as to whether "accident" occurred on "insured location" as exception to "automobile exclusion" of homeowners insurance policy. Court of Appeals upheld finding of trial court that the "accident" occurred at intersection of two public roads, some distance from "insured location."

ADJUSTERS

Definition. Insurance producers must be licensed; however, insurance companies' officers, directors, or employees whose functions relate to underwriting, loss control, inspection, or processing, adjusting, investigating, or settling of claim on contract of insurance, are not "insurance producers." C.R.S. §10-2-105(2)(c.3). Adjustment of claims or losses is considered transacting of insurance business. C.R.S. §10-3-903(1)(f).

Licensing Requirements. Companies must obtain certificate of authority to transact insurance business in Colorado. C.R.S. §10-3-105(1). No person shall act or hold oneself out to be a public insurance adjuster adjusting claims for losses or damages arising out of policies of fire and allied lines insurance employed by and representing solely interest of named insured in policy of fire and allied lines insurance unless licensed therefor. C.R.S. §10-2-417.



Managing General Agents (“MGA”) must be licensed as producers. *See* C.R.S. §10-2-1002 & 1003; Ins. Regulation 1-2-7 §3(A).

Independent claims adjuster has duty to act in good faith in processing worker’s compensation claims. *Jordan v. City of Aurora*, 876 P.2d 38, 44 (Colo. App. 1993).

See “AGENTS AND BROKERS.”

AGE

See “AUTOMOBILES”; “LIABILITY INSURANCE”; “NEGLIGENCE”; “RELEASE”; “INFANTS.”

“Minor” means unemancipated individual who has not attained eighteen (18) years of age. C.R.S. §15-14-102(8). A minor can contract or ratify contract at age 18 (age of majority). C.R.S. §13-22-101(1)(a).

Any minor age twelve (12) or older must be notified and be heard in guardianship or conservatorship proceedings. *See e.g.*, C.R.S. §15-14-203.

A minor (or any individual of any age) with guardian is “Ward.” C.R.S. §15-14-102. A minor (or any individual of any age) with conservator is “Protected Person.” *Id.*

“Guardianship” of minor terminates upon minor’s death, adoption, emancipation, or attainment of majority (age 18) or as ordered by court. C.R.S. §15-14-210(1).

Conservatorship terminates upon death of protected person or upon order of court determining that conservatorship is no longer necessary or needed to protect assets of protected person. Unless created for reasons other than that protected person is minor, conservatorship created for minor also terminates when protected person attains age of twenty-one (21) years. C.R.S. §15-14-431(1).

AGENTS AND BROKERS (PRODUCERS)

Definition. “Insurance producer” or “producer” means person who solicits, negotiates, effects, procures, delivers, renews, continues, or binds: a) policies of insurance for risks residing, located, or to be performed in Colorado; b) membership in prepayment plan; or c) membership enrollment in health care plan. C.R.S. §10-2-103(6).

License Required. Colorado enacted NAIC Producer Licensing Model Act in 2001. *See* C.R.S. §10-2-101 *et seq.* No person shall act as or hold himself out to be insurance producer unless duly licensed. C.R.S. §10-2-401(1). Every insurance producer who solicits or negotiates application for insurance of any kind on behalf of insurer shall be regarded as representing insurer and

not insured or any beneficiary of insured in any controversy between insurer and such insured or beneficiary. *Id.*

Fraud of Agent. *See Generally*, C.R.S. §10-1-128. Producers may be ordered to pay restitution to insured for listed violations of insurance laws. *See* C.R.S. §10-2-801(1) *revised by* HB 08-1228.

Knowledge of Agent. As general rule, acts performed or statements by insurance agent, within scope of real or apparent authority, are binding on principal regardless whether principal has actual knowledge of agent’s act. *Life Investors v. Smith*, 833 P.2d 864, 868 (Colo. App. 1992). However, if insured has copy of insurance policy, oral misrepresentation, which contradicts express terms of policy will not be imputed to insurance company. Insured is presumed to have knowledge of restrictions stated in policy. *Branscum v. American Community*, 984 P.2d 675, 680 (Colo. App. 1999).

Liability of Agent. Where insurer has right under policy provisions to cancel same and instructs its agent to obtain reduction of liability on or to cancel policy, it becomes agent’s duty to follow instructions promptly, and if agent fails to carry out instructions diligently, agent is liable for amount of loss to insurer. *Mitton v. Granite State*, 196 F.2d 988, 989 (10th Cir. 1952).

Regular advances to insurance agent presumed to be in nature of compensation, and advances in excess of earned commission are not recoverable. However, express agreement making insurance agent personally liable for amount of advances is enforceable. *Slabodnik v. Traveler’s*, 489 P.2d 604, 605-06 (1971); *SDJ Ins. Agency v. Am. Nat’l Prop. & Cas. Co.*, 292 F.3d 689, 694 (10th Cir. 2002).

Failure to procure policy. Insurance broker or agent who agrees to obtain particular form of insurance coverage for person seeking such insurance has legal duty to obtain such coverage or to notify person of failure or inability to do so. *Bayly, Martin & Fay v. Pete’s Satire*, 739 P.2d 239, 243 (Colo. 1987). Where claim for relief is predicated on negligent failure to procure policy, plaintiff must prove insurance was generally available in insurance industry when broker or agent obtained policy. *Id.* at 244. Insured cannot be held to have ratified something of which he is not aware. Insured not liable for ungratified provisions of policy. *Corbin Douglass v. Kelley*, 472 P.2d 764 (1970).

ARBITRATION

“The Uniform Arbitration Act.” Enacted during 2004 legislative session with an effective date of August 4, 2004, *see*, C.R.S. §13-22-201, *et seq.*, repeals “Uniform Arbitration Act of 1975”, and reenacts, with



amendments Part 2 of article 22 of title 13, and other related statutory provisions.

Prohibits parties to arbitration agreement from waiving certain provisions or agreeing to unreasonable restriction of certain rights. Specifies procedures governing application for judicial relief, and establishes validity of arbitration agreements. Requires court to decide whether agreement to arbitrate exists or whether controversy is subject to arbitration. Requires arbitrator to decide whether condition precedent to arbitrability has been met. Requires court to order arbitration under certain circumstances. Empowers court to enter provisional remedies in order to protect effectiveness of arbitration proceeding.

Specifies requirements for initiating arbitration. Permits consolidation of separate arbitration proceedings under certain circumstances. Parties may agree on method of appointing arbitrator. Court shall appoint arbitrator if parties' method for appointment fails. Requires prospective arbitrator to disclose facts that are likely to affect impartiality in arbitration. Imposes continuing disclosure obligation on appointed arbitrator. Grants judicial immunity to arbitrator. Exempts arbitrator under most circumstances from testifying and producing records on matters that occurred during arbitration proceeding.

Permits arbitrator to conduct arbitration in manner that arbitrator considers appropriate for fair and expeditious disposition of proceeding. Permits arbitrator to decide request for summary disposition under certain circumstances. Specifies procedures for setting and conducting arbitration hearing. Empowers arbitrators to issue subpoenas, order discovery, issue protective orders, and perform other acts concerning management of arbitration process.

Permits party to arbitration proceeding to request arbitrator to incorporate favorable pre-award ruling into award. Requires arbitrator to make award. Specifies procedures by which arbitrator may change award. Permits arbitrator to award reasonable attorney fees and arbitration expenses under certain circumstances.

Specifies procedures by and grounds upon which court confirms, vacates, or modifies award. Requires court to enter judgment on award. Permits court to award reasonable attorney fees and expenses. Permits appeals to be taken from certain orders.

Dispute Resolution Act mandates the establishment of programs and procedures for resolution of disputes by neutral mediators. Any court of record may, in its discretion, refer any case for mediation, except those cases in which one of the parties claims to have been victim of physical or psychological abuse by other party and is

unwilling to enter into mediation or dispute resolution programs. C.R.S. §§13-22-301 through 313.

ATTORNEYS

Appointment and Authority. Authority of attorney to appear for another is presumed; but court has inherent authority to determine that authority. Party challenging the attorney's authority to appear must overcome presumption by clear and convincing evidence. *Traxler v. Bd. of Trustees*, 701 P.2d 607, 608-09 (Colo. App. 1984).

Conflicts of Interest. If substantial conflicts exist or will in all probability arise during representation of client, then attorney must withdraw. *Allen v. Dist. Court*, 519 P.2d 351, 353 (Colo. 1974).

Legal Malpractice. While attorney owes client duty to employ degree of knowledge, skill, and judgment ordinarily possessed by members of legal profession, there is no requirement that attorney be infallible, and making a mistake is not negligence as a matter of law. *Myers v. Beem*, 712 P.2d 1092, 1094 (Colo. App. 1985). Except in clear and palpable cases, expert testimony is necessary to establish standards of acceptable professional conduct. *Boigegrain v. Gilbert*, 784 P.2d 849, 850 (Colo. App. 1989). Expert testimony may also be required to establish damages supposedly caused by a breach of fiduciary duty. *Allen v. Martin*, 203 P.3d 546, 569 (Colo. App. 2008). Where expert testimony is necessary to establish legal malpractice, plaintiff must file a certificate of review pursuant to C.R.S. §13-20-602. *Martinez v. Badis* 842 P.2d 245 (Colo. 1992).

Fees. In proceedings for recovery of attorney fees, attorney must show that services to be performed under fee agreement were reasonably worth amount stated in agreement. *Jenkins v. Dist. Court*, 676 P.2d 1201, n. 4 (Colo. 1984). Factors to be considered in awarding attorney's fees include number of witnesses sworn, the amount in controversy, the length of time needed to represent the client effectively, the complexity of the case, the value of the legal services to the client, the standard in the legal community concerning fees in a similar case. *Hartman v. Freedman*, 591 P.2d 1318, 1322 (Colo. 1979) (citing *Warrenberg v. Cline*, 114 P.2d 302, 303 (Colo. 1941)). Fees in workers' compensation cases are governed by C.R.S. §8-43-403. Contingent fee agreements must be in writing to be enforceable. *See Mullens v. Hansel-Henderson*, 65 P.3d 992, 995 (Colo. 2002); *see also*, Colorado Rules of Civil Procedure Chapter 23.3. However, attorneys may generally recover on unenforceable contract based on quantum merit. *Id.*

Deceptive Trade Practices. Claims against attorneys may be brought pursuant to Colorado Consumer Protec-



tion Act (“CCPA”), C.R.S. §§6-1-101, 6-1-115. Private claim for relief against attorney under CCPA must allege attorney or law firm knowingly engaged in deceptive trade practice, which occurred in course of attorney or firm’s business, vocation, or occupation, significantly impacting public as actual or potential consumers of legal services, and causing injury in fact to legally protected interest of plaintiff. *Crowe v. Tull*, 126 P.3d 196, 200 (Colo. 2006).

AUTOMOBILES

See Law Digest Tables.

See “NEGLIGENCE,” “NO-FAULT.”

Age. No resident under 16 years of age may receive a license to operate automobile. C.R.S. §42-2-104. No person under age of 18 years shall drive any motor vehicle used to transport explosives or inflammable material or any motor vehicle used as a school bus for transportation of pupils to or from school. C.R.S. §42-2-105. No person under age of 18 years shall drive motor vehicle used as commercial, private or common carrier of persons or property unless he has experience in operating motor vehicles and has been examined regarding qualifications in operating such vehicles. *Id.*

Agency/Negligent Entrustment. It is general rule that negligence in use of automobile by one other than owner cannot be imputed to owner merely because of ownership, automobile not being in itself a dangerous instrumentality. *Graham v. Shilling*, 291 P.2d 396 (Colo. 1955). Moreover, child’s negligence in operation of parent’s automobile cannot be imputed to parent on basis of that relationship alone. However, employer is generally liable for acts of employees in course of employment. *Gibson v. Dupree*, 144 P. 1133 (Colo. App. 1914); *see also, Pham v. OSP Consultants*, 992 P.2d 657 (Colo. App. 1999) (holding that central inquiry is whether employee is engaged in activity that bears some relationship to employer’s business).

Choice of Law. In determining which state’s substantive law will apply in multi-state actions, Colorado Supreme Court adopted the “most significant contacts” approach of Restatement (Second) of Conflicts of Laws, §145 to resolve choice of law questions. *First Nat’l Bank v. Rostek*, 514 P.2d 314 (Colo. 1973). “Significant contacts” is purposes of tort rules involved. Contacts to be considered in determining which state has most significant contacts in multistate tort controversy include place of injury; place where conduct causing injury; domicile, residence, nationality, place of incorporation, and place of business of parties; and place where relationship, if any, between parties is centered. *Scheer v. Scheer*, 881 P.2d 479 (Colo. App. 1994), *citing* Restatement (Sec-

ond) of Conflict of Laws, §145. When Colorado resident is involved in automobile accident in another state, standard of care is governed by §157 of Restatement (Second) of Conflict of Laws. *Sabell v. Pacific Intermountain Express*, 536 P.2d 1160 (Colo. App. 1975). However, Colorado’s Comparative Negligence Statute is applicable in ascertaining whether negligence on part of plaintiff precludes recovery in whole or in part. *Id.* Where resident of another state is involved in accident in Colorado with Colorado resident, law of Colorado applies. *Dorr v. Briggs*, 709 F. Supp. 1005 (D. Colo. 1989).

Comparative Negligence. Colorado has adopted modified comparative negligence regime and has been held that plaintiff pedestrian could not be awarded damages, in action to recover for injuries sustained when automobile struck him, where plaintiff was found to be more negligent than driver. *Shuey v. Hamilton*, 540 P.2d 1122 (Colo. App. 1975). Under theory of negligent entrustment, vehicle owner who has right and ability to control use of vehicle and takes no action to prevent continued use of vehicle by borrower who owner knows is likely to operate vehicle while intoxicated, is engaged in morally reprehensible behavior and comparative negligence provides appropriate framework for examining this negligence. *Casebolt v. Cowan*, 829 P.2d 352 (Colo. 1992).

Compulsory Insurance Coverage. Motor vehicle insurance is compulsory in Colorado. C.R.S. §10-4-619. Colorado’s “No-Fault Act” was repealed effective July 1, 2003, and state returned to a tort-based regime; however, motorists are still obligated to maintain certain minimum coverages, including \$25,000 per person for bodily injury, \$50,000 per accident and \$15,000 for property damage. C.R.S. §10-4-620. Insurers must still offer collision coverage. C.R.S. §10-4-610. Uninsured and underinsured motorist coverage requirements allow ‘stacking’. C.R.S. §10-4-609 (2007).

Alcohol/DWI. Testing and penalties for driving under influence of drugs or alcohol are governed by C.R.S. §42-2-126, which permits Department of Revenue to revoke license of any person shown to be a safety hazard by driving with excessive amount of alcohol in his body or who has refused to submit to analysis. License revocation proceedings are civil in nature, and protections afforded criminal defendants do not apply. *Colorado Dep’t. of Revenue v. Kirke*, 743 P.2d 16 (Colo. 1987). Results of breath test of licensee are presumed to be accurate if test was conducted by certified operator in accordance with Health Department regulations on machine shown to be operating correctly at time of test. *Scherr v. Colorado Dep’t. of Revenue*, 49 P.3d 1217 (Colo. App. 2002).



Damages. Colorado's "No-Fault" Act has been repealed. Recovery of damages is now governed by tort principles. As with other torts, party injured by another's negligent conduct in course of automobile accident is entitled to compensatory damages as matter of right. Injured party may also be entitled to exemplary damages pursuant to C.R.S. §13-21-102, where injury complained of is attended by circumstances of willful and wanton conduct.

Family Purpose Doctrine. This doctrine, also referred to as Family Car Doctrine, provides that where head of household has control over use of vehicle, he may be liable even though he is not operator. *Hasegawa v. Day*, 684 P.2d 936 (Colo. App. 1983). Doctrine has been adopted by Colorado courts and rationale is that it serves to fasten financial responsibility upon a person with sufficient assets to pay damages. For it to apply one must establish: 1) owner of automobile was head of household; 2) owner had control over use of vehicle; 3) vehicle was used by member of household; 4) vehicle was used with expressed or implied permission of owner; 5) member was negligent in operating vehicle; and 6) member's negligence caused damage to plaintiff. *Id.* However, in *Casebolt v. Cowan*, 829 P.2d 352 (Colo. 1992), Colorado Supreme Court overruled *Hasegawa* to the extent it requires entrustor to have right or ability to exercise control at time of negligent act resulting in injury. Instead, right or ability to exercise control may occur prior to negligent conduct causing injury.

Financial Responsibility Law. Motor Vehicle Financial Responsibility Act is found at C.R.S. §§42-7-101, *et seq.* Purpose of law is to induce and encourage all motorists to provide for their financial responsibility for protection of others, and to assure widespread availability to insuring public of insurance protection against financial loss caused by negligent financially irresponsible motorists. C.R.S. §42-7-102. Act mandates minimum liability coverage and failure to comply will result in conviction of a misdemeanor. C.R.S. §42-7-507.

Guest Statute. Colorado's Guest Statute was repealed in 1975.

Imputed Negligence/Joint Enterprise. Imputed negligence is form of vicarious liability and represents one exception to rule in tort liability that individuals are responsible for own negligence, but not that of another. Colorado courts have imputed negligence based on theory of "joint enterprise." *Mayer v. Sampson*, 402 P.2d 185 (Colo. 1965). Joint enterprise exists where participants are engaged in joint prosecution of a common purpose, each having authority to act for all and each controlling movements of undertaking in some part. *Id.* Two critical elements in joint enterprise involving automobile are mutual right of control and common purpose. *Id.* In

motor vehicle cases, primary method of establishing control is to prove ownership of vehicle. Owner or joint owner passenger in his own automobile, riding for a purpose in common with driver, is presumed to have right to control driver. *Bainbrich v. Wells*, 476 P.2d 53 (Colo. App. 1970). However, right to control may be shown where there is no ownership of instrumentality but joint venturers are sharing operation and management of vehicle. *Boyd v. Close*, 257 P. 1079 (Colo. 1927). In Colorado, imputation of driver's negligence to an owner-passenger is limited to suits brought by or against third parties. *Sommermeier v. Price*, 603 P.2d 135 (Colo. 1979). Rule of imputing negligence is not a symmetrical rule; meaning it no longer applies to impute comparative negligence. *Watson v. RTD*, 762 P.2d 133 (Colo. 1988). A passenger who claims against third party will no longer be burdened with presumption of control and imputed negligence based upon passenger's ownership interest in vehicle. *Id.*

Jurisdiction/Service of Process. Jurisdiction over non-residents is controlled by C.R.S. §13-1-124, Colorado's Long Arm Statute, which provides for personal jurisdiction over persons involved in automobile accidents in Colorado if proper service is effected. *In re ReMine v. District Court*, 709 P.2d 1379 (Colo. 1985).

Last Clear Chance Doctrine. Since Colorado's adoption of comparative negligence, Last Clear Chance Doctrine is no longer available.

No-Fault. Effective July 1, 2003, Colorado's No-Fault Act was repealed and state has returned to a tort-based system (See discussion above regarding Compulsory Coverage).

Seat Belts. Use of seat belts is mandatory for drivers and front seat passengers. C.R.S. §42-4-237. Colorado also enacted statute requiring use of child restraint systems. C.R.S. §42-4-236. Evidence of non-usage of seatbelt is admissible to mitigate damages for claims for pain and suffering. C.R.S. §42-4-237(7). Colorado courts have held that once there is evidence to support inference that failure to wear seat belt contributed to plaintiff's pain and suffering, defendant is entitled to have jury instructed on affirmative defense of nonuse of seat belt. *Anderson v. Watson*, 929 P.2d 6 (Colo. App. 1996).

Speed Limits. C.R.S. §42-4-1101 governs speed limits in Colorado and provides no person shall drive vehicle on highway at speed greater than is reasonable and prudent under conditions then existing. It also states that except when special hazard exists that requires lower speed, following speeds shall be lawful: a) Twenty miles per hour on narrow, winding mountain highways or on blind curves; b) Twenty-five miles per hour in any

business district, as defined in C.R.S. §42-1-102(11); c) Thirty miles per hour in any residence district, as defined in C.R.S. §42-1-102(80); d) Forty miles per hour on open mountain highways; e) Forty-five miles per hour for all vehicles in business of transporting trash, where higher speeds are posted, when said vehicle is loaded as exempted vehicle pursuant to C.R.S. §42-4-507(3); f) Fifty-five miles per hour on other open highways which are not on interstate system and are not surfaced, four-lane freeways or expressways; g) Sixty-five miles per hour on surfaced, four-lane highways which are on interstate system or are freeways or expressways; h) Any speed not in excess of speed limit designated by an official traffic control device. C.R.S. §42-4-1101.

Sudden Emergency Doctrine and Instruction. Sudden emergency instruction is evidentiary guideline under which jury applies prudent person rule in evaluating evidence of negligence. *Carlson v. Ferris*, 58 P.3d 1055 (Colo. App. 2002). Instruction may be given where competent evidence is presented that party was confronted with sudden or unexpected emergency not of party's own making. *Id.* Instruction is not appropriate when party asserting it was obviously negligent. *Young v. Clark*, 814 P.2d 364 (Colo. 1991).

Uninsured and Underinsured Coverage. With uninsured (UM) and underinsured (UIM) coverage, it is absence or insufficiency of liability coverage that triggers first-party coverage under whatever policy is available to tort victim. Since 1983, uninsured motorist (UM) coverage in Colorado has included underinsured coverage. C.R.S. §§10-4-609, 610. Determining fact of insurance in auto accident claims is no longer enough. Amount of liability coverage must also be discovered, for comparison to insured's UM/UIM limit, in order to determine whether UM coverage is available. UM/UIM motorist coverage requirements underwent a change, effective January 1, 2008. Rather than replacing the bodily injury liability coverage of the at-fault driver, UM/UIM insurance must provide coverage in addition to the at-fault driver's bodily liability coverage. C.R.S. §10-4-609 (2007). Also, UM/UIM coverage must be in addition to medical payments coverage and health insurance and cannot be used to offset any other health care benefits. *Id.*

Vehicle sizes, weights, and loads are governed by C.R.S. §42-4-501 *et seq.*

AVIATION

Pilot has continuing duty to be aware of danger with his own eyes and instruments. *Colorado Flying Academy v. United States*, 506 F. Supp. 1221, 1228 (D. Colo. 1981). "See-and-avoid" principle is inapplicable where each aircraft is in blind spot of the other. *Univer-*

sal Aviation v. United States, 496 F. Supp. 639, 649 (D. Colo. 1980).

Provision in policy excepting death while engaged as passenger in "aeronautics expedition" is not violated where insured takes pleasure trip in airplane over airport on pleasant day. *Day v. Equitable*, 83 F.2d 147, 149-50 (10th Cir. 1936) (case originating in Colorado Federal Court). *See also Woolverton v. London*, 126 P.2d 494 (Colo. 1942).

Word "crew" as used in provision of accident policy excluding coverage to any person serving as member of aircraft crew, meant company of two or more persons associated together for purpose of operating aircraft between different points or during certain time interval. *Traveler's v. Warner*, 456 P.2d 732, 734 (Colo. 1969); *see also, Ranger Ins. Co. v. Ram Flying Club*, 653 P.2d 65, 66-67 (Colo. App. 1982).

Where insurance policy covering airplane specifically excluded coverage to insured while aircraft was operated for purpose or use other than "Industrial Aid or Pleasure and Business" with knowledge and consent of insured or executive officers or partner, and contrary to instructions from one named insured, another named insured used plane for charter flight, policy did not provide coverage for damage sustained by plane. *Ringsby Truck Lines v. Ins. Co. of North Am.*, 496 P.2d 1069, 1070-71 (Colo. App. 1972).

Limited Liability Provisions of Airline Pilot Hiring and Safety Act, 49 U.S.C. §44936, do not preempt state law defamation claims when challenged statements are not based on records maintained by previous employer. *Sky Fun 1 v. Schlattloffel*, 27 P.3d 361, 363 (Colo. 2001). *See also* C.R.S. §§41-1-103 to 108.

BROKERS

See "AGENTS AND BROKERS."

BURGLARY INSURANCE

Burglary insurance is not regulated as a separate line of insurance in Colorado. It is included in larger classification of property and casualty insurance. For premium rating purposes it is "Type II" insurance. C.R.S. §10-4-401(3)(b).

Loss resulting from insured's acceptance of counterfeit bank cashier's check was within business policy exclusion for losses resulting from any fraudulent scheme, trick, devise or false pretense that caused insured to part with title to or possession of any property. *Computer Works, Inc. v. CNA Ins.*, 757 P.2d 167, 169 (Colo. App. 1988). Insurer was not liable under burglary policy indemnifying insureds against loss by felonious



entry into safe by actual force and violence, of which force and violence there was required to be visible marks upon exterior of safe's doors, where no such marks were visible upon exterior door of safe, through which felonious entry was gained by manipulation of lock, notwithstanding marks of violence appeared on inner door of safe. *General Acc. Fire & Life Assur. Corp. v. Heller*, 253 P.2d 966, 968 (Colo. 1953).

Exclusion in policy issued to a bean dealer to effect that policy did not insure against any loss resulting from insured voluntarily parting with title or possession of any property, if induced to do so by any fraudulent scheme, was applicable to loss sustained by dealer when it contacted a shipping broker to arrange drayage of beans to Texas purchaser, and beans were loaded on trailers, but thereafter no trace of either truck, beans or driver was found. Exclusion applies to both named insured and its representatives or agents. *Outwest Bean, Inc. v. National Fire Ins. Co. of Hartford*, 514 P.2d 782, 783 (Colo. App. 1973).

CANCELLATION

See "ACCIDENT AND HEALTH INSURANCE"; "AUTOMOBILES"; "FIRE INSURANCE"; "INLAND MARINE"; "LIABILITY INSURANCE"; "MALPRACTICE"; "WORKERS' COMPENSATION."

Usually policy cancellation provisions prevail. Where no statute or rule of public policy controls, unequivocal agreement contained in insurance policy by which either party may cancel contract is binding between parties for parties to insurance contract may validly contract as they please with respect to cancellation. *Dye Const. v. Indus. Com'n*, 678 P.2d 1066, 1069 (Colo. Ct. App. 1983). Cancellation provisions of insurance policy require strict compliance by insurer. See *Geiger v. Am. Standard Ins. Co.*, 117 P.3d 16 (Colo. Ct. App. 2004); *Geiger v. Am. Std. Ins. Co.*, No. 06CA2247, 2008 Colo. App. LEXIS 440 (Colo. Ct. App. Mar. 20, 2008). Carrier's failure to specify time of effective cancellation resulted in coverage being effective until midnight of date on which cancellation was to be effective. *State Comp. Ins. Fund v. Building Systems*, 713 P.2d 940, 942 (Colo. Ct. App. 1985).

Where insured admitted he knew facts showing himself in default, he was bound by cancellation provisions even though he did not receive mailed notice of cancellation. *Warner v. Farmers*, 90 P.2d 965 (1939). The term "cancellation" in insurance context has not been used to refer to voiding of endorsement, alteration in policy, or any change other than complete cancellation of entire policy. The term "cancellation" in insurance policy refers to abrogation of entire policy or that portion of policy that remains unperformed at time of

cancellation. *First Fin. Ins. Co. v. Albertson's, Inc.*, 91 P.3d 470, 472 (Colo. Ct. App. 2004). Actual receipt of cancellation notice was not conditioned precedent to cancellation of liability policy containing "standard form" cancellation clause providing that policy could be cancelled by mailing written notice to insured and further providing that mailing should be sufficient proof of notice. *Campbell v. Home Ins.*, 628 P.2d 96, 98 (Colo. 1981). Failure of insurer to return unearned premium with cancellation notice created only debtor-creditor relationship between insured and insurer and did not affect validity of cancellation. *Jorgensen v. St. Paul*, 408 P.2d 66, 68 (Colo. 1965). See also *Mancillas v. Campbell*, 595 P.2d 267 (Colo. Ct. App. 1979), *aff'd*, *Campbell v. Home Ins.*, 628 P.2d 96 (Colo. 1981).

Insurance policy cancellation notice defective as to effective date of cancellation is not inoperative, it merely postpones cancellation until full period provided for in policy has expired. *Mancillas v. Campbell, supra*.

Cancellation by substitution is inconsistent with principle that termination of contract occurs only by agreement of parties. Insurance policy may be canceled only by compliance with terms of policy, by operation of law, or by mutual agreement of parties to contract. Accordingly, at minimum, notice from named insured communicated to insurer that insured is canceling policy and obtaining replacement coverage is required to terminate existing policy by substitution. *Omni Dev. v. Atlas*, 956 P.2d 665 (Colo. Ct. App. 1998).

Statutes. See "ACCIDENT AND HEALTH INSURANCE"; "AUTOMOBILES"; "FIRE INSURANCE"; "INLAND MARINE"; "LIABILITY INSURANCE"; "MALPRACTICE"; "WORKERS' COMPENSATION."

Commercial exposures (not including surplus lines or exempt commercial policyholders). No insurer shall cancel a policy of insurance that provides coverages on commercial exposures such as general comprehensive liability, municipal liability, automobile liability and physical damage, fidelity and surety, fire and allied lines, inland marine, errors and omissions, excess liability, products liability, police liability, professional liability, or false arrest insurance unless such insurer mails by first-class mail to named insured at least 45 days in advance a notice of company's intention to cancel; but, where cancellation is for nonpayment of premium, at least 10 days' notice of cancellation accompanied by reasons therefor shall be given. Notice of cancellation is valid only if it is based on one or more of the following reasons: (a) nonpayment of premium; (b) false statement knowingly made by insured on application for insurance; (c) substantial change in exposure or risk other than that indicated in application and underwritten as of effective



date of policy unless insured has notified insurer of change and insurer accepts such change. C.R.S. §10-4-109.7.

Homeowners. No insurer shall cancel or refuse to renew a policy of homeowner's insurance unless such insurer mails by first-class mail to named insured, at least thirty days in advance a notice of its intended action which specifically states reasons for proposing to take such action; but, where cancellation is for nonpayment of premium, at least ten days' notice of cancellation accompanied by reasons therefor shall be given. If insurer issues binder of insurance during period in which insurer assesses risk related to individual's real and personal property for purposes of homeowner's insurance insurer shall provide notice to potential insured that documents are only a binder and subject to cancellation. C.R.S. §10-4-110.7. Insurer may not cancel or fail to renew coverage of insured solely because insured inquires about coverage for homeowner's insurance and inquiry is not related to actual claim to property insured. C.R.S. §10-4-110.8(1). Use of credit information. Insured that offers personal lines of property and casualty insurance shall not deny, cancel or fail to renew policy of personal lines of property and casualty insurance on basis of credit information, without consideration of any other applicable underwriting factor that is independent of credit information. See C.R.S. §10-4-116(1)(b).

CHATTEL MORTGAGE

See "FIRE INSURANCE."

CONSTRUCTION OF POLICY

In General. Insurance policy is a contract and rules of construction that are applicable to other contracts are applicable to insurance policies. *Cary v. United of Omaha Life Ins. Co.*, 108 P.3d 288 (Colo. 2005); *Union Ins. Co. v. Houtz*, 883 P.2d 1057 (Colo. 1994); *Allstate v. Starke*, 797 P.2d 14 (Colo. 1990).

Ambiguity. When wording in insurance policy is ambiguous, court must examine insurance contract as a whole to determine whether other provisions resolve ambiguity. *Cary v. United of Omaha Life Ins. Co.*, *supra*; *State Farm v. Stein*, 940 P.2d 384 (Colo. 1997). Any ambiguities in policy are resolved against drafter and in favor of insured. *Cruz v. Farmers Ins. Exch.*, 12 P.3d 307, 311 (Colo. Ct. App. 2000); *Union Ins. Co. v. Houtz*, *supra*; *Royal v. Markley*, 116 Colo. 84, 178 P.2d 672 (Colo. 1947). Insurance policies that purport to grant broad coverage must be interpreted to further principles of coverage, and any exclusions must be clear and specific in order to be enforced against interests of insured. *Fire Ins. v. Rael*, 895 P.2d 1139 (Colo. Ct. App. 1995). However, mere disagreement between parties does not

create ambiguity. *Cary v. United of Omaha Life Ins. Co.*, *supra*; *State Farm v. Stein*, 940 P.2d 384 (Colo. 1997). In reading whole policy to determine whether there is ambiguity, court must construe language to give effect to plain meaning of its terms. *Id.* Words retain their ordinary and customary meaning. *Gulf Ins. v. Colorado*, 43 Colo. App. 360, 607 P.2d 1016 (1979). Courts are not permitted to create ambiguity where none exists. *Cruz v. Farmers Ins. Exch.*, *supra*; *Kwal Paints v. Travelers*, 525 P.2d 471, *aff'd*, 189 Colo. 66, 536 P.2d 1136 (Colo. 1975). Courts may neither add provisions to extend coverage beyond that contracted for, nor delete them to limit coverage. *Cyprus Amax Minerals Co. v. Lexington Ins. Co.*, 74 P.3d 294 (Colo. 2003). Clauses in insurance contracts that attempt to dilute, condition, or limit statutorily mandated coverage are invalid or void. *DeHerrera v. Sentry Ins. Co.*, 30 P.3d 167, 173 (Colo. 2001); *Briggs v. Am. Family*, 833 P.2d 859 (Colo. Ct. App. 1992). Law in force at time policy was written determines rights of parties. *McCowan v. Equitable*, 116 Colo. 78, 179 P.2d 275 (Colo. 1947).

Conditional Receipt of Application. Delivery of policy is not condition precedent to coverage when conditional receipt affords temporary insurance from date of completion of application until date of death. *Farmer's v. Crites*, 487 P.2d 608 (Colo. Ct. App. 1971). Whether temporary coverage is effective depends on particular wording in conditional receipt. *Pappageorge v. Fed. Kemper*, 878 P.2d 56 (Colo. Ct. App. 1994). When conditional receipt sets forth its own terms for coverage and does not reference terms of policy, extent of coverage is dependent on terms contained in conditional receipt. *Id.*

Inconsistent Policy Terms and Endorsements. One common rule of construction of insurance policies—that endorsement prevails over inconsistent provisions contained in body of insurance policy—has been partly rejected in Colorado. *Simon v. Shelter Gen.*, 842 P.2d 236 (Colo. 1992). *Simon* court specifically found that endorsement provisions, when issued contemporaneously with policy, do not automatically prevail when they conflict with terms contained in policy. *Id.* Court held that such conflicting provisions should be construed against the insurer. *Id.*

Oral Binder. Oral binder merges with written policy. *Chevron Oil v. Industrial Commission*, 169 Colo. 336, 456 P.2d 735 (Colo. 1969).

DAMAGES

Appellate Review. Excessive verdicts. Jury's award may only be reduced if it is excessive and unjust. *Mayer v. Sampson*, 402 P.2d 185 (Colo. 1965). When trial judge makes a finding that verdict is excessive due to jury's bias, prejudice, or passion, a new trial must be



granted. *Marks v. District Court*, 643 P.2d 741 (Colo. 1982). Damages award in personal injury cases may not be set aside unless award is either grossly and manifestly excessive or grossly and manifestly inadequate. *Gibbons v. Choury*, 455 P.2d 649 (Colo. 1969). Damages award in personal injury actions will not be set aside unless enormity of damages award induces court to believe that jury acted with prejudice, partiality, or corruption. *Riss v. Anderson*, 114 P.2d 278 (Colo. 1941).

Arbitration Awards. Collateral Estoppel. If traditional collateral estoppel test has been met, principles of collateral estoppel preclude relitigation of issues decided in arbitration proceeding, including awards for actual damages. *Quist v. Specialties Supply*, 12 P.3d 863 (Colo. 2000). Collateral estoppel test precludes relitigation of an issue decided at arbitration proceeding when: 1) issue is identical to issue actually determined in prior proceeding; 2) party against whom estoppel is asserted was a party to or was in privity with party to prior proceeding; 3) there is final *determination* on merits of issue in prior proceeding; and 4) party against whom estoppel is asserted had full and fair opportunity to argue issue in prior proceeding. *Guaranty Nat. v. Williams*, 982 P.2d 306 (Colo. 1999).

Comparative Negligence. Contributory negligence is not a bar to recovery, so long as contributory negligence is less than negligence of defendant. C.R.S. §13-21-111(l). Where there is finding of contributory negligence, damages shall be reduced in proportion to allocation of contributory negligence. *Id.* There must be sufficient evidence that both parties are at fault before comparative negligence applies. *Gordon v. Benson*, 925 P.2d 775 (Colo. 1996). Comparative negligence not applicable to award of exemplary damages. *Lira v. Davis*, 832 P.2d 240 (Colo. 1992). No joint defendant shall be liable for amount greater than percentage of fault attributable to him. C.R.S. §13-21-111.5.

Mental Pain and Suffering. Except for medical malpractice, noneconomic loss (such as pain, suffering and emotional distress) cannot exceed sum of \$250,000 (new inflation adjustment January 1, 2008), unless court finds clear and convincing evidence that greater amount is justified. C.R.S. §13-21-102.5(3)(a). However, under no circumstances may noneconomic loss damages exceed \$500,000 (new inflation adjustment January 1, 2008). *Id.* In civil actions for noneconomic loss, damages shall not exceed \$250,000 (new inflation adjustment January 1, 2008). C.R.S. §13-21-102.5(3)(b). It is lawful for plaintiff to claim and collect interest on damage award occurring from date complaint is filed. C.R.S. §13-21-101.

Exemplary Damages. Exemplary damages may be awarded when injury is attended by circumstances of

fraud, malice or willful and wanton conduct beyond reasonable doubt. C.R.S. §13-21-102(1)(a). However, exemplary damages shall not exceed amount of actual damages, *Id.* Claim for exemplary damages is made by amendment to pleadings only after exchange of initial disclosures and after plaintiff establishes prima facie proof of a triable issue of exemplary damages. C.R.S. §13-21-102(1.5)(a). Award of exemplary damages may be increased up to three times amount of actual damages if it is shown that the defendant's willful and wanton behavior continued during the pendency of the case. C.R.S. §13-21-102(3)(a).

Collateral Source Rule. In any action to recover damages for tort that resulted in death or injury to person or to property, court shall reduce jury's final award of damages by amount received from insurance and from any other collateral source. C.R.S. §13-21-111.6. Purpose of this rule is to prevent double recovery. *USF&G v. Salida Gas*, 793 P.2d 602 (Colo. App. 1989). Collateral source rule only applies to payments made by collateral sources that do not have any alleged liability for tort at issue. *Montoya v. Grease Monkey*, 883 P.2d 486 (Colo. App. 1994).

Attorneys' Fees. As a general rule, and in absence of any contractual or statutory liability therefor, attorneys' fees and expenses of litigation of plaintiff's claim are not recoverable as item of damages either in contract or tort action. *Beebe v. Pierce*, 521 P.2d 1263 (Colo. 1974); *but see Buder v. Sartore*, 774 P.2d 1383 (Colo. 1988); *Bunnett v. Smallwood*, 793 P.2d 157 (Colo. 1990); *Wilcox v. Clark*, 42 P.3d 29 (Colo. App. 2001).

However, court may award reasonable attorneys fees against any attorney or party who has brought or defended a civil action that court determines is substantially frivolous, groundless, or vexatious. C.R.S. §13-17-101 *et seq.*

Appealed money judgments in Civil Actions. Whether affirmed, modified or reversed, interest shall be payable from date judgment was first entered in trial court. C.R.S. §5-12-106(1)(a). Each January 1st rate of interest will be certified to be two percentage points above the discount rate. C.R.S. §5-12-106(2)(a).

Statutory Caps. Except for medical malpractice, noneconomic loss (such as pain, suffering and emotional distress) cannot exceed the sum of \$250,000 (plus annual adjustments January 1, 2008), unless court finds clear and convincing evidence that greater amount is justified. C.R.S. §13-21-102.5(3)(a). However, under no circumstances may noneconomic loss damages exceed \$500,000 (plus inflation adjustments). *Id.* In civil actions for noneconomic loss, damages shall not exceed \$250,000 (plus inflation adjustments). C.R.S. §13-21-



102.5(3)(b). If wrongful act, neglect, or default causing death constitutes a felonious killing, there shall be no limitation on damages for noneconomic loss or injury recoverable in such action. C.R.S. §13-21-203. C.R.S. §12-47-801 limits actions brought against liquor licensees and social hosts for damages resulting from serving alcohol.

DEATH

Person who has sustained irreversible cessation of circulatory and respiratory functions or irreversible cessation of all functioning of the entire brain, including brain stem, is dead. C.R.S. §12-36-136 (2006); *Lovato v. District Ct.*, 601 P.2d 1072, 1077 (Colo. 1979).

Abatement and Survival of Actions. All causes of action, except actions for slander or libel, shall survive and may be brought or continued notwithstanding death of person in favor of or against whom such action has accrued. In tort actions based upon personal injuries, damages recoverable after death of plaintiff are limited to loss of earnings and expenses sustained or incurred prior to death; such damages shall not include damages for pain, suffering or disfigurement, nor prospective earnings and profits after death. In no event will punitive damages be awarded after death of defendant. C.R.S. §13-20-101. An action for wrongful death is a new cause of action and not survival of decedent's action. *Fish v. Liley*, 208 P.2d 930, 932 (Colo. 1949); *Allen v. Pzcheco*, 71 P.3d 375, 379 (Colo. 2003); *Rowell v. Clifford*, 976 P.2d 363, 364 (Colo. App. 1998). Survival of actions statute applies not only to survival of pending actions, but also to causes of action. *Micheletti v. Moidel*, 32 P.2d 266, 267 (Colo. 1934); *Kruse v. McKenna*, 178 P.3d 1198 (Colo. 2008). Action of administratrix for wrongful death survives death of tortfeasor. *Fish v. Liley*, *supra*.

Where deceased is not survived by widow, widower, minor children, or dependent parent, any damages recovered for noneconomic loss or injury under Colorado Wrongful Death Statutes (§13-21-201 or §13-21-202 C.R.S.) shall not exceed \$250,000 or \$500,000 if court finds justification by clear and convincing evidence unless wrongful act causing death constitutes felonious killing as set forth in C.R.S. §15-11-803. C.R.S. §13-21-203.

See "DAMAGES."

Colorado has radically expanded damages recoverable for wrongful death to include grief, loss of companionship, pain and suffering, and emotional stress. As alternative means of establishing damages, Colorado provides election for a \$50,000 solatium in addition to eco-

nomie damages and reasonable funeral expenses. C.R.S. §13-21-203.5. (will be adjusted on January 1, 2008).

The damages cap provision, of the Ski Safety Act (SSA), §§33-44-101 to -114, prevails over the damages cap provision of the Wrongful Death Act (WDA), §§13-21-201 to -204 in its entirety, including the felonious killing exception. The SSA itself mandates that its provisions prevail over any inconsistent provision of law or statute. *Stamp v. Vail Corp.*, 172 P.3d 437 (Colo. 2007).

Exemplary damages are not allowed in initial action brought under survival statute, but may be added 60 days after initial disclosures and plaintiff establishes prima facie proof of triable issue. C.R.S. §13-21-203.

There is two year statute of limitations on actions brought under C.R.S. §§13-21-201 through 204. Statute of Limitations begins to run on date damage or injury arising from alleged negligence from which death later resulted becomes known or by reasonable care could have been discovered or within one year from such death, whichever is later. *Rauschenberger v. Radetsley*, 745 P.2d 640 (Colo. 1987); *Ritter v. Aspen Skiing Corp.*, 519 F. Supp. 907 (D. Colo. 1981); *see also Miller v. Armstrong World Indus., Inc.*, 817 P.2d 111 (Colo. 1991). For example, the cause of action for death of child from carbon monoxide poisoning arises when the alleged negligence of gas company results in injury causing death rather than when the gas company negligently causes gas leak leading to the injury. This is because no claim or right of action exists by virtue of negligent act alone. It arises when negligence results in injury, which causes death. Plaintiffs cannot file suit predicated solely on defendant's negligent act. There must also be injury or damage. *DeCaire v. Public Service Co.*, 479 P.2d 964 (Colo. 1971).

Under statute providing that wrongful death action may be brought by husband or wife of deceased or if there was no husband or wife or if he or she fails to sue within one year, then by heir or heirs of deceased, parents of married adult decedent, whose widow failed to bring action for wrongful death, were not within term "heir or heirs of deceased" and were not entitled to bring action for death of deceased. *McGill v. General Motors*, 484 P.2d 790, 791-92 (Colo. 1971); *Whitenhill v. Kaiser Permanente*, 940 P.2d 1129 (Colo. 1997); *Potter v. Thieman*, 770 P.2d 1348 (Colo. App. 1988); C.R.S. §13-21-201(1); *see also* C.R.S. §13-21-201.

Siblings are not "heirs" within meaning of statute. *Ablin v. Richard O'Brien Plastering*, 885 P.2d 289, 290-91 (Colo. App. 1994).

Action for funeral expense is not personal injury action and survives to decedent's estate despite absence of statutory dependents, *Kling v. Phayer*, 274 P.2d 97



(Colo. 1954), and funeral expenses can be recovered independent of death statute and after expiration of two year limitation. *Espinoza v. Gurule*, 356 P.2d 891 (Colo. 1960). Under C.R.S. §13-21-203.5, funeral expenses may also be recovered by solarium statute.

Executor may also sue for funeral expenses apart from death claim, such claim being property claim which comes into existence after death, it being proper to claim such expenses in action other than for wrongful death. *Publix Cab v. Colorado Nat'l Bank*, 338 P.2d 702 (Colo. 1959). Funeral expenses, though incurred after death, can be recovered under survival statute, and are, therefore, not included in damages under wrongful death statute. *Hernandez v. United States*, 383 F. Supp. 168 (D. Colo. 1974); *Estate of Kronemeyer v. Meining*, 948 P.2d 119 (Colo. App. 1997).

Individual whose death is not established under other provisions of statute and who is absent for continuous period of five years, during which he or she has not been heard from, and whose absence is not satisfactorily explained after diligent search or inquiry, is presumed to be dead. His or her death is presumed to have occurred at end of period unless there is sufficient evidence for determining that death occurred earlier. C.R.S. §15-10-107.

Loss of Consortium. Wife has statutory cause of action for loss of consortium, equal to that husband may have. C.R.S. §14-2-209. Loss of consortium was not recoverable under wrongful death statute but may be recovered for any time between tort occurrence and date of decedent's death. *Hernandez v. United States*, 383 F. Supp. 168 (D. Colo. 1974). Loss of companionship is recoverable. §13-21-203; *Elgin v. Bartlett*, 994 P.2d 411 (Colo. 1999).

DISABILITY

See "ACCIDENT AND HEALTH INSURANCE."

See "WORKERS' COMPENSATION."

FINANCIAL RESPONSIBILITY LAW

Under Colorado's Motor Vehicle Financial Responsibility Act.

Proof of financial responsibility for future means proof of ability to respond in damages for liability, on account of accidents occurring after effective date of said proof, arising out of ownership, maintenance or use of motor vehicle, in amount of \$25,000 because of bodily injury to or death of one person in any one accident, and, subject to said limit for one person, in amount of \$50,000 because of bodily injury to or death of two or more persons in any one accident, and in amount of

\$15,000 because of injury to or destruction of property of others in any one accident. C.R.S. §42-7-103(2) & (14)(a); and §42-7-101, *et seq.*

Motor Vehicle Financial Responsibility Act does not require every motorist carry insurance; rather, it requires automobile owner or operator involved in accident provide certain security for any judgment that might be entered against owner or operator as result of accident and file proof of financial responsibility for future. *Allstate Ins. Co. v. Starke*, 797 P.2d 14, 26 (Colo. 1990); *Morris v. Goodwin*, 185 P.3d 777, 780 (Colo. 2008).

Driver of vehicle involved in traffic accident resulting in death, personal injury or property damage has duty to immediately report accident to nearest police authority. C.R.S. §42-4-1606(1). Person who violates provisions regarding duty to report commits class 2 misdemeanor traffic offense. C.R.S. §42-4-1606(6). Owner or operator named in accident report must file security to satisfy any judgments unless exempted. C.R.S. §42-7-301. Owner or operator named in accident report is exempted if he or she had in effect at time of such accident automobile liability policy insuring vehicle. C.R.S. §42-7-302(1)(f). If owner or operator is not insured and does not file security in accordance with C.R.S. §42-7-301, that person's driver's license can be suspended. C.R.S. §42-7-301(3)(a). Suspension remains in force until person is found not at fault or deposits proof of financial responsibility for future. C.R.S. §42-7-303(1). Suspension can also result from failure to satisfy judgment within 30 days of entry in any court of record in any state for damages resulting in death, personal injury or property damage in excess of \$100 arising out of motor vehicle accident on public highway. Suspension shall remain in effect for six years or until satisfied, vacated or discharged in bankruptcy. C.R.S. §42-7-401 to 404.

FIRE INSURANCE

Fire insurance is not regulated as separate line of insurance in Colorado. It is included in larger classification of property and casualty insurance. For premium rating purposes it is "Type II" insurance. C.R.S. §10-4-401(3)(b).

Appraisal. Provision in fire insurance policy for appraisal of loss where parties disagree as to amount, presupposes actual bona fide disagreement. Denial of insurer of all liability under fire policy is waiver of right to appraisal. *Insurance Co. of N. Am. v. Baker*, 268 P. 585 (Colo. 1928).

Resort to provisions of appraisal clause not condition precedent to action on policy but constitutes irrevocable option to determine loss in that manner. *Wagner v. Phoenix Ins. Co.*, 348 P.2d 150 (Colo. 1960).



Arbitration. Submission to arbitration under terms of policy is binding on all parties until vacated for fraud or other sufficient cause. *Scania Ins. Co. v. Johnson*, 45 P. 431 (Colo. 1896).

Assignment. Provision that policy should be void if assigned without written consent of insurer, held valid. *Zimbelman v. Hartford*, 22 P.2d 866 (Colo. 1933).

Chattel Mortgages. Where fire policy contains stipulation entirely avoiding policy if property becomes encumbered by chattel mortgage, giving of such mortgage by insured without consent of insurance company, terminates insurance and prevents recovery under policy by insured. *Fireman's Fund v. Barker*, 41 P. 513 (Colo. App. 1895). *But see, Western Assur. Co. v. Bronstein*, 236 P. 1013 (Colo. 1925), holding condition of sole ownership is not broken merely because part of property is subject to mortgage.

Contract - Policy. Binder and Cancellation. No insurer shall cancel or refuse to renew policy of homeowner's insurance unless such insurer mails by first-class mail to named insured, at least thirty days in advance a notice of its intended action which specifically states reasons for proposing to take such action; but, where cancellation is for nonpayment of premium, at least ten days' notice of cancellation accompanied by reasons therefore shall be given. C.R.S. §10-4-110.7(3).

Legislature enacted laws, effective January 1, 2005, affecting homeowner's insurance binders and cancellation. These changes include the following: 1) insurer is required to provide notice to potential insured that binder is subject to immediate cancellation; 2) insurer must advise potential insured if insurer underwrites based on credit score or claims history and if claims history results in adverse action, insurer must disclose information that resulted in adverse action; 3) insurer is required to file its underwriting methodologies with Commissioner of Insurance, but only Commissioner has access to information and only for consumer publications; and 4) insurer may issue binder or conditional policy allowing insurer 30 days to assess risk and give potential insured decision, however, if before 30 day deadline, insurer determines more time is necessary for justifiable reasons, insurer may extend deadline. C.R.S. §10-4-110.7.

See also, "CANCELLATION."

Mortgage Clause. Trustee in deed of trust is not bound by agreement between company and insured as to amount of loss. *Scottish Union v. Field*, 70 P. 149 (Colo. App. 1902).

Reformation. Policy may be reformed. *Merchants Mut. v. Harris*, 116 P. 143 (Colo. 1911). Where fire insurance company, with full knowledge, erroneously

named insured it cannot take advantage of its fault and no reformation is necessary. *Northwestern v. Glass*, 19 P.2d 489 (Colo. 1933). Reformation of fire policies could only be granted for mutual mistake of fact regarding coverage of property. *Dossey v. USF&G*, 528 P.2d 417 (Colo. App. 1974).

Severable Contracts. Fire policy insuring furniture, hay, and grain, each for separate amount is severable. *Fireman's Fund v. Barker*, 41 P. 513 (Colo. App. 1895).

Damages. Excepted Risks. Explosion. Fire causing explosion and rendering insurer liable for damage caused by explosion under policy excluding explosion as cause of loss must be actual fire according to common use of term and not blaze produced by lighting match, gas jet, or lamp. If fire precedes explosion and latter is incident of former and caused by it, insured may recover for his entire loss, but if explosion precedes fire, and is not caused by it, insured can only recover for loss by fire. *Employer's Casualty v. Wainwright*, 473 P.2d 181 (Colo. App. 1970). *See also, Western v. Skass*, 64 Colo. 342, 171 P. 358 (1918).

Fire escaping from range and burning floor and walls is "hostile" hence recovery on fire policy for damage from resulting smoke and soot is warranted. *Fire Ass'n v. Nelson*, 10 P.2d 943 (Colo. 1932).

Smoke and Soot. See case under "Friendly Fire" above.

Proof of Loss. There must be substantial compliance with terms of policy in furnishing proof of loss unless waived by insurer. Notice to company's local agent is sufficient. *Connecticut Fire Ins. Co. v. Colorado Leasing*, 116 P. 154 (Colo. 1911). Failure to file proof within required 60 days does not void policy provided reasonable excuse is given. *Noyes Supervision v. Canadian Indem. Co.*, 487 F. Supp. 433 (D. Colo. 1980). Where insurer refuses to pay loss on grounds other than absence of proof of loss, that defect is waived. *Bloom v. Wolfe*, 547 P.2d 934 (Colo. App. 1976).

Repair. Factual findings as to cost to repair will not be disturbed on appeal unless record discloses intentional, fraudulent, or purposeful misrepresentation of costs. *Republic v. Jernigan*, 753 P.2d 229, 231 (Colo. 1988). Once insurer causes insured to reasonably believe that insured is assuming responsibility for repair, insured has duty to complete repair with due care and will be liable for damage, caused by performance of repair, even if done by independent contractor. *Weaver v. Harmon*, 508 P.2d 418 (Colo. App. 1972).

Replacement Value. "Replacement Cost is the estimated cost to construct, at current prices, a building with utility equivalent to the building being appraised,

using modern materials and current standards, design, and layout.” Under this definition, claimant’s recovery is not limited to pre-fire condition. *Dupre v. Allstate*, 62 P.3d 1024, 1031 (Colo. App. 2002).

Multiple Policies. Co-Insurance. Provision that other insurance shall not be taken out except by consent of insurer is valid. *National Mut. v. Duncan*, 98 P. 634 (Colo. 1908).

Contribution Between Companies. “Contribution” is principle sanctioned in equity and arises between co-insurers to permit one which has paid whole loss to obtain reimbursement from other insurers which are also liable. There must be identity between policies as to parties and insurable interest and risk. *Republic v. USF&G*, 444 P.2d 868 (Colo. 1968); C.R.S. §13-50.5-101 to 106.

Insurable Interest. C.R.S. §10-1-102(11), defines insurable interest in property as “every interest in property or any relation thereto, or liability in respect thereof, of such nature that a contemplated peril might directly damnify the insured.” Mortgagor may insure property to cover his interest and mortgagee may likewise insure his interest in property. *Farmers v. San Luis State Bank*, 281 P. 366 (Colo. 1929). Equitable owner of property has insurable interest therein. *Wich v. Equitable*, 31 P. 389 (Colo. App. 1892). Where no insurable interest exists, insurer not liable even if it mistakenly believes interest was insurable when policy issued. *Iron Mueller v. Federal Crop Ins. Corp.*, 334 P.2d 734 (Colo. 1959).

Miscellaneous. Colorado enacted statutes affective July 18, 2002, specifically governing issuance and renewal of fire insurance in federally designated disaster areas. C.R.S. §10-4-110.9. Generally speaking, these statutes prohibit an insurer from refusing to issue or renew a policy of fire insurance based on a property’s location within disaster area, except under limited circumstances.

Colorado General Assembly enacted notice requirements for applicants of homeowner’s insurance. These include: 1) insurer may not cancel or fail to renew coverage of insured solely because insured inquires about coverage for homeowner’s insurance and inquiry is not related to actual claim to property insured; and 2) insurer may only provide information regarding claims to entity that compiles or monitors personal claim or loss experience shared by insurers for underwriting or rating purposes. C.R.S. §10-4-110.8.

GUEST CASES

See “AUTOMOBILES.”

Guest statute repealed in 1975.

HOSPITALS

See also “MALPRACTICE.”

Evidence Records. Every patient record in custody of a hospital shall be available for inspection to patient or his designated representative, except records pertaining to psychiatric problems are not available if they would have negative psychological impact on patient. C.R.S. §25-1-801(1)(a).

Hospital records may be received as evidence in hearing before Division of Labor. C.R.S. §8-43-210. Every duly licensed hospital which furnishes services to any person injured as result of the negligence of another person shall have a lien for charges for reasonable and necessary hospital care upon net amount payable to such injured person out of total amount of any recovery collected. C.R.S. §38-27-101.

Professional Review. Records, reports, or other information of a licensed or certified health care facility that are part of a quality management program designed to identify, evaluate, and reduce risk of patient or resident injury associated with care or to improve quality of patient care shall be confidential information and, subject to specified exceptions, are not subject to subpoena or discoverable or admissible as evidence in any civil or administrative proceeding. C.R.S. §§25-3-109(1) and (4).

The Colorado Board of Medical Examiners has the power to govern licensure, discipline, and professional review of persons licensed to practice medicine in this state (peer review). C.R.S. §12-36.5-101. This power for peer review has been expanded to hospital peer review boards or professional review committees. C.R.S. 12-36.5-103. Members who participate directly or indirectly on a professional review proceedings are granted certain immunities from liability arising from actions which are within the scope of their activities and taken in good faith. C.R.S. §§12-36.5-105. Additionally, a hospital is not liable for negligently extending certain staff privileges to a physician, so long as there is a professional review process in place. See C.R.S. §12-36.5-101 and *Kauntz v. HCA-HEALTHONE, LLC*, 174 P.3d 813, 816 (Colo. App. 2007).

Liens. Under Hospital Lien Act, C.R.S. §38-27-101, *et seq.*, hospital that furnishes services to a person injured as a result of third person’s negligent or wrongful acts is entitled to a lien for all reasonable and necessary charges for hospital care upon the net amount payable to the injured person out of the total amount recovered as damages for the injuries. Act mandates award of out of attorney fees and costs for collection and enforcement of such lien.



Warranties. Hospital's indemnity insurer not necessary party to suit against hospital for tort. Immunity of hospital trust funds from execution for judgment in tort does not prevent hospital from being sued for torts of its agents. Hospital not insurer of patient's safety. *St. Luke's v. Long*, 240 P.2d 917 (Colo. 1952); also, *Hemenway v. Presbyterian Hosp.*, 419 P.2d 312 (Colo. 1966); *Kitto v. Gilbert & Presbyterian Medical Ctr.*, 570 P.2d 544 (Colo. App. 1977).

Immunity. Colorado General Assembly passed legislation in 2003 to restore and reinstate corporate practice of medicine doctrine so that no individual or entity, other than a patient's physician, may be held liable or vicariously liable in any action for physician's professional negligence or other tortious conduct. See C.R.S. §§12-36-134, 12-36-117, 13-64-202, 13-64-403 as amended by HB 03-1012.

Corporation such as medical clinic cannot be licensed to practice medicine and consequently cannot command or forbid any act by a doctor in practice of medicine. Its relationship with a doctor providing medical services is necessarily that of an independent contractor. *Lutfi v. Brighton Community Hosp. Ass'n*, 40 P.3d 51, 57 (Colo. App. 2001); *Moon v. Mercy Hosp.*, 373 P.2d 944, 945 (Colo. 1962); see also, *Nieto v. State*, 952 P.2d 834, 840 (Colo. App. 1997), *rev'd on other grounds*, 993 P.2d 493 (Colo. 2000) (A hospital's "relationship" with doctor it employs is necessarily that of independent contractor. Hence, the entity employing the doctor cannot be held liable for doctor's negligence based on respondeat superior.)

Doctrine does not extend to other employees, such as nurses. Thus, hospital which employed nurse was responsible, under doctrine of respondeat superior, for alleged negligent acts of nurse in administering injection to patient, out of presence of physician but in pursuance of written post operative order. *Bernardi v. Community Hosp. Assn.*, 443 P.2d 708 (Colo. 1968).

Health Care Availability Act limits malpractice actions and provides for periodic payments of tort judgments. C.R.S. §13-64-101, *et seq.* Lawsuits must be brought within two years after date that action accrues, but in no event shall an action be brought more than three years after act or omission, which gave rise to action. C.R.S. §13-80-102.5(1). However, the limitations do not apply if the cause of action was knowingly concealed, could not have been known by the exercise of reasonable diligence. C.R.S. §13-80-102.5(3).

Total amount recoverable for all damages for a course of care for all defendants in any civil action brought against health care professional or health care institution shall not exceed one million dollars, present

value per patient, including any derivative claim for derivative noneconomic loss or injury by any other claimant, of which not more than \$300,000 (for actions accruing after July 1, 2003, \$250,000 for prior actions) shall be attributable to noneconomic loss. C.R.S. §13-64-302.

Under Health Care Availability Act, if trial court makes finding of good cause, court may allow total award to exceed one million dollars in order to provide for adequate compensation for lost future earnings or future medical expenses. *Id.*

Pre-judgment interest that accrues prior to filing of complaint is included within total limit on damages. If trial finds that good cause exists for award in excess of one million dollars, pre-filing interest may not be awarded for that portion of judgment that exceeds one million dollars. *Wallbank v. Rothenberg*, 74 P.3d 413 (Colo. App. 2003).

For actions accruing prior to July 1, 2003, statutory cap on noneconomic damages does not limit amount of damages awarded for losses from physical impairment or disfigurement. *Preston v. Dupont*, 35 P.3d 433, 439 (Colo. 2001). For actions accruing after July 1, 2003, the \$300,000 limit on noneconomic damages applies to awards for physical impairment or disfigurement.

HUSBAND AND WIFE

Parental liability for property damage by minors see "INFANTS."

Community Property Rights. Community property system not adopted in Colorado.

Loss of Service and Medical Expense. Husband may recover for medical treatment, loss of services, society, care and comfort of wife caused by her injuries. *Slack v. Farmers*, 5 P.3d 280 (Colo. 2000). Wife has same right of recovery for loss of consortium as is afforded her husband in like actions. *Elgin v. Bartlett*, 994 P.2d 411 (Colo. 1999); *Crouch v. West*, 477 P.2d 805 (Colo. App. 1970). Loss of consortium is a derivative claim, and separate from the injured spouse's claim. *Terry v. Sullivan*, 58 P.3d 1098 (Colo. App. 2002). However, a spouse's loss of consortium claim will not be tolled by their spouse's disability. *Id.* at 1102.

Loss of consortium claim is collateral to personal injury claim for purposes of comparative negligence. *Slack v. Farmers*, 5 P.3d 280 (Colo. 2000); *Lee v. Colorado Dep't of Health*, 718 P.2d 221, 232 (Colo. 1986). As a result, when victim suffers indivisible injury, apportionment of fault for loss of consortium must match apportionment of fault for underlying injury. *Slack v. Farmers, supra.*



Right to Sue Each Other in Tort. Wife may sue her husband for damages for personal injuries caused by his negligence. *Rains v. Rains*, 46 P.2d 740 (Colo. 1935); *Simmons v. Simmons*, 773 P.2d 602 (Colo. App. 1988). Court of appeals has since expanded this rule to include contract claims in addition to tort claims. *In Re: Marriage of Lewis*, 66 P.3d 204 (Colo. App. 2003). However, public policy does not allow the permissive or compulsory joinder of a tort claim, or a non-related contract claim in marital dissolution proceedings. *Id.*

Furthermore, a husband and wife are not treated as one. *Rains v. Rains*, 97 Colo. 19, 21 (Colo. 1935). Spouses are treated as independent actors with respect to income, contracts, and property which they enter into on their own accord. *Montrose County School Dist. Re-IJ v. Lambert*, 826 P.2d 349, 352 (Colo. 1992).

Statute of limitations and laches do not run as between husband and wife during continuance of marital relationship. *Linker v. Linker*, 470 P.2d 921 (Colo. 1970).

INFANTS

See “AUTOMOBILES, Age”; “LIABILITY INSURANCE, Violation of Law”; “NEGLIGENCE’ Age”; “RELEASE.”

Parent Liability. State or any county, city, town, school district, or other political subdivision of the state, or any person, partnership, corporation, association, or religious organization, whether incorporated or unincorporated, is entitled to recover damages in amount not to exceed three thousand five hundred dollars (\$3,500) in court of competent jurisdiction from parents of each minor under age of eighteen years, living with such parents, who maliciously or willfully damages or destroys property, real, personal, or mixed, belonging to state, or to any such county, city, town, or other political subdivision of state, or to any such person, partnership, corporation, association, or religious organization or who maliciously or willfully damages or destroys any such property belonging to or used by such school district. Recovery shall be actual damages in amount not to exceed three thousand five hundred dollars (\$3,500), in addition to court costs and reasonable attorney fees. C.R.S. §13-21-107(1). Any person is entitled to recover damages in amount not to exceed three thousand five hundred dollars in court of competent jurisdiction from parents of each minor under age of eighteen years, living with such parents, who knowingly causes bodily injury to that person, including bodily injury occurring on property belonging to or used by school district. Recovery shall be actual damages, not exceeding three thousand five hundred dollars, plus costs and attorneys fees. C.R.S. §13-21-107(2). Three thousand five hundred dollar (\$3,500)

limit is to each person entitled to restitution as a result of each delinquent act. *In interest of JLR*, 895 P.2d 1151 (Colo. App. 1995).

Absent other theory, parent is vicariously liable for negligence of child only if parent’s negligence in supervising child is proximate cause of injury. *Horton v. Reaves*, *supra*.

Parental Immunity Doctrine accepted in Colorado with some exceptions. Qualified parental immunity adopted in *Trevarton v. Trevarton*, 378 P.2d 640 (Colo. 1963), in which child has tort remedy against parent for injuries while parent is in performance of business or employment duties, as distinguished from parental duties. Although simple negligence will not suffice, child can prevail against parent in claim of willful, wanton and intentional misconduct. *Horton v. Reaves*, 526 P.2d 304 (Colo. 1974); *Terror Mining v. Roter*, 866 P.2d 929 (Colo. 1994). Where unemancipated child sues parent for personal injuries sustained by child in automobile accident allegedly caused by parent’s negligent operation of automobile, and child’s complaint does not allege willful and wanton or intentional misconduct or that parent was pursuing business or employment activity, Auto Accident Reparations Act does not abrogate parental immunity doctrine. *Schlessinger v. Schlessinger*, 796 P.2d 1385 (Colo. 1990).

Representation of Minor. In relation to property rights, all persons of age of eighteen years shall be considered of full age. Before that they are considered minors. Whenever infant has representative, such as guardian or conservator, representative may sue or defend on behalf of infant. If infant does not have duly appointed representative, or such representative fails to act, he may sue by next friend or guardian ad litem. Court shall appoint guardian ad litem for infant not otherwise represented in action or make such other order as deemed proper for protection of infant. C.R.C.P. 17(c).

Negligence and contributory negligence. A child under the age of seven at the time of an occurrence is incapable of negligence. CJI-Civ 9:9. Minors seven years or older at the time of the occurrence are required to exercise only such care as might reasonably be expected from persons their age, experience, and intelligence. *Id.*; *Wales v. Howard*, 433 P.2d 493 (Colo. 1967); *LeCoq v. Klemme*, 476 P.2d 280, 281 (Colo. App. 1970).

Contracts with Minors. Minor may disaffirm any contract, unless such contract is one authorized by statute, during his minority or within reasonable time thereafter, notwithstanding fact that he misrepresented his age. *Keser v. Chagnon*, 410 P.2d 637 (Colo. 1966); *Doenges-Long v. Gillen*, 328 P.2d 1077 (Colo. 1958); *Jones v. Dressel*, 623 P.2d 370, 373 (Colo. 1981). Upon



minor's disaffirmance, seller is entitled to set off against buyer's recovery of price any damage sustained by seller as result of false representation as to age. *Keser v. Chagnon, supra*.

Intentional Torts by Minors. In commission by minor of intentional tort, there must be intent to make harmful contact and infant must appreciate offensiveness or wrongfulness of his act before liability attaches. *Horton v. Reaves, supra*.

INLAND MARINE

Inland marine insurance is not regulated as a separate line of insurance in Colorado. Rather, Inland Marine is included in larger classification of property and casualty insurance. For premium rating purposes it is "Type II" insurance. C.R.S. §10-4-401(3)(b).

Cancellation and nonrenewal. Forty-five day notice via first-class mail is required if insurance carrier intends to cancel, nonrenew, increase premium or unilaterally decrease coverage benefits for commercial inland marine coverage. C.R.S. §§10-4-109.7(1), 10-4-110, 10-4-110.5(1). Restriction on nonrenewal does not apply if either: insured fails to pay any premium required for renewal; or policy in question has been in effect less than sixty days (unless it is a renewal policy). C.R.S. §10-4-110. Restrictions do not apply to surplus lines insurance in Colorado. Where cancellation is for non-payment of premium, ten days' notice of cancellation, accompanied by reasons therefore, shall be given. C.R.S. §10-4-109.7(1).

Transportation broker that arranged shipment of shipper's potatoes had no claim as third-party beneficiary under carrier's cargo insurance policy or Interstate Commerce Commission (ICC) endorsement when potatoes were lost in transit because the policy and endorsement covered only physical damage or loss of cargo, not other kinds of consequential loss, and insurer's certification to broker that coverage was in effect did not make broker third-party beneficiary. Furthermore, shipper was not third-party beneficiary and could not maintain direct action against insurer for loss of cargo, even though shipper had judgment against insured. *All Around Transport v. Continental Western*, 931 P.2d 552, 555 (Colo. App. 1996).

LIABILITY INSURANCE

Duties of Liability Insurer. Allegation that insurer acted negligently by summarily rejecting third party's settlement offers and exposing insured to risk of large excess judgment is a sufficient cause of action. *Farmers v. Trimble*, 658 P.2d 1370 (Colo. 1982), *overruled on other grounds*, *Goodson v. Amer. Standard Ins. Co.*, 89

P.3d 409 (Colo. 2004). *See Bucholtz v. Safeco*, 773 P.2d 590, 592 (Colo. 1988) (Vendor of an insurance policy has legal duty to deal fairly and in good faith with its insured. Breach of that duty renders the insurer liable for damages naturally flowing from the breach.)

Bashor Agreements. Agreements between insured and third party judgment creditors are legal. *Northland v. Bashor*, 494 P.2d 1292, 1294 (Colo. 1972). *Bashor* agreement is settlement reached between opposing parties after judgment has been obtained against defendant. *Stone v. Satriana*, 41 P.3d 705, 708 n.1 (Colo. 2002). Prevailing party agrees not to execute on judgment in exchange for defendant's agreement not to appeal and instead pursue claims against third party. *Id.* Pretrial stipulated judgments are not enforceable against third party insurer. *Old Republic Ins. Co. v. Ross*, 180 P.3d 427 (Colo. 2008).

Compromise of Claims. Where automobile policy contains provision that insured should not voluntarily assume any liability and the insured makes settlement with others involved in accident, he cannot recover from insurance company amount expended in making settlement since it was incumbent upon him to remain inactive pending action in court against him. *Kesinger v. Commercial*, 70 P.2d 776 (1937). "No action clause" does not apply to suit insured brings asserting insurer is withholding benefits due under policy, but rather to claims by third party alleging insured is responsible for third party's injuries or claims. *Fight Against Coercive Tactics Network v. Coregis Ins. Co.*, 926 F. Supp. 1426 (D. Colo. 1996). Insurer which settled claim without consulting insured and without showing as to insured's liability therefore could not seek reimbursement from insured even though policy contained reimbursement clause. *Employers Mut. v. Nicholas*, 238 P.2d 1120 (Colo. 1951).

Contribution between Joint Tortfeasors. Colorado has created statutory right in favor of tortfeasor who has paid more than his pro rata share of common liability to contribution among two or more persons jointly or severally liable. C.R.S. §§13-50.5-101 to 106; *D.R. Horton, Inc. v. D&S Landscaping, LLC*, 2008 Colo. App. LEXIS 1077 (Colo. Ct. App. June 26, 2008). Total recovery is limited to amount paid in excess of pro rata share. C.R.S. §13-50.5-102(2). Colorado no longer follows the concept of "joint and several liability." C.R.S. §13-21-111.5; *Watters v. Pelican*, 706 F. Supp. 1452 (D. Colo. 1989). In Colorado, relative degrees of fault of joint tortfeasors will be used in determining their pro-rata shares. C.R.S. §13-50.5-103.

Cooperation of Insured. Cooperation of insured is usually a jury question. To constitute breach of cooperation clause, there must be failure in some material and



substantial respect. *Farmers v. Konugres*, 202 P.2d 959 (Colo. 1943); *Ahmadi v. Allstate Ins. Co.*, 22 P.3d 576 (Colo. Ct. App. 2001). Some disadvantage to insurer must be proved, and disadvantage must be material and substantial before insured will be found in breach of “cooperation” clause. *Brooks v. Haggard*, 481 P.2d 131 (Colo. Ct. App. 1970).

Collateral Source. C.R.S. §13-21-111.6 provides that in any action to recover damages for tort resulting in death or injury to person or property, court, after finder of fact has returned verdict stating amount of damages, must reduce amount of verdict by amount by which such person, his estate, or his personal representative has or will be fully or partially indemnified or compensated for his loss by any other person, corporation, insurance company or fund. There is a significant exception, however: verdict may not be reduced by amount of benefits paid as result of contract entered into and paid for by or on behalf of claiming party. See *Miller v. Brandon*, 207 P.3d 923 (Colo. Ct. App. 2009); *Barnett v. American Family Co.*, 843 P.2d 1302, 1309 (Colo. 1993); *Keelan v. VanWaters*, 820 P.2d 1145, 1147 (Colo. 1991).

Coverage. Insured is not deprived of his rights to reimbursement for amount recovered from and paid by him for injury to third party simply because third party happens also to be party insured under another paragraph of same policy. *Union Ins. v. Samelson*, 207 P. 1113 (Colo. 1922).

Policy Construction. Interpretation of insurance policy is issue of law to be decided by court. *Colonial Ins. v. American Hardware*, 969 P.2d 796 (Colo. App. 1998). General rules of contract interpretation apply to construction of insurance policies. *Bohrer v. Church Mut. Ins. Co.*, 965 P.2d 1258, 1261 (Colo. 1998). Generally speaking, insurance policies will be construed to give effect to intent of parties, and courts will not rewrite an unambiguous policy exclusion. *American Fam. Ins. Co. v. Johnson*, 816 P.2d 952 (Colo. 1991). Exclusionary clauses that insulate certain conduct from coverage must be written in clear and specific language, and are to be interpreted against defeat of the coverage. *Bohrer*, 965 P.2d 1261.

Absent any ambiguity, insurance policy will be enforced as written. *Bengtson v. USAA*, 3 P.3d 1233, 1235 (Colo. App. 2000). See “CONSTRUCTION OF POLICY.”

Reasonable Expectations Doctrine. If various provisions of insurance policy are in conflict with each other, then Court will construe contract in manner that protects reasonable expectations of insured at time insured purchased policies. *Public Service Co. v. Wallis*, 986 P.2d 924 (Colo. 1999). “Reasonable expectations”

doctrine was followed in *Davis v. M.L.G. Corp.*, 712 P.2d 985 (Colo. 1986). However, Court of Appeals ruled in *Shelter Mut. Ins. Co. v. Breit*, 908 P.2d 1149 (Colo. App. 1995), that doctrine should only be resorted to in extraordinary cases where ordinary rules of contract interpretation would lead to unconscionable results. Further, doctrine may not be applied where policy provisions are unambiguous. *TerraMatrix, Inc. v. U.S. Fire Ins. Co.*, 939 P.2d 483 (Colo. App. 1997).

Occurrence. The term “occurrence” is broadly construed against insurer. *Colard v. American Family Mut. Ins. Co.*, 709 P.2d 11 (Colo. App. 1985). Utility’s refusal to provide natural gas to mobile home park was “event” or “happening,” rejecting insurer’s contention that such terms required finding of fortuity as with “accident.” *Public Service Co. of Colorado v. Continental Cas. Co.*, 26 F.3d 1508 (10th Cir. 1994). Contractor’s poor workmanship “created an exposure to a continuous condition that resulted in property damage” which was result of occurrence, stating that “occurrence” is ambiguous and should be broadly construed. See *Colard v. American Family*, *supra*. However, poor workmanship constituting a breach of contract was not covered “occurrence.” *General Sec. Indem. Co. v. Mt. States Mut. Cas. Co.*, 205 P.3d 529 (Colo. Ct. App. 2009); *Union Ins. Co. v. Hottenstein*, 83 P.3d 1196 (Colo. App. 2003). There was no covered “accident” or “occurrence” where construction contractor performed construction of building according to design and completed walls were functional, but walls were rejected by owner as not being up to contract specifications because they did not adequately muffle sound. *DCB Constr. Co. v. Travelers Indem. Co.*, 225 F. Supp. 2d 1230 (D. Colo. 2002). Site-induced damage to construction was “occurrence.” *Hoang v. Assur. Co. of Am.*, 149 P.3d 798 (Colo. 2007).

Economic Losses. Purely economic losses do not constitute “property damage” within meaning of liability insurance policy. *Lamar Truck Plaza, Inc. v. Sentry Ins.*, 757 P.2d 1143 (Colo. App. 1988). While loss of use of tangible property includes such property which has diminished in value or been made useless irrespective of any physical injury to property, the phrase does not include mere economic damages in nature of loss of investments, anticipated profits, and financial interests. *Hommel v. George*, 802 P.2d 1156, 1158 (Colo. App. 1990).

Direct Action Against Insurer and Rights of Injured Party. Colorado recognizes bad faith breach of insurance contract in first-party situations. *American Fam. Mut. Ins. Co. v. Allen*, 102 P.3d 333 (Colo. 2004); *Rederscheid v. Comprefcare*, 667 P.2d 766 (Colo. App. 1983) (action against health care maintenance organization); *Savio v. Travelers*, 678 P.2d 549 (Colo. App. 1983), *af-*

f'd, 706 P.2d 1258 (Colo. 1985) (workers' compensation benefits). See also *Ballow v. Phico Ins. Co.*, 875 P.2d 1354 (Colo. 1993) (Referring to the wide-ranging duties pursuant to C.R.S. §10-1-101 that all persons providing insurance services to the public must be at all times actuated by good faith in everything pertaining thereto). Burden of proof for bad faith in first-party context is higher than in third-party context – insured must prove that carrier's conduct was unreasonable and knew it acted unreasonably or acted with reckless disregard as to fact of unreasonableness. *Allen*, 102 P.3d 342. However, ancillary tort claims of bad faith, intentional/negligent infliction of emotional distress, outrageous conduct, etc. emanate from insurance coverage and if there is no such coverage there are no bad faith or other ancillary tort claims. *Jarnigan v. Banker's Life*, 824 P.2d 11 (Colo. App. 1991); *Signature Dev. Cos. v. Royal Ins. Co. of Am.*, 1999 U.S. Dist. LEXIS 23322 [*9] (D. Colo. 1999).

Duty to Defend. Duty to defend and indemnify are separate and distinct and duty to defend is broader. *Hecla Mining v. New Hampshire Ins. Co.*, 811 P.2d 1083 (Colo. 1991). Carrier must defend if complaint alleges facts which potentially or arguably state claim within policy coverage or raise doubt as to coverage. *Id.* Carrier denies coverage at its own risk. *Id.* Insurer seeking to avoid defense obligation faces "heavy burden" as it must show that allegations are either "clearly not covered by insuring language or are solely and entirely within exclusion provisions." *Id.* By contrast, duty to indemnify is based upon evidence presented at trial and not mere allegations of complaint. *Id.* Duty to defend continues until "insurer can establish that the allegations in the complaint are solely and entirely within the exclusion in the insurance policy." *Id.* at 1090. Insurer is not excused from its duty to defend unless there is "no factual or legal basis on which the insurer might eventually be held liable to indemnify the insured." *Id.* Insurers may seek reimbursement for cost of defense of insureds where coverage is ultimately found not to exist. *Cotter Corp. v. American Empire Surplus Lines Ins. Co.*, 90 P.3d 814, 828 (Colo. 2004). Duty to defend is broader than duty to indemnify, and where no duty to defend exists, it follows there can be no duty to indemnify. *Fire Ins. Exch. v. Sullivan*, 2009 Colo. App. LEXIS 994 (Colo. Ct. App. May 28, 2009).

Allocation of Defense Costs. Where several carriers each have independent duty to defend, Colorado law recognizes that primary coverage insurers "are duty bound to defend the insured and are required to contribute their *pro rata* share" to defense costs. *National Cas. Co. v. Great S.W. Fire Ins. Co.*, 833 P.2d 741, 747-48 (Colo. 1992). *Signature Development* case held "the fortuitous existence of another insurer who was willing to meet its own obligations did not excuse [the other car-

rier] from discharging its duty to defend." *Signature Dev. Cos. v. Royal Ins. Co. of Am.*, 230 F.3d 1215, 1220 (10th Cir. 2000). "[T]he appropriate course of action for an insurer who believes that it is under no obligation to defend, is to provide a defense to the insured under a reservation of its rights to seek reimbursement should the facts at trial prove that the incident resulting in liability was not covered by the policy." *Id.* at 1219 citing, *Hecla Mining Co.*, 811 P.2d at 1089.

Exclusions Generally. Exclusion in liability insurance policy violates public policy if it allows insurer to receive premium with no realistic chance of incurring any risk of liability, though courts should be cautious in applying this rule so as not to frustrate purposes of coverage. *Horace Mann v. Peters*, 948 P.2d 80 (Colo. App. 1997). In order to avoid policy coverage, insurer must establish that exemption claimed applies in particular case, and that exclusions are not subject to any other reasonable interpretation. *Compass v. City of Littleton*, 984 P.2d 606 (Colo. 1999).

Intentional Acts Exclusion. When complaint alleges both negligence and intentional torts, allegations of negligence in complaint do not necessarily invoke duties of insurer to defend or indemnify insured under homeowner's policy, which incorporates intentional acts exclusion. *Colorado Farm Bureau Mut. Ins. v. Snowbarger*, 934 P.2d 909 (Colo. App. 1997). Intentional injuries are excluded from liability coverage as a matter of public policy to "prevent extending to the insured a license to commit harmful, wanton or malicious acts." *American Fam. Mut. Ins. Co. v. Johnson*, 816 P.2d 952, 957 (Colo. 1991). Injury from insured's acts in tape-recording sexual encounter and playing tape for third persons was foreseeable as matter of law, and thus within homeowners policy's liability coverage exclusion for occurrences resulting from insured's intentional acts where results are reasonably foreseeable, even if insured did not intend to harm his sexual partner. *Fire Ins. v. Bentley*, 953 P.2d 1297 (Colo. App. 1998). Recovery will be barred only if insured intended damages, or if it can be said that damages were in a broader sense "intended" by insured because insured knew that damages would flow directly and immediately from its intentional act. *Hecla Mining*, 811 P.2d at 1088. Intent will be inferred as a matter of law in certain cases, such as sexual assaults, where insured's conduct is deemed to be inherently injurious. *Allstate Ins. Co. v. Troelstrup*, 789 P.2d 415, 419 (Colo. 1990); *Nikolai v. Farmers Alliance Mut. Ins. Co.*, 830 P.2d 1070 (Colo. App. 1991).

Pollution Exclusion. Qualified pollution exclusion clause in commercial liability policy, which stated that policy would not cover bodily injury or property damage caused by discharge, dispersal, release, or escape of irri-

tants, pollutants, or contaminants, but which provided exception where discharge, dispersal, release or escape was sudden and accidental, would provide coverage to insured, a uranium mill operator, regarding claims of nearby residents for personal injuries and property damage allegedly sustained due to seepage from mill operation, only if discharges of contaminants was unexpected and unintended and not where damages were unexpected and unintended. *Cotter v. American Empire*, 90 P.3d 814 (Colo. 2004).

An absolute pollution exclusion barred coverage for injury claims caused by ammonia vapor exposure. *Terra Matrix v. United States Fire Ins. Co.*, 939 P.2d 483 (Colo. App. 1997). See *Blackhawk-Central City Sanitation Dist. v. Am. Guar. & Liab. Ins. Co.*, 856 F. Supp. 584 (D. Colo. 1994), *rev'd on other grounds*, 214 F.3d 1183 (10th Cir. 2000) (an absolute pollution exclusion excluded coverage for damage resulting from discharge of improperly treated sewage into a creek); *West Am. Ins. Co. v. Baumgartner*, 812 P.2d 696 (Colo. App. 1990), *vacated on other grounds*, 812 P.2d 654 (Colo. 1991) (what caused environmental damage, rather than how the damage was caused, was significant factor in determining application of pollution exclusion).

Business Pursuits Exclusion. "Business pursuits" exclusion in shooter's homeowners insurance policy excluded coverage for injury shooter inflicted on homicide victim; injury occurred at shooter's place of business, injury arose out of shooter's business, "business pursuits" exclusion in shooter's homeowners insurance policy contained no exception for activities ordinarily incident to nonbusiness pursuits, and coverage provided by shooter's homeowners insurer did not overlap with coverage provided by shooter's commercial liability insurer. *Bolejack v. Travelers*, 64 P.3d 939 (Colo. App. 2003).

Reservation of Rights. If liability insurer assumes responsibility of defending action under reservation of rights and if it is later determined that it had no duty to do so, insurer can seek reimbursement for its costs of defense from insured. *Hecla Mining*, 811 P.2d at 1089; *Employers' Fire Ins. Co. v. Western Guar. Fund*, 924 P.2d 1107 (Colo. App. 1996). Insurer does not waive its policy defenses when it settles the claims after issuing a reservation of rights letter. *Nikolai v. Farmers*, 830 P.2d 1070 (Colo. App. 1991); *Hartford v. District Court*, 625 P.2d 1013 (Colo. 1981). When insurer denies coverage on specific grounds, it may waive right later to assert additional defenses to coverage, including lack of timely notice. *Flatiron Paving Co. v. Great Southwest Fire Ins. Co.*, 812 P.2d 668 (Colo. App. 1990). Failure to raise late notice defense in preliminary letter does not, without more, constitute waiver of that defense. *Public Serv. Co. of Colorado v. Wallis & Cos.*, 955 P.2d 564 (Colo. App.

1997), *reversed on other grounds*, 986 P.2d 924 (Colo. 1999); *Haller v. Hawkeye Sec. Ins. Col.*, 936 P.2d 601 (Colo. App. 1997).

Insolvency of Insured. Individuals, whose home insured contractor had begun construction on, had standing to seek declaratory judgment to determine whether coverage existed under contractor's liability policy, where all persons having any interest in construction of insurance policy were before court, including contractor who was joined by insurer as third-party defendant even though his debt to individuals was discharged in bankruptcy, and individuals claimed coverage with insurer denying liability, making construction of policy appropriate for declaratory judgment. *Colard v. American Family*, 709 P.2d 11 (Colo. App. 1985).

Evidence. Testimony that defendant is insured is inadmissible testimony but jurors may be asked on voir dire as to their interest in companies which write auto indemnity insurance. *Johns v. Shinall*, 86 P.2d 605 (Colo. 1939). Evidence of party's liability insurance is irrelevant to question of whether he acted negligently or otherwise, and as such, any allusion to insurance coverage is improper. *Prudential Prop. & Cas. Ins. Co. v. District Court of 17th Jud. Dist.*, 617 P.2d 556 (Colo. 1980).

Notice. Liability insurer must show prejudice before denying coverage for late notice. *Friedland v. Travelers Indem. Co.*, 105 P.3d 639 (Colo. 2005). Three-part test applies to determine prejudice: 1) insurer bears burden of showing that insured's late notice of claim or suit was untimely and delay unreasonable; 2) insurer bears burden of showing that late notice prejudiced insurer; and 3) insurer is presumed to have been prejudiced if notice to claim occurs after insured's settlement of liability case. *Id.* at 647. Court defines prejudice to insurer as circumstances which foreclose a "materially better outcome" in litigation because of insurer's lack of participation in dispute. *Id.* at 648. Timely notice of accident not given by insured under auto liability policy where notice was delayed for almost year after accident. Delay was not justified because of insured's confusion as to whether coverage extended to particular vehicle. *Jennings v. Horace Mann*, 549 F.2d 1364 (10th Cir. 1977). A two-step approach to late-notice cases is appropriate, which would require preliminary determination of whether insured's notice was timely. Such determination should include evaluation of timing of notice, and reasonableness of any delay. Once court has determined that insured's notice was untimely, and delay was unreasonable, it should then turn to issue of whether insured was prejudiced by untimely notice. *Clementi v. Nationwide Mut. Fire Ins. Co.*, 16 P.3d 223, 231 (Colo. 2001).



Punitive Damages. Colorado does not permit indemnification for punitive damages as being against public policy. *Lira v. Shelter Ins. Co.*, 913 P.2d 514 (Colo. 1996). See *Union Ins. Co. v. Kjeldgaard*, 775 P.2d 55 (Colo. App. 1988). Exemplary damages were not compensatory and automobile liability insurer was not liable, under policy obligating insurer to pay all sums which insured shall become legally obligated to pay as damages because of bodily injury, sickness, death or disease sustained by any person and caused by accident, for exemplary damages assessed against insured, notwithstanding that exemplary damages were not specifically excluded from coverage. *Brown v. Western Cas.*, 484 P.2d 1252 (Colo. App. 1971).

Apportionment Across Multiple Policy Periods. In situation where property damage is gradual, long term and indivisible, numerous insurance policies may be triggered. Indemnity for judgments for settlements in such cases is to be allocated according to time-on-the-risk and degree of risk assumed. *Public Serv. Co. v. Wallis & Cos.*, 986 P.2d 924 (Colo. 1999); *Scott's Liquid Gold, Inc. v. Lexington Ins. Co.*, 97 F. Supp. 2d 1226 (D. Colo. 2000), *aff'd in part, rev'd in part on other grounds*, 293 F.3d 1180 (10th Cir. 2002). But see *Globe Indem. Co. v. Travelers Indem. Co.*, 98 P.3d 971 (Colo. App. 2004) (Coverage for landslide causing damage to homes that were built on lots that had been improperly graded was determined to be available to homeowner only if actual damage occurred during policy period. Court distinguished environmental cases).

LIMITATION OF TIME FOR COMMENCEMENT OF ACTION

See Law Digest Tables.

Contract. Action for breach of contract must be commenced within three years after cause of action accrues. C.R.S. §13-80-101; *Daugherty v. Allstate*, 55 P.3d 224, 226 (Colo. App. 2002) (“A cause of action for breach of contract accrues on the date the breach is discovered or should have been discovered by the exercise of reasonable diligence.”)

Accrual. See C.R.S. §13-80-108. Cause of action for wrongful death shall be considered to accrue on date of death. Cause of action for fraud, misrepresentation, concealment, or deceit shall be considered to accrue on date such fraud, misrepresentation, concealment, or deceit is discovered or should have been discovered by exercise of reasonable diligence. Cause of action for debt, obligation, money owed, or performance shall be considered to accrue on date such debt, obligation, money owed, or performance becomes due. Cause of action for balance due on open account for goods or services shall accrue at time of last item of goods or ser-

vices proved in such account. Cause of action for wrongful possession of personal property, goods, or chattels shall accrue at time wrongful possession is discovered or should have been discovered by exercise of reasonable diligence. Cause of action for losses or damages not otherwise enumerated shall be deemed to accrue when the injury, loss, damage, or conduct giving rise to cause of action is discovered or should have been discovered by exercise of reasonable diligence. Cause of action for penalty for commission of traffic infraction, as defined in C.R.S. §42-4-1701, accrues on date of commission of traffic infraction. Cause of action for bodily injury or property damage from use or operation of motor vehicle accrues on date both existence of injury or damage and cause of injury or damage are known or should have been known through exercise of reasonable diligence. C.R.S. §13-80-108.

Discovery Rule. Tort claims statute of limitations does not begin to run until plaintiff knew or should have known through exercise of reasonable diligence of injury by a wrongful act. Concept of accrual encompasses idea that plaintiff must not only discover injury but also cause of injury. *Gallagher v. Bd. of Trs.*, 54 P.3d 386 (Colo. 2002).

Fraud. Cause of action for fraud accrues on date “claimant has knowledge of facts which would put a reasonable person on notice of the nature and extent of an injury and that the injury was caused by the wrongful conduct of another.” *Jones v. Cox*, 828 P.2d 218, 223-24 (Colo. 1992). Standard is objective. “The focus is on a plaintiff’s knowledge of facts that would put a reasonable person on notice of the general nature of damage and that the damage was caused by the wrongful conduct of [the defendant].” *Peltz v. Shidler*, 952 P.2d 793, 796 (Colo. App. 1997).

Tolling. Equitable tolling applied where the defendant’s wrongful conduct prevented plaintiff from asserting claims in timely manner. *Garrett v. Arrowhead*, 826 P.2d 850, 853-854 (Colo. 1992) (tolling statute of limitations period where defendant employer failed to provide employee with report needed to file petition for workers compensation); *First Interstate Bank v. Piper*, 744 P.2d 1197 (Colo. 1987) (holding statute of limitations period subject to equitable tolling for fraudulent concealment of facts underlying wrong); *Strader v. Beneficial*, 551 P.2d 720 (Colo. 1976) (tolling statute of limitations where defendant-lender knowingly withheld statutorily required disclosure of true interest rate to plaintiff-borrower); *Klamm Shell v. Berg*, 441 P.2d 10 (Colo. 1968) (applying equitable tolling where plaintiff’s mental incapacity, resulting from defendant’s assault and battery, prevented timely filing of assault and battery charges).



Waiver. Failure to plead statute of limitations waives the defense. C.R.C.P. 8.

Statutory and Case Law References to Specific Limits on Causes of Action. Generally, statute of limitations is 3 years for civil actions for fraud, misrepresentation, deceit, breach of fiduciary duty, violations of Uniform Consumer Credit Code, replevin, converting goods and tort actions, arising out of operation of motor vehicles. C.R.S. §13-80-101. Generally, statute of limitations is 2 years for negligence and intentional tort actions, for claims against veterinarians and for wrongful death. C.R.S. §13-80-102. Two years is default statute of limitations for claims for which no limitations period is provided. For medical malpractice actions, statute of limitations is 2 years after accrual, but in no event more than three years after act. C.R.S. §13-80-102.5. For tort claims of assault, battery, false imprisonment, false arrest, libel and slander, limitations period is one year. C.R.S. §13-80-103. Colorado law also provides statute of limitations for numerous other specific claims. C.R.S. §§13-80-103.5 to 13-80-107.5. Strict 180 day deadline after date of loss or discovery of liability to give formal written notice to public entity under Governmental Immunity Act, C.R.S. §24-10-109. Failure to give notice bars claim. C.R.S. §24-10-109(1) is non-claim statute and failure to file claim within the 180-day filing period creates absolute bar to claim. Unlike ordinary statutes of limitations, non-claim statutes are not subject to equitable defenses such as waiver, tolling, or estoppel. Likewise, subject-matter jurisdiction cannot be waived or conferred by consent, estoppel, or laches. *Mesa County v. Kelsey*, 8 P.3d 1200 (Colo. 2000).

Statute of limitations is tolled until trial court rules on plaintiff's motion to amend complaint if, before expiration of appropriate statute of limitations, plaintiff files motion to amend accompanied by amended complaint and if motion, amended complaint, and summons are served on defendant before expiration of statute of limitations period. C.R.C.P. 15; *Moore v. Grossman*, 824 P.2d 7, 9 (Colo. App. 1991).

For purposes of statute of limitations, cause of action for breach of fiduciary duty or negligence accrues on date claimant has knowledge of facts which would put a reasonable person on notice of nature and extent of injury and that injury was caused by wrongful conduct of another. *Colburn v. Kopit*, 59 P.3d 295, 296-297 (Colo. App. 2002).

MALPRACTICE

Medical. Medical malpractice cause of action accrues on date when both injury and its cause are known or should be known by exercise of reasonable diligence. *Quiroz v. Goff*, 46 P.3d 486, 489 (Colo. App. 2002).

Damages awarded for noneconomic loss or injury in a medical malpractice action are capped at \$300,000. Damages cap includes physical impairment or disfigurement claims in medical malpractice actions as noneconomic loss. C.R.S. §13-64-302(1)(a) and (c).

Expert witness must be not only licensed physician but also must demonstrate by competent evidence that, as result of training, education, knowledge, and experience in evaluation, diagnosis, and treatment of disease or injury which is subject matter of action or proceeding against physician defendant, that he or she is substantially familiar with applicable standards of care and practice as they relate to act or omission which is subject of claim on date of incident. C.R.S. §13-64-401. Expert in one medical subspecialty may testify against physician in another medical subspecialty if, in addition to such showing of substantial familiarity, there is showing that standards of care and practice in the two fields are similar. *Id.*

To show lack of informed consent, plaintiff must show that defendant did not obtain informed consent from patient, that a reasonable person would not have consented to procedure if information had been given, and that defendant's negligent failure to inform caused plaintiff's damages. *Williams v. Boyle*, 72 P.3d 392, 398 (Colo. App. 2003).

In medical malpractice case, relevant standard of care is that of a reasonably careful physician acting as specialist in same field of practice. To determine whether applicable standard of care has been violated, jury must compare defendant's conduct with what a reasonably careful physician would do under same circumstances. Because applicable standard of care is not within common knowledge and experience of ordinary people, standard must be established by expert testimony. *Wallbank v. Rothenberg*, 74 P.3d 413, 416 (Colo. App. 2003); *see also* CJI-Civ. 4th 15:3 (2006).

Claim characterized as a "wrongful life" claim – a medical malpractice claim in which child alleges that but for physician's negligence, she would not have been born to suffer the impairment – is not maintainable in Colorado. Being born with impairment is not "injury" for purposes of maintaining negligence action. *See Linger v. Eisenbaum*, 764 P.2d 1202, 1210 (Colo. 1988). "Wrongful birth" – medical malpractice claim brought by parents of child born with impairment or birth defect – is viable claim in Colorado. Parents who alleged second child was born blind, that physicians were negligent in failing to diagnose first child's blindness as hereditary and that parents would not have had second child but for such negligence, stated viable claim upon which relief in form of extraordinary medical and education expenses could be granted. *Id.* at 1208.



Hospital. C.R.S. §13-21-116 provides immunity for volunteers and for board members of non-profit corporations, including public hospitals. Hospital association existing solely for religious, charitable and educational purposes cannot be required to satisfy a judgment against it out of its trust fund. *Hemenway v. Presbyterian*, 419 P.2d 312, 313 (Colo. 1966). However, judgments may be satisfied out of insurance. *Michard v. Myron Stratton Home*, 355 P.2d 1078, 1081 (Colo. 1960).

Determination of damages is made in accordance with C.R.S. §13-64-205. Total amount recoverable for all damages for a course of care for all defendants in any civil action for damages in tort brought against health care professional, or health care institution, or as result of binding arbitration, whether past damages, future damages, or a combination of both, shall not exceed one million dollars, present value per patient, including any claim for derivative noneconomic loss or injury by any other claimant. C.R.S. §13-64-302.

Hospital does not generally have duty to advise patient prior to surgery as to surgical procedure to be employed and risks involved and, therefore, has no duty to obtain informed consent similar to that which surgeon is obligated to obtain. *Krane v. Saint Anthony*, 738 P.2d 75, 77 (Colo. App. 1987).

Legal, See "ATTORNEYS."

Other Professionals. Psychologists are statutorily immune from liability when they act in accordance with duty to warn others of their patient's serious threats of imminent physical violence. C.R.S. §13-21-117; *McCarty v. Kaiser-Hill*, 15 P.3d 1122, 1125 (Colo. App. 2000).

Under church liability policy that covered counseling activities but excluded liability arising from "actual conduct of a sexual nature," coverage for minister's counseling of teenage girl ceased when he began sexual fondling of girl. *Bohrer v. Church Mut. Ins. Co.*, 965 P.2d 1258, 1262 (Colo. 1998). Critical distinction exists between a claim for clergy malpractice, which because of the constraints of the First Amendment courts may not entertain, and claim for breach of fiduciary duty, which may properly be brought to the extent that the alleged wrongdoing falls outside the beliefs and doctrine of the religion. *Bohrer v. DeHart*, 943 P.2d 1220, 1226 (Colo. App. 1996).

Evidence sufficient in lawsuit where Cowboys' Association sued accountants for malpractice for damages incurred when, because of errors by the accountants, two cowboys were declared world champions, resulting in an expenditure of extra prize money. *Professional Rodeo Cowboys v. Wilch*, 589 P.2d 510, 512 (Colo. App. 1978).

NEGLIGENCE

See Law Digest Tables.

See "AUTOMOBILES"; "NO-FAULT - Damages."

Age. Children of very tender years are incapable of negligence and assume no risks. *Lewis v. Buckskin Joe's*, 396 P.2d 933, 940 (1964). Children may be held to lower standard of care than adults if they have less capacity than adults to know and understand consequences of their actions and potential risk of harm. *Kushnir v. Benson*, 520 P.2d 134, 136 (Colo. App. 1973) (not selected for official publication). Child six years of age or younger is incapable of being contributorily negligent. *Benallo v. Bare*, 427 P.2d 323, 325 (1967); *Majors v. J.C. Penney*, 506 P.2d 399, 401 (1972); *Fletcher v. Porter*, 754 P.2d 788 (Colo. App. 1988).

Attractive Nuisance. Attractive nuisance doctrine is recognized in Colorado. Doctrine of attractive nuisance imposes liability upon owners of dangerous or attractive machinery for intervening acts of child where proper safeguards have not been taken by owner to prevent intervening acts of child from taking place. *Central Mut. v. Wilson*, 533 P.2d 57, 58 (Colo. App. 1975) (not selected for official publication).

Assumption of Risk. Assumption of risk by person shall be considered by trier of fact in apportioning negligence pursuant to C.R.S. §13-21-111; C.R.S. §13-21-111.7. Person assumes risk if he voluntarily or unreasonably exposes himself to injury or damages with knowledge or appreciation of damages and risk involved. C.R.S. §13-21-111.7. Assumption of risk no longer bar to recovery, but may be used to reduce recovery in manner similar to comparative negligence. *Rosen v. L.T.V.*, 569 F.2d 1117, 1121 (10th Cir. 1978). One who voluntarily exposes himself to known danger does not necessarily consent to negligence of another. *Beeson v. Kelran*, 608 P.2d 369, 372 (1979).

Comparative Negligence. Plaintiff may recover his damages, reduced by percentage of his contributory negligence, unless he is 50 percent or more contributorily negligent, in which case judgment will be entered for defendant C.R.S. §13-21-111(3). Colorado statute providing for use of comparative fault as measure of damages in products liability actions relates only to damages and not to liability; it merely permits jury to consider fault in arriving at damage figure. C.R.S. §13-21-406; *Welch v. F.R. Stokes*, 555 F. Supp. 1054, 1055 (D. Colo. 1983). In multiple defendant cases, joint and several liability has been abolished. In any action brought as result of death or injury to person or property, no defendant shall be liable for amount greater than that represented by degree or percentage of negligence or fault



attributable to that defendant. C.R.S. §13-21-111.5. Finder of fact allowed to consider degree of percentage of negligence or fault of person not party to action, if nonparty was someone with whom claimant had settled with or if defending party has given notice of identity of nonparty within 90 days following commencement of action. C.R.S. §13-21-111.5. Plaintiff's negligence must be compared with combined negligence of defendants. If percentage of plaintiff's negligence is less than 50%, each defendant is liable for his percentage of his negligence. *B.G.'s, Inc. v. Gross*, 23 P.3d 691 (Colo. 2001). Plaintiff never has obligation to negate contributory negligence, because such negligence is affirmative defense, defendant has burden of proving. *Stevens v. Strauss*, 364 P.2d 382, 384 (1961).

Governmental Immunity. Public entity enjoys broad tort immunity except for operation of motor vehicle; dangerous condition of public highway, road or public building; operation of public hospital and correctional facility; and operation of public water, electric, gas, power and swimming facility. C.R.S. §24-10-106.

“Dangerous condition” of facility means physical condition which constitutes unreasonable risk to health or safety of public which is known to exist or should have been known to exist. Mere existence of wind, water, snow, ice or temperature shall not, by itself, constitute dangerous condition. C.R.S. §24-10-103(1).

“Dangerous condition” of public highway, road or street is condition which physically interferes with movement of traffic on paved or drivable portion of roadway; but not positioning or lack of traffic signs, signals or markings. C.R.S. §24-10-106(1)(d)(I).

Public entity shall be put on written notice within 180 days of loss. Notice shall be filed with attorney or governing body of public entity and shall include name and address of claimant, and name and address of his attorney, if any; concise statement of factual basis of claim, including date, time, place and circumstances of act, omission, or event complained of; name and address of any public employee involved, if known; concise statement of nature and extent of injury claimed to have been suffered; and statement of amount of monetary damages that is being requested. C.R.S. §24-10-109(1),(2)(a)-(e).

Imputed Negligence. Negligence of driver cannot be imputed to his passenger where there is joint enterprise, *i.e.*, where two persons share common purpose and right to control vehicle. *Watson v. Regional Transportation*, 762 P.2d 133, 141 (Colo. 1988).

Bailor not responsible for negligence of bailee in absence of agency relationship. *Graham v. Shilling*, 291 P.2d 396, 398 (Colo. 1955).

Negligence of parents of child of tender years is not imputed to child. *Public Service Co. v. Petty*, 75 Colo. 454, 226 P. 297, 298 (Colo. 1924); *Fletcher v. Porter*, 754 P.2d 788 (Colo. App. 1988).

Liquor Liability/Dram Shop Act. Any person who sells or gives away intoxicating liquor to a habitual drunkard is liable to any person injured by habitual drunkard if and only if person who sells or gives away any intoxicating liquors is first put on written notice not to sell or give away such liquor to habitual drunkard. C.R.S. §13-21-103. Liability of seller of liquor or beer to injured third parties is limited to \$150,000 for sale of liquor to visibly intoxicated persons or to person under age of 21 (adjusted for inflation \$219,750). C.R.S. §12-47-801(3)(a)(I); (3)(c). Civil action must be commenced within one year after sale or service. C.R.S. §12-47-801(3)(a)(II). However, no civil action may be brought by the person to whom liquor was sold or served. C.R.S. §12-47-801(3)(b). Subject to foregoing limitations and conditions, liability of social host is further limited to willfully and knowingly serving liquor to another under age of 21. C.R.S. §12-47-801(4)(a)(I); *Forrest v. Lorri-gan*, 833 P.2d 873, 874 (Colo. App. 1992); *Christoph for Aguero v. Colorado Communications Corp.*, 946 P.2d 519 (Colo. App. 1992).

Indemnification. Doctrine of indemnity, insofar as it requires one of two joint tortfeasors to reimburse other for entire amount paid by other as damages to party injured as result of negligence of both joint tortfeasors, is no longer viable in light of adoption of Uniform Contribution Among Tortfeasors Act, and is abolished. *Brochner v. Western*, 724 P.2d 1293, 1299 (Colo. 1986).

Insanity. Insanity not a defense to intentional tort according to ordinary use of term, but is a characteristic that may make it more difficult to prove intent element. Jury still must find intent. Insane person may be liable for his torts, except where malice and intent are necessary. *Johnson v. Lambotte*, 363 P.2d 165, 166 (1961); *Munz v. White*, 979 P.2d 23 (Colo. App. 1998), *rev'd*, *White v. Munz*, 999 P.2d 814 (Colo. 2000).

Landlord and Tenant. Duty of landowner for injuries caused to tenant is set forth at C.R.S. §13-21-115 (3)(c)(I). Landlord is chargeable only with reasonable care and is held only to such knowledge as he actually possessed, or such as reasonable person, from known conditions, should have possessed. *Baughman v. Cosler*, 459 P.2d 294, 298 (1969). Landlord is not responsible for damages suffered by tenant due to defective conditions, unless it is shown that he knew or in exercise of reasonable care, should have known of defect. *Girardot v. Williams*, 80 P.2d 433, 433-34 (1938); *Singleton v. Collins*, 574 P.2d 882, 883 (1978); *Labbe v. Steffens*, 752 P.2d 1067 (Colo. App. 1988). Lessee is not liable



for injury to employee attributable to condition of portion of premises over which he has no control. Provision in lease which assumes to exonerate lessor from statutory liability is without effect. *Colorado Mortgage v. Giacomini*, 55 Colo. 540, 136 P. 1039, 1046 (1913).

There is no common law duty on landlord to light stairways and halls in absence of unusually dangerous condition. *Miller-Du Pont v. Service*, 208 P.2d 87, 92 (1949); *but see Crosby v. Kroeger*, 330 P.2d 958, 963 (1958) (where it was held that landlord assumed duty to provide light and then negligently failed to perform assumed duty). Where landlord undertook covenant to repair, under circumstances, he is liable to tenant. *Davis v. Marr*, 413 P.2d 707, 709-10 (1966).

Last Clear Chance Doctrine. Last clear chance doctrine is applicable in Colorado. It applies not only to discovered peril, but to such as might have been discovered by exercise of ordinary care. It applies only where plaintiff is guilty of negligence or negligence might be imputed to him. *Shanahan v. Patterson*, 539 P.2d 1289, 1290 (Colo. App. 1975) (not selected for official publication).

Last Clear Chance Doctrine constitutes affirmative defense and must be pleaded. *Barnes v. Wright*, 231 P.2d 794, 798 (1951). Burden of proof is on plaintiff. *Anchor v. Denver & Rio Grande*, 277 P.2d 523, 525 (1954).

Where plaintiff is able to extricate himself from position of peril by exercise of reasonable care, doctrine does not apply. *Ankeny v. Talbot*, 250 P.2d 1019, 1023 (1952); *Dennis v. Johnson*, 317 P.2d 890, 892-93 (1957) (likewise where defendant is not guilty of negligence). Last clear chance doctrine not available to defendant. *Rein v. Jarvis*, 281 P.2d 1019, 1020 (1955).

Last clear chance doctrine is applicable only where defendant was aware of plaintiff's peril or should have been aware of it, and where defendant thereafter could have avoided accident by exercise of reasonable care and caution. *Reed v. Barlow*, 386 P.2d 979, 982 (1963).

Negligence Per Se. Arises from violation of state statute or ordinance that establishes the existence of defendant's breach of a legally cognizable duty owed to plaintiff. *Largo Corp. v. Karen Crespin*, 727 P.2d 1098, 1107 (Colo.1986). Statutes that create a standard of care are those enacted to promote the safety of others. The court may adopt a statutory standard of care when the purpose of the law is designed to protect a class of people from the type of injury that occurred. Even if violation of a statute supports a negligence per se claim, plaintiff must still show defendant's negligence was cause of plaintiff's injuries. *Dmitruk v. George & Sons' Repair Shop, Inc.*, 217 Fed. Appx. 765, 769 (10th Cir. 2007). For negligence per se, plaintiff must show that:

1) defendant violated a statutory standard; 2) violation proximately caused injuries at issue; and 3) plaintiff is a member of the class which statute or ordinance was intended to protect and...injuries are of the type it was enacted to prevent. *Foster v. Redd*, 128 P.3d 316, 318 (Colo. App. 2005); *Bittle v. Brunetti*, 750 P.2d 49, 55 (Colo. 1988); *see also Largo, supra*.

Premises Liability. Premises Liability statute is C.R.S. §13-21-115. This statute preempts common law claims against landowners and codifies landowners duties in tort. *Vigil v. Franklin*, 103 P.3d 322 (Colo. 2004). Liability of landowner based upon status of injured person. A "trespasser" is one who enters or remains on land of another without landowner's consent. "Licensee" is one who enters or remains on land of another for his own convenience or to advance his own interests with the landowner's permission or consent. Term "licensee" includes social guest. "Invitee" means person who enters or remains on land of another to transact business in which the parties are mutually interested or one who enters or remains on land in response to landowner's express or implicit representation that public is requested, expected, or intended to enter or remain.

Under premises liability statute, certain duties are imposed upon "landowners." Statute defines "landowner" as "including, without limitation, an authorized agent or person in possession of real property and a person legally responsible for the condition of real property or for the activities conducted or circumstances existing on real property." A lessor, who transfers control of the premises to its lessee is no longer a "person in possession of the real property." *Perez v. Grovert*, 962 P.2d 996, 998 (Colo. App. 1998). However, *see Flamingo v. Colorado Springs Props. Fund I*, 33 Fed. Appx. 467 (10th Cir. 2002), *distinguishing Perez v. Grovert*, holding that plaintiffs could survive summary judgment if they could present sufficient evidence including reasonable inferences that the landlord assumed responsibility for making repairs to the residence.

Trespasser may recover only for damages willfully or deliberately caused by landowner. C.R.S. §13-21-115 (3)(a). Licensee may recover only for damages caused by landowner's unreasonable failure to exercise reasonable care with respect to dangers created by landowner of which landowner actually knew; or by landowner's unreasonable failure to warn of dangers not created by landowner which are not ordinarily present on property of type involved and of which landowner actually knew. C.R.S. §13-21-115 (3)(b)(I)-(II).

Except for injuries on vacant or agricultural land, invitee may recover for damages caused by landowner's unreasonable failure to exercise reasonable care to protect against dangers of which he actually knew or should



have known. C.R.S. §13-21-115 (c)(I). The phrase “knew or should have known” is satisfied by actual or constructive knowledge, also referred to as the knowledge that one exercising reasonable diligence should have. *Lombard v. Colo. Educ. Cent., Inc.*, 187 P.3d 565, 571 (2008). On agricultural or vacant land invitee may recover for damages caused by landowner’s unreasonable failure to exercise reasonable care to protect against dangers of which he actually knew. C.R.S. §13-21-115 (c)(II).

Proximate Cause Doctrine. In general, Colorado follows common law. When negligent acts of two or more persons concur in causing injury, both are jointly liable without regard to whose negligence was proximate cause of injury. *Alden v. Watson*, 102 P.2d 479, 483 (1940); *but see Barnes v. Wright*, 231 P.2d 794, 798 (1951) (where proximate cause was for jury even though plaintiff was negligent as matter of law). Where there is only a possible connection between an act or condition and result, it is not sufficient in law to impose liability. *Widefield v. Griego*, 416 P.2d 365, 367 (1966).

Proximate cause not synonymous with “a” cause. *Perry v. Ruybal*, 297 P.2d 531, 532 (1956). Intervening cause only relieves defendant of liability for negligence where intervening cause was not reasonably foreseeable. *Bradford v. Bendix-Westinghouse*, 517 P.2d 406, 414 (1973). *See also, Perlmutter v. United States Gypsum Co.*, 4 F.3d 864 (10th Cir. 1993). Intentionally tortious or criminal act of third person is not superseding cause immunizing defendant from liability if it is reasonably foreseeable. *Ekberg v. Greene*, 588 P.2d 375, 376 (1978).

Res Ipsa Loquitur. Doctrine is rebuttable presumption that defendant was negligent if plaintiff incurred injuries caused by instrumentality within exclusive control of defendant and if injury probably would not have occurred had defendant exercised reasonable care. *Adams v. Leidholdt*, 563 P.2d 15, 18-19 (Colo. App. 1976). It is not necessary for plaintiff to eliminate all possibilities, other than negligence of defendant, which might explain accident and his injuries. *Montgomery Elevator Co. v. Gordon*, 619 P.2d 66, 69 (Colo. 1980). Doctrine may be applicable in cases involving more than one defendant and in cases where defendant may not have had “exclusive” control in literal sense. *Adams*, 579 P.2d 618, 619. Doctrine does not apply, however, if circumstances of accident do not suggest or indicate superior knowledge or opportunity for explanation on part of defendant or if plaintiff has equal or superior means of information. *Shutt v. Kaufman’s Inc.*, 438 P.2d 501, 503 (1968).

Sudden Emergency. Loss of control of leg, due to unexpected embolism, which caused car to surge for-

ward and hit plaintiffs stopped car, held to be unavoidable. *Hughes v. Worth*, 427 P.2d 327, 328 (1967).

In collision where evidence tended to show that it was caused by unexpected failure of defendant’s brakes due to rainwater in brake drum, and where defendant testified that he had no notice of diminished braking power prior to accident, jury allowed to determine that accident resulted from brake failure beyond defendant’s control; and if so, defendant cannot be held responsible. *Bartlett v. Bryant*, 442 P.2d 425, 426-27 (Colo. 1968); *Young v. Clark*, 814 P.2d 364, 368 (Colo. 1991). However, *see also, Vu v. Fouts*, 924 P.2d 1129 (Colo. App. 1996), holding that while it may be proper to give a sudden emergency instruction, whether course of conduct chosen by party is reasonable is a question of fact for the jury.

Defense of act of God is available only when defendants can prove that injury resulted solely from natural causes. *Wilson v. Calder*, 518 P.2d 952, 954 (1973) (not selected for official publication).

NO-FAULT

See “AUTOMOBILES.”

On July 1, 2003, Colorado’s “No-Fault” auto insurance act expired by “sunset repeal” and the state returned to a tort based system for motor vehicle insurance. The new auto insurance requirements, are located under C.R.S. §§10-4-601 *et seq.*

Several provisions of No-Fault Act will require that motor vehicle claims are concluded under its provisions (*e.g.*, the PIP IME Panel program is expected to continue until June 30, 2014).

Claims accruing prior to July 1, 2003 remain subject to the repealed No-Fault Act.

PENALTY AND ATTORNEYS’ FEES

In the absence of an express statute, court rule, or private contract to the contrary, attorney fees generally not recoverable by prevailing party in contract or tort action. This reasoning is based on the American Rule, which requires each party to bear its own legal expenses. *Continental W. Ins. Co. v. Heritage Estates Mut. Hous. Ass’n*, 77 P.3d 911, 913 (Colo. App. 2003) citing *Bernhard v. Farmers Ins. Exch.*, 915 P.2d 1285 (Colo. 1996).

Party recovering in action on insurance policy is not entitled to attorneys’ fees. *Bhd. Accident Co. v. Jennings*, 44 Colo. 144, 96 P. 983, 983 (1908). An exception applies when attorneys’ fees are provided for in contract or insurance policy. *Evans v. Century Cas. Co.*, 159 Colo. 596, 413 P.2d 457, 461 (1966) citing 8 Appelman, *Insurance Law and Practice*, §14532.



Determination whether contract provides for attorney fees presents a question of insurance policy interpretation. *Continental W. Ins. Co. v. Heritage Estates Mut. Hous. Ass'n*, 77 P.3d 911, 913 (Colo. App. 2003) citing *Allstate Insurance Co. v. Huizar*, 52 P.3d 816 (Colo. 2002) and *Cruz v. Farmers Ins. Exch.*, 2000 Colo. J. C.A.R. 1358, 12 P.3d 307 (2000).

PRIVILEGED COMMUNICATIONS

Spousal. Husband or wife may not testify against the other without the other's consent with respect to any communications made by one to the other during the marriage. Privilege, and thus the requirement of obtaining consent, applies during and after the marriage as to communications made during marriage. Privilege does not apply: 1) in a civil action by one against the other; 2) in a criminal action for crime committed by one against the other; or 3) when such communications are made for the purpose of aiding the commission of a future crime or of a present continuing crime. C.R.S. §13-90-107(1)(a). The party claiming the privilege has the burden of proving the existence of the marriage. C.R.S. §13-90-107(1)(a)(IV).

Attorney. Attorney shall not be examined without consent of his client as to any communication made by client to him or his advice given thereon in the course of professional employment, nor shall attorney's secretary, paralegal, legal assistant, stenographer, or clerk be examined without consent of his employer concerning any fact, knowledge of which he has acquired in such capacity. C.R.S. §13-90-107(b). Privilege may be waived only by the client. *Losavio v. Dist. Ct.*, 188 Colo. 127, 533 P.2d 32 (1975).

Clergyman, Minister, Priest or Rabbi. Clergy member, minister, priest, or rabbi shall not be examined without both his consent and also consent of person making confidential communication as to any confidential communication made to him in his professional capacity in the course of discipline expected by religious body to which he belongs. C.R.S. §13-90-107(c).

Physician, Surgeon or Registered Professional Nurse. Physician, surgeon, or registered professional nurse duly authorized to practice profession pursuant to laws of this state or any other state shall not be examined without consent of patient as to any information acquired in attending patient which was necessary to enable him to prescribe or act for patient. However, restriction shall not apply to physician, surgeon, or registered professional nurse who is sued by or on behalf of patient or by or on behalf of heirs, executors, or administrators of patient on any cause of action arising out of or connected with the physician's, surgeon's, or nurse's care or treatment of such patient. C.R.S. §13-90-107(d). Privilege is

personal to the patient. *Stauffer v. Karabin*, 30 Colo. App. 357, 492 P.2d 862 (1971). A plaintiff waives privilege upon raising the issue of injury. *Kelley v. Holmes*, 28 Colo. App. 79, 470 P.2d 590 (1970).

Certified public accountant (CPA). CPAs may not be examined absent the consent of the client as to any communications made by the client to him in person or through documentary records or as to the CPA's advice given in the course of the CPA's employment. C.R.S. §13-90-107(f).

PRODUCTS LIABILITY

Actions brought against manufacturer or seller for injuries, death, or damage resulting from 1) defective product, 2) failure to warn, or 3) failure to instruct, are controlled by C.R.S. §§13-21-401-406.

Strict Liability. Colorado's statute closely resembles strict liability principles as set forth in Restatement (Second) of Torts §402A. *Barton v. Adams*, 938 P.2d 532 (Colo. 1997). Elements of strict liability for product defect claims are as follows: 1) product is defective and unreasonably dangerous to consumer; 2) product reaches consumer without substantial change in condition in which it was sold; 3) design defect caused plaintiff's injury; 4) defendant sold product and is engaged in business of selling products; and 5) plaintiff sustained damages. *Id.* Colorado has adopted risk-benefit analysis to determine whether product design is unreasonably dangerous. *Camacho v. Honda*, 741 P.2d 1240 (Colo. 1987). Factors to consider under risk-benefit analysis are not exclusive and may include the following: 1) usefulness and desirability of product - its utility to user and to public as a whole; 2) safety aspects of product - likelihood that it will cause injury and probable seriousness of injury; 3) availability of substitute product which would meet same need and not be as unsafe; 4) manufacturer's ability to eliminate unsafe character of product without impairing usefulness or making it too expensive to maintain utility; 5) user's ability to avoid danger by exercise of care in use of product; 6) user's anticipated awareness of dangers inherent in product and their avoidability because of general public knowledge of obvious condition of product, or of existence of suitable warnings or instructions; 7) feasibility, on part of manufacturer, of spreading loss by setting price of product or carrying liability insurance. *Id.*

Duty to Warn. Manufacturer of product has duty to warn of any dangers inherent in product; *supplier* may have same duty if there is insufficient evidence of identity of manufacturer. *Barton v. Adams Rental*, 938 P.2d 532 (Colo. 1997). Failure to warn claims often arise in the same context as defect claims. *Id.* Failure to warn of inherent dangers may cause product to be considered



defective for strict liability purposes if failure to warn is proximate cause of injury. *Id.*; *Hiigel v. General Motors Corp.*, 544 P.2d 983, 988 (Colo. 1975). However, manufacturer cannot warn of dangers that are not known to it based on prevailing scientific and technical knowledge at time of manufacture. *Fibreboard Corp. v. Fenton*, 845 P.2d 1168 (Colo. 1993).

Defenses. It shall be rebuttably presumed that product was not defective and that manufacturer or seller thereof was not negligent if product: 1) prior to sale by manufacturer, conformed to "state of the art" (as distinguished from industry standards) existing at time of sale, 2) complied with any applicable code, standard, or regulation adopted by the United States or this state at time of sale, or 3) was first sold over ten years prior. C.R.S. §13-21-403.

Innocent Seller. No product liability action may be brought against seller of product unless seller is manufacturer of product or part thereof. C.R.S. §13-21-402. However, seller or distributor, over whom jurisdiction can be obtained, will be deemed manufacturer for purposes of products liability action if jurisdiction is unattainable over manufacturer of product. *Id.*

Assumption of Risk. Voluntarily and unreasonably proceeding to encounter known danger is defense to strict liability; however, ordinary contributory negligence, generally consisting of failure to exercise due care to discover danger or to guard against it, is not. *Union Supply v. Pust*, 583 P.2d 276 (Colo. 1976); *see also* Restatement (Second) of Torts §402A.

Alteration/Misuse. Manufacturer cannot be legally responsible for injuries caused by its product if product was used in manner other than that intended and which could not reasonably have been expected by manufacturer, and that such misuse caused plaintiff's injuries. C.R.S. §13-21-402.5; *see also Armentrout v. FMC Corp.*, 842 P.2d 175 (Colo. 1992).

Comparative/Contributory Fault. Fault of person suffering harm, as well as fault of all others who allegedly caused harm, shall be compared by trier of fact in all products liability actions. C.R.S. §13-21-406. If fault is attributed to person suffering harm, such fault shall not preclude award of damages, but any award of damages shall be reduced in proportion to fault apportioned to person suffering harm. *Id.* Even so, comparative negligence provisions do not apply to any strict products liability action. *Id.* See "NEGLIGENCE."

Privity of Contract. In products liability case, privity of contract is not prerequisite to recovery under strict liability theory. *Bradford v. Bendix-Westinghouse*, 517 P.2d 406 (Colo. App. 1973).

RELEASE

Common law rule that release of one tortfeasor operates to release all tortfeasors, absent specific language in release, is abrogated by C.R.S. §§13-50.5-101-106; 13-21-111.5, which specifically allow finder of fact to consider degree or percentage of negligence or fault of nonparties if defendant has given notice of identity of nonparty within 90 days following commencement of action. Designation by defendant must state nonparty's name last known address and provide best identification of nonparty possible under circumstances. It must also provide brief statement of basis for believing that nonparty was at fault.

Settlements, Releases and Statements of Injured Persons. Obtaining statement, or general release of liability from or negotiation of settlement with, injured person who is hospitalized or under medical care by person whose interest is adverse to injured person within 15 days of occurrence of injury which might rise to liability is prohibited. C.R.S. §13-21-301(1)(c). Any release or agreement obtained improperly is void and inadmissible in court. C.R.S. §13-21-301(2).

Automobile accident victim's general release of tortfeasor, in absence of specific provision which unequivocally includes personal injury protection claims within terms of release, does not operate to release automobile insurer from its obligation to pay personal injury protection benefits to injured victim. *Cingoranelli v. St. Paul Fire & Marine Ins. Co.*, 658 P.2d 863, 869 (Colo. 1983). But right of subrogation may be lost if tortfeasor not put under notice before release is signed.

Accord and Satisfaction. Payment of lesser sum in satisfaction of greater, which greater sum is not liquidated, is not satisfaction of unpaid remainder. Where claim is unliquidated or disputed, acceptance of lesser sum, with knowledge that it is tendered as full payment, bars action for balance. *New York Life Ins Co. v. MacDonald*, 160 P. 193, 194 (Colo. 1916). Acceptance of check bearing endorsement "Payment in Full" is in effect accord and satisfaction and precludes further recovery. *R.A. Reither Constr., Inc. v. Wheatland Rural Electric Ass'n*, 680 P.2d 1342, 1345 (Colo. App. 1984).

Agreement may be set aside by one who enters into agreement without full understanding of material facts, but affirmance of transactions after learning facts makes agreement binding upon him. *Wheeler v. Carl Rabe, Inc.*, 574 P.2d 878, 881 (1977), *rev'd on other grounds*, 599 P.2d 902 (1979).

Covenant Not to Sue. Where plaintiff executed agreement with bus company and individual dismissing action against them "without prejudice" and refraining from prosecuting any action against them, this consti-



tuted covenant not to sue, not release, and did not dismiss or extinguish plaintiff's action against codefendant. *Chandler v. City of Aurora*, 407 P.2d 680, 682 (1965). Plaintiffs' covenant not to sue employee, which did not expressly reserve right to proceed against employer, did not release employer on theory of *respondeat superior*. *Dworak v. Olson Constr. Co.*, 551 P.2d 198, 200 (1976).

Effect on Right of Subrogation. Where defendants had no notice of subrogation rights of plaintiff's insurer prior to execution of general release, insurer's right to recover against defendants was effectively barred. *Employers Mut. Liab. Ins. Co. of Wis. v. American Protection Industries*, 531 P.2d 983, 985 (Colo. App. 1975) (not selected for official publication).

Fraud. To set aside release by alleging fraud, proof of fraud must be by a preponderance of the evidence. C.R.S. §13-25-127. Gross inadequacy of consideration for release may in itself constitute evidence of fraud. *Oman v. Mishler*, 22 P.2d 132, 133 (1933).

Joint Obligers. C.R.S. §13-50-101 provides: "All joint obligations and covenants shall hereafter be taken and held to be joint and several obligations and covenants." This section has no application to oral contracts. *Townsend v. Heath*, 103 P.2d 691, 692 (1940). C.R.S. §13-50-102 provides that creditor may release one of joint debtors without releasing remaining debtors. Unless settlement agreement provides otherwise, prior settlement does not discharge any non settling tortfeasor from liability for its several, *pro rata* share of liability for injury, death or damage, but merely reduces aggregate claim against non settling tortfeasor by percent of negligence of fault attributable to that settling tortfeasor. C.R.S. §13-50.5-105 (1)(a). Where two parties are jointly and severally liable for injury to another, release or covenant not to sue as against one of two joint tortfeasors does not discharge other from liability. C.R.S. §13-50.5-105; *see also Summey v. Lacy*, 588 P.2d 892, 894 (1978) (where release of original tortfeasor did not bar suit against doctor for alleged negligence in treatment of injuries).

Rescission. Rescission is available for mistakes relating to nature of known injuries, but not for mistake as to future course and effects of those injuries. *Gleason v. Guzman*, 623 P.2d 378, 383 (Colo. 1981). Where both plaintiff and defendants believed that plaintiff had sustained no permanent injury, release is obtained by mutual mistake and can be set aside and is no defense in action in tort. *McCarthy v. Eddings*, 127 P.2d 883, 885 (1942).

REPRESENTATIONS AND WARRANTIES

General Rule. Representation in application for insurance is not part of contract, and will void policy only if false in any respect material to risk. By contrast, warranty enters into and forms part of contract itself, specifying precise limits of obligation insurer assumes. Warranties are not to be created or extended by construction, but must arise, if at all, from fair interpretation and clear intendment of words used by parties. Warranties are not favored, and if there is any doubt as to character of statement, it should be considered representation and not warranty. *Northwestern Life Assur. Co. v. Tietze*, 64 P. 773, 775 (Colo. App. 1901).

Statutory Provisions. Person commits fraudulent insurance act if, in connection with application for insurance or claim for benefits, he or she intentionally conceals information regarding material fact, or knowingly presents false written statement regarding material fact. C.R.S. §10-1-128(1). However, under C.R.S. §10-16-209(1) of Health Care Coverage Act, insured is not bound by any statement made in application for sickness or accident policy unless copy of application is attached to or endorsed on policy, and under §209(3), falsity of any statement in application for health care coverage policy may not bar right to recovery unless such statement materially affected either acceptance of risk or hazard assumed by insurer.

Incorporation of Application. Where a policy expressly makes statements made in application form part of insurance contract, provisions in application are incorporated by reference into policy. *Genua v. Kilmer*, 546 P.2d 1279, 1280 (Colo. App. 1976); *see also Travelers Ins. Co. v. Lampkin*, 38 P. 335, 336 (Colo. App. 1894) (issued "in consideration of warranties in application for this policy," warranties in application were part of policy). Representations, as distinguished from warranties, need not be attached to contract in order for insurer to rely upon them. *Safeco Ins. Co. of Am. v. Gonacha*, 350 P.2d 189, 191 (Colo. 1960); *see also Nationwide Mut. Ins. Co. v. Mrs. Condiess Salad Co., Inc.*, 141 P.3d 923, 925 (Colo. App. 2006) ("Where a policyholder misrepresents material facts to obtain insurance, the provisions obtained under those circumstances are void from their inception.").

Materiality. For purposes of insurance law, material fact is one to which reasonably prudent person would attach importance in determining course of action. *Wade v. Olinger Life Ins. Co.*, 560 P.2d 446, 452 n.7 (Colo. 1977); *see also Briggs v. Am. Nat'l Prop. & Cas. Co.*, 2009 Colo. App. LEXIS 330, at *12 (Colo. App. 2009) ("Undisclosed facts are 'material' if the consumer's decision might have been different had the truth been disclosed."). Misrepresentation must not only be actually



material to insurer's risk, as demonstrated by customary underwriting practices, but also must be such that reasonable person would understand that question on application calls for disclosure of specific information. *Wade*, 560 P.2d at 452.

Rescission. There are five essential elements to justify rescission on basis of misrepresentations in application: 1) false statement or concealment of fact, 2) made knowingly by applicant, 3) which materially affected acceptance of risk or hazard assumed by insurer, 4) of which insurer was ignorant and thus not chargeable with knowledge, and 5) on which insurer detrimentally relied. *Murray v. Montgomery Ward Life Ins. Co.*, 584 P.2d 78, 80 (Colo. 1978); *Hollinger v. Mutual Benefit Life*, 560 P.2d 824, 827 (Colo. 1977).

Reformation. Court may not reform insurance contract absent proof of mutual mistake between parties. *Simon v. Truck Ins. Exch.*, 757 P.2d 1123, 1124 (Colo. App. 1983). A prerequisite to reformation on ground of mutual mistake is existence of a prior agreement that represents parties' actual expectations. *Maryland Cas. Co. v. Buckeye Gas Products Co., Inc.*, 797 P.2d 11, 13 (Colo. 1990). Purpose of reformation is to give effect to parties' actual intentions. *Carder, Inc. v. Cash*, 97 P.3d 174, 181 (Colo. App. 2003).

Insurance Agent. Acts performed or statements made by agent within scope of real or apparent authority are binding on principal regardless of whether principal has actual knowledge of agent's act. However, if insured has copy of insurance policy, oral misrepresentation contradicting express terms of policy will not be imputed to insurance company. *Branscum v. American Community Mut. Ins. Co.*, 984 P.2d 675, 680 (Colo. App. 1999); *Pete's Satire, Inc. v. Commercial Union Ins. Co.*, 698 P.2d 1388, 1391 (Colo. App. 1985). Knowledge of general agent is imputed to insurer. *Life Investors Ins. Co. v. Smith*, 833 P.2d 864, 870 (Colo. App. 1992).

SERVICE OF PROCESS

Upon Corporations. Service of process may be made upon any form of corporation, association, or other entity recognized under laws of Colorado or any jurisdiction by delivering copy of process to its registered agent, officer, partner, manager member, trustee, or functional equivalent. C.R.C.P. 4(e)(4).

Upon Commissioner of Insurance. Service of process may be made upon insurance commissioner for any foreign insurance company under power of attorney, which must be filed before it is authorized to do business in Colorado. C.R.S. §10-3-107.

Service of process may be upon any agent of foreign corporation doing business in Colorado. *Union Mut. v. District Court*, 97 Colo. 108, 47 P.2d 401 (Colo.

1935); *see also White Rodgers Co. v. District Court of Weld County*, 160 Colo. 491, 418 P.2d 527, 529 (Colo. 1966) (service upon agent of foreign corporation in Colorado proper); *General v. Bell*, 105 Colo. 133, 95 P.2d 816, 821 (Colo. 1939) (service not proper when agency of party served was severed prior to service).

Upon Non-resident Motorists. Process may be served outside Colorado by the Sheriff of the county where service is made or by any nonparty aged 18 or older C.R.C.P. 4(d).

See "AUTOMOBILES."

Personal Service. Process may be served: upon natural person over 18 years of age by leaving copy of process with him, or at his residence with family member over 18, or with his secretary, bookkeeper or manager at usual place of business; upon persons 13-18 years old by delivering copy of process to that person and to his parent/guardian. C.R.C.P. 4(e)(1)-(2).

SUBROGATION

In General. Subrogation occurs when one person is substituted in place of another with reference to lawful claim, demand, or right of other in relation to debt or claim and its rights, remedies or securities. *Browder v. USF&G*, 893 P.2d 132, 135 n.4 (Colo. 1995), *overruled on other grounds*, 149 P.3d 798 (Colo. 2007). Subrogation is equitable right and will be enforced or not according to dictates of equity and good conscience, and according to wording of instruments involved. *Concialdi v. Pueblo Gas*, 328 P.2d 98, 102 (Colo. 1958). Subrogation rights usually arise by statute or by contract (e.g., a subrogation clause in an insurance policy). *See, e.g., Trevino v. HHL Fin. Servs.*, 945 P.2d 1345, 1348 (Colo. 1997). Rights of subrogee are same and no greater than those of person for whom he is substituted. *Browder*, 893 P.2d at 135 n.4. While statutes and insurance clauses usually describe subrogation right as one of first priority, appellate decisions in Colorado have construed both statutes and insurance policies to require pro-rata sharing of attorney fees and costs. *See e.g., County Workers Comp. Pool v. Davis*, 817 P.2d 521 (Colo. 1991); *Castellari v. Partners Health Plan*, 860 P.2d 593, 594 (Colo. App. 1993).

Equitable Subrogation. In mortgage context, equitable subrogation permits substitution of a later lienholder into lien-priority status of a prior lienholder if deed of trust was released by mistake. Five factors are used to assess applicability of equitable subrogation: 1) subrogee made payment to protect own interest, 2) subrogee did not act as volunteer, 3) subrogee was not primarily liable for debt paid, 4) subrogee paid off entire encumbrance, and 5) subrogation would not work any



injustice to rights of junior lienholder. *Hicks v. Londre*, 125 P.3d 452, 456 (Colo. 2005).

Liability Insurance. When an insurance company becomes subrogated to rights of insured, it has right to bring tort action on behalf of insured against tortfeasors not immune from suit. *Trevino*, 945 P.2d at 1348. Subrogation is intended to prevent an insured from recovering twice for one injury. *Blue Cross of Western NY v. Bukulmez*, 736 P.2d 834, 840 (Colo. 1987).

Excess insurer who has funded defense of insured may obtain reimbursement of funds expended from primary carrier under theories of subrogation and contribution. *National Cas. Co. v. Great Southwestern Fire Ins. Co.*, 833 P.2d 741, 747 (Colo. 1992).

Surety. Generally, a surety, by payment of its obligation, is subrogated to rights of obligee of bond against principal. *United States v. Gisi*, 213 F. Supp. 616 (D. Colo. 1962).

Workers' Compensation. Workers' Compensation Act of Colorado contains specific provisions for settlement and compromise of claims against negligent third parties. C.R.S. §8-41-203. Injured employee has right to compensation under Act and also to proceed against third-party tortfeasor for damages in excess of compensation available under Act. C.R.S. §8-41-203(1)(a); see *Tate v. Industrial Claim Appeals Office*, 815 P.2d 15, 17 (Colo. 1991). Payment of compensation under Act operates as assignment of cause of action to payor of workers' compensation benefits, and payor is subrogated to rights of employee to extent of benefits paid. C.R.S. §8-41-203(1)(b). If injured employee proceeds against third-party tortfeasor, payor of workers' compensation benefits need contribute only deficiency between amount of recovery and amount due under Act. *Id.* Right of subrogation does not extend to noneconomic damages for pain and suffering, inconvenience, emotional stress, or impairment of quality of life. C.R.S. §8-41-203(1)(d)(II). Unless payor of workers' compensation benefits independently pursues subrogated cause of action, amount of assignment is reduced by amount of reasonable attorneys fees and costs paid in pursuing subrogated cause of action. C.R.S. §8-41-203(1)(e).

See "WORKERS' COMPENSATION"

WAIVER AND ESTOPPEL

Provisions in policy providing "insurance shall not be in force or effect until and unless...premium thereon is paid" may be waived by general agent. *Capital Livestock v. Champion*, 204 P. 604 (Colo. 1922). "[E]stoppel operates only when the person relying upon it has been misled to his disadvantage." *Williams v. Hankins*, 225 P. 243 (Colo. 1923). "Waiver requires a clear, unequivocal,

and decisive act of a party showing such purpose." *Vogel v. Carolina Int'l*, 711 P.2d 708 (Colo. App. 1985). "Waiver, unlike estoppel, is always a matter of intention. It may result from an express agreement, or it may be inferred from circumstances which indicate an intent to waive." *Davis v. Brinkhouse Hotel Co.*, 219 P. 1074 (Colo. 1923). Insurer's unconditional defense of action against insured constitutes waiver of claim of noncoverage. *Bd. of County Comm'rs of Larimer County v. Guarantee Ins. Co.*, 90 F.R.D. 405 (D. Colo. 1981).

"The absolute refusal of an insurer to pay the loss in any event waives compliance with a provision requiring notice and proof of loss ... [and] denial of liability on the ground that the insured committed suicide waives proof of loss." *Massachusetts Protective Ass'n v. Daugherty*, 288 P. 888 (Colo. 1930).

Denial of liability on a specific ground waives all other grounds of objection, regardless of attempted reservation couched in general language. Waiver may take place even after time for performing conditions precedent. *Federal Life Ins. Co. v. Wells*, 56 P.2d 936 (Colo. 1936).

Fact that insurer paid claimant certain medical expenses did not constitute waiver of policy provisions under which it was later determined that vehicle and driver involved in accident were not insured. *Morrison v. Droll*, 588 P.2d 383 (Colo. App. 1978).

Acceptance of premium check and/or change of beneficiary form does not constitute waiver or estoppel to deny any other condition of reinstatement. *Volis v. Puritan Life*, 548 F.2d 895 (10th Cir. 1977).

However, "waiver and estoppel cannot be invoked against an agreement which is void as against public policy." *Topro Servs. v. McCarthy*, 856 F. Supp. 1461 (D. Colo. 1994).

WORKERS' COMPENSATION

Statutory Reference. Director of Division of Workers' Compensation and Administrative Law Judges employed by Office of Administrative Courts have original jurisdiction to hear and decide all matters arising under Colorado Workers' Compensation Act. C.R.S. §8-43-201. Appellate jurisdiction is vested in Industrial Claim Appeals Office by C.R.S. §8-43-301 with appeals to Court of Appeals and Supreme Court governed by C.R.S. §§8-43-307, 313. Appellate jurisdiction is also found at C.R.S. §13-4-102. Workers' compensation cases have precedence over any civil cause of action in Court of Appeals, but are only "advanced on the calendar" of Supreme Court. C.R.S. §§8-43-307(2), 8-43-313.

Benefits. Claimant's benefit rate is based primarily on average weekly wage as of date of injury, which is



computed under C.R.S. §§8-42-102, 8-40-201(19). However, if claim is closed, and claimant obtains employment elsewhere, but then claimant's condition worsens such that claim is reopened, average weekly wage is based on claimant's salary earned at subsequent employer after original accident; and average weekly wage must now include cost of continuing healthcare from subsequent employer pursuant to COBRA (Consolidated Omnibus Budget Reconciliation Act of 1985). *Avalanche Indus. v. Clark*, 198 P.3d 589 (Colo. 2008) (en banc) (allowing calculation of AWW at time claim was reopened, and not limiting to time accident occurred). Wage calculation may include wages from concurrent employment and employee's cost of continuing health insurance or conversion to similar or lesser insurance plan only after claimant loses fringe benefit. *St. Mary's Church v. ICAO*, 735 P.2d 902 (Colo. App. 1986); see also *Schelly v. ICAO*, 961 P.2d 547 (Colo. App. 1997). Wage calculation may also include cost of room and board, because "a worker's earnings may comprise, in significant part, compensation other than money wages." *Iler v. ICAO*, 207 P.3d 945 (Colo. App. 2009) (setting aside ALJ's determination, on grounds of abuse of discretion, that claimant did not meet burden of proof on reasonable value of room and board, where claimant sustained compensable injury in Antarctica but could only present value of room and board in suburban Denver).

Claimants entitled to unlimited medical benefits which are reasonable and necessary to cure and relieve effects of injuries. C.R.S. §8-42-101(1)(a). Insurers liable for only authorized medical care, which does not exceed fee schedule. Employer entitled to choose medical provider at time it learns of claim. C.R.S. §§8-43-404(5); 8-43-404 and 8-43-501. However, in all cases of injury, employer or insurer must provide list of at least two physicians or two corporate medical providers or at least one physician and one corporate medical provider, from which injured employee may select physician to attend said employee. The two designated providers shall be at two distinct locations without common ownership; if no two providers meet these criteria, employer may designate two providers at same location or with shared ownership interests. If a physician's services are not tendered at time of injury, employee shall have right to select physician or chiropractor. C.R.S. §8-43-404(5)(a)(I)(A). Upon written request to insurance carrier or employer's authorized representative if self-insured, employee may procure written permission to have personal physician or chiropractor attend employee. If permission is neither granted nor refused within twenty days, employer or insurance carrier shall be deemed to have waived any objection thereto. C.R.S. §8-43-404(5)(a)(VI). However, if division-selected IME doctor gets 25 percent of income from referral system

operated by employer's insurer, and if DIME also acts as medical advisor for insurer, then apparent conflict of interest may exist. *Ruff v. ICAO*, ___ P.3d ___, 2009 Colo. App. LEXIS 815 (Colo. App. May 14, 2009); but see *Benuishis v. ICAO*, 195 P.3d 1142 (Colo. App. 2008) (holding that DIME was "independent" even though DIME derived over 35 percent of income from referrals from employer's insurer, because DIME did not consult with insurer regarding claimant's case and did not receive compensation from insurer for issuing any opinion favorable to insurer). See also Senate Bill 09-168 (effective Aug. 4, 2009), modifying C.R.S. § 8-42-107.2 to bar DIME from contacting any authorized treating physicians or any examining or reviewing physician; nor can DIME request claimant to undergo repeat testing, when testing results were valid during division examination and DIME has resolved any disparity in testing results. Also, by providing written notice to employer, claimant can obtain one-time change of physician to physician or provider on employer's designated list where maximum medical improvement has not yet been attained, and claimant requests change within 90 days of date of injury. C.R.S. §8-43-404(5)(a)(III). Medical benefits may be awarded beyond date of maximum medical improvement to maintain maximum medical improvement. *Grover v. Indus. Comm'n*, 759 P.2d 705, 710 (Colo. 1988). Finally, Senate Bill 09-243 (effective Aug. 4, 2009), adds C.R.S. § 8-43-404(9), which states that if claim is initially denied but ultimately found compensable, health care services are deemed authorized when claim was initially denied, and employer did not tender a physician, and worker was treated at Colorado public health facility within 150 miles of claimant's residence, or is treated through publicly-funded program; claimant is not liable for paying for treatment by provider under this section if treatment reasonably needed and related to injury.

Fee Schedule for Medical Providers. Director required to establish fee schedule for medical services pertaining to injured workers whether related to treatment or not. Unlawful for any person or institution, including expert witnesses, reviewers or evaluators, to contract for services in excess of fee schedule without permission. C.R.S. §8-42-101(3). Aggregate of all lump sums granted is increased to \$60,000. Upon request from represented claimant, insurer must review, calculate and pay all lump sum requests, with applicable discount, within 10 days of receipt. Insurer must file with the Division, calculation and proof of payment within these same 10 days. Division will review, calculate and issue orders on lump sum requests by unrepresented claimants. Insurer must automatically pay up to \$10,000 in a lump sum for both scheduled and non-scheduled awards. Division must make available to all parties methods for



calculating lump sums. 7 C.C.R. 1101-3(5-10). However, if claimant received lump sum payment before statutory maximum amount of allowable lump sum payment was increased, and claimant reapplies, claimant is entitled to difference between amount of lump sum previously received and newly allowable aggregate amount. *Nelson v. ICAO*, ___ P.3d ___, Colo. App. LEXIS 990 (Colo. App. 2009). In addition, Senate Bill 09-243 (effective Aug. 4, 2009), modifying C.R.S. 8-42-101(3)(a)(I), states that fee schedule amounts for medical treatment apply to all medical and expert witness services in a workers' compensation case after any final order, final admission, or full or partial settlement of a claim, thus allowing claimant who has settled claim or closed claim based on order, can still get medical benefits at fee schedule amount, even though claim is closed.

Temporary total and temporary partial disability benefits generally available until claimant has reached maximum medical improvement, has been released to regular duty, has actually returned to work, is offered work but fails to begin modified duty, or is responsible for termination of employment. C.R.S. §§8-42-105, 106. First installment of compensation to claimant must be paid no later than date that insurer or self-insured employer admits liability. C.R.S. §8-42-105(2)(a) (effective Aug. 4, 2009). However, even if claimant fails to attend two straight appointments with attending physician, TTD benefits still accrue for period of non-attendance until claimant attends subsequent rescheduled appointment. Thus, benefits may be withheld only temporarily, rather than suspended completely, for claimant's period of non-attendance. *Sigala v. Atencio's Mkt.*, 184 P.3d 40, 46-47 (Colo. 2008). But even if claimant suffers admitted work-related injury, is released to modified employment by authorized treating physician, and is then terminated for cause shortly after injury occurs, TTD benefits may be rightfully denied based on for-cause termination. *Gilmore v. ICAO*, 187 P.3d 1129 (Colo. App. 2008), *cert. denied*, 2009 Colo. LEXIS 824 (Colo. Oct. 6, 2008). However, employee's TTD, TPD, or medical benefits cannot be reduced based on previous injury. In addition, employee's recovery of PTD benefits cannot be reduced when disability is result of work-related injury or work-related injury combined with genetic, congenital, or similar conditions, except for recovery or apportionments allowed under *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). C.R.S. § 8-42-104(3), (4). In addition, in cases of permanent medical impairment, employee's award must be reduced if certain criteria are met. C.R.S. § 8-42-104(5). Even so, employers or insurers can still seek contribution or reimbursement, as permitted by law, from other employers or insurers for benefits paid to or for injured employee as long as employee's benefits are not reduced or otherwise affected

by such contribution or reimbursement. C.R.S. §8-42-104(6).

Permanent medical impairment benefits (formerly called permanent partial disability) are available for injuries occurring on schedule set forth at C.R.S. §8-42-107(2). Rate benefits are paid pursuant to schedule as set forth at C.R.S. §8-42-107(6)(a). Schedule set forth at C.R.S. §8-42-107(2) is modified each July 1 to reflect any increase or decrease in state average weekly wage. C.R.S. §8-42-107(6)(b). Injuries resulting in permanent impairment not set forth in schedule at C.R.S. §8-42-107(2) are calculated pursuant to C.R.S. §8-42-107(8) and any rating must be provided by physician, accredited by the Division, and pursuant to *AMA Guides to the Evaluation of Permanent Impairment*, 3d Ed. Revised. Hearing on whole person impairment may be requested only after division-selected IME has rendered opinion on permanent impairment and/or MMI status. Opinion of Division IME as to MMI or permanent impairment may be overcome at hearing only by clear and convincing evidence. C.R.S. §8-42-107(8)(c). Thus, employer may not circumvent Workers' Compensation Act hearing procedures by simply requesting follow-up DIME before first DIME places claimant at MMI. *Jefferson County Pub. Schs. v. ICAO*, 181 P.3d 1199 (Colo. App. 2008). *See also Feeley v. ICAO*, 195 P.3d 1154 (Colo. App. 2008), *cert. denied sub nom. Feeley v. Century Commons.*, 2008 Colo. LEXIS 1731 (Colo. Dec. 2, 2008) (en banc) (holding Colorado Supreme Court's decision in *Williams v. Kunau*, 147 P.3d 33 (Colo. 2006), could not be applied retroactively to reopen claim, because claimant had not objected to final admission of liability and claim was properly closed under Workers' Compensation Act statute of limitations). For injuries arising after July 1, 1991, maximum total indemnity award, including both temporary and permanent, is either \$60,000 or \$120,000 (for injuries arising after Jan. 1, 2006, maximum is \$75,000 or \$150,000), depending on degree of permanent medical impairment. C.R.S. §8-42-107.5. However, Senate Bill 09-243, effective July 1, 2009, provides that, for purposes of determining the PPD cap only, mental impairment rating is to be combined with physical impairment rating. Additional compensation for disfigurement up to \$4,000, and for award of up to \$8,000 for extensive facial or body scars or stumps from loss of limb, is controlled by C.R.S. §8-42-108. Permanent total disability is controlled by C.R.S. §8-42-111.

Disability benefits may be reduced or terminated by actions of claimant. C.R.S. §§8-42-103(1)(g), 8-42-105(4) (if claimant responsible for termination of employment), 8-42-112 (willful safety violations, willfully misleading employer regarding physical ability to perform job), 8-42-112.5 (intoxication by drugs/alcohol), 8-42-113 (confined in jail after conviction), 8-43-102(1)(a)



(late written notice to employer of claim), and 8-43-404(3) (refusal to submit to medical or vocation evaluation). *See Anderson v. Longmont Toyota*, 102 P.3d 323, 325 (Colo. 2004) (holding that C.R.S. §8-42-105(4) “bars TTD wage loss claims when the voluntary or for-cause termination of the modified employment causes the wage loss”). Insurers may also take offsets pursuant to C.R.S. §8-42-103. Death benefits are available to dependents. C.R.S. §§8-42-114 to 123.

Employment Defined. Employers and employees subject to the Act are defined and limited by C.R.S. §§8-40-202, 203; §§8-40-301, 302. Rights of contractors and lessees are controlled by C.R.S. §§8-41-401 to 403. Under *Hall & Co. v. Newsom*, 125 P.3d 444 (Colo. 2005), statutory employment relationship can exist if subcontractor is independent contractor as to contracting-out company. (negligence of contractor was protected by exclusivity rule). Loaning employer may be liable for benefits. C.R.S. §8-41-303.

Colorado Workers’ Compensation Act is exclusive remedy for work-related injuries where employer has complied with insurance requirements. §8-41-102. Bad faith actions against insurer are neither barred nor covered by Act. *Travelers v. Savio*, 706 P.2d 1258, 1276 (Colo. 1985). Exclusive remedy provisions may not protect employers or co-employees acting in dual capacity. *Wright v. Dist. Ct.*, 661 P.2d 1167, 1168 (Colo. 1983); *see Shaw v. City of Colo. Springs*, 683 P.2d 385, 388 (Colo. App. 1984).

Arising Out of and in the Course of. Injuries must arise out of and within course and scope of employment to be compensable. C.R.S. §8-41-301(1). Also, “quasi-course-of-employment” doctrine extends workers’ compensation benefits to injuries sustained while traveling to and from treatment by authorized provider; but claimant not entitled to benefits under such doctrine if route taken to treatment was substantial deviation from shortest possible route, or if treatment had not yet been authorized by employer. *Kelly v. ICAO*, 2009 Colo. App. LEXIS 322 (Colo. App. Mar. 5, 2009).

Occupational Diseases. Occupational diseases are compensable and Colorado recognizes last employer liable rule. C.R.S. §8-41-304.

Claims for Mental Injury. Colorado also recognizes claims for mental injury. C.R.S. §§8-41-302(1), 8-41-301(2); *White Star v. ICAO*, 787 P.2d 189 (Colo. App. 1989); *Holme, Roberts & Owen v. ICAO*, 800 P.2d 1332 (Colo. App. 1990). However, compensation for “mental impairment” is limited by C.R.S. §§8-41-301(2), 8-42-107(7)(b).

Compensation for Aggravation of Pre-existing Condition. Compensation may also be obtained for ag-

gravation of pre-existing condition. *Seifried v. Indus. Comm’n*, 736 P.2d 1262, 1263 (Colo. App. 1986).

Compensation for Travel Expenses. For purposes of reimbursing claimant for mileage traveled to and from medical appointments, claimant is not considered to be “provider” such that claimant would have to submit bills for mileage within 120 days of date of travel under applicable administrative rule. Rather, claimant may recover mileage expenses, which are recoverable as “incident[al] to medical treatment,” under rule applicable to “injured worker” where no time limit for submission of bills is specified. *Safeway, Inc. v. ICAO*, 186 P.3d 103 (Colo. App. 2008).

Fellow Employee Rule. Co-employees acting within course and scope of employment are generally immune from suit. C.R.S. §8-41-101. *But see Stuart v. Frederick R. Ross Inv. Co.*, 773 P.2d 1107 (Colo. App. 1988); *Patel v. Thomas*, 793 P.2d 632 (Colo. App. 1990), *overruled in part on other grounds, Gallagher v. Bd. of Trs.*, 54 P.3d 386 (Colo. 2002).

Heart Attacks. Must be result of “unusual exertion.” C.R.S. §8-41-302(2).

Liens. Workers’ compensation benefits are subject to liens except for amounts due under court-ordered support. C.R.S. §8-43-204(4).

Attorney Fees. Attorney fees are governed by C.R.S. §8-43-403. A contingency fee of twenty percent of contested benefits is considered reasonable.

Settlements. Claims, including medical benefits, may be settled on full and final basis. C.R.S. §8-43-204.

Reopening Claims. Closed claims may be reopened because of fraud, overpayment, error, mistake, or change in claimants’ condition within certain time limits. Full and final settlements may be reopened only because of fraud or mutual mistake of material fact. C.R.S. §8-43-303. But if claimant sustained admitted work-related injury, and then claimant’s condition worsens after employer files uncontested Final Admission of Liability, claimant must prove worsening of condition is attributable to work-related injury; thus, even if subsequent authorized treating physician issues impairment rating exceeding prior rating, reopening not required as matter of law. *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008), *cert denied sub nom. Heinicke v. King Soopers, Inc.*, 2008 Colo. LEXIS 1744 (Colo. Dec. 15, 2008).

Fraud. Misrepresentation or false statement for purpose of obtaining order or benefits is felony, and upon conviction, claimant loses all rights to “compensation.” C.R.S. §8-43-402. *But see Wolford v. Pinnacol Assurance*, 107 P.3d 947, 955 (Colo. 2005) (forfeiture applies only to those benefits fraud was used to obtain, not all benefits).

