Significant Medical Malpractice Cases During the Past Year: A Review and Some Observations

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Introduction

There was one supreme court and a number of court of appeals decisions rendered last year pertaining to medical malpractice issues. This article is a review and commentary on those decisions.

Supreme Court Decision

DeSantis v. Simon – The Discoverability of BME Investigation Records

DeSantis v. Simon[1] involved a discovery issue. The court took it on a direct C.A.R. 21 appeal. It addressed itself to the important issue of the discoverability of investigation files from the Colorado State Board of Medical Examiners ("BME"), against a challenge by the physician that such records were intended by statute to be confidential, similar to the statutory confidentiality enjoyed by peer review documents pursuant to § 12-36.5-104 (10) of the Colorado Peer Review Act ("CPRA"). The court ruled that for the most part, these records were discoverable and non-privileged.

The underlying action arose from two hernia-repair surgeries, the second of which resulted in Virginia DeSantis's death. The survivor initiated not only a complaint against the doctor, with the hospital, but one with the BME as well. The BME investigation, in turn, addressed not only the DeSantis's complaint, but also the defendant's treatment of four other patients, none of whom were parties to the DeSantis's malpractice lawsuit. During the course of the malpractice lawsuit, the plaintiffs subpoenaed the defendant to produce "any and all information and docmentation relating to the discovery proceedings against [him] by BME." The defendant objected, and instead produced a privilege log. He contended that the documents were protected by the terms of § 12-36-118(10) of the Medical Malpractice Act, by § 12-36.5-104(10) of CIPRA and by physician-patient privileges. The trial court overruled the defendant's contentions and ordered production of the documents. The supreme court accepted review based upon the defendant's C.A.R. 21 petition.

The supreme court affirmed the trial court's determination with regard to the two statutory provisions, but ruled as well, that records of this type, particularly because they involved investigations with regard to four other patients, mandated an in camera *Martinelli*[2] type review by the trial court, based upon "expectation of confidentiality" considerations. Interestingly, not only the defendant, Dr. Simon, objected to the production of the documents, but the BME in its amicus curiae brief opposed the concept as well, albeit with different reasoning.

Of initial significance, the court refused to apply the confidentiality provisions of CIPRA because in its mind the BME was a clearly a distinguishable entity from the peer review committees contemplated by CIPRA. In this regard, the court emphasized that § 12-36.5-103(1) of CPRA provided that the BME may utilize peer review committees to "assist it in meeting its responsibilities under article 36." Thus, it reasoned that peer review committees were "an extension of the BME's authority" and the BME was not itself a peer review committee.[3]

The discussion and analysis concerning the construction of § 12-36-108(10) of the Medical Malpractice Act was more extensive. At the outset, the court emphasized the strict construction that courts must follow when privileges from discovery are at issue. With regard to such, they noted:

> Generally, privileges are creatures of statute and therefore must be strictly construed." *People v. Turner*, 109 P.3d 639, 644 (Colo. 2005). Because a privilege or other basis for non-disclosure can operate to withhold relevant

> information from a litigant, we exercise caution in determining whether the claimed protection exists. *See Cantrell v. Cameron*, 195 P.3d 659, 660 (Colo. 2008); *see also Churchey v. Adolph Coors Co*., 759 P.2d 1336, 1346 (Colo. 1998); *see also Jenkins v. Dist. Court*, 676 P.2d 1201, 1205 (Colo. 1984). Parties claiming the privilege or other non-disclosure protection have the burden of establishing its applicability. *See People v. State*, 797 P.2d 1259, 1262 (Colo. 1990)….[4]

The statutory privilege claimed by the defendant was that of § 12-36-118(10) of the Medical Malpractice Act, which provides that:

> Investigations, examinations, hearings, meetings, or any other proceedings of the board conducted pursuant to the provisions of this section shall be exempt from the provisions of any law requiring that the proceedings of the board be conducted publicly or that the minutes or records of the board with respect to action of the board taken pursuant to the provisions of this section be open to public inspection.

The trial court found that this provision simply provided that the BME was "not required to conduct meetings publicly, and minutes and records are not subject to public inspection,"[5] but did not create a discovery privilege during the course of a civil action. Generally agreeing with this assessment, the supreme court noted as well that:

> . . . the plain language of section 12-36-118(10) addresses only "public inspection" of BME records. In contrast to section 12-36.5-104(10) of the Peer Review Act which states that documents, "shall not be subject to subpoena or discovery and shall not be admissible in any civil suit brought against a physician who is the subject of such records," the General Assembly does not address civil discovery at all in section 12-36-118(10) of the Medical Practice Act, much less provide that documents connected with a BME investigation are shielded from discovery.[6]

The court ruled, however, that accessibility to the BME's records through discovery was not without limits. This was based primarily upon the fact that the BME's investigation involved not just the defendant's treatment of the plaintiff, but his treatment of four other patients as well. Thus, this warranted in camera *Martinelli* protections - if requested by the defendant - based upon the "doctor's expectation of confidentiality,"[7] although of significance, the supreme court also noted that there was no question that the *DeSantis* plaintiffs were "entitled to production of Virginia DeSantis's own medical records and information."[8] With regard to other documents, however, the court directed that trial courts must engage in these situations, in an "ad hoc balancing of the competing interests" of "expectations of privacy" and "disclosure of materials that are relevant to the litigation," in determining what documents should be disclosed.[9]

Court of Appeals Decisions

Finalized Decisions

Dotson v. Bernstein – Claims for Wrongful Birth – *Lininger v. Eisenbaum* Revisited

Lininger v. Eisenbaum[10] was a 1988 supreme court decision brought by the parents of a child born with congenital blindness, who contended that the defendant physicians had misdiagnosed her other child's blindness as optic nerve hypoplasia, which was non-hereditary, instead of the correct diagnosis, which was Leber's congenital amaurosis, a hereditary form of blindness. Given that their first child had been born with Leber's, the risk that their second child would suffer a similar disability was one in four. Had they known this, plaintiffs contended that they would have avoided conception or terminated the pregnancy if such had occurred. Instead, not knowing about the likelihood of Leber's, they bore a second child with the same hereditary blindness as the first.

The parents sought general damages for their emotional stress, pain and suffering, as well as special damages for doctors, nurses, hospitals and special education. They also brought a separate action on their son's behalf, requesting compensation for all of those damages, as well as his loss of enjoyment of a natural life.

After the trial court dismissed the case for failing to state a cognizable claim, the Liningers appealed. The supreme court found that the trial court erred and determined that the Liningers stated a cognizable claim with regard to the parent claim for the "extraordinary medicals' and education expenses" occasioned by the blindness of their son.

The court expressed "no opinion as to whether other damages, such as damages for emotional distress, may be recovered, and, if so, whether the benefit rule would require an offset against such damages."[11] The court, however, refused to recognize the claim brought on behalf of their son, concluding that however impaired his life may have been, it could not rationally be said to be a detriment to him when measured against the alternative of his not having existed at all.

It was an interesting discussion indeed. The bottom line rule seemed

to be, however, that one could make a cognizable claim for extraordinary medical and educational expenses of a child with birth defects, but not for the ordinary expenses of caring for a normal child.

Dotson v. Bernstein[12] readdressed these issues in 2009. In *Dotson*, the plaintiff had sought the services of the defendant physician to terminate her unwanted pregnancy and later gave birth to a healthy baby. She asserted the claim against the physician for negligence, claiming as her damages, injuries that resulted from the pregnancy, delivery and financial burden of raising an unplanned child. The trial court dismissed her claim based upon *Lininger* because she bore a normal child.

On appeal, the court of appeals disagreed at least to an extent. The court recognized that her claim that she suffered "economic and non-economic damages, including medical expenses and pain and suffering associated with labor, delivery, and subsequent medical complications from the birth,"[13] represented cognizable and recoverable injuries and damages. Again, the question of the recoverability of the ordinary costs of raising a healthy child, which *Lininger* did not answer, seemed to be apparent, but the court of appeals again demurred and reached no decision as to that issue, inasmuch as it concluded that it was not relevant to whether the plaintiff had alleged a cognizable claim. In a specifically concurring opinion, one of the three judges believed that the panel should have decided the issue. Judge Connelly opined that "because a child's existence cannot constitute a legally cognizable injury, and because the normal costs of rearing a child are inextricably intertwined with that existence, [he would] hold now that plaintiff is not entitled to damages for raising her healthy child."[14] It seems clear, however, that at least as is stands presently, medical expenses, as well as pain and suffering associated with labor, delivery and subsequent medical complications from the birth of a normal child can be recovered, as well as any extraordinary expenses associated with bearing and raising an abnormal child, but normal childrearing expenses, particularly for a normal child, most likely are not.

Ochoa v. Vered – The "Captain of the Ship" and Res Ipsa Loquitur Doctrines Are Alive and Well

Ochoa v. Vered,[15] discussed in last year's *Trial Talk*® article,[16] was finalized. *Ochoa* involved a probable bad sponge count by one of the surgical nurses and the surgeon being held accountable for such based upon the doctrine of "captain of the ship." After a plaintiff's verdict at trial, the defendant appealed and challenged the viability of the "captain of the ship"

doctrine, which the court of appeals rejected. Although there was some debate as to whether the captain of the ship doctrine continued to be viable, the court of appeals found no reason to depart from the decisions of other divisions of the court affirming the doctrine. It noted that the 1957 supreme court decision in *Beatles v. Metayka*[17] continued to be good law until the supreme court overturned it. The court of appeals, as well, described the impact of the doctrine, i.e., the "surgeon is vicariously liable for the negligence of subordinate hospital employees from the time the surgeon assumes control of the operating room until the surgeon concludes the procedure."[18] The court of appeals determined as well, that given a proper foundation, the court could instruct the jury based upon the doctrine of res ipsa loquitur, even though there was no evidence that the surgeon himself was negligent. Instead, it is sufficient that those people over whom the surgeon has responsibility were likely negligent.

Perhaps of greatest significance, the court of appeals confirmed the notion that wherever applicable, res ipsa loquitur shifts the burden of proof and not merely the burden of coming forward. Thus, the doctrine requires "the defendant to prove by a preponderance of the evidence that he was not negligent."[19] This represents the clarification of a previously uncertain issue, and its burden shifting conclusion is significant indeed.

Non-Finalized Decisions

Ford v. Eicher – The Limited Scope of *Shreck* Challenges

Estate of Ford v. Eicher[20] addresses the extent of *Shreck*[21] challenges to the admissibility of expert testimony regarding contentions of causation in medical malpractice cases. Although the decision is not yet final, it is instructive in its analysis and well worth reading, even in its non-finalized version.

Oftentimes in malpractice cases, the defendant contests the plaintiff's contentions of causation without a viable alternative theory. *Ford* involved contentions of medical malpractice with regard to an infant's brachial plexus injury, which plaintiff contended was attributable to the defendant applying excessive traction during the baby's delivery. In response, the defendant endorsed two experts to opine that the baby's brachial plexus injury was attributable not to excessive traction, but to intrauterine contraction - a theory that likely cannot be tested by way of medical studies because of probable injury to its subjects." Thus, the plaintiff moved by way of motion in limine to exclude their testimony based upon a *Shreck* challenge to the scientific basis of their opinions.

Although the trial judge acknowledged in his analysis that "there was a body of literature, 'much of it peer reviewed, challenging the orthodox view that excessive traction is the only, or perhaps even the primary, cause of brachial plexus injury in deliveries accompanied by shoulder dystocia,'" he nevertheless granted the plaintiff's motion in limine to exclude the testimony. In doing so, the judge was troubled by the fact that the defendant's experts' opinions suggesting that an alternative mechanism causing intrauterine contractions was not "testable" because it would involve unacceptable human testing likely to cause injury to its subjects. The jury would thus not have the "tools to decide whether that explanation is more likely than not the correct one."

Instead, the judge reasoned that the jury would decide the question "based upon their views about the credibility of Dr. Eicher, which is precisely where they would be with or without [the expert's] testimony." Further, the only way to exclude the plaintiff's contentions regarding causation was for the expert to assume "what Dr. Eicher says is true," and not by using "any testable techniques."[22]

Upon a plaintiff's verdict, the defendants appealed the matter to the court of appeals. It found that the trial court went too far in its analysis by proceeding "beyond the trial court's gate-keeping function"[23] to eliminate "'junk science' that does not meet Rule 702's reliability standards,"[24] by "instead of evaluating whether the theory propounded by [the defendant's expert] was reasonably reliable, as required by *Shreck*, … determined which medical theory of causation was more plausible."[25] It emphasized as well "that the trial court's concerns with the lack of testing of the intrauterine contraction theory and possible error rates went to the weight of the [expert's] testimony, not to its admissibility."[26] In emphasizing the more liberal standard of admissibility set forth in *Shreck* and more recently *People v. Ramirez*,[27] the court stated:

> In making a determination of reliability and relevancy, the trial court should consider the following: (1) whether the scientific principles to which the witness is testifying are reasonably reliable; (2) whether the witness is qualified to express an opinion on such matters; and (3) whether the witness's testimony would be useful to the jury. *Shreck*, 22 P.3d at 77-79. The trial court's reliability inquiry should consider the totality of the circumstances of each specific case. *People v. Ramirez*, 155 P.3d 371, 378 (Colo.

2007); *Shreck*, 22 P.3d at 77. The court should also consider whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. *Shreck*, 22 P.3d at 79; *see* CRE 403.

Ford is thus further confirmation of the liberal rules concerning the admissibility of expert opinions, and bolsters the notion that vigorous and well-prepared cross-examination should bring out challenges to the validity of expert opinions and not witness preclusion.

Clements v. Davies – A Narrowing (Misunderstanding) of *Trattler?*

Clements v. Davies[28] is a mildly concerning case about witness preclusion as well. Its analysis is worth reading because it affirmed the striking of an expert witness based upon the defendant's failure to produce records concerning previous testimony. The court of appeals affirmed based upon an abuse of discretion review, which seemingly was outmoded or overruled by the supreme court decision in *Trattler v. Citron*.[29]

The defendant in *Clements* was exceptionally neglectful in making proper disclosures with regard to one of his expert witnesses, Dr. Chang, including not disclosing Dr. Chang as an expert witness within the timeframes permitted by C.R.C.P. 26(a)(2). Further, even after their late endorsement of Dr. Chang, the defendant failed to provide a complete statement of Dr. Chang's opinion, but instead stated that "Dr. Chang is currently out of the country; however, his disclosure will be finalized within the next ten days upon his return."[30] The defendant failed to do even that, precipitating the plaintiff's motion to strike his testimony on July 20, 2006, when they filed nothing within the ten days defendant had referenced in his original disclosures. The trial court denied this motion, which found a lack of prejudice to the plaintiff at that point. The plaintiff thereafter deposed Dr. Chang, who did not produce a copy of his expert witness file, as was the understanding of the attorneys concerning expert witnesses. When confronted by this in his deposition, Dr. Chang agreed to provide the materials, but did not. Dr. Chang also did not provide his entire testimonial history. Less than four months prior to trial, plaintiffs moved to strike Dr. Chang as an expert witness for the defendants based upon his failure to:

> (1) disclose sworn testimony given in the last four years pursuant to C.R.C.P. 26(a)(2)(B) and (C) and (2) produce materials on which he relied to form his opinions on the case prior to the deposition.[31]

On March 7, 2007, approximately three months prior to the trial, the trial court - having lost its patience - granted the plaintiff's motion to strike. It concluded that the defendant failed

> to disclose Dr. Chang's prior testimony - 5 to 10 transcripts - as required by C.R.C.P. 26(a)(2), and for failure to produce his file at deposition, or since deposition" and that "[t]he continuing failure is inexcusable.[32]

The trial ended with a verdict for the plaintiff, and the defendant appealed.

The appeal implicated the rule of *Trattler v. Citron*,[33] which had been ruled to have had retroactive effect in the 2008 case of *Erskine v. Beim*,[34] and the defendant in fact argued that *Trattler* and its retroactive applicability required reversal. Using an abuse of discretion standard with regard to the trial judge's decision to strike, the court of appeals easily concluded that the trial judge had not abused her discretion, and rejected the defendant's appeal. But did the court of appeals miss the point and provide language that would narrow the effect of *Trattler*? Although such a result most likely was not intended, the analysis leaves some doubt. The cases overruled by *Trattler*[35] had in fact used the same "abuse of discretion" standard of review in upholding what was viewed by many as clearly excessive trial court leeway in striking expert witnesses based upon a party's failures to fully comply with the technical disclosure requirements of C.R.C.P. 26(a)(2) to list such expert's previous testimony, even though the parties' failures were many times fully explainable, lacking prejudicial effect and often times entirely faultless. Thus, the standard prescribed by *Trattler* after it overruled these cases was much better defined. Specifically, *Trattler* provided in part that:

> When considering an appropriate sanction for nondisclosure or late disclosure of testimonial history, the trial court should be guided by the alternatives specified in Rule 37(c)(1), including the alternatives cross referenced in sections (b)(2)(A), (b)(2)(B), and (b)(2)(C) of the rule. Thus, the court may consider rescheduling depositions or trial, payment of attorney fees and costs, contempt proceedings against the experts, admitting evidence of the noncompliance, instructing the jury that noncompliance may reflect on the credibility of the witness, or any other sanction directly commensurate with the prejudice caused.[34]

Probably because the underlying trial court's decision came before the Colorado Supreme Court announced its decision in *Trattler*, there was no evidence that the trial court conducted the type of an analysis prescribed in *Trattler*, including most specifically,

the alternative sanction analysis, referenced above. Although the court of appeals seemed hesitant to embrace fully the retroactive conclusions of *Erskine* with regard to the applicability of *Trattler*, it ultimately concluded *Erskine* to have been "well-reasoned," but concluded that because of distinguishable facts, *Trattler* "[did] not control."[37] In its analysis, the court emphasized that unlike in *Trattler*, the trial court did not feel compelled by Rule 37 to preclude the witnesses' testimony. It further emphasized that the present case was significantly more egregious with regard to the expert witness disclosures, because "Dr. Chang failed to provide his complete testimonial history and to produce material on which he relied to form his opinions in the case."[38] Finally, it noted that unlike in *Trattler*, the court did not deprive the defendant of an opportunity to present standard of care testimony, which she presented through her own testimony as well as the testimony of another expert. The lack of alternative sanction analysis was, however, ignored.

Whether this case is fully reconcilable with *Trattler* remains an open question. Perhaps a better conclusion by the court of appeals with regard to the retroactive application of the rule of *Trattler* was that everything about it was retroactive vis a vis *Erskine*, except its mandated alternative sanction analysis, which trial courts could not prospectively anticipate. Thus, the courts should apply that analysis only prospectively. What is confusing about *Clements* is that it seems to suggest that the alternative sanction analysis of *Trattler* is an optional part of the court's determination process with regard to expert witness preclusion issues, which it is not.

Vitetta v. Corrigan

Vitetta v. Corrigan[39] was an appeal of a significant plaintiff's verdict in a birth injury case. It is not a finalized decision, but its discussion is instructive. It primarily addressed issues regarding the retroactive effect of the General Assembly's amendment to the periodic payments provisions of the Health Care Availability Act ("HCAA"). The HCAA previously required that future damages for a present value above $150,000 "be paid by periodic payments rather than by a lump sum payment."[40] The exception to this was that a plaintiff could elect within three months after the entry of the verdict to receive a lump sum, provided that the plaintiff was at least 21 years old. In 2007, this exception was modified to lower the age provision of adulthood from 21 to 18.[41] The amendment also extended the election rights to "a person under disability who has a legal representative authorized to take action on his or her behalf."[42] The modification of the statute came after entry of final judgment on the plaintiffs' verdict, which was approximately four months after a notice of appeal. Thus, one question presented on appeal was whether it could be retroactively applied to allow the infant plaintiff to invoke the option. After a statutory analysis of legislative intent, as well as dealing with the defendant's contentions of unconstitutional retrospective legislation and special legislation, the supreme court approved the retroactive application of the statute, and allowed the infant, through her representatives, to elect a lump sum payment for future losses.

The trial court, however, had capped the jury's award for future lost earnings at $1 million based upon § 13-64-302(1)(b) of the HCAA, which raised serious issues as well. Plaintiffs contended on appeal that such was error, and that the trial court should have allowed such based upon the exception to the cap at § 13-64-302(1)(b), which instructs the court to exceed the $1 million cap "if upon good cause shown," it "would be unfair" to apply the $1 million limit.[43] The trial court had reasoned that there was "'no need to compensate [the child] for loss of future income when her daily living expenses are already included in' the uncapped multi-million dollar award for future 'life care' and medical expenses."[44] The court of appeals confirmed such by finding that this type of analysis comported with the "unfairness" guidance of the statute, and plaintiffs had thereby not shown "clear error," or "abuse of discretion," which would justify reversal. In 2006 the court of appeals' decision of *Wallbank v. Rothenberg*,[45] reached a similar result, i.e., allowing a trial court's finding of lack of "unfairness" to stand based upon an "abuse of

discretion" analysis. This is somewhat troubling because it allows trial courts obviously wide latitude to make this determination, and make the call based upon what most people would view as an "unconscionability" assessment, which would nevertheless pass appellate scrutiny for an "unfairness" assessment, given only an abuse of discretion review. Whether the statute intended this result is an open question.

The plaintiffs also made an argument with regard to the health insurer's subrogation claim, that the trial court should have applied "common fund" principles to impose some share of the fees and costs of this litigation, or to reflect some part of the $1 million cap with regard to the carrier's subrogation interest. The court of appeals overruled this contention because it determined that the plaintiffs did not raise it in a timely and adequate fashion at the trial court level. In dicta, however, the court stated that: "[e]ven if we considered common-fund arguments, they would remain at the trial court's discretion to decide whether Fortis should recover less than the full amount of its prior payments."[46] This is troubling as well, because it belies the principle seemingly found in *Kuhn v. State*[47] that the application of the "common fund" doctrine is a legal or at least equitable right.

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Endnotes

1 *DeSantis v. Simon*, 209 P.3d 1069 (Colo. 2009).

2 *See generally Martinelli v. Dist. Ct.*, 199 Colo. 163, 612 P.2d 1083 (1980).

3 *DeSantis*, 209 P.3d at 1073.

4 *Id*. at 1073-1074.

5 *Id*. at 1072.

6 *Id*. at 1074-1075.

7 *Id*. at 1075.

8 *Id*. at 1076.

9 *Id*.

10 *Lininger v. Eisenbaum*, 764 P.2d 1202 (Colo. 1988).

11 *Id*. at 1207.

12 *Dotson v. Bernstein*, 207 P.3d 911 (Colo. App. 2009).

13 *Id*. at 914.

14 *Id*. at 915.

15 *Ochoa v. Vered*, 212 P.3d 963 (Colo. App. 2009).

16 Francis V. Cristiano, *Other Significant Medical Malpractice Cases Decided During the Past Year*, TRIAL TALK (Dec. 2008/Jan. 2009) at 25.

17 *Beatles v. Metayka*, 135 Colo. 366, 370-71, 311 P.2d 711, 713-14 (1957).

18 *Ochoa*, 212 P.3d at 966.

19 *Id*. at 970. *See also Stone's Farm Supply v. Deacon*, 805 P.2d 1109, 1114 (n. 10) (Colo. 1991).

20 *Estate of Ford v. Eicher*, 2008 WL 5173615, ___ P.3d ___ (Colo. 2008) (This opinion has not been released for publication in the permanent law reports).

21 *See generally People v. Shreck*, 22 P.3d 68 (Colo. 2001).

22 2008 WL 5173615 at *4.

23 Id. at *12.

24 *Id*. at *2, *citing Elsayed Mukhtar v. California State University, Hayward,* 299 F.3d 1053, 1063 (9th Cir.2002).

25 *Ford*, 2008 WL 5173615 at *11.

26 *Id*. at *12.

27 *People v. Ramirez*, 155 P.3d 371 (Colo. 2007).

28 *Clements v. Davis*, 217 P.3d 912 (Colo. App. 2009), *cert. denied*, 2009 WL 3260959 (Colo. Oct 13, 2009).

29 *Trattler v. Citron*, 182 P.3d 674 (Colo. 2008).

30 *Clements* at 914.

31 *Id*. at 915.

32 *Id*.

33 *Trattler*, 182 P.3d 674.

34 *Erskine v. Beim*, 197 P.3d 225 (Colo. App. 2008).

35 *Carlson v. Ferris*, 58 P.3d 1055 (Colo. App. 2002), *Svendsen v. Robinson*, 94 P.3d 1204 (Colo. App. 2004) and *Wocnicki v. Music*, 119 P.3d 567 (Colo. App. 2005).

36 *Trattler*, 182 P.3d at 682-683.

37 *Clements* at 915.

38 *Id*. at 916.

39 *Vitetta v. Corrigan*, 2009 WL 2527856 (Colo. 2009) (This opinion has not been released for publication in the permanent law reports).

40 C.R.S. § 13-64-203(1).

41 C.R.S. § 13-64-205(1)(f)(I).

42 C.R.S. § 13-64-205(1)(f)(II).

43 *See* C.R.S. § 13-64-302(1)(b).

44 *Vitetta*, 2009 WL 2527856 at *7.

45 140 P.3d 177 (Colo. App. 2006).

46 *Vitetta*, 2009 WL 2527856 at *9.

47 *Kuhn v. State*, 924 P.2d 1053, 1059 (Colo. App. 1996).