Colorado Court of Appeals 101 West Colfax Avenue, Suite 800 Denver, CO 80202	
Denver District Court The Honorable Michael A. Martinez 2008CV9245	
Plaintiff-Appellant/Cross-Appellee: Joan L. Holley. **v.** **Defendant-Appellee/Cross- Appellant:** Linda C. Huang, MD.	**COURT USE ONLY**
Attorney or Plaintiff-Appellant/Cross-Appellee Joan L. Holley: Andrew T. Brake, Reg. Andrew T. Brake, P.C. 777 E. Girard Ave., Suite 200 Englewood, CO 80113 Phone Number: (303)806-9000 Fax: (888) 236-7709 E-mail: atbrake@gmail.com Registration No: 12021	Case Number: 2010CA1187
OPENING BRIEF	

Comes now Joan L. Holley ("Ms. Holley") and for her Opening Brief provides as follows:

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STATEMENT OF THE ISSUES PRESENTED FOR APPEAL

1. Whether the Court erred in prohibiting Ms. Holley from testifying concerning what she would have done had an appropriate informed consent process taken place.

2. Whether the Court erred in prohibiting relevant expert testimony including of documentation negligence, causation, "standard of care" and otherwise.

3. Whether the Court erred in evidentiary rulings, including limiting expert cross examination on "standard of care", and refusing expert opinion *voir dire*.

5. Whether the Court erred in addressing juror questions, by failing to timely and/or correctly address questions of Ms. Holley's experts Dr. Pousti, and Dr. Festekjian.

6. Whether the Court erred in its instructions to the jury, including refusing Ms. Holley's case theory; causation instruction; informed consent instructions, using irrelevant battery affirmative defense instruction; omitting the burden on Dr. Huang; and inappropriate language in the carrying instruction and verdict forms.

STATEMENT OF THE CASE

This is an informed consent medical malpractice breast augmentation case, arising as a result of a significant surgical change made in the surgical holding room just prior to surgery. The surgical plan, for which informed consent had been obtained, involved relatively non invasive surgery underneath both breasts for implant placement. The surgical change was to Ms. Holley's right breast, and involved cutting all around the nipple areola complex, areola tissue removal, and surgery along the front of Ms. Holley's right breast down to lower chest wall crease, and then performing further surgery under the chest wall muscle to place an implant. The planned surgery, as was performed on Ms. Holley's left breast, merely involved a small incision at the lower breast/chest wall crease, and then surgery under the chest wall muscle to place the implant. It did not involve the nipple areola complex.

Dr. Huang decided to change the right breast surgical procedure within a matter of minutes of surgery, and added language to the consent form that the surgery on the right breast would be around the nipple. Ms. Holley initialed the surgical consent form, however her informed consent was not obtained. The left breast surgery went as planned and contemplated. Ms.

Holley's right breast was disfigured by the much more invasive surgery, and she suffered sensation loss and other adverse effects the substantially more invasive surgical procedure performed on her left breast.

The Court deprived Ms. Holley of a fair trial by making numerous serious errors, necessitating this appeal.

STATEMENT OF FACTS

Ms. Holley first saw Dr. Huang on September 25, 2006. H. Apx.[1] P. 999 L. 1-7. Dr. Huang recommended that the surgical incision be under the breast. H. Apx. P. 1000 L. 21- P. 1001 L. 2. The planned surgical procedure had the least possibility of deformity and something going wrong, and would maintain breast sensation and form. H. Apx. P. 1006 L. 7-14. H. Apx. P. 1000 L. 16-20. Ms. Holley wanted both breasts to be the same. H. Apx. P. 1001 L.11-15, and wanted sensation preserved. H. Apx. P. 1006 L. 7-14. The surgery discussed and planned was to be breast augmentation via bilateral inframammary implant placement (Bilateral sub pectoral augmentation mammoplasty). H. Apx. P. 1012 L. 17-20 ; H. Apx. P. 2264.

The morning of surgery, Dr. Huang came in to the pre-operative holding area and wanted to change the surgery. H. Apx. P.1019 L. 17-P. 1020

[1] H. Apx. Refers to the Appendix which Ms. Holley has compiled in PDF searchable format, and which is included in the disc provided here with. The Appendix includes the trial transcript, the District Court record, and select exhibits, and questions asked by the Jury.

L. 1. Ms. Holley was prepped for surgery, had taking her clothes off, put on a gown, was laying on a gurney and had a needle placed in her arm and was hooked to something, H. Apx. P.1019 L. 11-16. Ms. Holley was crying, distraught, disoriented, she was not thinking, did not have her glasses on, and was in no condition to sign anything. Ms. Holley was also depressed, scared, and risks were not explained nor were differences between the procedures. H. Apx. P.1020 L. 17-23; H. Apx. P.1020 L. 15-16, and Ms. Holley was in no condition to sign anything. H. Apx. P.1021 L. 10-11. Dr. Huang said that she was going to cut around the nipple and put the implant in. H. Apx. P.1020 L. 24-25. Dr. Huang said that this new procedure would raise the right breast, and thought it would be better to do so. H. Apx. P.1021 L. 7-10. It was Dr. Huang who brought this up, not Ms. Holley. H. Apx. P.1021 L. 4-5.

In the pre-op holding area, Dr. Huang wrote as follows on previously signed consent form: "incision on right side will be around the nipple" H. Apx. P.2505; H. Apx. P. 2363; H. Apx. P. 1017 L. 2-9. Ms. Holley initialed it. H. Apx. P.1023 L. 6-8. Dr. Huang has no recollection whatsoever regarding the day of surgery. H. Apx. P. 1439 L. 18 – P. 1441 L. 11. In her surgical report Dr. Huang wrote: "I decided it was [sic] look more

symmetrical if she had a circumareolar approach on the right and an inframammary approach on the left." H. Apx. P. 2269.

Dr. Huang removed skin from the areola and left scarring all the way around Ms. Holley's right nipple. H. Apx. P. 1539 L. 7-12. Surgery on the right breast was much more invasive (H. Apx. P. 1539 L. 17 – 25; H. Apx. P. 1512 L. 12-24), which Ms. Holley learned much later. H. Apx. P.1021 L. 15-20. The surgical approach for the right breast was not within her contemplation or objective. H. Apx. P.1022 L. 2-9. The right breast surgery as performed had greater risks of injury. H. Apx. P.1022 L. 19-23.

As a result of the surgery, Ms. Holley's right nipple areola complex surface area is about two and a half to three times larger than her left nipple. H. Apx. P.1045 L. 20-21. There is scarring around the entire nipple areola complex. H. Apx. P.1539 L. 13-16. Vol. 3 P. 1542 L. 9-11. A crescent shaped wedge of skin was removed around the areola, so that the nipple and areola could be pulled up and then it was sutured together. H. Apx. P. 1543 L. 3 – P. 1544 L. 5.

A photo Ms. Holley took of her breast (Holley Exhibit. 11) shows the right breast disfigurement. H. Apx. P.1093 L. 8-25. The resulting injuries include discoloration, right areola spreading, scarring, discoloration, loss of

sensation, and pain. H. Apx. P.1094 L. 15 – P. 1096 L. 18. In addition Ms. Holley has experienced substantial adverse psychological harm and damage. H. Apx. P.1096 L. 19 – P. 1098 L. 2. By comparison Ms. Holley's left breast is pretty and the scar from the incision under the breast can't really be seen. H. Apx. P.1098 L. 16-23. Ms. Holley went into a state of depression. H. Apx. P.1035 L. 15–21. Ms. Holley has always had problems with depression. The degree of depression caused by this was some of the worst that she has experienced. H. Apx. P.1050 L. 2-9.

SUMMARY OF THE ARGUMENT

Prejudicial errors of the Court began with *in limine* rulings. Ms. Holley was prohibited from testifying that she would not have agreed to the surgical change had she received appropriate informed consent. Ms. Holley was thereby deprived of her important testimony relevant to the absence of informed consent. Ms. Holley's experts could not opine concerning relevant and important documentation deficiencies, thereby being deprived from expressing their disclosed opinions.

During trial, the numerous prejudicial errors included prohibiting Ms. Holley's experts from mentioning the phrase "standard of care", improperly

limiting and striking testimony, erroneously dealing with juror questions and unduly limiting cross examination.

Jury instruction errors included prohibiting Ms. Holley from theory of the case language, giving a portion of the irrelevant battery affirmative instruction, causation instruction errors, instructing the jury on surgical outcome as not reflective of negligence (which was irrelevant and highly prejudicial), and that the jury could consider it more probably than not that a person acted in accordance with habit, thereby benefitting Dr. Huang who had no recollection of consent discussions. The Court also erroneously instructed on the irrelevant subject that a physician does not guarantee a successful outcome, which was irrelevant. Similarly, the Court failed to instruct on Dr. Huang's duty to go forward in accordance with *Stauffer v. Karabin*, 492 P. 2d 862, 865(Colo. App. 1971). Dr. Huang's only retained expert ultimately testified, on cross examination, that he really did not have enough evidence to form a standard of care opinion in this case about Dr. Huang because of her lack of memory. H. Apx. P. 2044 L. 20 – P. 2045 L. 3.

ARGUMENT

MOTION IN LIMINE ERRORS - ADMISSIBILITY OF ALLEGED SUBJECTIVE STANDARDS OF CARE

Standard of Appellate Review and Citation to Record (See below)

The standards of review are abuse of discretion on evidentiary rulings, *Estate of Ford v. Eicher*, 220 P.3d 939, 942 (Colo. App. 2008); *People v . Ramirez*, 155 P.3d 371 (Colo.2007) and *de novo* on questions of law. *St. James v. People*, 948 P.2d 1028, 1031 n. 8 (Colo. 1997).

The Court granted (H. Apx. P. 436) Dr. Huang's motion in limine (H. Apx. P. 184), over Ms. Holley's objection (H. Apx. P. 212) to exclude subjective standards of care testimony, the effect of which was to preclude testimony of Ms. Holley's "experts' personal, subjective opinion or practice." H. Apx. P. 187. This ruling constitutes reversible error. *Ford at* 942, 943; *Ramirez* at 378. The Court failed to consider the appropriate factors, and failed to apply and make the appropriate findings. *Eicher* at 943. Expert opinions and conclusions are admissible where they are scientifically sound and based upon sufficiently reliable requirements. *Ramirez*, Id. at 378. The Court failed to correctly apply CRE 401, 402, 403 and 702.

ADMISSIBILITY OF WHAT MS. HOLLEY WOULD HAVE DONE

Standard of Appellate Review and Citation to Record (See below)

The standards of review are abuse of discretion on evidentiary rulings, *Eicher*, *Ramirez*; review is *de novo* on questions of law. *St. James*.

The Court granted (H. Apx. P. 436) Dr. Huang's motion in limine (H. Apx. P. 190), over Ms. Holley's objection (H. Apx. P. 225) ruling that Ms. Holley could not testify as to what she would have agreed to had she received informed consent by Dr. Huang. H. Apx. P. 436.

So ruling was contrary to CRE 701, which permits a witness to express opinions rationally based on perception which is helpful to a clear understanding of the testimony or determination of a fact in issue. The Court's ruling was also contrary to CRE 401, 402 and 403, as Ms. Holley's testimony would have been highly probative of whether or not her informed consent had been obtained. Pursuant to *People v. Cousins*, 181 P.3d 365 at 372 (Colo. App. 207), the maximum probative value and the minimum prejudicial impact of Ms. Holley's anticipated testimony should be assumed, and the need for evidence exclusion must be great. There was no such "great" need.

Furthermore, Ms. Holley's testimony was relevant and probative of what a reasonable person in her situation, and under the circumstances, and having her goals and objectives which included minimizing scarring, loss of sensation and invasiveness, would have agreed to. Ms. Holley had initially chosen the procedure that had the least possibility of deformity, or of

something going wrong, and that would maintain sensation and breast form. H. Apx. P. 1006 L. 7-14. H. Apx. P. 1000 L. 16-20. Ms. Holley was entitled to explain her reasoning and motivations as to why she would not have agreed to the procedure performed on her right breast had informed consent occurred.

The Court wrongfully used the "reasonable person" standard set forth in CJI 15:10 (3). What Ms. Holley would have done is probative of, and relevant to what a reasonable person would have done, had the hypothetical "reasonable person" been provided the information required in order to obtain his or her informed consent.

Ms. Holley's testimony would have been probative of her state of mind just prior to surgery when the surgical procedure was changed, and of her mental condition and ability to comprehend, as well as being afforded a reasonable period of time within which to have understood, reflected upon, and made an informed decision, all of which was relevant. H. Apx. P. 1377 L. 20 – P. 1388 L.9. In determining what a reasonable person would do in Ms. Holley's specific circumstances, what Ms. Holley would have done is relevant evidence for the jury in assessing this reasonable person standard, and admissible. CRE 401, 402 and 403. Ms. Holley's testimony was also

probative, and the best evidence of whether or not Ms. Holley had been appropriately informed, and was consistent with the surgical report where of Dr. Huang wrote "I decided it was look more symmetrical . . . ." H. Apx. P. 2269..

NEGLIGENCE IN DOCUMENTATION

Standard of Appellate Review and Citation to Record (See below)

The standards of review are abuse of discretion on evidentiary rulings, *Eicher*, *Ramirez;* review is *de novo* on questions of law *St. James*.

The Court granted (H. Apx. P. 436) Dr. Huang's motion in limine (H. Apx. P. 174), over Ms. Holley's objection (H. Apx. P. 212) to exclude evidence of negligence not causally related to alleged damages, the effect of which was to prohibit all direct and cross examination regarding documentation related negligence, an important aspect of informed consent. The Court repeatedly prohibited direct and cross exam relating to documentary failures, in complete disregard of the disclosed opinions of Ms. Holley's experts.

EVIDENTIARY RULING ERRORS – DR POUSTI

Dr. Pousti has practiced plastic surgery in San Diego 13 years. H. Apx. P. 1352 L. 13-15. His practice is purely cosmetic surgery. H. Apx. P.

1352 L. 21-24. Dr. Pousti has impeccable world class credentials. (Magna Cum Laude and Alpha Omega Alpha). H. Apx. P. 1353 L. 10-21). He was a Clinical Fellow in surgery at Harvard Medical School, and Chief Resident at Brigham Children's Harvard, Boston. H. Apx. P. 1354 L. 21 – P. 1355 L. 1. See also H. Apx. P. 1354 L. 4-11, P. 1355 L. 23 – P. 1356 L. 8. Dr. Pousti was endorsed (H. Apx. P. 491-493) by Ms. Holley to testify about standards of care and Dr. Huang's negligence.

The endorsed deviations included failure to document discussions (H. Apx. P. 492); failure to have mastopexy consent forms (H. Apx. P. 492); no documentation that mastopexy was mentioned or needed (H. Apx. P. 492); the consent form which was modified at the time of surgery makes no mention of mastopexy or the incision undertaken (H. Apx. P. 492); the description of the incision being "around the nipple" was imprecise, and anatomically incorrect (H. Apx. P. 492); there was no documentation of consent for mastopexy, whereas the standard of care was for Dr. Huang to have documented a discussion regarding the procedure and the risks and complications (H. Apx. P. 492); there was no documented consent for mastopexy, including that Ms. Holley understood the planned procedure and the common complications (H. Apx. P. 492-493); the complications would

have included spreading of the areola, scarring, abnormal scarring, loss of sensation of the nipple areola, continued breast asymmetry, unsatisfactory cosmetic result and the need for further surgery (H. Apx. P. 493).

Dr. Pousti was also endorsed to testify that loss of sensation was permanent (H. Apx. P. 493); the surgery on Ms. Holley's right breast was of increased complexity, which thereby increased the risk of complications to Ms. Holley's right breast. (H. Apx. P. 493); and that Dr. Huang's failure to clearly and accurately document changes in the procedure on the consent form, and Dr. Huang's failure to write or dictate a note that she had covered the necessary information to obtain Ms. Holley's consent was substandard (H. Apx. P. 493).

Prohibiting Negligence in Documentation Testimony.

Standard of Appellate Review and Citation to Record (See below)

The standards of review are abuse of discretion on evidentiary rulings, *Eicher*, *Ramirez;* review is *de novo* on questions of law, *St. James*.

Prior to Dr. Pousti testifying, Dr. Huang argues *ad nauseum* that Dr. Pousti should not be permitted to testify concerning negligent documentation, nor causation H. Apx. P.1321 L. 16 – P. 1344 L.24. The Court ruled that Dr. Pousti could not testify that that Dr. Huang was negligent ". . . in the manner

in which she obtained the records or made her entries." H. Apx. P. 1340 L. 14-17 (Vol. 3 P. 24). The Court also initially essentially ruled that Dr. Pousti could testify concerning verbal consent and the basis for the opinion. H. Apx. P. 1343 L. 16 – P. 1344 L. 7. The Court ruled that there must be a causal connection or nexus between the lack of informed consent and the injury, and incorrectly ruled that it was not enough to show that undisclosed risks occurred for testimony to be admissible. H. Apx. P.1340 L. 21 – P. 1341 L. 9. H. Apx. P. 339 L. 15 – P. 1340 L. 17.

Ms. Holley made an offer of proof of Dr. Pousti's testimony, based upon Dr. Pousti's deposition that Dr. Pousti would testify that informed consent is to be both written and verbal; that written consent is required, not just verbal, in order to obtain informed consent in changing a procedure H. Apx. P.1335 L 9 – 15.The offer of proof included Dr. Pousti's opinions about the need for documentation of the greater risks of mastopexy, and the risks associated with mastopexy performed n Ms. Holley, including sensation loss with circumareolar incision, areola scarring and related aspects and complications, loss of enervation or sensitivity, and consent forms. H. Apx. P.1335 L 9 –P. 20 L. 23. Further, that Dr. Pousti would testify that he does not believe that the right breast outcome would have been the same if the

mastopexy had not been performed on Ms. Holley's right breast. H. Apx. P.1336 L. 24-25. That Dr. Pousti would testify that there was no indication for a mastopexy in this case. H. Apx. P.1337 L. 12-14.

When on direct exam Dr. Pousti was asked what a reasonable and careful plastic surgeon should have done relative to a patient's understanding, Dr. Pousti described what should have been done, including the responsibility to document the discussion, including the risk, complications reviewed, and that the patient had sufficient time to think about the additional procedure, its risks and complications, and to make sure that the patient had time to obtain answers to questions. H. Apx. P.1377 L. 20 – P. 1378 L. 9. Dr. Huang's counsel asked to approach the bench (H. Apx. P.1378 L. 10-11), objecting that Dr. Pousti's response violated the Court's order concerning documentation. H. Apx. P.1378 L. 14- P. 1379 L. 1. The Court did not accept Ms. Holley's argument that it was only reasonable for Dr. Pousti to explain the basis of his opinion, and that it would be unduly prejudicial to tell the jury to disregard the testimony, as it was an integral part of Dr. Pousti's testimony and such an instruction would adversely affect Dr. Pousti's credibility. H. Apx. P.1379 L. 2 – P. 1381 L. 2). The Court instructed the Jury "Ladies and gentlemen, the Court will not instruct you that you should

disregard that portion of the response of Dr. Pousti relating to documentation of the informed consent, and specifically the documentation that he complained that – or noted in his answer to this last question." H. Apx. P.1381 L. 25 – P. 1382 L. 5. The Court thereby erred, to the substantial prejudice of Ms. Holley. The Court's ruling deprived Ms. Holley of a fair trial, was violative of CRE 401-3, 702, and CRCP 26, and warrants a new trial.

Direct Examination Limitation Errors.

Standard of Appellate Review and Citation to Record (See below)

The standards of review are abuse of discretion on evidentiary rulings, *Eicher*, *Ramirez*; review is *de novo* on questions of law, *St. James*.

Ms. Holley's right breast has a longer scar, the areola has spread, and there is sensation loss. H. Apx. P. 1383 L. 4-6. When on direct exam Dr. Pousti was asked if those were the expected type of complications from the mastopexy procedure on the right breast, the defense erroneously objected on the grounds of Rule 26 disclosure, and without affording Ms. Holley's counsel to respond, the Court sustained the objection. H. Apx. P. 1383L..1 - 11. In her disclosure, Ms. Holley had sufficiently disclosed Dr. Pousti's opinions in this regard as follows:

> These complications would have included spreading of the areola, scarring, abnormal scarring, loss of sensation of the nipple areola, continued breast asymmetry, unsatisfactory cosmetic result and the need for further surgery.

H. Apx. P. 493.

This endorsement language had already been pointed out to the Court at H. Apx. P. 1327 L. 6- P. 1328 L.7. In addition, in her expert endorsement (H. Apx. P. 495), Ms. Holley disclosed that each of her experts "is expected to render opinions in accordance with the opinions elicited from them during their depositions, . . ." See also H. Apx. P. 1335 L. 4-8 where this had already been pointed out to the Court. In his deposition Dr. Pousti was cross examined about sensation or loss of sensation by Mr. Karr at Pousti Depo. pages 62, 64, 65, 67, 75, 79, 82, 86, 87, 89, 103, 131, 136, 138 and 143 (see also H. Apx. P. 1328 L. 2); about areola spread at Pousti Depo. , pages 97 (spreading of the areola is quite common with mastopexy and not with breast augmentation at lines 5-8), and at Pousti Depo., page 99 (See also H. Apx. P. 1328 L. 1-2). Additional scarring was addressed at Pousti Depo., pages 84 L. 11-16 (additional risks include additional scarring and change of areola shape), Pousti Depo., P. 85 L. 11, Pousti Depo., P. 86 L. 20 (abnormal scarring, hypertrophic scarring), Pousti Depo., P. 130 L. 8 (abnormal scarring), Pousti Depo., P. 142, and 143. See also H. Apx. P. 1327 – P. 1328

L. 5. In addition, that some risks are greater with circumareolar mastopexy than with other types of mastopexy. H. Apx. P. 1404 L.1-3. There are some complications that occur more frequently with an incision around the areola than with other types of mastopexy. H. Apx. P. 1416 L. 7- P. 1417 L. 16. This included spreading of the areola. H. Apx. P. 1417 L. 4-16. The Court's ruling deprived Ms. Holley of a fair trial, was violative of CRE 401-3, 702, and Rule 26, CRCP, and warrants a new trial.

Dr. Pousti Cross - Prejudicial Striking of Scarring Testimony

Standard of Appellate Review and Citation to Record (See below)

The standards of review are abuse of discretion on evidentiary rulings, *Eicher*, *Ramirez;* review is *de novo* on questions of law, *St. James*.

During cross exam, when asked to cite literature to support the statement that there's going to be a scar where an incision is placed, Dr. Pousti responded "No, I cannot. But I'm basing it based on my clinical experience." H. Apx. P.1404 L. 8-13. Dr. Huang moved to strike, the answer as being non-responsive, which the Court then sustained as not limited to the words either "yes" or "no". H. Apx. P.1404 L. 14-18. The answer was responsive, and the Court striking the entire answer was error, and contrary

to CRE401-3 and 702. Nor did striking the response make common sense, other than further demonstrating the unfair treatment of Ms. Holley.

The Court refused, as a result of Dr. Huang's objection, to allow Dr. Pousti to respond as to whether a reasonable surgeon should advise a patient of the risk of areola spreading from a circumareolar mastopexy as was performed in this case. H. Apx. P.1417 L 1-22. This was prejudicial and violative of CRE 401-403, and C.R.C.P. 26. The question sought evidence that was highly probative and logically relevant to informed consent and the standard of care, and was appropriately disclosed by Ms. Holley pursuant to Rule 26, C.R.C.P. H. Apx. P. 491-493.

Standard of Care Terminology Prohibited

The standards of review are abuse of discretion on evidentiary rulings, *Eicher*, *Ramirez;* review is *de novo* on questions of law, *St. James*.

Questioning using the term "standard of care" was prohibited in requesting the informed consent opinion of Dr. Pousti H. Apx. P.1374 L. L. 7-14. At H. Apx. P.1375 L. 14-22. The Court held that the question was inappropriate and sustained an objection as to form.

When Dr. Pousti was asked "Do you have an opinion whether or not that was negligence in this case, Doctor?", Dr. Pousti responded that "the

process of informed consent, . . . was below the standard of care." (H. Apx. P.1375 L. 23 to P. 1376 L. 2). A bench conference was held (H. Apx. P.1376 L. 3-7) and Dr. Huang's counsel moved to strike Dr. Pousti's response, arguing that the jury instructions do not refer to standard of care, but whether or not conduct was "reasonable, acceptable, and appropriate." H. Apx. P.1376 L. 3-17. Dr. Huang erroneously argued that it was "impermissible to ask a question of standard of care claiming that it gives a false impression. H. Apx. P.1376 L. 18-24. Upon understanding the objection, the Court instructed Ms. Holley's counsel to rephrase the question, and then sustained the objection to the form of the question, telling the jury that the question will be rephrased. H. Apx. P.1376 L. 25 – P. 61 L. 8. Upon the defense asking that the response be stricken, the judge struck the answer and instructed the jury to disregard the response. H. Apx. P.1377 L. 9-12. The rulings were prejudicial, and contrary to established evidentiary rules and case law, including CRE 401, 402, 403, 702, and *Eicher*, at 942, 943; *Ramirez* id. In contradistinction, and to show the fundamental unfairness of the trial, the Court gave Dr. Huang's erroneous jury instruction with the phrase "standard of care" H. Apx. P.448.

Juror Question Not Being Addressed – Dr. Pousti

Standard of Appellate Review and Citation to Record (See below)

The standard of review is abuse of discretion, on a specific finding of good cause. C.R.C.P. 47 (u). *Medina v. People*, 114 P.3d 845, 847 (Colo. 2005).

The Court failed to let counsel know of a juror question (Juror Question 10, H. Apx. P. 2553-4; H. Apx. P.1511 L. 6 – P. 1512 L. 2). The question was "In your experience is it common for the patients to cry in the post op exam room" (H. Apx. P. 2553).

Ms. Holley made a record of her objection to the Court not informing the parties of the jury question, as Dr. Pousti could have effectively responded and clarified any confusion. H. Apx. P.1788 L. 7 – P. 1789 L. 3. The Court received and reviewed Juror Question 10 before Dr. Pousti left, but neglected to address it with counsel, or make any record, prior to releasing Dr. Pousti. H. Apx. P. 1791 L. 18-23. The Court noted that the testimony had been about the preoperative time period, and that the Court could not change the question (H. Apx. P.1791 L. 18 – P. 1792 L. 8), and went on to state:

> So there wasn't anything, really, I could do with the question, and that was my rule on it in the absence of Dr. Pousti or prior to releasing Dr. Pousti.

H. Apx. P.1792 L. 9-12.

C.R.C.P. 47 (u) provides the Court discretion to prohibit or limit questions ". . . on a specific finding of good cause . . ." The Court failed to demonstrate good cause to withhold this relevant question. Ms. Holley had the right to have this question answered, and any juror confusion addressed by Dr. Pousti. The failure to do so deprived Ms. Holley of a fair trial.

EVIDENTIARY RULING ERRORS – DR FESTEKJIAN

Dr. Festekjian is an associate professor in plastic surgery at UCLA. H. Apx. P.1579 L. 9-10. He is board certified in general and plastic surgery. H. Apx. P.1581 L. 18-19. Over 90 percent of his practice is breast reconstruction. H. Apx. P. 1585-1588. Dr. Festekjian has an active clinical practice, and teaches plastic surgery to residents and medical students. H. Apx. P. 1581 L. 6-9.

Dr. Festekjian was endorsed (H. Apx. P. 487-491) by Ms. Holley to testify regarding standards of care for informed consent, the negligence of Dr. Huang, damages, permanency and additional corrective surgery. Dr. Festekjian examined Ms. Holley and evaluated her condition. H. Apx. P. 1583 L. 5-9. Dr. Festekjian's testimony included that Dr. Huang performed two separate procedures on Ms. Holley's right breast, each of which requires a consent that needs to be addressed with a patient H. Apx. P. 1584 L. 21 – P.

1585 L. 4. Dr. Huang did not act as a reasonable and careful plastic surgeon in changing the procedure that was to be performed on Ms. Holley's right breast. H. Apx. P. 1584 L. 10 – P. 1585 L. 11. It was highly likely that Ms. Holley's areola would spread, the diameter would increase, unless a purse string suture was placed around the areola. H. Apx. P. 1593 L. 4-6.

Permanent sensory loss to Ms. Holley's right breast nipple areola complex resulted from the surgery by Dr. Huang. H. Apx. P. 1602L. 4 – P. 1603 L. 8. So has spreading of the areola due to the circumareolar incision compounded by the large implant underneath. H. Apx. P.1601 L. 25 – P. 1602 L. 5. It is very unlikely that the spreading would have occurred had the mastopexy not been performed on Ms. Holley's right breast. H. Apx. P. 1601 L. 17-24.

Opinion Testimony Limitation Errors

Standard of Appellate Review and Citation to Record (See below)

The standards of review are abuse of discretion on evidentiary rulings, *Eicher*, *Ramirez;* review is *de novo* on questions of law, *St. James*.

Dr. Festekjian was prohibited from expressing his opinions, as set forth in Ms. Holley's C.R.C.P. Rule 26 expert endorsement (H. Apx. P. 488 as follows:

Q. Is it important for a reasonable and careful plastic surgeon to give a patient enough time to not only think about it but then to see if they have any questions about a particular procedure, such as a mastopexy, before performing it, Doctor?

MR. NIXON: Objection. Leading.

THE COURT: Sustained.

Q. (BY MR. BRAKE) Doctor, do you have an opinion as to why it is important for a patient to have a reasonable period of time to think about and contemplate a procedure such as a mastopexy together with an implant?

MR. NIXON: Objection. Leading.

THE COURT: Well, the question isn't, but the doctor hasn't been answering. He's just been stating his opinion. So on that basis, I'm going to sustain the objection.

H. Apx. P. 1592 L. 2-17. This occurred after the Court ruled that Dr. Festekjian could express opinions as an expert in plastic surgery. H. Apx. P. 1582 L. 21 – P. 1583 L. 4. This ruling was manifestly arbitrary, unreasonable and unfair, and contrary to C.R.E. 402, 403, and 702, in wrongfully excluding relevant, reliable, admissible opinion evidence. The ruling was also contrary to established precedent relating to admissibility of expert testimony. *Eicher*, 942, 943 (reasonably reliable scientific principles, the witness was qualified, and the testimony would be useful and assist the trier of fact); *Ramirez*, 378, 379. In *People v. Shreck*, 22 P.3d 68, 78 (Colo.2001), the trial Court failed to issue specific findings for a CRE 403

determination "as to whether the probative value of the evidence was substantially outweighed by its prejudicial effect." Id. at 70,78.

Dr. Festekjian was prohibited from expressing his opinion on a key consent issue in this case. The ruling was detrimental to all of the opinions of Dr. Festekjian as calling into question the propriety, and undermining and discounting all "opinions" expressed by Dr. Festekjian, and constitutes an abuse of discretion and reversible error pursuant to CRE 401, 402, 403, 702 and *Eicher*, *Shreck*, and *Ramirez*.

Juror Question Errors

Standard of Appellate Review and Citation to Record (See below)

The standard of review is abuse of discretion, on a specific finding of good cause. C.R.C.P. 47 (u); *Medina v. People*, 114 P.3d 845, 847 (Colo. 2005).

The jury had the following question of Dr. Festekjian (H. Apx. P. 1720):

> What is your opinion on the consent form. Should the change of surgical procedure be signed and dated by patient, operating surgeon and witness as the original consent form was executed.

Jury Question 11, H. Apx. P. 1720 L. 14 – 24.

The defense objected on grounds that it was a new issue (, H. Apx. P. 1721 L. 21-25, and the question went to documentation and placed emphasis

on documentation as the standard of care. Ms. Holley requested that the question be given as it was not a new issue and was relevant to what was necessary to effectuate informed consent. , H. Apx. P. 1722 L. 1-4. The Court refused to give the question ruling that the issue had already been effectively addressed (H. Apx. P. 1722 L. 8-13, and secondly, that the question was inconsistent with the Court's prior rulings on the issue of documentation, and the Court did not want to undue those rulings. H. Apx. P. 1722 L. 18-23). Not allowing this question to be answered constitutes reversible error, pursuant to CRE 401, 402, 403, 702 and *Eicher*, , *Shreck*, and *Ramirez*.

CROSS EXAMINATION PROHIBITATION ERRORS

Standard of Appellate Review and Citation to Record (See below)

The standard of review is abuse of discretion, *Eicher*; *Ramirez*; Vega v. People, 893 P.2d 107 (Colo.1995); People v. Liggett, 114 P. 3d. 85, 87 (Colo. App. 2005).

The Court erroneously prohibited cross examination of Dr. Huang's expert, Dr. Baker, thereby depriving Ms. Holley of a fair trial, including: prohibiting cross exam directed towards Dr. Huang's surgical report (H. Apx. P. 1997 L. 24 -1998 L. 5 and H. Apx. P. 1998 L. 12 – 17); prohibiting

questions of Dr. Baker about expressing an opinion without knowing what was discussed pre-operatively (H. Apx. P. 1999 L. 8-24); prohibiting examination about documentation and surgical success, and exhibits used by Dr. Huang during the cross examination of Ms. Holley's experts (H. Apx. P. 2001 L. 11 – P. 2005 L.4); prohibiting bias cross examination (H. Apx. P. 2006 L. 15-20); prohibiting inquiry about expressing opinions about circumstances when Dr. Baker was not there (H. Apx. P. 2017 L. 3-10); prohibiting exam regarding subject areas Dr. Baker would not express an opinion about as a scientist (H. Apx. P. 2017 L. 19-25); prohibiting meaningful cross examination about and admission of Exhibit 21, the American Society of Plastic Surgery Code of Ethics for plastic surgeons, which the defense utilized in cross examination of Ms. Holley's experts (Dr. Festekjian H. Apx. P. 1628 L. 10 – P. 1629 L. 25 (H. Apx. P. 2019 L. 12-P. 2024 L. 17); prohibiting cross exam about pre-surgical consent discussions (H. Apx. P.2037 L. 1 – P. 2038 L. 8); Prohibiting cross exam regarding a patient being provided with written consent documentation for a mastopexy (H. Apx. P. 2039 L. 24 – P. 2041 L. 8); prohibiting cross exam about mastopexy consent forms without the basis of the objection being stated (H. Apx. P. 2043 L. 15-22); prohibiting cross exam about Dr. Baker not

expressing an opinion about non-documented matters such as the consent discussions in this case. H. Apx. P. 2044 L. 10-17.

While the Court has broad discretion in limiting cross examination, whereas here the Court rulings are manifestly arbitrary, unfair and unreasonable, so doing constitutes reversible error. People v. Liggett, 114 P. 3d. 85, 87 (Colo. App. 2005).

Exhibit Admission Errors

Standard of Appellate Review and Citation to Record (See below)

The standard of review is abuse of discretion, *Eicher*; *Ramirez*.

Previously undisclosed prejudicial Photos from the UCLA web site (Exhibit 42) were erroneously admitted (H. Apx. P. 1785 L. 2-9), over objection (H. Apx. P. 1783 L. 15 -20, 22 – P. 1784 L. 1; P. 1784 L. 12 – P. 1785 L. 16), long after Dr. Festekjian had left the stand.

Previously undisclosed photos from Dr. Huang's web site (H. Apx. P. 1926 L. 1-9) were erroneously permitted to be used by Dr. Baker (H. Apx. P. 1925 L. 22 – P. 1926 L. 23), over objection (H. Apx. P. 1925 L. 13 –20) and in violation of C.R.C. P. 16 and 26. H. Apx. P. 1924 L. 1- P.1926 L. 23.

Dr. Baker was improperly (C.R.E. 803(18)) allowed (H. Apx. P. 1945 L. 8-13) to read from or comment upon a journal article (H. Apx. P. 1946 L.

22 – P. 1947 L. 17), over timely objection. H. Apx. P. 1945 L. 8-13. In that Dr. Baker disagreed that the journal was a reliable authority, but rather one that presents articles, technically advertisements, it was permitting him to do so was error. H. Apx. P. 1945 L. 8-13; H. Apx. P. 1944 L. 9-14. See also H. Apx. P. 1963 L. 1-8.

JURY INSTRUCTION ERRORS

Standard of Appellate Review and Citation to Record (See below)

The standard(s) of review are abuse of discretion as to instruction formulation, *Woznicki v. Musick*, 119 P.3d 567, 573 (Colo. App. 2005) (overruled on other grounds by, *Trattler v. Citron*, 182 P.3d 674 (Colo. 2008)), and *de novo* on questions of law. *St. James*, Id. Jury Instructions rulings occurred at H. Apx. P. 2133 L. 21 – P. 2158 L. 6.

Pattern Jury instruction use is mandatory, C.R.C.P. 51.1(1), except where there are no Colorado pattern instructions, or where the factual situation or changes in the law warrant, and the instructions shall be "clear, unambiguous, impartial and free from argument, using CJI instructions as models as to the form so far as possible. C.R.C.P. 51,1(2).

Jury Instruction 7

The following paragraph was erroneously added to CJI-Civ. 15:11 (CLE ed. 2010):

> Express consent may be given orally or in writing. Implied consent means words or conduct of the Plaintiff that led the defendant reasonably to believe that the plaintiff was consenting to the operation.

H. Apx. P. 448 (Court Instruction 7). This was language added to the stock instruction by Dr. Huang, and given by the trial Court. H. Apx. P. 2140 L. 4-5 (ruling by the Court). Ms. Holley objected as being an incorrect statement of applicable law. H. Apx. P. 2139 L. 14 – P. 2141 L. 11. The language was intended to serve as part of the battery affirmative defense set forth in CJI-Civ. 15:8 (CLE ed. 2010), was misleading under the facts of this case, and the words "implied consent" were nowhere stated or defined in any other instruction. This was not a case of implied consent. Rather a case of lack of informed consent. This language was not in accordance with nor supported by the testimony of the experts. Implied consent was not at issue nor was it tried, as the jury heard no evidence of implied consent. H. Apx. P. 2139 L. 14 – P. 2141 L. 11. Had this language been appropriate, there should have been an additional instruction regarding it being an affirmative defense with the burden of proof thereof being on Dr. Huang. H. Apx. P. 2140 L. 13 – P. 2141 L. 2.

The instructions on use for CJI-Civ. 15:10 (CLE ed. 2010) (note 7) and CJI-Civ. 15:7 (CLE ed. 2010) (note 1) make it clear that only "the

instructions in subpart C of this part I should be" used if the claim is only based upon lack of "informed consent", as in this case. The above added language created an issue of fact not supported by the evidence, and diverted the jury from the factual issues in the case, thereby constituting reversible error. *Millenson v. Department of Highways*, 41 Colo. App. 460, 590 P.2d 979 (App. 1978).

The giving of this instruction was an abuse of discretion in instruction formulation, and was contrary to established Colorado law, necessitation *de novo* review, and was unduly prejudicial and warrants reversal.

Jury Instruction 10

Jury Instruction 10, given at Dr. Huang's request reads (H. Apx. P. 2144 L. 15 – P. 2145 L. 9 (Court Ruling)) :

> In considering whether or not the defendant exercised ordinary and reasonable care in treating plaintiff, you must be guided by the evidence presented in this case. You cannot set up a standard of your own, but must be guided in that regard solely by the testimony of the physicians who appeared in this action, according with the instructions of the **standard of care** of physicians contained herein. (*Emphasis added.*)
>
> In case of doubt as to what a person has done, it may be considered more probably that he has done what he has been in the habit of doing, than that he acted otherwise.

H. Apx. P. 451 (Court Instruction 10).

First Paragraph – "Standard of Care"

Ms. Holley's objections to the first paragraph included that if the case of *Clayton v. Hepp* was intended to be instructed upon, then there would have been a separate stock instruction thereon. H. Apx. P. 2143 L. 9-15. It was duplicative and misleading, as there was already an instruction on the subject. H. Apx. P. 2143 L. 16-22. Apx. P. 2143 L. 23 - P. 2145 L. 15. See Instruction 3. H. Apx. P. 444.

At the behest of Dr. Huang, H. Apx. P. 1374 L. 7-14, use of the words "standard of care" were totally prohibited during trial, not only during direct and cross exam, but also when mentioned by a witness in answering a question (the Court would strike the testimony, H. Apx. P. 1377 L.9-12). This instruction demonstrates the prejudicial favoritism shown Dr. Huang by the Court, and the blatant unfairness of the trial proceedings. Dr. Huang's reliance upon *Clayton* was misplaced.

Jury Instruction 10 - Second Paragraph – "Habit" Presumption

Ms. Holley objected on grounds that this "habit" instruction (H. Apx. P. 451 (Court Instruction 10)) was not a correct statement of the law and was improper. H. Apx. P. 2145 L. 16 – P. 2146 L. 19.

C.R.E. 406 governs the admissibility of habit testimony but in no way creates or permits a presumption concerning such "habit" testimony. Dr.

Huang's reliance upon *Bloskas v. Murray,* 646 P.2d 907 (Colo. 1982) and *Denver Tramway Co. v. Owen*, 70 Colo. 107, 36 P. 848 (1894) was misplaced. Both cases merely address admissibility. Giving this language was an abuse of discretion, as an appropriate stock jury instruction existed and was given as Instruction 3 (H. Apx. P. 444 (CD P. 443), based upon CJI-Civ. 3:8 (CLE ed. 2010). Vista Resorts, Inc. v. Goodyear Tire & Rubber Co., 117 P.3d 60, 70 (Colo. App. 2004); C.R.C.P. 51.1(1). The "habit" instruction wrongfully emphasized such testimony, which should have been considered as any other testimony, pursuant to Instruction 3 (H. Apx. P. 444 (CD P. 443), based upon CJI-Civ. 3:8 (CLE ed. 2010).

Jury Instruction 11 – Guarantee of Successful Outcome

This instruction, prepared by Dr. Huang, based upon CJI 15:4 read:

> A physician does not guarantee or promise a successful outcome by simply treating or agreeing to treat a patient. An unsuccessful outcome does not, by itself, mean that a physician was negligent. An exercise of judgment that results in an unsuccessful outcome does not, by itself, mean that a physician was negligent.

H. Apx. P. 452 (CD P. 451).

The tort of lack of informed consent occurs in the process of obtaining consent, *Gorab v. Zook,* 943 P.2d 423, 427 (Colo. 1997). Surgical outcome is irrelevant in determining negligence. Giving this instruction was reversible

error. Ms. Holley objected as the only issue tried in this case was informed consent. H. Apx. P. 2146 L. 20 – P. 2147 L. 11 (Vol. 6 P. 76 - P. 77). The technical performance of the surgery was not an issue, and no expert testified of negligence in performance, or relating to outcome. The sole negligence issue was informed consent. H. Apx. P. 2146 L. 20 – P. 2147 L. 11 (Vol. 6 P. 76 - P. 77). Ms. Holley was deprived of a fair trial as a result of this error of law. This instruction was misleading and confusing for the jury, and giving such and instruction constitutes error. *States v. R.D. Werner Co.,* 799 P.2d 427, 430 (Colo.App.1990)

Carrying Instruction 12 and Special Verdict Forms A and B

The trial Court is required to use stock instructions. *Vista Resorts,* Id. The Court abused its discretion in giving Instruction 12 (H. Apx. P. 453) and Special Verdict Forms A and B (H. Apx. P. 463- 466) prepared by Dr. Huang, and rejecting the language of CJI-Civ. 15:14 and 15:15, (CLE ed. 2010), over Ms. Holley's objections. H. Apx. P. 2147 L. 12 – 21, and rejecting those tendered by Ms. Holley, H. Apx. P. 313-319.

Instruction 12 and the verdict forms contained non-stock confusing language, and incorrectly placed the Defendant first, and only partially restated the determination to be made. They selectively included modified

language from Instruction 6 (H. Apx. P. 447 (CD P. 446)). The first 3 paragraphs of Instruction 12, and the first three paragraphs of the special verdict forms contain the language:

> 1. Did the defendant, Linda C. Huang, M.D., negligently fail to obtain the plaintiff's informed consent to use an incision around the areola to place an implant and perform a mastopexy on plaintiff's right breast?
> 2. Would a reasonable person in the same or similar circumstances as the plaintiff have not consented to the use of an incision around the areola to place an implant and perform a mastopexy on plaintiff's right breast, if she had been given the information required for informed consent?
> 3. Did the defendant's negligent failure cause the plaintiff additional injuries or damages?

H. Apx. P. 453 (CD P. 452)

Whereas the first 3 paragraphs of the carrying instruction, pursuant to CJI-Civ. 15:8 (CLE ed. 2010), and of the verdict forms, should have read:

> 1. Did the Plaintiff, Joan Holley, have injuries, damages or losses?
> 2. Was the defendant Linda C. Huang, M.D. negligent?
> 3. Was the negligence, if any, of the defendant Linda C. Huang, M.D. a cause of any of the injuries, damages or losses claimed by the plaintiff?

The language should have been limited to the stock CJI-Civ. 15:14 and 15 (CLE ed. 2010) language. They circumvent instruction 15:11, (H. Apx. P. 448 (CD P. 447) and do don't comprise an accurate restatement of Instruction 6 (H. Apx. P. 447 (CD P. 446)) by changing the language and meaning of

both paragraphs (1) and (2), using confusing language, and not mentioning the substance of instruction 7 (H. Apx. P. 448 (CD P. 447)), thereby erroneously misleading the jury by incorrectly summarizing the determination to be made

The language added to the carrying instruction and verdict forms do not make any mention of the burden on Dr. Huang pursuant to *Hamilton v. Hardy*, 549 P.2d 1099,1105 *cert. denied* (1976). The carrying instruction and verdict form were not intended to neutralize or re-characterize CJI 15:10 and 15:11, nor summarize them incorrectly, nor restate the language in CJI 15:10 and 15:11. H. Apx. P. 2147 L. 12 – 25 (Vol. 6 P. 77), and their use was unduly prejudicial to Ms. Holley and constitute reversible error. See also H. Apx. P. 2150-P. 2151 L. 22 setting forth Ms. Holley's objections. Ms. Holley's attempt to ameliorate the adverse consequence thereof by requesting modification was denied. H. Apx. P. 2137 L. 7-18. Dr. Huang's only retained expert ultimately conceded that he really did not have enough evidence to form a standard of care opinion in this case about Dr. Huang because of her lack of memory. H. Apx. P. 2044 L. 20 – P. 2045 L. 3.

Damages Instruction

The Court added the following language to Instruction 14 (H. Apx. P. 455):

> While you have heard argument and evidence in this case concerning the following physical injuries and/or conditions, you may not award damages for them: right arm pain, right hand numbness or tingling, right shoulder or chest pain, right breast pain.

This paragraph was added as a result of the Court directing a verdict on these damages. The Court erred in so doing, as argued by Ms. Holley in the record. H. Apx. P. 2129 L. 2 – P. 2130 L. 10. In addition, damages in an informed consent case are those which arise from a procedure for which informed consent did not occur. Thus it was for the jury to determine, based on the evidence, damages that resulted from the more invasive surgery which carried substantially greater risk.

Theory of the Case Instruction

Ms. Holly was entitled to a theory of the case instruction so long as it did not misstate the law, was not argumentative and did not improperly emphasize specific evidence. *Vista Resorts,* Id at 73, 74. The Court deferred to Dr. Huang in all respects concerning the statement of the case instruction, and wrongfully deprived Ms. Holley of a theory of the case instruction. The Court refused to allow Plaintiff a theory of the case instruction, by not allowing language regarding performing a lift of the right breast as a part of

the process. H. Apx. P. 2139 L. 2-13 (Vol. 6 P. 69); H. Apx. P. 442 (Instruction 2:1 CD P. 441 (Court Instruction 2)). Similarly, knowing that the Court was going to give Dr. Huang's carrying instruction, Ms. Holley requested that the carrying instruction at least be modified to state that Ms. Holley should have had a reasonable period of time to consider the matter. H. Apx. P. 2137 L. 7-18 as was testified to by Ms. Holley's experts. Ms. Holley was thereby deprived of a fair trial as a result.

Causation Instruction 19 (H. Apx. P. 460)

Ms. Holley objected on the grounds that the evidence was that there were many possible causes. H. Apx. P. 2148 L. 1-11. Ms. Holley requested that her tendered instruction based upon CJI-Civ. 9:20 (CLE ed. 2010). The Court ruled at H. Apx. P. 2148 L. 12-22. The Court thereby deprived Ms. Holley of a fair trial.

Tendered and Rejected Instructions H. Apx. P. 2149 L. 16 - 25

The Court erroneously rejected (H. Apx. P. 2149 L. 16 – P. 2158 L. 6) all of Ms. Holley's Tendered Instructions, based upon the supporting authorities as follows: Theory of Case -2:1 (H. Apx. P. 324); Causation – Multiple causes - 9:20 (H. Apx. 331), H. Apx. 2148 L. 1-22; Causation and reasonable foreseeability - 9:21 (H. Apx. 332); Elements of Informed

Consent - 15:10 (H. Apx. 334); Disclosure of Specific Risks – *Stauffer*, Id. (H. Apx. 336); Duty of Defendant to go forward, *Stauffer* , Id. (H. Apx. 337); Failure to inform of risks - 15:13 (H. Apx. 338); Physical Frailties - 6:7 (H. Apx. 339); Damages - 6:1(H. Apx. 340); Carrying Instruction - Special Verdict Form - 15:14. H, Apx. 341); Special Verdict Forms (H. Apx. 343 – 348). Ms. Holley was deprived of a fair trial as a result.

CONCLUSION

The numerous errors at trial deprived Ms. Holley from a fair presentation of her testimony, and of appropriate instruction to and deliberation of the jury, thereby necessitating a new trial as a matter of law. The errors including serious and numerous evidentiary errors in prohibiting vital testimony on both direct and cross examination.

Ms. Holley's experts were not permitted to express their disclosed opinions about which Dr. Huang had thoroughly cross examined them, and when the phrase "standard of care" was used, although inadvertently, the testimony was stricken. The Court refusing to allow any mention of documentary deficiencies or negligence relating thereto in the face of Dr. Huang having no recollection of the key time frame when the surgical change was made, was error. This error is highlighted by the only documenting that

Dr. wrote about the surgical change decision making was to the effect that she had made the decision leading to the change to the more invasive and risk prone procedure. This refusal to allow relevant expert testimony concerning the only claim in this case, by itself, constitutes blatant error and disregard for Ms. Holley's right to a fair trial. For the reasons stated above, the jury verdict and judgment entered should be set aside, and Ms. Holley should be granted a new trial on all issues.

Respectfully submitted this 8th day of October, 2010.

Andrew T. Brake, P.C.

By: *s/Andrew T. Brake*

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Colorado Court of Appeals 101 West Colfax Avenue, Suite 800 Denver, CO 80202	
Denver District Court The Honorable Michael A. Martinez 2008CV9245	
Plaintiff-Appellant/Cross-Appellee: Joan L. Holley. **v.** **Defendant-Appellee/Cross- Appellant:** Linda C. Huang, MD.	**COURT USE ONLY**
Attorney or Plaintiff-Appellant/Cross-Appellee Joan L. Holley: Andrew T. Brake Andrew T. Brake, P.C. 777 E. Girard Ave., Suite 200 Englewood, CO 80113 Phone Number: (303)806-9000 Fax: (888) 236-7709 E-mail: atbrake@gmail.com	Case Number: 2010CA1187
CERTIFICATE OF COMPLIANCE	

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

Choose one:
[XX]It contains 8742 words, excluding the caption, table of contents, table of authorities, certificate of compliance, certificate of service, signature block and any addendum containing statutes, rules, regulations, etc.
[ ]It does not exceed 30 pages.

The brief complies with C.A.R. 28(k).

[XX]For the party raising the issue:
It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R. _____, p. _____), not to an entire document, where the issue was raised and ruled on.

[ ]For the party responding to the issue:
It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

s/Andrew T. Brake
Signature of attorney or party

CERTIFICATE OF SERVICE

I hereby certify that on the date hereof, a true and correct copy of the foregoing pleading was to be served *via* Lexis/Nexis as indicated below, on the following, and a copy of the Appendix was to be electronically or otherwise served upon counsel named below, and a copy of this Opening Brief and of the Appendix placed on a CD were to be delivered to the Clerk of this Court the date hereof.

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ADDENDUM OF STATUTES, RULES AND JURY INSTRUCTIONS

INDEX

C.A.R. Rule 28

➡RULE 28. BRIEFS

(a) Brief of the Appellant. The brief of the appellant, which shall be entitled "opening brief," shall contain under appropriate headings and in the order here indicated:

(1) A table of contents, with page references, and a table of cases (alphabetically arranged), statutes, and other authorities cited, with references to the pages of the brief where they are cited;

(2) A statement of the issues presented for review;

(3) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. There shall follow a statement of the facts relevant to the issues presented for review, with appropriate references to the record (see section (e));

(4) An argument. The argument must be preceded by a summary. The argument shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on;

(5) A short conclusion stating the precise relief sought.

(6) Any request for Attorney Fees.

(b) Brief of the Appellee. Request for or opposition to Request for Attorney Fees. The brief of the appellee, which shall be entitled "answer brief," shall conform to the requirements of subsections (a)(1) through (a)(6) of this Rule, except that a statement of the issues or of the case need not be

made unless the appellee is dissatisfied with the statement of the appellant and appellee must in its answer brief make its request for attorney fees or state any opposition it may have to attorney fees requested in appellant's brief.

(c) Reply Brief. -- Opposition to Attorney Fees Request. The appellant may file a brief which shall be entitled "reply brief," in reply to the answer brief. Any opposition to attorney fees requested in appellee's answer brief must be set forth in the reply brief. No further briefs may be filed except with leave of court.

(d) References in Briefs to Parties. Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee". It promotes clarity to use the designations used in the lower court or in the agency proceedings, or the actual names of parties, or descriptive terms such as "the employee", "the injured person", "the taxpayer", etc.

(e) References in Briefs to the Record. References to the bound and paginated record shall be by appropriate page and line numbers and references to material appearing in an addendum to the brief shall be by appropriate page numbers. References to the electronic record shall be by ID number and appropriate page and line number. When the reference is to the evidence, to the giving and refusal to give an instruction, or to a ruling upon the report of a master, the page and line number must be specific, and if the reference is to the exhibit both the page and line number at which the exhibit appears and at which it was offered in evidence must be indicated.

(f) Reproduction of Statutes, Rules, Regulations, etc. If determination of the issues presented requires the study of statutes, rules, regulations, etc. or relevant parts thereof, they shall be reproduced in the brief or in an addendum at the end, or they may be supplied to the court in pamphlet form.

(g) Length of Briefs. Except by permission of the court, principal briefs shall not exceed thirty pages, and reply briefs shall not exceed eighteen pages,

unless they comply with the word limits set forth below. Principal briefs are opening brief, answer brief, opening-answer brief, and answer-reply brief. A principal brief is acceptable if it contains no more than 9,500 words. A reply brief is acceptable if it contains no more than 5,700 words. Headings, footnotes, and quotations count toward the word limitations. The caption, table of contents, table of authorities, certificate of compliance, certificate of service, signature block and any addendum containing statutes, rules, regulations, etc. do not count toward the page limits or word limits.

(h) Briefs in Cases involving Cross-Appeals. If a cross-appeal is filed, the party first filing the notice of appeal is deemed to be the appellant for the purposes of this rule unless the parties otherwise stipulate or the court otherwise orders. The appellant shall file the opening brief within the time provided in C.A.R. 31. A cross-appellant shall file a single brief as appellee and cross-appellant at the time the appellee's brief is due. This brief shall be entitled "opening-answer brief" and must contain the issues and argument involved in the cross-appeal as well as the answer to the brief of the appellant. The appellant's answer to the argument of the cross-appeal, as well as the reply to appellee's answer brief, shall be included in a brief entitled "answer-reply brief." The cross-appellant may then file a reply brief confined strictly to reply to those arguments raised in the cross-appeal.

(i) Briefs in Cases Involving Multiple Appellants or Appellees. In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

(j) Citation of Supplemental Authorities. If pertinent and significant new authority comes to a party's attention after the party's brief has been filed a party may promptly advise the court by notice, with a copy to all parties, setting forth the citation. The notice must state without argument the issue to which the supplemental citation pertains.

(k) Standard of Review; Preservation. For each issue raised on appeal, the party raising such issue must provide, under a separate heading placed before discussion of the issue: (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record where the issue was raised and ruled on, if the issue involves (i) admission or exclusion of evidence, (ii) giving or refusing to give a jury instruction, or (iii) any other act or ruling for which the party seeking relief must record an objection or perform some other act to preserve appellate review. A citation of where the issue was preserved for appellate review shall include, if applicable, the record reference where an objection, offer of proof, motion in limine, motion for directed verdict, or other relevant motion was made and ruled on. For each issue, the responding party must provide, under a separate heading placed before discussion of the issue, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

C.A.R. Rule 32

➡RULE 32. FORM OF BRIEFS AND APPELLATE DOCUMENTS

(a) Standards for Non-Typewriter-Produced Briefs and Other Appellate Papers. Except for briefs and other appellate papers produced through the use of a typewriter, all briefs and appellate papers including those E-filed must comply with following standards:

(1) The typeface must be 14-point or larger, except that the caption may be in 12-point if necessary to fit on one page.

(2) The typeface must be a plain, roman style, although italics or boldface may be used for emphasis.

(3) If a brief or other appellate paper is subject to a word limit, it must include a certificate by the attorney, or by an unrepresented party, that the paper complies with the applicable word limit. The person preparing the certificate may rely on the word count of the word-processing system used to prepare the paper. The certificate must state the number of words in the paper.

(b) Standards for All Briefs and Other Appellate Papers. All briefs and other appellate papers, including those produced through the use of a typewriter, must comply with the following standards.

(1) Only 8 1/2 by 11 inch paper shall be used.

(2) Text shall be double-spaced, except that quotations more than two lines long may be indented and single-spaced, and headings and footnotes may be single-spaced.

(3) Margins shall be no less than 1 1/2 inches at the top and 1 inch at the left, right, and bottom, excluding page numbering, which shall be required.

(4) Text shall appear only on the face side of each page.

(c) Binding and Duplication. Briefs and other appellate papers shall be produced by any duplicating or copying process which produces a clear black image on white paper. Carbon copies may not be submitted without permission of the court, except by parties allowed to proceed in forma pauperis. Consecutive sheets shall be attached at the top left margin.

(d) Basic Document Information. Each brief or other appellate document shall contain basic document information on the first page of the document. The information in the case caption shall be arranged in the following order and shall be in the forms illustrated in subsection (1) or (2) below, except that documents issued by the court or clerk of court should omit the attorney section as illustrated in subsection (1)(II) and (2)(II):

On the left side:

Court name and mailing address.

Name of lower court(s), lower court judge(s), and case number(s).

Names of parties.

Name, address, and telephone number of attorney or pro se party filing the document. Fax number and e-mail address are optional.

Attorney registration number.

Document title.

On the right side:

An area for "Court Use Only" that is at least 2 1/2 inches in width and 1 3/4 inches in length (located opposite the court information).

Case number.

(1) *Illustration of Preferred Case Caption Format*:

(I) Preferred Caption for documents initiated by a party:

[Designation of Court] Court Address:	
[Name of Lower Court(s), Lower Court Judge(s), and Case Number(s)]	
Appellant(s): [Substitute appropriate party designations & names] **Appellee(s):** **COURT USE ONLY**	
Attorney or Party Without Attorney: (Name &	Case Number:

Address) Phone Number: FAX Number: E-mail: Atty. Reg. #:	
NAME OF DOCUMENT	

(II) Preferred Caption for documents issued by the court or clerk of court:

[Designation of Court] Court Address:	
[Name of Lower Court(s), Lower Court Judge(s), and Case Number(s)]	

Appellant(s): [Substitute appropriate party designations & names] **Appellee(s):**	**COURT USE ONLY** Case Number:
NAME OF DOCUMENT	

(2) *Illustration of Optional Case Caption*:

(I) Optional Caption for documents initiated by a party:

[Designation of Court] Court Address:	
[Name of Lower Court(s), Lower Court	

Judge(s), and Case Number(s)]	
Appellant(s): [Substitute appropriate party designations & names] **Appellee(s):**	**COURT USE ONLY**
Attorney or Party Without Attorney: (Name & Address) Phone Number: FAX Number: E-mail: Atty. Reg. #:	Case Number:

NAME OF DOCUMENT

(II) Optional Caption for documents issued by the court or clerk of court:

[Designation of Court] Court Address:	
[Name of Lower Court(s), Lower Court Judge(s), and Case Number(s)]	
Appellant(s): [Substitute appropriate party designations & names]	**COURT USE ONLY**
Appellee(s):	Case Number:

NAME OF DOCUMENT

(e) Improper Form of Briefs and Other Papers. In the event the clerk determines that a brief or other paper does not comply with the Colorado Appellate Rules or is not sufficiently legible, the clerk shall accept the document for filing but may require that a conforming document be filed.

(f) Certificate of Compliance. Each brief shall include, on a separate page immediately behind the caption page, a certificate that the brief complies with all requirements of C.A.R. 28 and C.A.R. 32. Form 6 is a suggested form for a certificate of compliance, use of which shall be regarded as meeting the requirements of C.A.R. 32(a)(3) and C.A.R. 32(f).

CJI-Civ. 3:8 (CLE ed. 2010)

3:8 EVIDENCE IN THE CASE — STIPULATIONS — JUDICIAL NOTICE — INFERENCES PERMITTED AND DEFINED

The evidence in the case consists of the sworn testimony of all the witnesses (all exhibits which have been received in evidence), (all facts which have been admitted or agreed to), (all facts and events which have been judicially noticed), (and all presumptions stated in these instructions).

In deciding the facts, you must consider only the evidence received at trial. Evidence offered at the trial and rejected or stricken by the Court must not be considered by you.

Statements, remarks, arguments, and objections by counsel and remarks of the Court not directed to you are not evidence.

You are to consider only the evidence in the case and the reasonable inferences from that evidence. An inference is a deduction or conclusion that reason and common sense lead the jury to draw from other facts that have been proved.

(If there are any stipulations or admissions of fact or stipulations regarding the testimony of any witnesses, instruct the jury in accordance with Instructions 1:12 and 1:13 unless the jury has already been so instructed.)

(When the Court declares it has taken judicial notice of some fact or event, the jury must

accept that fact or event as proved.)

Notes on Use

1. If no exhibits have been admitted, or if no facts have been admitted or stipulated or judicially noticed or the jury will not be instructed on any presumptions, references to any of these matters should be deleted from the first paragraph. If the parties have agreed or stipulated to any facts or if the court has judicially noticed any facts, the court should enumerate such facts at the appropriate time, preferably during the trial. Omit the fourth paragraph (or portions thereof) and the fifth paragraph if not applicable.

2. Instruction 3:9 should be given with this instruction whenever the third paragraph of this instruction is given.

3. Though instructions emphasizing specific evidence are disfavored, policy considerations in some circumstances may permit the trial court to instruct the jury on inferences it may draw from particular facts. **Krueger v. Ary**, 205 P.3d 1150 (Colo. 2009) (though presumption of undue influence and unfairness were sufficiently rebutted such that presumption instruction was not appropriate, trial court had discretion to inform jury of permissible inferences to be drawn from the evidence giving rise to the presumption); see, e.g., Instructions 34:17 and 30:19. *See also* **Aloi v. Union P. R.R.**, 129 P.3d 999 (Colo. 2006) (instructing the jury it could draw an adverse inference from party's destruction of evidence not an abuse of discretion).

Source and Authority

As to the definition and use of inferences, this instruction is supported by **Venetucci v. City of Colorado Springs**, 99 Colo. 389, 63 P.2d 462 (1936) and **Independence Coffee & Spice Co. v. Kalkman**, 61 Colo. 98, 156 P. 135 (1916).

CJI-Civ. 9:20 (CLE ed. 2010)

9:20 CAUSE — CONCURRENT CAUSES — INTERVENING CAUSES

The word "cause" as used in these instructions means an act or failure to act that in natural and probable sequence produced the claimed injury. It is a cause without which the claimed injury would not have happened.

If more than one act or failure to act contributed to the claimed injury, then each act or failure to act may have been a cause of the injury. Acause does not have to be the only cause or the last or nearest cause. It is enough if the act or failure to act joins in a natural and probable way with some other act or failure to act to cause some or all of the claimed injury.

(One's conduct is not a cause of another's injuries, however, if, in order to bring about such injuries, it was necessary that his or her conduct combine or join with an intervening cause that also contributed to cause the injuries. An intervening cause is a cause that would not have been reasonably foreseen by a reasonably careful person under the same or similar circumstances.)

Notes on Use

1. This instruction should be used when there is sufficient evidence that the defendant's negligence was a

proximate cause even though such negligence may not have been the most immediate cause and, to bring about the plaintiff's losses, such negligence had to operate in conjunction with other causes.

2. When another concurrent actual cause may not have been sufficiently foreseeable so that it might constitute an intervening cause, thereby relieving the defendant of liability, the last parenthesized paragraph of this instruction setting forth the doctrine of intervening cause must be given. **Jones v. Caterpillar Tractor Co.**, 701 P.2d 84 (Colo.App. 1984), *cert. denied* (1985). *See also* **Albo v. Shamrock Oil & Gas Corp.**, 160 Colo. 144, 415 P.2d 536 (1966); **Estate of Newton v. McNew**, 698 P.2d 835, 837 (Colo.App. 1984), *cert. denied* (1985) (intentional intervening act of third persons sufficiently foreseeable; "[a]n intervening cause relieves a defendant of liability for negligence only if the intervening cause is not reasonably foreseeable"); RESTATEMENT (SECOND) OF TORTS §§ 440-53 (1965); W. PROSSER & W. KEETON, TORTS § 44 (5th ed. 1984). The fact that a third person's concurrent act was intentionally tortious or criminal does not necessarily render that act an intervening cause. It is sufficient "if that act [was] reasonably and generally foreseeable." **Ekberg v. Greene**, 196 Colo. 494, 497, 588 P.2d 375, 377 (1978). *See also* **Taco Bell, Inc. v. Lannon**, 744 P.2d 43 (Colo. 1987); **Largo Corp. v. Crespin**, 727 P.2d 1098 (Colo. 1986); **Sewell v. Public Serv. Co.**, 832 P.2d 994 (Colo.App. 1991), *cert. denied* (1992). See also cases in Source and Authority to Instruction 9:27.

3. In **Webb v. Dessert Seed Co.**, 718 P.2d 1057 (Colo. 1986), the court adopted the test that is set forth in the RESTATEMENT (SECOND) OF TORTS § 442B (1965), for determining the existence of an intervening cause. *Accord* **Scharrel v. Wal-Mart Stores, Inc.**, 949 P.2d 89 (Colo.App. 1997), *cert. denied* (1998); **Voight v. Colorado Mtn. Club**, 819 P.2d 1088 (Colo.App. 1991). Intervening cause principles apply in situations in

which the defendant's negligence is alleged to have caused the plaintiff's decedent to commit suicide. In such
cases, the test set forth in the RESTATEMENT (SECOND) OF TORTS § 455 (1965) is relevant in determining causation.
Moore v. Western Forge Corp., 192 P.3d 427 (Colo.App. 2007), *cert. denied* (2008).
4. When a case is submitted to the jury on more than one theory of negligence and on the basis of the evidence
the last parenthetical paragraph of this instruction would be appropriate as to one or more of the theories
of negligence but not to all, the paragraph must be modified to make clear to the jury the theory or theories to
which the rule stated in the paragraph may be applicable and the theory or theories to which it would not. **Kerby**
v. Flamingo Club, Inc., 35 Colo.App. 127, 532 P.2d 975, *cert. denied* (1974).
5. In civil actions in which the negligence or fault of a designated nonparty has been properly put in issue
under § 13-21-111.5(2) and (3)(b), C.R.S., as a cause, in whole or in part, of the plaintiff's claimed damages,
this instruction should be used rather than Instruction 9:19. In addition, in those cases, Instruction 9:24 should
also be given.
6. As to the sufficiency of evidence on the issue of cause, see **Kaiser Foundation Health Plan v. Sharp**,
741 P.2d 714 (Colo. 1987) (cause need not be proved with absolute certainty, nor need defendant's conduct be
proved the only cause). *See also* **Gossard v. Watson**, 122 Colo. 271, 221 P.2d 353 (1950).
See authorities cited in Source and Authority to Instruction 9:19. See also the following cases supporting
the second paragraph of this instruction: **Moore v. Standard Paint & Glass Co.**, 145 Colo. 151, 358 P.2d 33
(1960) (acts of others and act of God concurring with defendant's negligence); **Barlow v. North Sterling**
Irrigation District, 85 Colo. 488, 277 P. 469 (1929) (concurring act of God); **Ryan Gulch Reservoir Co. v.**

Swartz, 83 Colo. 225, 263 P. 728 (1928) (same); **Bradley v. Guess**, 797 P.2d 749 (Colo.App. 1989), *rev'd on other grounds sub nom.* **Seaward Construction Co. v. Bradley**, 817 P.2d 971 (Colo. 1991).

" 'An intervening act of a human being . . . which is a normal response to the stimulus of a situation created by [the actor's] negligent conduct, is not a superseding cause of harm to another which the actor's conduct is a substantial factor in bringing about.' " **Calkins v. Albi**, 163 Colo. 370, 377, 431 P.2d 17, 20 (1967), quoting RESTATEMENT (SECOND) OF TORTS § 443 (1965). *See also* **Webb v. Dessert Seed Co.**, 718 P.2d 1057 (Colo. 1986) (the precise manner in which the injuries were caused need not have been foreseeable).

Cases supporting the third parenthesized paragraph include **Farmers Mutual Insurance Co. v. Chief Industries, Inc.**, 170 P.3d 832 (Colo.App. 2007) (defendant who seeks to assert defense of intervening cause must request optional instruction language from the third parenthesized paragraph or the issue of intervening cause is deemed to be waived), and **Smith v. State Compensation Insurance Fund**, 749 P.2d 462 (Colo.App. 1987) (subsequent motorcycle accident an independent, intervening cause because not a foreseeable consequence of the defendant's claimed negligence).

CJI -Civ 15:4(CLE ed. 2010)

15:4 NO IMPLIED WARRANTY OF SUCCESSFUL OUTCOME
(Unless a physician states or agrees otherwise, a) (A) physician does not guarantee or promise a successful outcome by simply treating or agreeing to treat a patient.
(An unsuccessful outcome does not, by itself, mean that a physician was negligent.) (An exercise of judgment that results in an unsuccessful outcome does not, by itself, mean that a physician was negligent.)

Notes on Use

1. The Notes on Use to Instructions 15:1 and 15:2 are also applicable to this instruction.

2. This cautionary instruction may be given in conjunction with Instruction 15:2 or 15:3 when the evidence of malpractice includes an unsuccessful outcome.

3. Use whichever parenthesized words are appropriate. Omit the first parenthesized clause unless there has been some evidence that the defendant may have so stated or agreed. If there is sufficient evidence that the defendant may have warranted or promised a cure, instructions based on that contractual theory of relief should be given either in addition to, or as an alternative to, any other theories, e.g., negligent malpractice, battery, etc., depending on the evidence in the case.

Source and Authority

This instruction is based on **Brown v. Hughes**, 94 Colo. 295, 30 P.2d 259 (1934); **Locke v. Van Wyke**, 91 Colo. 14, 11 P.2d 563 (1932); **Craghead v. McCullough**, 58 Colo. 485, 146 P. 235 (1915); and **Bonnet v. Foote**,

47 Colo. 282, 107 P. 252 (1910).

CJI. 15:8 (CLE ed. 2010)

15:9 AFFIRMATIVE DEFENSE — IMPLIED CONSENT BASED ON EMERGENCY

The defendant, *(name)***, is not legally responsible to the plaintiff,** *(name)***, on (his) (her)**
claim of battery if the affirmative defense of implied consent based on an emergency is
proved. This defense is proved if you find all of the following:

1. At the time the defendant treated the plaintiff, the defendant reasonably believed the
plaintiff's life or health was in such danger that to delay (surgery) (treatment) would further
endanger the plaintiff's life or health;

2. Under the same or similar circumstances, a reasonably careful physician would have
believed the same thing; and

3. The plaintiff was in a mental or physical condition that prevented (him) (her) from
being able to indicate (his) (her) consent or lack of consent.

Notes on Use

1. The first two sentences of Note 2 of Notes on Use to Instruction 15:2 are also applicable to this instruction.

2. Use whichever parenthesized words are most appropriate.
3. The rule stated in this instruction applies to claims based on lack of "informed consent" (Instruction 15:10) and battery claims generally, but not to other malpractice claims.
4. In cases governed by § 13-21-108, C.R.S. ("Good Samaritan" statute), or any similar statute, an instruction based on the particular statute should be given in lieu of this instruction. In certain cases, however, it is possible that both a statute and the rule stated in this instruction may be applicable.
5. The rule of this instruction does not apply if the physician knows or reasonably should have known the patient would not have consented to the operation or treatment had the patient been in a position to indicate his or her desires. See Source and Authority below.
6. This instruction must be appropriately modified if another person was authorized by the plaintiff or by operation of law to give or withhold consent on the plaintiff's behalf in such circumstances.

Source and Authority

This instruction, as previously worded, was cited with approval in **Blackman v. Rifkin**, 759 P.2d 54 (Colo.App. 1988), *cert. denied* (1989). *See also* RESTATEMENT (SECOND) OF TORTS § 892D (1979).

CJI 15:10 (CLE ed. 2010)

15:10 UNINFORMED CONSENT — ELEMENTS OF LIABILITY
For the plaintiff, *(name)***, to recover from the defendant,** *(name)***, on (his) (her) claim of**
negligence based on lack of informed consent, you must find all of the following have been
proved by a preponderance of the evidence:
1. The defendant *(insert an appropriate description of the procedure, treatment, surgery,*
tests, etc., that the plaintiff claims the defendant performed or prescribed) **(on) (for) the**
plaintiff;
2. The defendant negligently failed to obtain the plaintiff's informed consent before
*(insert appropriate description of procedure, etc., as above)***;**
3. A reasonable person in the same or similar circumstances as the plaintiff would not
have consented to *(insert appropriate description)* **had (he) (she) been given the information**
required for informed consent; and
4. The defendant's negligent failure caused the plaintiff (additional) (injuries) (damages)
(losses).
If you find that any one or more of these *(number)* **statements has not been proved, then**
your verdict must be for the defendant.
On the other hand, if you find that all of these *(number)* **statements have been proved,**
(then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative
defense(s) of *[insert any affirmative defense that would be a complete defense to plaintiff's*
*claim]***).**

If you find that (this affirmative defense has) (any one or more of these affirmative
defenses have) been proved by a preponderance of the evidence, then your verdict must be
for the defendant.
However, if you find that (this affirmative defense has not) (none of these affirmative
defenses have) been proved, then your verdict must be for the plaintiff.
Notes on Use
1. Omit any numbered paragraphs, the facts of which are not in dispute.
2. Use whichever parenthesized words are most appropriate and omit the last two paragraphs if the defendant
has put no affirmative defense in issue or there is insufficient evidence to support any defense.
3. Although mitigation of damages is an affirmative defense (see Instruction 5:2), only rarely, if ever, will
it be a complete defense. For this reason, mitigation should not be identified as an affirmative defense in the concluding
paragraphs of this instruction. Instead, if supported by sufficient evidence, Instruction 5:2 should be
given along with the actual damages instruction appropriate to the claim and the evidence in the case.
4. In cases involving multiple defendants or designated nonparties where the pro rata liability statute, § 13-
21-111.5, C.R.S., is applicable, see Notes on Use to Instruction 4:20.
5. The first two sentences of Note 2 of Notes on Use to Instruction 15:2 are also applicable to this instruction.
Whenever this instruction is given, Instruction 15:11 and, if otherwise applicable, Instructions 15:12 and
15:13 must also be given. For the general definition of "negligence" as used in this instruction, use the first paragraph
of Instruction 15:2. (The applicable standard for determining such negligence, "national" or "local," is
covered in Instruction 15:11.)
6. The appropriate instruction relating to causation in Chapter 9 should also be given with this instruction.
7. "The law in Colorado distinguishes between an action based on no consent (battery) (Instructions [15:7-

15:9]) and one based on lack of informed consent (Instructions [15:10-15:13]).” **Blades v. DaFoe**, 666 P.2d 1126, 1129 (Colo.App. 1983), *rev’d on other grounds*, 704 P.2d 317 (Colo. 1985). *See also* **Gorab v. Zook**, 943 P.2d 423 (Colo. 1997); **Espander v. Cramer**, 903 P.2d 1171 (Colo.App.), *cert. denied* (1995). Consequently, if the plaintiff is making a claim only on the basis of the lack of “informed consent,” the instructions in subpart C of this Part I should be used. If the plaintiff is making a claim on the basis of no consent as well as one on the basis of lack of “informed consent” (and there is sufficient evidence supporting each claim), applicable instructions in subparts B and C of this Part I should be given, appropriately modified as may be necessary.

8. When supported by sufficient evidence, Instruction 15:9 (emergencies) should be given with this instruction.

9. If the defense of contributory negligence has been properly raised, the numbered paragraphs of this instruction should be substituted for the numbered paragraphs in Instruction 9:22, and that instruction should then be used in accord with its Notes on Use.

10. Generally, it is the treating physician or surgeon and not a hospital that has the legal obligation to obtain the informed consent of the patient prior to surgery. **Krane v. Saint Anthony Hosp. Sys.**, 738 P.2d 75 (Colo.App. 1987). *See* **Garhart v. Columbia/HealthONE, L.L.C**, 95 P.3d 571 (Colo. 2004) (generally, doctor has duty to obtain patient’s informed consent to perform proposed medical procedure, and hospital presented sufficient evidence to show that doctors were negligent in failing to inform plaintiff of risks associated with vaginal delivery).

11. With regard to electroconvulsive treatment, an appropriate instruction based on §§ 13-20-401 to 13-20-403, C.R.S., should be used rather than this instruction.

12. A claim for lack of informed consent is based on information communicated by a physician to a patient

before treatment is commenced and, in the absence of a significant change in the patient's condition that would
cause a risk to become substantial, a physician has no duty to continue warning the patient during the course of
that treatment. However, where a new, previously undisclosed and substantial risk arises during the course of
medical treatment, there may be an additional duty on the part of the physician to warn the patient of that risk.
Gorab v. Zook, 943 P.2d 423 (Colo. 1997).
13. "Informed consent claims typically arise out of a substantial risk associated with a competently performed
procedure." **Hall v. Frankel**, 190 P.3d 852, 864 (Colo.App. 2008), *cert. denied* (2009). For purposes of
informed consent, a physician has no duty to disclose risks of diagnostic errors or the availability of other procedures
that the physician has determined are not medically indicated, as those kinds of errors are adequately
covered by claims of negligence. *Id.* (claims for failure to properly diagnose or to order appropriate tests are generally
litigated under negligence theory). See Instructions 15:2 and 15:3.

Source and Authority

This instruction as well as Instruction 15:13 is based on **Gorab v. Zook**, 943 P.2d 423 (Colo. 1997); **Mallett
v. Pirkey**, 171 Colo. 271, 466 P.2d 466 (1970); **Short v. Downs**, 36 Colo.App. 109, 537 P.2d 754, *cert. denied*
(1975); **Martin v. Bralliar**, 36 Colo.App. 254, 540 P.2d 1118, *cert. denied* (1975) (also, disclosure of general
risks does not discharge the duty to disclose substantial or specific risks); **Stauffer v. Karabin**, 30 Colo.App.
357, 492 P.2d 862 (1971) (citing with approval what is now the third paragraph of Instruction 15:11; once there
is evidence that the patient was uninformed when "consent" was given due to a failure to disclose, the physician
must go forward with evidence showing that the failure to disclose conformed with community standards or, if
applicable, national standards). *See also* **Mudd v. Dorr**, 40 Colo.App. 74, 574 P.2d 97 (1977); **Hamilton v.
Hardy**, 37 Colo.App. 375, 549 P.2d 1099, *cert. denied* (1976).

CJI-Civ. 15:11 (CLE ed. 2010)

15:11 INFORMATION REQUIRED

A physician must obtain the patient's informed consent before (treating) (operating on) (or) (performing a procedure on) the patient.

For a patient's consent to be an informed consent, a physician must have informed the patient of the following:

1. The nature of the (illness) (injury) (or) (medical condition);

2. The nature of the (operation) (procedure) (or) (treatment);

3. The alternative treatments available, if any; and

4. The substantial risks, if any, involved in undergoing the (operation) (procedure) (or) (treatment), and the substantial risks, if any, of the alternative treatments.

A physician must inform a patient of the above *(insert number)* **items to the extent a reasonable physician practicing in the same field of practice (as a general practitioner in the same or similar locality) (as a specialist), at the same time, would have under the same or similar circumstances. The failure to do so is negligence.**

Notes on Use

1. See Notes on Use to Instruction 15:10.

2. The last paragraph of Instruction 15:8 may be given with this instruction to explain what is meant by "express or implied" consent.

3. Use whichever parenthesized words are appropriate. In the last paragraph, if there is a dispute as to which standard is applicable in light of the evidence in the case, both parenthetical clauses should be given in the alternative, with another instruction, based on the first clause of the first paragraph of Instruction 15:3, explaining to

the jury how they should determine whether the defendant should be considered a "general practitioner" or a "specialist." Expert testimony is necessary to establish the precise scope of a physician's duty of disclosure, and therefore, a claim based on lack of informed consent is properly dismissed where plaintiff fails to file a certificate of review pursuant to § 13-20-602, C.R.S. **Espander v. Cramer**, 903 P.2d 1171 (Colo.App.), *cert. denied* (1995). *See also* **Williams v. Boyle**, 72 P.3d 392 (Colo.App.), *cert. denied* (2003).

4. If numbered paragraph 4 of this instruction is given, Instruction 15:12, defining "substantial risk," must also be given.

5. If the plaintiff shows that a physician failed to inform of any risks of a medical procedure, that element of a prima facie case is met, and the burden shifts to the defendant to establish that nondisclosure conformed to the applicable standard. **Gorab v. Zook**, 943 P.2d 423 (Colo. 1997). However, if the plaintiff claims that the disclosure was simply incomplete or that a specific risk was assessed incorrectly, then the plaintiff has the burden of showing that the specific risk was substantial and should have been disclosed in conformity with the applicable standard. **Williams v. Boyle**, 72 P.3d 392 (Colo.App.), *cert. denied* (2003).

Source and Authority

In addition to those authorities cited in Source and Authority to Instruction 15:10, see **Bloskas v. Murray**, 646 P.2d 907 (Colo. 1982); **Miller v. Van Newkirk**, 628 P.2d 143 (Colo.App. 1980), *cert. denied* (1981).

CJI-Civ. 15:14 (CLE ed. 2010)

15:14 SPECIAL VERDICT — MECHANICS FOR SUBMITTING — TORT ACTIONS AGAINST HEALTH CARE PROFESSIONALS OR HEALTH CARE INSTITUTIONS

You are instructed to answer the following questions. You must all agree on your answers to each question for which an answer is required:

1. Did the plaintiff, *(name)***, have (injuries) (damages) (losses)?**

2. Was the defendant, *(name of first or only defendant)***, negligent?**

3. Was the negligence, if any, of the defendant, *(name of first or only defendant)***, a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff?**

4. Was the defendant, *(name of second defendant)***, negligent?**

5. Was the negligence, if any, of the defendant, *(name of second defendant)***, a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff?**

If you find that the plaintiff, *(name)***, did not have (injuries) (damages) (losses), or if you find that (the defendant was not) (none of the defendants were) negligent or that no negligence (of the defendant) (of any of the defendants) was a cause of any of the plaintiff's claimed (injuries) (damages) (losses), then your foreperson shall complete only Special Verdict Form A and he or she and all jurors will sign it.**

On the other hand, if you find that the plaintiff did have (injuries) (damages) (losses) and you further find that (the defendant) (one or more of the defendants) was negligent and that such negligence was a cause of any of the plaintiff's (injuries) (damages) (losses), then

on Special Verdict Form B you shall answer questions 1 through *(insert the figure "3" or "5" depending on whether there is one defendant or there are two defendants)* **as well as the following questions, and your foreperson shall complete only Special Verdict Form B, and he or she and all jurors will sign it.**

6. Was *(name or other appropriate description of designated nonparty)* **negligent or at fault?**

7. Was the negligence or fault, if any, of *(name or other appropriate description of designated nonparty)* **a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff?**

8. Was the plaintiff, *(name)***, negligent?**

9. Was the negligence, if any, of the plaintiff a cause of (his) (her) own claimed (injuries) (damages) (losses)?

10. and 11. State your answers to numbered questions 10 and 11 as they appear on Special Verdict Form B relating to the damages the plaintiff had that were caused by the negligence of the (defendant) (one or more of the defendants) and the negligence, if any, of the plaintiff and of the nonparty, *(name or other appropriate description)***.**

12. Taking as 100 percent the combined negligence or fault of all parties and the nonparty you find were negligent or at fault and whose negligence or fault was a cause of any of the plaintiff's (injuries) (damages) (losses), what percentage of negligence or fault, if any, was that of the defendant, *(name of first or only defendant)***, of the defendant,** *(name of second defendant)***, of the plaintiff,** *(name)***, and of the nonparty,** *(name or other appropriate description)***?**

You must enter the figure of zero, "0," for the nonparty and any party you decide was

not negligent or at fault or whose negligence or fault you decide was not a cause of any of
the plaintiff's (injuries) (damages) (losses).

Notes on Use

1. Under the Health Care Availability Act (HCAA), the instructions in this subpart D, if otherwise applicable,
should be used in "any civil action for damages in tort brought against a ['licensed'] health care professional
or ['licensed and certified'] health care institution." Sections 13-64-203 and 13-64-302, C.R.S. For the definitions
of these persons and institutions, see § 13-64-202(3) & (4), C.R.S. *See also* **Scholz v. Metro.**
Pathologists, P.C., 851 P.2d 901 (Colo. 1993) (unlicensed, nonprofessional lab employee of "health care professional"
was covered by HCAA); **Chavez v. Parkview Episcopal Med. Ctr.**, 32 P.3d 609 (Colo.App. 2001)
(cap on noneconomic damages under § 13-64-302(1), C.R.S., not applicable to manufacturer of health care
equipment). *Cf.* **Moffett v. Life Care Ctrs. of Am.**, 187 P.3d 1140 (Colo.App.), *cert. denied* (2008) (under
durable power-of-attorney statute and definition of "medical treatment," § 15-14-505(7), C.R.S., decision to
admit patient to nursing home constitutes "medical treatment decision").

2. This instruction and Instruction 15:15, which must be given with this instruction, have been drafted to
cover what are likely to be the most extensive, yet typical, circumstances to which they might apply. These
instructions, therefore, must be appropriately modified in any of the following circumstances:

a. There is sufficient evidence that the tort involved is one other than malpractice in the form of professional
negligence, e.g., battery;

b. There is more than one plaintiff;

c. There is only one defendant or more than two defendants;

d. No defense of contributory negligence has been raised or there is insufficient evidence to support the
defense;

e. No nonparty has been designated under the provisions of § 13-21-111.5(3)(b), C.R.S., or there is no or insufficient evidence of any tortious conduct on the part of a properly designated nonparty or that such conduct was a cause of any of the plaintiff's claimed injuries; or

f. The claim against one or more defendants is based only on the vicarious liability of that defendant for the tortious conduct of another defendant or person who has not been joined as a party.

3. When appropriate to the evidence in the case, Instructions 15:16 and 15:17 should also be given with this instruction.

4. Use whichever parenthesized words and phrases are appropriate.

5. If this instruction is otherwise applicable, none of the instructions in Chapter 9 concerning comparative negligence or several liability should be given except that, if otherwise appropriate, Instructions 9:28 (Comparative Negligence) and 9:24 (Affirmative Defense — Negligence or Fault of Designated Nonparty) should be given with this instruction.

6. This instruction has been drafted to allow the court to apply the limitations on damages set out in § 13-64-302, C.R.S., and also the limitations set in § 13-21-102.5, C.R.S., to the extent those limitations may be applicable in cases in which the acts or omissions occurred before July 1, 2003. For that reason, when otherwise applicable, this instruction should be used rather than Instruction 6:1A. *See also* **Preston v. Dupont**, 35 P.3d 433 (Colo. 2001) (damages for physical impairment or disfigurement are not precluded by HCAA, and are not subject to cap on noneconomic damages; this latter holding was legislatively overruled for acts or omissions occurring after July 1, 2003, by § 13-64-302(1)(b), C.R.S.). *See also* **Chavez v. Parkview Episcopal Med. Ctr.**, 32 P.3d 609 (Colo.App. 2001) (noneconomic damages award against hospital should not be reduced to statutory limit for health care institutions before apportioning damages between hospital and defendant that was not health

care professional or institution).
7. Delete any reference to Question 11 if there is insufficient evidence of any future damages. *See***Wallbank v. Rothenberg**, 74 P.3d 413 (Colo.App. 2003), *cert. dism'd* (2004) (award of future medical expenses must be based upon substantial evidence that establishes reasonable probability that such expenses will necessarily be incurred). *See also* **Ochoa v. Vered**, 212 P.3d 963 (Colo.App. 2009) (trial court did not abuse discretion in remitting damages awarded for plaintiff's future medical expenses).
8. The third paragraph to the Note on Use to Instruction 4:2 also applies to this instruction.
9. Insert in this instruction and Instruction 15:15 any other questions that may be necessary to resolve properly any other claims of the plaintiff or affirmative defenses of any of the defendants.
10. For special procedural and substantive limitations that are, or may be, applicable when a claim for punitive damages is based on a negligence claim against a "health care professional," see § 13-64-302.5, C.R.S.; **Sheron v. Lutheran Medical Center**, 18 P.3d 796 (Colo.App. 2000), *cert. dism'd* (2001) (under statute, request for punitive damages may not be included in initial claim for relief, though after parties have substantially completed discovery, plaintiff may amend pleadings to assert claim, provided plaintiff establishes prima facie proof of triable issue). To the extent any provisions of this section are applicable, appropriate modifications may be required in this instruction. *See, e.g.*, § 13-64-302.5(4) and (5), C.R.S. The legislature has made it clear that noneconomic damages and, therefore, any limitation on them, do not include punitive damages. Section 13-64-302(1)(a)(I), C.R.S.
11. The damages caps imposed by the HCAA apply to any prefiling interest to which the plaintiff would be entitled. Section 13-64-302(2), C.R.S. (legislatively overruling, in part, **Scholz v. Metro. Pathologists, Inc.,**

P.C., 851 P.2d 901 (Colo. 1993)); **Morris v. Goodwin**, 185 P.3d 777 (Colo. 2008); **Wallbank v. Rothenberg**,
74 P.3d 413 (Colo.App. 2003), *cert. dism'd* (2004). Prejudgment interest is to be calculated on the amount of
the reduced award, after application of any HCAA damages caps, regardless of the amount awarded by the jury.
Morris, 185 P.3d 777.
12. For a discussion as to the duty of a mental health care provider to warn against violent behavior of a
mental health patient, see **McCarty v. Kaiser-Hill Co.**, 15 P.3d 1122 (Colo.App. 2000), *cert. denied* (2001);
Sheron, 18 P.3d 796; **Halverson v. Pikes Peak Family Counseling & Mental Health Center, Inc.**, 795 P.2d
1352 (Colo.App.), *cert. stricken* (1990). *See also* **Halverson v. Pikes Peak Family Counseling & Mental
Health Ctr., Inc.**, 851 P.2d 233 (Colo.App. 1992), *cert. denied* (1993) (construing § 13-21-117, C.R.S.).
13. Physicians and other healthcare professionals, *inter alia*, who also have a duty to report suspected child
abuse or neglect to local authorities, § 19-3-304(1), C.R.S., are entitled to immunity from liability for any goodfaith
participation in providing those reports, § 19-3-309, C.R.S.; **Credit Serv. Co. v. Dauwe**, 134 P.3d 444
(Colo.App. 2005), *cert. denied* (2006); *see* **Montoya v. Bebensee**, 761 P.2d 285 (Colo.App. 1988), unless the
plaintiff presents evidence that would show that the defendant's conduct was "willful, wanton, and malicious."
Section 19-3-309, C.R.S.; **Dauwe**, 134 P.3d 444; *see* **Montoya**, 761 P.2d 285 (decided under prior statute);
Martin v. Weld County, 43 Colo.App. 49, 598 P.2d 532 (1979).
14. For a discussion of the constitutionality of the HCAA, see **Garhart v. Columbia/HealthONE, L.L.C.**,
95 P.3d 571 (Colo. 2004) (rejecting various constitutional attacks and upholding constitutionality of damages
cap; reaffirming **Scholz**); **HealthONE v. Rodriguez**, 50 P.3d 879 (Colo. 2002) (HCAA section barring incapacitated
person from electing to receive lump-sum payment of future damages did not violate equal protection);

Scholz, 851 P.2d 901 (upholding constitutionality of damages cap).

15. Under § 13-64-207(1), C.R.S., the trial court has discretion in determining the form and distribution of periodic payments. **Rodriguez**, 50 P.3d 879; **Garhart v. Columbia/HealthONE L.L.C.**, 168 P.3d 512 (Colo.App. 2007).

Source and Authority

In addition to the authorities cited above in the Notes on Use, see §§ 13-64-203 through 13-64-205, C.R.S.

See also § 13-64-102(2), C.R.S. (legislative declaration, effective as to "actions or omissions occurring on or after" July 1, 2003).

CJI-Civ. 15:15

15:15 SPECIAL VERDICT FORMS — TORT ACTIONS AGAINST HEALTH
CARE PROFESSIONALS OR HEALTH CARE INSTITUTIONS — FORMS AAND B
FORM A
IN THE _____ COURT IN AND FOR THE
COUNTY OF _____, STATE OF COLORADO
Civil Action No. _____
_____)
Plaintiff,)
v.) SPECIAL VERDICT
_____) FORM A
Defendant.)
DO NOT ANSWER THIS SPECIAL VERDICT FORM A IF YOUR FOREPERSON
HAS COMPLETED SPECIAL VERDICT FORM B AND ALL JURORS HAVE SIGNED
IT.
We, the jury, present our Answers to Questions submitted by the Court, to which we
have all agreed:
1. Did the plaintiff, *(name)***, have (injuries) (damages) (losses)? (Yes or No)**
ANSWER:_____
2. Was the defendant, *(name of first or only defendant)***, negligent? (Yes or No)**
ANSWER:_____
3. Was the negligence, if any, of the defendant, *(name of first or only defendant)***, a cause**

of any of the (injuries) (damages) (losses) claimed by the plaintiff? (Yes or No)
ANSWER:_____
4. Was the defendant, *(name of second defendant)***, negligent? (Yes or No)**
ANSWER:_____
5. Was the negligence, if any, of the defendant, *(name of second defendant)***, a cause of any**
of the (injuries) (damages) (losses) claimed by the plaintiff? (Yes or No)
ANSWER:_____
We, the jury, find for the defendant(s) and award no damages to the plaintiff, (name).

_____ _____
_____ _____
_____ _____
Foreperson
FORM B
IN THE _____ COURT IN AND FOR THE
COUNTY OF _____, STATE OF COLORADO
Civil Action No. _____
_____)
Plaintiff,)
)
v.) SPECIAL VERDICT
) FORM B
_____)
Defendant.)
DO NOT ANSWER THIS SPECIAL VERDICT FORM B IF YOUR FOREPERSON
HAS COMPLETED SPECIAL VERDICT FORM A AND ALL JURORS HAVE SIGNED
IT.
We, the jury, present our Answers to Questions submitted by the Court, to which we
have all agreed:
1. Did the plaintiff, *(name)***, have (injuries) (damages) (losses)? (Yes or No)**
ANSWER:_____

2. Was the defendant, *(name of first or only defendant)***, negligent? (Yes or No)**
ANSWER:_____
3. Was the negligence, if any, of the defendant, *(name of first or only defendant)***, a cause**
of any of the (injuries) (damages) (losses) claimed by the plaintiff? (Yes or No)
ANSWER:_____
4. Was the defendant, *(name of second defendant)***, negligent? (Yes or No)**
ANSWER:_____
5. Was the negligence, if any, of the defendant, *(name of second defendant)***, a cause of any**
of the (injuries) (damages) (losses) claimed by the plaintiff? (Yes or No)
ANSWER:_____
If you find that the plaintiff did have (injuries) (damages) (losses), and you further find
that (the defendant) (one or more of the defendants) was negligent, and that such negligence
was a cause of any of the plaintiff's (injuries) (damages) (losses), then answer the following
questions:
6. Was *(name or other appropriate description of designated nonparty)*
negligent or at fault?
(Yes or No)
ANSWER:_____
7. Was the negligence or fault, if any, of *(name or other appropriate description of designated*
nonparty) **a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff?**
(Yes or No)
ANSWER:_____
8. Was the plaintiff, *(name)***, negligent? (Yes or No)**
ANSWER:_____
9. Was the negligence, if any, of the plaintiff a cause of (his) (her) claimed (injuries)
(damages) (losses)? (Yes or No)
ANSWER:_____

State your answers to the following questions numbered 10 and 11 relating to the damages
the plaintiff had that were caused by the negligence of the (plaintiff) (defendant) (one
or more of the defendants) and the negligence, if any, of the nonparty *(name or other appropriate*
*description)***:**
10. Damages to the present: What is the total amount of (injuries) (damages) (losses)
that the plaintiff has had to the present in each of the following categories? Enter the figure
zero, "0," for any category if you determine there were no (injuries) (damages) (losses) in
that category.
a. Medical and other health care expenses: $____
b. Lost earnings (and lost earning capacity): $____
c. Other economic losses than those included immediately above in a. and b.:
$____
d. Non-economic losses, including pain and suffering, inconvenience, emotional stress,
impairment of the quality of life, and (insert any other recoverable non-economic loss
of which there is sufficient evidence): $____
11. Future damages: What is the present value of the total amount of (injuries) (damages)
(losses) that the plaintiff will probably have in the future in each of the following categories?
Enter the figure zero, "0," for any category, if you determine that the plaintiff will
probably have no future (injuries) (damages) (losses) in that category. For each category in
which you determine the plaintiff will probably have future (injuries) (damages) (losses),
you must also indicate the period of time that plaintiff will probably have those future
(injuries) (damages) (losses).
a. Medical and other health care expenses: $_____

Duration of injuries, damages, losses: From _____ To _____
b. Lost earnings (and lost earning capacity): $_____
Duration of injuries, damages, losses: From _____ To _____
c. Other economic losses than those included immediately above in a. and b.:
$_____
Duration of injuries, damages, losses: From _____ To _____
d. Non-economic losses, including pain and suffering, inconvenience, emotional stress,
impairment of the quality of life, and (insert any other recoverable non-economic loss of
which there is sufficient evidence): $_____
Duration of injuries, damages, losses: From _____ To _____
12. Taking as 100 percent the combined negligence or fault of all parties and the nonparty
you find were negligent or at fault and whose negligence or fault was a cause of any
of the plaintiff's (injuries) (damages) (losses), what percentage of negligence or fault, if any,
was that of the defendant, (name of first or only defendant), of the defendant, *(name of second*
*defendant)***, of the plaintiff,** *(name)***, and of the nonparty,** *(name or other appropriate*
*description)***?**
You must enter the figure of zero, "0," for the nonparty and any party you decide was
not negligent or at fault or whose negligence or fault you decide was not a cause of any of
the plaintiff's (injuries) (damages) (losses).
ANSWER: _____
Percentage charged to *(name of first or only defendant)***: _____%**
Percentage charged to *(name of second defendant)***: _____%**
Percentage charged to *(name or other appropriate description of nonparty)***: _____%**
Percentage charged to *(name of plaintiff)***: _____%**
MUST TOTAL: 100% _____%

_____ _____
_____ _____

_____ _____

Foreperson

Notes on Use

1. The Notes on Use to Instruction 15:14 also apply to this instruction.

2. Delete any category of future damages under Question 11 if there is insufficient evidence of any future damages in that category. *See* **Wallbank v. Rothenberg,** 74 P.3d 413 (Colo.App. 2003), *cert. dism'd* (2004), (award of future medical expenses must be based upon substantial evidence that establishes reasonable probability that such expenses will necessarily be incurred).

3. As to how the court should use the various findings of the jury, see §§ 13-21-102.5 and 13-64-201 through 13-64-213, C.R.S. As to the limitations on the total damages for personal injuries in actions against a health care professional or institution, see § 13-64-302(1)(b), C.R.S. In addition, as to limitations on the recovery of damages for noneconomic loss or injury in cases in which the acts or omissions occurred before July 1, 2003, *see* § 13-21-102.5(3)(a). For the limitations on such damages both before and after that date in actions involving "medical malpractice," see also §§ 13-64-102 and 13-64-302(1), C.R.S. In **Garhart v. Columbia/HealthONE, L.L.C.,** 95 P.3d 571 (Colo. 2004), the supreme court held that the HCAA allows a total recovery of the cap amount against all defendants, and that statutory cap applies to both defendants and designated nonparty health care tortfeasors; thus, a trial court must first apply the HCAA cap to the jury's noneconomic damages award, and then apportion those damages according to the jury's allocation of fault among any health care defendants and nonparty tortfeasors. For a case involving apportionment among health care tortfeasors and non-health care tortfeasors, see **Chavez v. Parkview Episcopal Medical Center**, 32 P. 3d 609 (Colo.App. 2001). In some cases, to apply the limitations relating to noneconomic losses properly, this instruction may need to be modified to

include additional questions, e.g., questions relating to possible physical impairment or disfigurement. *See* **Preston v. Dupont,** 35 P.3d 433 (Colo. 2001) (damages for physical impairment or disfigurement are not precluded by HCAA, and are not subject to cap on noneconomic damages; this latter holding was legislatively overruled for acts or omissions occurring after July 1, 2003, by § 13-64-302(1)(b), C.R.S.). See also relevant discussion in Notes on Use to Instructions 6:1 and 6:1A.

4. Although the jury will issue its findings regarding future lost earnings, the HCAA requires that a plaintiff prove both that good cause exists to support such an award, and that applying the total damages limit under the Act would be unfair. Section 13-64-302(1)(b), C.R.S.; **Wallbank v. Rothenberg**, 140 P.3d 177 (Colo.App.), *cert. denied* (2006) (decided under former version of statute). This statute does not specify what factors a trial court should consider in assessing whether a plaintiff has met the burden of proving "good cause" and "unfairness," and the trial court must exercise discretion in considering the totality of the circumstances, i.e., those factors that it deems relevant under the circumstances of any particular case. **Wallbank v. Rothenberg**, 140 P.3d 177 (Colo.App.), *cert. denied* (2006) (trial court did not abuse discretion in considering relevant factors not expressly specified in the statute).

Source and Authority

In addition to the authorities cited above in the Notes on Use, this instruction is based on §§ 13-64-204 and 13-64-205(1)(d), C.R.S.

C.R.C.P. 26

C.R.C.P. ➡RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY; DUTY OF DISCLOSURE

(a) Required Disclosures; Methods to Discover Additional Matter.

Unless otherwise ordered by the court or stipulated by the parties, provisions of this Rule shall not apply to domestic relations, juvenile, mental health, probate, water law, forcible entry and detainer, C.R.C.P. 120, or other expedited proceedings.

(1) **Disclosures.** Except to the extent otherwise directed by the court, a party shall, without awaiting a discovery request, provide to other parties:

(A) The name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying who the person is and the subjects of the information;

(B) A listing, together with a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings, making available for inspection and copying the documents or other evidentiary material, not privileged or protected from disclosure, as though a request for production of those documents had been served pursuant to C.R.C.P. 34;

(C) A description of the categories of damages sought and a computation of any category of economic damages claimed by the disclosing party, making available for inspection and copying pursuant to C.R.C.P. 34 the documents or other evidentiary material, not privileged or protected from disclosure, as though a request for production of those documents had been served pursuant to C.R.C.P. 34; and

(D) Any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment, making such agreement available for inspection and copying pursuant toC.R.C.P. 34.

The timing of disclosures shall be within 30 days after the case is at issue as defined in C.R.C.P. 16(b). A party shall make the required disclosures based on the information then known and reasonably available to the party and is not excused from making such disclosures because the party has not completed investigation of the case or because the party challenges the sufficiency of another party's disclosures or because another party has not made the required disclosures.

(2) **Disclosure of Expert Testimony.**

(A) In addition to the disclosures required by subsection (a)(1) of this Rule, a party shall disclose to other parties the identity of any person who may present evidence at trial, pursuant to Rules 702, 703, or 705 of the Colorado Rules of Evidence together with an identification of the person's fields of expertise.

(B) Except as otherwise stipulated or directed by the court, this disclosure shall:

(I) With respect to a witness who is retained or specially employed to provide expert testimony, or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report or summary. The report or summary shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years. In addition, if a report is issued by the expert it shall be provided.

(II) With respect to a witness who may be called to provide expert testimony but is not within the description contained in subsection (a)(2)(B)(I) above, the report or summary shall contain the qualifications of the witness and a

complete statement describing the substance of all opinions to be expressed and the basis and reasons therefor.

(C) Unless otherwise provided in the Case Management Order, the timing of the disclosures shall be as follows:

(I) The disclosure by a claiming party under a complaint, counterclaim, cross-claim or third-party claim shall be made at least 120 days before the trial date.

(II) The disclosure by a defending party shall be made within 30 days after service of the claiming party's disclosure, provided, however, that if the claiming party serves its disclosure earlier than required under subparagraph 26(a)(2)(C)(I), the defending party is not required to serve its disclosures until 90 days before the trial date.

(III) If the evidence is intended to contradict or rebut evidence on the same subject matter identified by another party under subparagraph (a)(2)(C)(II) of this Rule, such disclosure shall be made within 20 days after the disclosure made by the other party.

(3) [There is no Colorado Rule--see instead C.R.C.P. 16(c).]

(4) Form of Disclosures; Filing. All disclosures pursuant to subparagraphs (a)(1) and (a)(2) of this Rule shall be made in writing, in a form pursuant to C.R.C.P. 10, signed pursuant to C.R.C.P. 26(g)(1), and served upon all

other parties. Disclosures shall not be filed with the court unless requested by the court or necessary for consideration of a particular issue.

(5) **Methods to Discover Additional Matters.** Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, pursuant to C.R.C.P. 34; physical and mental examinations; and requests for admission. Discovery at a place within a country having a treaty with the United States applicable to the discovery must be conducted by methods authorized by the treaty except that, if the court determines that those methods are inadequate or inequitable, it may authorize other discovery methods not prohibited by the treaty.

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) **In General.** Subject to the limitations and considerations contained in subsection (b)(2) of this Rule, parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

(2) **Limitations.** Except upon order for good cause shown, discovery shall be limited as follows:

(A) A party may take one deposition of each adverse party and of two other persons, exclusive of persons expected to give expert testimony disclosed pursuant to subsection 26(a)(2). The scope and manner of proceeding by way of deposition and the use thereof shall otherwise be governed by C.R.C.P. Rules 26, 28, 29,30, 31, 32 and 45.

(B) A party may serve on each adverse party 30 written interrogatories, each of which shall consist of a single question. The scope and manner of proceeding by means of written interrogatories and the use thereof shall otherwise be governed by C.R.C.P. Rules 26 and 33.

(C) A party may obtain a physical or mental examination (including blood group) of a party or of a person in the custody or under the legal control of a party pursuant to C.R.C.P. 35.

(D) A party may serve each adverse party requests for production of documents or tangible things or for entry, inspection or testing of land or property pursuant to C.R.C.P. 34, except such requests for production shall be limited to 20 in number, each of which shall consist of a single request.

(E) A party may serve on each adverse party 20 requests for admission, each of which shall consist of a single request. A party may also serve requests for admission of the genuineness of up to 50 separate documents that the party intends to offer into evidence at trial. The scope and manner of proceeding by

means of requests for admission and the use thereof shall otherwise be governed by C.R.C.P. 36.

(F) In determining good cause to modify the limitations of this subsection (b)(2), the court shall consider the following:

(i) Whether the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(ii) Whether the party seeking discovery has had ample opportunity by disclosure or discovery in the action to obtain the information sought;

(iii) Whether the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues in the litigation, and the importance of the proposed discovery in resolving the issues; and

(iv) Whether because of the number of parties and their alignment with respect to the underlying claims and defenses, the proposed discovery is reasonable.

[Subsections (E)(i)--(iv) are moved to new paragraph (F).]

(3) **Trial Preparation: Materials.** Subject to the provisions of subsection (b)(4) of this Rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subsection (b)(1) of this Rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of C.R.C.P. 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is:

(A) A written statement signed or otherwise adopted or approved by the person making it, or

(B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) **Trial Preparation: Experts.**

(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. Except to the extent otherwise stipulated by the parties or ordered by the court, no discovery, including depositions, concerning either the identity or the opinion of experts shall be conducted until after the disclosures required by subsection (a)(2) of this Rule.

(B) A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial only as provided by C.R.C.P. 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subsection (b)(4); and (ii) with respect to discovery obtained pursuant to subsection (b)(4)(B) of this Rule, the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(5) **Claims of Privilege or Protection of Trial Preparation Materials.** When a party withholds information required to be disclosed or provided in discovery by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and

shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

[This subsection has been moved from section (a)(6) and amended.]

(c) Protective Orders. Upon motion by a party or by the person from whom disclosure is due or discovery is sought, accompanied by a certificate that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) that the disclosure or discovery not be had;

(2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters;

(5) that discovery be conducted with no one present except persons designated by the court;

(6) that a deposition, after being sealed, be opened only by order of the court;

(7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or other person provide or permit discovery. The provisions of C.R.C.P. 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) Timing and Sequence of Discovery. Except when authorized by these Rules, by order, or by agreement of the parties, a party may not seek discovery from any source before submission of the proposed Case Management Order pursuant to C.R.C.P. 16. Any discovery conducted prior to issuance of the Case Management Order shall not exceed the limitations established by C.R.C.P. 26(b)(2). Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of Disclosures and Responses. A party is under a duty to supplement its disclosures under section (a) of this Rule when the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the disclosure or discovery process. A party is under a duty to amend a prior response to an interrogatory, request for production or request for admission when the party learns that the prior response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process. With respect to experts, the duty to supplement or correct extends both to information contained in the expert's report or summary disclosed pursuant to section (b) of this Rule and to information provided through any deposition of or interrogatory responses by the expert. Supplementation shall be performed in a timely manner.

(f) [No Colorado Rule--See C.R.C.P. 16].

(g) Signing of Disclosures, Discovery Requests, Responses, and Objections.

(1) Every disclosure made pursuant to subsections (a)(1) or (a)(2) of this Rule shall be signed by at least one attorney of record in the attorney's individual name. An unrepresented party shall sign the disclosure and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.

(2) Every discovery request, or response, or objection made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name. An unrepresented party shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information and belief, formed after a reasonable inquiry, the request, response or objection is:

(A) Consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(B) Not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(C) Not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

If a request, response or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

(3) If without substantial justification a certification is made in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who made the certification, the party on whose behalf the

disclosure, request, response or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including reasonable attorney fees.

CREDIT(S)

Repealed and Adopted eff. Jan. 1, 1995. Amended eff. Jan. 9, 1995, for all cases filed on or after that date; Jan. 1, 1998; July 1, 2001; Jan. 1, 2002; amended Oct. 20, 2005, eff. Jan. 1, 2006.

C.R.C.P. 47 (u)

C.R.C.P. ➡RULE 47. JURORS

(a) Orientation and Examination of Jurors. An orientation and examination shall be conducted to inform prospective jurors about their duties and service and to obtain information about prospective jurors to facilitate an intelligent exercise of challenges for cause and peremptory challenges.

(1) The jury commissioner is authorized to examine and, when appropriate, excuse prospective jurors who do not satisfy the statutory qualifications for jury service, or who are entitled to a postponement, or as otherwise authorized by appropriate court order.

(2) When prospective jurors have reported to the courtroom, the judge shall explain to them in plain and clear language:

(I) The grounds for challenge for cause;

(II) Each juror's duty to volunteer information that would constitute a disqualification or give rise to a challenge for cause;

(III) The identities of the parties and their counsel;

(IV) The nature of the case, utilizing the parties' CJI(3d) Instruction 2:1 or, alternatively, a joint statement of factual information intended to provide a relevant context for the prospective jurors to respond to questions asked of them. Alternatively, at the request of counsel and in the discretion of the

judge, counsel may present such information through brief non-argumentative statements.

(V) General legal principles applicable to the case, including burdens of proof, definitions of preponderance and other pertinent evidentiary standards and other matters that jurors will be required to consider and apply in deciding the issues.

(3) The judge shall ask prospective jurors questions concerning their qualifications to serve as jurors. The parties or their counsel shall be permitted to ask the prospective jurors additional questions. In the discretion of the judge, juror questionnaires, posterboards and other methods may be used. In order to minimize delay, the judge may reasonably limit the time available to the parties or their counsel for juror examination. The court may limit or terminate repetitious, irrelevant, unreasonably lengthy, abusive, or otherwise improper examination.

(4) Jurors shall not be required to disclose personal locating information, such as address or place of business in open court and such information shall not be maintained in files open to the public. The trial judge shall assure that parties and counsel have access to appropriate and necessary locating information.

(5) Once the jury is impaneled, the judge will again explain in more detail the general principles of law applicable to civil cases, the procedural guidelines regarding conduct by jurors during the trial, case specific legal principles and definitions of technical or special terms expected to be used during the presentation of the case. Jurors shall be told that they may not discuss the case with anyone until the trial is over with one exception: jurors may discuss the evidence among themselves in the jury room when all jurors are present. Jurors shall also be told that they must avoid discussing any potential outcome of the case and must avoid reaching any conclusion until they have heard all the evidence, final instructions by the court and closing arguments by counsel. The trial court shall have the discretion to prohibit or limit pre-deliberation discussions of the evidence in a particular trial based on a

specific finding of good cause reflecting the particular circumstances of the case.

(b) Alternate Jurors. The court may direct that one or two jurors in addition to the regular panel be called and impaneled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. An alternate juror who does not replace a principal juror shall not be discharged until the jury renders its verdict or until such time as determined by the court. If the court and the parties agree, alternate jurors may deliberate and participate fully with the principal jurors in considering and returning a verdict. If one or two alternate jurors are called each side is entitled to one peremptory challenge in addition to those otherwise allowed. The additional peremptory challenge may be exercised as to any prospective juror.

(c) Challenge to Array. Any party may challenge the array of jurors by motion setting forth particularly the causes of challenge; and the party opposing the challenge may join issue on the motion, and the issue shall be tried and decided by the court.

(d) Challenge to Individual Jurors. A challenge to an individual juror may be for cause or peremptory.

(e) Challenges for Cause. Challenges for cause may be taken on one or more of the following grounds:

(1) A want of any of the qualifications prescribed by the statute to render a person competent as a juror;

(2) Consanguinity or affinity within the third degree to any party;

(3) Standing in the relation of guardian and ward, master and servant, employer and clerk, or principal and agent to either party, or being a member of the family of any party; or a partner in business with any party or being security on any bond or obligation for any party;

(4) Having served as a juror or been a witness on a previous trial between the same parties for the same cause of action;

(5) Interest on the part of the juror in the event of the action, or in the main question involved in the action, except the interest of the juror as a member, or citizen of a municipal corporation;

(6) Having formed or expressed an unqualified opinion or belief as to the merits of the action;

(7) The existence of a state of mind in the juror evincing enmity against or bias to either party.

(f) Order and Determination of Challenges for Cause. The plaintiff first, and afterwards the defendant, shall complete challenges for cause. Such challenges shall be tried by the court, and the juror challenged, and any other person, may be examined as a witness.

(g) Order of Selecting Jury. The clerk shall draw by lot and call the number of jurors that are to try the cause plus such an additional number as will allow for all peremptory challenges permitted. After each challenge for cause sustained, another juror shall be called to fill the vacancy and may be challenged for cause. When the challenges for cause are completed, the clerk shall make a list of jurors remaining, in the order called, and each side, beginning with plaintiff, shall indicate thereon its peremptory challenge to one juror at a time in regular turn until all peremptory challenges are exhausted or waived. The clerk shall then swear the remaining jurors, or so many of them in the order listed as will make up the number fixed to try the cause, and these shall constitute the jury.

(h) Peremptory Challenges. Each side shall be entitled to four peremptory challenges, and if there is more than one party to a side they must join in such challenges. Additional peremptory challenges in such number as the court may see fit may be allowed to parties appearing in the action either

under Rule 14 orRule 24 if the trial court in its discretion determines that the ends of justice so require.

(i) Oath of Jurors. As soon as the jury is completed, an oath or affirmation shall be administered to the jurors in substance:

That you and each of you will well and truly try the matter at issue between _____, the plaintiff, and _____, the defendant, and a true verdict render, according to the evidence.

(j) When Juror Discharged. If, before verdict, a juror becomes unable or disqualified to perform his duty and there is no alternate juror, the parties may agree to proceed with the other jurors, or that a new juror be sworn and the trial begun anew. If the parties do not so agree the court shall discharge the jury and the case shall be tried anew.

(k) Examination of Premises by Jury. If in the opinion of the court it is proper for the jury to see or examine any property or place, it may order the jury to be conducted thereto in a body by a court officer. A guide may be appointed. The court shall, in the presence of the parties, instruct the officer and guide as to their duties. While the jury is thus absent, no person shall speak to it on any subject connected with the trial excepting only the guide and officer in compliance with such instructions. The parties and their attorneys may be present.

(l) Deliberation of Jury. After hearing the charge the jury may either decide in court or retire for deliberation. If it retires, except as hereinafter provided in this section (*l*), it shall be kept together in a separate room or other convenient place under the charge of one or more officers until it agrees upon a verdict or is discharged. While the jury is deliberating the officer shall, to the utmost of his ability, keep the jury together, separate from other persons. He shall not suffer any communication to be made to any juror or make any himself unless by order of the court except to ask it if it has agreed upon a verdict; and he shall not, before the verdict is rendered, communicate with

any person the state of its deliberations or the verdict agreed upon. The court in its discretion in any individual case may modify the procedure under this Rule by permitting a jury which is deliberating to separate during the luncheon or dinner hour or separate for the night under appropriate cautionary instructions, with directions that they meet again at a time certain to resume deliberations again under the charge of the appropriate officer.

(m) Items Taken to Deliberation. Upon retiring, the jurors shall take the jury instructions, their juror notebooks and notes they personally made, if any, and to the extent feasible, those exhibits that have been admitted as evidence.

(n) Additional Instructions. After the jury has retired for deliberation, if it desires additional instructions, it may request the same from the court; any additional instructions shall be given it in court in the presence of or after notice to the parties.

(*o*) New Trial if No Verdict. When a jury is discharged or prevented from giving a verdict for any reason, the action shall be tried anew.

(p) When Sealed Verdict. While the jury is absent the court may adjourn from time to time, in respect to other business, but it shall be nevertheless deemed open for every purpose connected with the cause submitted to the jury, until a verdict is rendered or the jury discharged. The court may direct the jury to bring in a sealed verdict at the opening of court, in case of an agreement during a recess or adjournment for the day.

(q) Declaration of Verdict. When the jury has agreed upon its verdict it shall be conducted into court by the officer in charge. The names of the jurors shall be called, and the jurors shall be asked by the court or clerk if they have agreed upon a verdict, and if the answer is in the affirmative, they shall hand the same to the clerk. The clerk shall enter in his records the names of the jurors. Upon a request of any party the jury may be polled.

(r) Correction of Verdict. If the verdict is informal or insufficient in any particular, the jury, under the advice of the court, may correct it or may be again sent out.

(s) Verdict Recorded, Disagreement. The verdict, if agreed upon by all jurors, shall be received and recorded and the jury discharged. If all the jurors do not concur in the verdict, the jury may be again sent out, or may be discharged.

(t) Juror Notebooks. Juror notebooks shall be available during trial and deliberation to aid jurors in the performance of their duties.

(u) Juror Questions. Jurors shall be allowed to submit written questions to the court for the court to ask of witnesses during trial, in compliance with procedure established by the trial court. The trial court shall have the discretion to prohibit or limit questions in a particular trial based on a specific finding of good cause reflecting the particular circumstances of the case.

CREDIT(S)

Amended eff. Jan. 1, 1999; Amended Feb. 19, 2003, eff. July 1, 2003; amended eff. June 7, 2010.

CRCP **RULE 51. INSTRUCTIONS TO JURY**

The parties shall tender jury instructions pursuant to C.R.C.P. 16(g). All instructions shall be submitted to the parties, who shall make all objections thereto before they are given to the jury. Only the grounds so specified shall be considered on motion for a new trial or on appeal or certiorari. Before argument, the court shall read its instructions to the jury but shall not comment upon the evidence. Such instructions shall be taken by the jury when it retires. All instructions offered by the parties, or given by the court, shall be filed with the clerk and, with the endorsement thereon indicating the action of the court, shall be taken as part of the record of the cause.

CREDIT(S)

Amended eff. Jan. 1, 1995, for all cases filed on or after that date; Sept. 10, 2009.

CRE ➡RULE 401. DEFINITION OF "RELEVANT EVIDENCE"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

CRE ➡RULE 402. RELEVANT EVIDENCE GENERALLY ADMISSIBLE; IRRELEVANT EVIDENCE INADMISSIBLE

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of the State of Colorado, by these rules, or by other rules prescribed by the Supreme Court, or by the statutes of the State of Colorado. Evidence which is not relevant is not admissible.

CRE ➡RULE 403. EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

CRE ➡RULE 701. OPINION TESTIMONY BY LAY WITNESSES

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

➡RULE 803. HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Spontaneous Present Sense Impression. A spontaneous statement describing or explaining an event or condition made while the declarant was perceiving the event or condition.

COMMITTEE COMMENT

The change reflected above was based on the fact that neither immediacy nor spontaneity would be guaranteed by the Federal rule. Colorado case law requires that a present sense impression be instinctive and spontaneous in order to be admissible. *See* Denver City Tramway Co. v. Brumley, 51 Colo. 251, 116 P. 1051 (1911). It was felt that the requirements set forth in that opinion constitute a greater guarantee of trustworthiness than the Federal rule, *i.e.*,spontaneity is the most important factor governing trustworthiness. This is especially true when there is no provision that the declarant be unavailable as a witness.

(2) Excited Utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for Purposes of Medical Diagnosis or Treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

COMMITTEE COMMENT

See: Houser v. Eckhardt, 168 Colo. 226, 450 P.2d 664 (1969); Ingles v. People, 90 Colo. 51, 6 P.2d 455 (1931); and § 8-53-103(2)(a) & (b), C.R.S. (Workmen's Compensation Act of Colorado).

(5) Recorded Recollection. A past recollection recorded when it appears that the witness once had knowledge concerning the matter and: (A) can identify the memorandum or record, (B) adequately recalls the making of it at or near the time of the event, either as recorded by the witness or by another, and (C) can testify to its accuracy. The memorandum or record may be read into evidence but may not itself be received unless offered by an adverse party.

COMMITTEE COMMENT

The change reflected above was made because the Federal rule is more restrictive than the Colorado rule, which does not require absence of a present recollection to be expressly shown as a preliminary to use of recorded recollection. Jordan v. People, 151 Colo. 133, 376 P.2d 699 (1962).

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

COMMITTEE COMMENT

The rule makes no reference to any objective standard of trustworthiness, *e.g.*, regularity with which records are kept.*See* Colorado cases: Patterson v. Pitoniak, 173 Colo. 454, 480 P.2d 579 (1971); Moseley v. Smith, 170 Colo. 177, 460 P.2d 222 (1969); Seib v. Standley, 164 Colo. 394, 435 P.2d 395 (1967); Rocky Mountain Beverage v. Walter Brewing Company, 107 Colo. 63, 108 P.2d 885 (1941); Hobbs v. Breen, 74 Colo. 277, 220 P. 997 (1923); Powell v. Brady, 30 Colo. App. 406, 496 P.2d 328 (1972).

(7) Absence of Entry in Records Kept in Accordance With the Provisions of Paragraph (6). Evidence that a matter is not included in the memoranda reports, records, or data compilations in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public Records and Reports. Unless the sources of information or other circumstances indicate lack of trustworthiness, records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and

other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law.

(9) Records of Vital Statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

COMMITTEE COMMENT

This rule is somewhat broader than the provisions of § 25-2-117, C.R.S., and respecting marriage records is desirable because the evidentiary use of the book of marriages provided in § 90-1-20, C.R.S. 1963, was repealed in 1973.

(10) Absence of Public Record or Entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the non-occurrence or non-existence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) Records of Religious Organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or

other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, Baptismal, and Similar Certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family Records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

COMMITTEE COMMENT

The age of the record or regularity of keeping are immaterial to admissibility. The content of fact is not limited to pedigree or genealogy.

(14) Records of Documents Affecting an Interest in Property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded or filed document and its execution and delivery by each person by whom it purports to have been

executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

COMMITTEE COMMENT

The generic term "property" used in the Federal rule indicates an intent that the rule apply to documents relating to interests in both real property and personal property. The term "filed" has been added to render the rule applicable to personal property under Colorado law: the Uniform Commercial Code, the Colorado Rules of Civil Procedure, and § 30-10-103, C.R.S., all refer to "filing" documents affecting an interest in personal property.

(15) Statements in Documents Affecting an Interest in Property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

COMMITTEE COMMENT

The rule extends admissibility beyond case law and statutes. *E.g.*, McClure v. Board of Commissioners of La Plata County, 19 Colo. 122, 34 P. 763 (1893); Wright v. People in the Interest of Rowe, 131 Colo. 92, 279 P.2d 676 (1955); Michael v. John Hancock Mutual Life Insurance Co., 138 Colo. 450, 334 P.2d 1090 (1959). Statutes more restrictive than the rule are §§ 38-35-102, 38-35-104, 38-35-105, 38-35-107, and 38-35-108, C.R.S.

(16) Statements in Ancient Documents. Statements in a document in existence twenty years or more the authenticity of which is established.

COMMITTEE COMMENT

The rule liberalizes the hearsay exception for ancient documents by eliminating proof of execution (*see* general statement for this principle in 32A C.J.S., *Evidence*, Sec. 744, page 32) and, further, reduces the required age of such document to twenty years from thirty years. For Colorado authorities on the subject, *see* McGary v. Blakeley, 127 Colo. 495, 258 P.2d 770 (1953) and § 38-35-107, C.R.S.

(17) Market Reports, Commercial Publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

COMMITTEE COMMENT

Colorado authorities affecting this rule are: 4-2-724, C.R.S.;Continental Divide Mining Investment Company v. Bliley, 23 Colo. 160, 166, 46 P. 633, 635 (1896); Willard v. Mellor, 19 Colo. 534, 36 P. 148 (1894); Kansas Pacific R.R. Company v. Lundin, 3 Colo. 94 (1876); Rio Grande Southern R.R. Company v. Nichols, 52 Colo. 300, 123 P. 318 (1912);Johnson v. Cousins, 110 Colo. 540, 135 P.2d 1021 (1943).

(18) Learned Treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence and may be received as exhibits, as the court permits.

COMMITTEE COMMENT

Unlike the Federal Rule, the Colorado Rule allows the learned treatises to be admitted as exhibits in the discretion of the court. The former Colorado Rule seemed to be that only if such treatise had been relied upon by the witness in forming his opinion might it be admitted. Denver City Tramway v. Gawley, 23 Colo. App. 332, 129 P. 258 (1912); Wall v. Weaver, 145 Colo. 337, 358 P.2d 1009 (1961); Ross v. Colo. Nat'l Bank, 170 Colo. 436, 463 P.2d 882 (1970).

(19) Reputation Concerning Personal or Family History. Reputation among members of his family by blood, adoption, or marriage, or among his associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his personal or family history.

COMMITTEE COMMENT

The former Colorado rule limited such evidence to reputation among persons related by blood or marriage to the family in question. Epple v. First Nat'l Bank of Greeley, 143 Colo. 319, 352 P.2d 796 (1960).

(20) Reputation Concerning Boundaries or General History. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

COMMITTEE COMMENT

This rule is thought consistent with the former Colorado rule. *See* § 38-44-101, C.R.S., reestablishing disputed boundaries.

(21) Reputation as to Character. Reputation of a person's character among his associates or in the community.

(22) Judgment of Previous Conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty or *nolo contendere*, adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

COMMITTEE COMMENT

The rule represents Colorado law by its inclusion of a *nolo contendere* plea. § 13-90-101, C.R.S., construed to include a *nolo contendere* plea in Lacey v. People, 166 Colo. 152, 442 P.2d 402 (1968).

(23) Judgment as to Personal, Family, or General History or Boundaries. Judgments as proof of matters of personal, family, or general

history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

COMMITTEE COMMENT

A judgment, under the circumstances stated, creates the reputations, and is admissible subject to the limitations applicable to evidence of reputation.

(24) [Transferred to Rule 807]

a