

## CHAPTER 5

### GENERAL INSTRUCTIONS RELATING TO DAMAGES

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**5:1 DAMAGES NOT TO BE INFERRED**

**The fact that an instruction on measure of damages has been given to you does not mean that the Court is instructing the jury to award or not to award damages. The question of whether or not damages are to be awarded is a question for the jury's consideration.**

**Notes on Use**

This instruction must be appropriately modified, or should not be given, in any case where the plaintiff is suing on a cause of action which, if proved, entitles the plaintiff to recover at least nominal damages. *See, e.g.*, Instructions 18:4, 20:4.

**Source and Authority**

This instruction is supported by **Sonoco Products Co. v. Johnson**, 23 P.3d 1287 (Colo. App. 2001).

## 5:2 AFFIRMATIVE DEFENSE — FAILURE TO MITIGATE

**If you find that the plaintiff, (name), has had actual damages, then you must consider whether the defendant, (name), has proved (insert applicable pronoun) affirmative defense of plaintiff’s failure to mitigate or minimize damages. The plaintiff has the duty to take reasonable steps under the circumstances to mitigate or minimize (insert applicable pronoun) damages. Damages, if any, caused by plaintiff’s failure to take such reasonable steps cannot be awarded to the plaintiff.**

**This affirmative defense is proved if you find (both) (all) of the following have been proven by a preponderance of the evidence:**

**1. The plaintiff failed to** *(if supported by sufficient evidence, insert appropriate description of that conduct which, under the applicable law of contracts or torts, etc., the plaintiff had an affirmative duty to undertake in order to mitigate any particular damages, e.g., “seek such medical attention for his claimed back injury as a reasonable person would have sought under the same or similar circumstances”);*

*(2. Insert, if necessary, appropriate descriptions of any additional qualifications the law places on the particular duty of mitigation being claimed, e.g., one of the qualifications on the duty to mitigate damages by undergoing surgery is that such surgery not involve a substantial hazard);*

**3. The plaintiff had ([some] [increased]) ([injuries] [damages] [losses]) because (insert applicable pronoun) did not (insert language of “reasonable steps” alleged).**

**If you find that any one or more of these propositions has not been proved by a preponderance of the evidence, then you shall make no deduction from plaintiff’s damages.**

**On the other hand, if you find that (both) (all) of these propositions have been proved by a preponderance of the evidence, then you must determine the amount of damages caused by the plaintiff’s failure to take such reasonable steps. This amount must not be included in your award of damages.**

### Notes on Use

1. Use whichever parenthesized or bracketed words are appropriate.
2. Omit the parenthesized second paragraph unless the duty which it is claimed the plaintiff failed to perform has been defined by the case law more specifically than the general duty set out in the first paragraph and the statement of that general duty alone would not be sufficient to describe adequately the law applicable to the evidence in the case.
3. This instruction should not be given unless the party asserting the duty to mitigate has properly pleaded the duty and there is sufficient evidence on the issue. C.R.C.P. 8(c); **Fair v. Red Lion Inn**, 943 P.2d 431 (Colo. 1997); **Mesa Sand & Gravel Co. v. Landfill, Inc.**, 759 P.2d 757 (Colo. App. 1988), *rev’d on other grounds*, 776 P.2d 362 (Colo. 1989); **First Nat’l**

**Bank v. Gilbert Marshall & Co.**, 780 P.2d 73 (Colo. App. 1989). Since mitigation is an affirmative defense, the burden of proof on the issue is on the party who asserts it. **U.S. Welding, Inc. v. Advanced Circuits, Inc.**, 2018 CO 56, ¶ 16, 420 P.3d 278; **Fair**, 943 P.2d at 437; **City of Westminster v. Centric-Jones Constructors**, 100 P.3d 472 (Colo. App. 2003); **Hedgecock v. Stewart Title Guar. Co.**, 676 P.2d 1208 (Colo. App. 1983); **Billings v. Boercker**, 648 P.2d 172 (Colo. App. 1982). Consequently, when this instruction is given, Instruction 3:1 must also be given and an appropriate reference to mitigation as an affirmative defense should be made in the “Statement of the Case to be Determined” instruction, *see* Chapter 2. However, although mitigation is an affirmative defense, only rarely, if ever, when established will it be a complete defense against a claim. For this reason, mitigation should not be identified as an affirmative defense in the concluding paragraphs of Instructions such as 9:1, 17:1, 20:1, or 30:10.

4. When appropriate to the evidence in the case, Instruction 5:6 (uncertainty as to amount of damages) should also be given with this instruction.

5. Section 42-4-237(7), C.R.S., provides that in certain motor-vehicle accidents, evidence of an injured person’s failure to comply with the mandatory seat belt law is admissible to show that the injured person failed to mitigate damages for “pain and suffering.” In such cases, Instruction 5:3 should be used, together with such special interrogatories as may be necessary to determine all relevant questions of fact. *See* Notes on Use to Instruction 5:3.

6. If appropriate to the evidence in the case, this instruction may be modified by specifying whether the alleged failure to mitigate damages relates to economic or to noneconomic damages. *See* Instruction 6:1.

7. For mitigation of damages in an outrageous conduct action, see Note on Use 3 to Instruction 23:6. For mitigation of damages in a defamation action, see Instruction 22:26 and its Notes on Use. For mitigation of damages in a wrongful discharge case, see Instruction 31:8.

### Source and Authority

1. This instruction is supported by **United States Welding**, ¶ 16, 420 P.3d at 282; **Fair**, 943 P.2d at 437; **Ballow v. PHICO Insurance Co.**, 878 P.2d 672 (Colo. 1994) (breach of contract to provide medical malpractice insurance, false representation and bad faith breach of insurance contract); **Intermill v. Heumesser**, 154 Colo. 496, 391 P.2d 684 (1964) (personal injury); **Valley Development Co. v. Weeks**, 147 Colo. 591, 364 P.2d 730 (1961) (crop damage); **Bodo v. Logan**, 145 Colo. 474, 358 P.2d 889 (1961) (personal injury); **City & County of Denver v. Noble**, 124 Colo. 392, 237 P.2d 637 (1951) (condemnation); **Hoehne Ditch Co. v. John Flood Ditch Co.**, 76 Colo. 500, 233 P. 167 (1925) (breach of contract); **Saxonia Mining & Reduction Co. v. Cook**, 7 Colo. 569, 4 P. 1111 (1884) (breach of contract action by employee for wrongful discharge by employer); **Mining Equipment, Inc. v. Leadville Corp.**, 856 P.2d 81 (Colo. App. 1993) (lease of mining equipment); **Technical Computer Services, Inc. v. Buckley**, 844 P.2d 1249 (Colo. App. 1992); **Pomeranz v. McDonald’s Corp.**, 821 P.2d 843 (Colo. App. 1991) (duty of landlord to mitigate damages following breach of lease by tenant), *aff’d in part, rev’d in part on other grounds*, 843 P.2d 1378 (Colo. 1993); **Bert Bidwell Investment Corp. v. LaSalle & Schiffer, P.C.**, 797 P.2d 811 (Colo. App. 1990) (unreasonable

refusal to consent to assignment of lease); **Gross v. Knuth**, 28 Colo. App. 188, 471 P.2d 648 (1970) (negligent performance of contract).

2. While one does have a duty to mitigate damages, this means only that reasonable means must be used. **Fair**, 943 P.2d at 437; **Lascano v. Vowell**, 940 P.2d 977 (Colo. App. 1996); **Berger v. Sec. Pac. Info. Sys., Inc.**, 795 P.2d 1380 (Colo. App. 1990); *see also* **Burt v. Beautiful Savior Lutheran Church**, 809 P.2d 1064 (Colo. App. 1990) (affirming denial of mitigation instruction where plaintiffs' financial condition rendered them unable to incur initial repair costs). Generally, what constitutes reasonable means is a question of fact for the trier of fact to determine. **Fair**, 943 P.2d at 437; **Francis v. Dahl**, 107 P.3d 1171 (Colo. App. 2005) (ten-year-old child, who was financially dependent on her mother, had no duty as a matter of law to mitigate her damages by seeking medical care for her injuries); **Westec Constr. Mgmt. Co. v. Postle**, 68 P.3d 529 (Colo. App. 2002). Thus, for example, one is not required "to submit to surgery which involves substantial hazards or which offers only a possibility of cure." **Hildyard v. W. Fasteners, Inc.**, 33 Colo. App. 396, 404, 522 P.2d 596, 600 (1974).

3. "[A]n aggrieved party cannot be required to accept offers from the breaching party if such offers are 'conditioned on surrender by the injured party of his claim for breach.'" **U.S. Welding**, ¶ 9, 420 P.3d at 280 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 350 cmt. e (1981)). Thus, the duty to mitigate does not oblige a party aggrieved by a breach of contract to accept an offer from the breaching party that relinquishes the aggrieved party's rights under the original contract. *Id.*

4. "[A] failure to mitigate is an affirmative defense only with regard to damages that could have been reasonably avoided, and the effect of that defense is to bar recovery from the breaching party of damages that need never have been suffered, notwithstanding its breach." *Id.* at ¶ 20, 420 P.3d at 283.

5. "[E]vidence of plaintiff's failure to wear a protective helmet [when riding a motorcycle] is inadmissible to show negligence on the part of the injured party or to mitigate damages." **Dare v. Sobule**, 674 P.2d 960, 963 (Colo. 1984); *accord* **Lawrence v. Taylor**, 8 P.3d 607 (Colo. App. 2000). Further, when evidence of a failure to wear a protective helmet is received, the plaintiff is entitled to a cautionary instruction that such failure does not constitute contributory negligence, even though the plaintiff may not have objected to such evidence and the defendant did not seek to use such evidence as a defense. **Dare**, 674 P.2d at 963-64.

6. A plaintiff, otherwise entitled to relief, is also entitled to recover as consequential damages, expenses and other costs incurred in taking reasonable steps to mitigate damages. **Gundersons, Inc. v. Tull**, 678 P.2d 1061 (Colo. App. 1983), *aff'd in part, rev'd in part on other grounds*, 709 P.2d 940 (Colo. 1985).

7. A plaintiff has no duty to anticipate a tortfeasor's illegal acts and, therefore, has no duty to mitigate damages until after the original injury has occurred. **Burt**, 809 P.2d at 1068.

8. In an attorney malpractice action, a failure by the client or successor counsel to appeal an adverse judgment "can never be a failure to mitigate damages caused by malpractice at trial." **Stone v. Satriana**, 41 P.3d 705, 712 (Colo. 2002).

9. A parent’s failure to mitigate damages arising out of injuries to a child cannot be imputed to the child. **Francis v. Dahl**, 107 P.3d 1171 (Colo. App. 2005).

10. As part of the duty to mitigate, a landlord must make reasonable efforts to re-lease a premises following an eviction. **Zeke Coffee, Inc. v. Pappas–Alstad P’ship**, 2015 COA 104, ¶ 30, 370 P.3d 261 (citing **Schneiker v. Gordon**, 732 P.2d 603 (Colo. 1987)).

11. A failure to mitigate instruction is not warranted when it is alleged that the plaintiff continued to undergo expensive treatment that was not resolving her pain. **Banning v. Prester**, 2012 COA 215, ¶¶ 13-14, 317 P.3d 1284, 1288 (jury instruction that failure to mitigate damages had been proved if plaintiff “continued to undergo expensive treatment when it was not resolving her pain” was error).

### 5:3 AFFIRMATIVE DEFENSE — NONUSE OF SAFETY BELT

**The defendant has the burden of proving by a preponderance of the evidence that the plaintiff failed to wear an available safety belt. You shall not award those noneconomic damages that you find were caused by the plaintiff’s failure to wear a safety belt.**

**Noneconomic damages are those defined in Instruction \_\_\_\_** (*insert the number assigned in the case to the instruction that sets forth Instruction 6:1 paragraph 1 for adults or 6:2 paragraph 1 for minor children*).

#### Notes on Use

1. The Notes on Use to Instruction 5:2 are also applicable to this instruction. If the failure to use a safety belt is not the only claimed breach of a duty to mitigate damages, Instruction 5:2, appropriately modified, should be used with this instruction.

2. Section 42-4-237(2), C.R.S., requires that “[u]nless exempted pursuant to subsection (3) of this section, every driver of and every front seat passenger in a motor vehicle and every driver of and every passenger in an auticycle equipped with a safety belt system shall wear a fastened safety belt while the motor vehicle is being operated on a street or highway in this state.” Where a vehicle has been equipped with a lap and shoulder belt, both must be worn to comply with the statute. **Carlson v. Ferris**, 85 P.3d 504 (Colo. 2003). Ordinarily, whether any of the exemptions from the requirement of wearing a seat belt set forth in section 42-4-237(3) are applicable will be determined by the court as a matter of law. However, if factual questions are presented, this instruction should be appropriately modified.

3. A defendant is entitled to the safety-belt instruction if he or she comes forward with competent evidence of safety-belt nonuse even if there is limited or no evidence of a causal relationship between the claimed injury and the non-use of the safety belt. **Anderson v. Watson**, 953 P.2d 1284 (Colo. 1998). The parties may leave it to the jury’s common sense to apportion pain and suffering damages between injuries associated with seat belt non-use and other injuries, or elect to present expert testimony on the issue. *Id.*

4. This instruction should not be given if the evidence is insufficient to establish that a statutory violation occurred. *See, e.g., Jackson v. Moore*, 883 P.2d 622 (Colo. App. 1994) (truck driver not required to wear safety belt when truck parked on side of road with its engine running).

5. The phrase “pain and suffering” in section 42-4-237(7) includes a broad range of noneconomic damages, including inconvenience, emotional stress, and impairment of quality of life, but not damages for physical impairment and disfigurement. **Pringle v. Valdez**, 171 P.3d 624 (Colo. 2007).

#### Source and Authority

1. This instruction is supported by section 42-4-237(7). *See also Pringle*, 171 P.3d at 628-29; **Anderson**, 953 P.2d at 1291.

2. In product liability actions, evidence of the failure to use a safety belt is limited to showing that the plaintiff failed to mitigate his or her damages for pain and suffering, and is not to be considered in deciding comparative fault. **Miller v. Solaglas Cal., Inc.**, 870 P.2d 559 (Colo. App. 1993).

## 5:4 EXEMPLARY OR PUNITIVE DAMAGES

**If you find in favor of the plaintiff, (name), on (insert applicable pronoun) claim of claim of (describe the plaintiff's claim, e.g., "battery"), then you shall consider whether the plaintiff should recover punitive damages against the defendant. If you find beyond a reasonable doubt that the defendant acted in a (fraudulent) (malicious) (willful and wanton) manner, in causing the plaintiff's (injuries) (damages) (losses) you shall determine the amount of punitive damages, if any, that the plaintiff should recover.**

**Punitive damages, if awarded, are to punish the defendant and to serve as an example to others.**

### Notes on Use

1. In cases involving speech or expressive conduct, see the Notes on Use to Instruction 22:27 for First Amendment limitations.

2. This instruction, appropriately modified, may also be used in statutory actions brought under section 13-21-106.5, C.R.S., for civil damages caused by bias-motivated crime (formerly ethnic intimidation). Section 13-21-106.5(3) requires a different state of mind be proved than that set out in the instruction. Also, if awarded, the punitive damages are not subject to the statutory limitations set out in either section 13-21-102 or section 13-21-102.5, C.R.S.

### Source and Authority

1. This instruction is based on sections 13-21-102 and 13-25-127, C.R.S.

2. The second paragraph of this instruction is based on **White v. Hansen**, 837 P.2d 1229 (Colo. 1992). *See also* **Barnes v. Lehman**, 118 Colo. 161, 193 P.2d 273 (1948); **McNeill v. Allen**, 35 Colo. App. 317, 534 P.2d 813 (1975).

### Related Instructions

3. Instruction 3:3 defining "reasonable doubt" should be used with this instruction. Also, when the parenthesized phrase "willful and wanton conduct" is used, Instruction 9:30 defining "willful and wanton" should be used with this instruction.

### Constitutional Limitations

4. In a series of decisions, beginning with **Pacific Mutual Life Insurance Co. v. Haslip**, 499 U.S. 1 (1991), the Supreme Court has recognized limitations on awards of punitive damages in civil actions based upon the Due Process Clause of the Fourteenth Amendment. Although the Court's decisions have recognized both procedural and substantive due process limitations, most of the Court's jurisprudence in this area is focused upon substantive limitations on the size of the awards, according to the three basic guideposts demarked and explicated in **BMW of North America, Inc. v. Gore**, 517 U.S. 559 (1996): (1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between actual harm or potential harm to the plaintiff and the punitive damages award; and (3) a comparison between the punitive damages awarded and civil or criminal penalties imposed in comparable cases. In terms of procedural due process, the

early decisions imposed relatively mild strictures on instructions to the factfinder, suggesting that they only need “enlighte[n] the jury as to the punitive damages’ nature and purpose, identif[y] the damages as punishment for civil wrongdoing of the kind involved, and explai[n] that their imposition was not compulsory.” **Haslip**, 499 U.S. at 19.

5. In **Cooper Industries, Inc., v. Leatherman Tool Group, Inc.**, 532 U.S. 424 (2001), the Court reiterated that the **Gore** factors must be reviewed de novo by appellate courts reviewing punitive damage awards.

6. In **State Farm Mutual Automobile Insurance Co. v. Campbell**, 538 U.S. 408 (2003), the Court linked substantive due process limitations with procedural due process requirements and strongly suggested that in some cases the substantive limitations on punitive damage awards should be provided in jury instructions to ensure that the punitive damages awards initially granted by a jury comport with constitutional standards.

7. As **Campbell** requires, evidence of acts offered to show the defendant’s culpability as a recidivist should be limited to those that are similar to the acts that caused the plaintiff’s injuries and tend to prove that the latter acts were reprehensible. *Id.* at 423. Moreover, evidence of acts committed by the defendant in jurisdictions in which those acts were not unlawful should not be admitted unless such evidence tends to prove that defendant’s acts that caused the plaintiff’s injuries were reprehensible; in that case the evidence should be admitted with such cautionary instructions as the court deems necessary to limit its consideration by the jury accordingly. *Id.* at 422. The court should carefully consider the admission of evidence of other acts by the defendant as evidence of reprehensibility in light of the caution urged by the Supreme Court in the **Campbell** decision.

8. If evidence that would establish any of the factors that any of the **Campbell** line of cases has recognized as indicative of the fact or degree of reprehensibility is admitted, this instruction may need to be modified to include that factor.

9. In **Philip Morris USA v. Williams**, 549 U.S. 346 (2007), the Court held that the Due Process Clause prohibits a state from punishing a defendant for injury inflicted upon nonparties to the litigation. Nonetheless, a plaintiff may demonstrate reprehensibility by showing harm to others. The jury should be instructed regarding this distinction.

10. In **Qwest Services Corp. v. Blood**, 252 P.3d 1071 (Colo. 2011), the Colorado Supreme Court reviewed and applied the U.S. Supreme Court cases and held that Colorado’s punitive damages statute, § 13-21-102, was not unconstitutional, either facially or as applied. Under **Phillip Morris**, evidence of harm to nonparties is relevant to demonstrate the reprehensibility of the defendant’s actions. Subsection 13-21-102(1)(b) complies with the holding in **Phillip Morris** to the extent it permits the jury to consider the “rights and safety of others” in assessing the willful and wanton nature of the defendant’s conduct. Further, nothing in **Phillip Morris** suggested that the state’s punitive damages statute must expressly limit a jury’s use of nonparty harm. As for an as-applied challenge under **Phillip Morris** to a punitive damages award, a defendant must request a limited-purpose instruction in order to preserve such a challenge. When such an instruction is given, absent evidence to the contrary, the court is to presume the jury followed that instruction.

11. The court in **Qwest Services Corp.** applied the **Gore** guideposts, including the reprehensibility criteria set forth in **Campbell**, in finding that the punitive damages award comported with substantive due process requirements.

### **Statutory Provisions**

12. The general purposes of punitive damages under section 13-21-102 are to punish the defendant and deter similar offenses by the defendant or others. **Coors v. Sec. Life of Denver Ins. Co.**, 112 P.3d 59 (Colo. 2005).

13. Section 13-21-102(1)(a) provides that punitive damages, when awarded by a jury, may not exceed the amount of the actual damages awarded. *See, e.g.*, **Hensley v. Tri-QSI Denver Corp.**, 98 P.3d 965 (Colo. App. 2004). However, based on certain determinations, the court may increase an award for punitive damages to a sum not to exceed three times the amount of the actual damages, § 13-21-102(3), or may reduce or disallow an award of punitive damages, § 13-21-102(2). *See, e.g.*, **Coors**, 112 P.3d at 65-66; **Vickery v. Vickery**, 271 P.3d 516 (Colo. App. 2010) (statute allowing punitive damages is permissive), *rev'd on other grounds sub nom Vickery v. Evans*, 266 P.3d 390 (Colo. 2011); **Bonidy v. Vail Valley Ctr. for Aesthetic Dentistry, P.C.**, 232 P.3d 277 (Colo. App. 2010) (trial judge may decline to award punitive damages even if statutory requirements are met); **Tait v. Hartford Underwriters Ins. Co.**, 49 P.3d 337 (Colo. App. 2001) (in determining whether to increase punitive damages award pursuant to section 13-21-102(3)(a), the trial court properly focused on litigation conduct of defendant). The “actual damages” to which an award of punitive damages are statutorily limited include any prejudgment interest. **Vickery**, 266 P.3d at 394. The cap on punitive damages limits recovery in an abuse of process and outrageous conduct case based on retaliatory conduct, even though the retaliation statute itself provides for treble damages and expressly does not limit the amount of recovery available in a civil action. **Palmer v. Diaz**, 214 P.3d 546 (Colo. App. 2009). Because the amount of punitive damages determined by the jury may be increased or decreased as the court may decide, the jury is not instructed about the effect of their determination, *see* § 13-31-102.5 (4), C.R.S. Section 13-21-102(1)(b) sets out a definition of “willful and wanton conduct” that has been incorporated into Instruction 9:30. Under section 13-21-102(6), evidence of the income or net worth of a party may not be considered in determining the appropriateness or amount of punitive damages. The provisions of section 13-21-102 apply equally to punitive damages awarded by a jury or by a judge. **Sky Fun 1, Inc. v. Schuttloffel**, 27 P.3d 361 (Colo. 2001).

14. Before the court increases a punitive damages award under section 13-21-102(3), it must conduct a hearing if requested. **Blood v. Qwest Servs. Corp.**, 224 P.3d 301 (Colo. App. 2009), *aff'd on other grounds*, 252 P.3d 1071 (Colo. 2011). Following such a hearing, the trial court must make findings regarding whether the defendant acted in a willful and wanton manner and, if it increases the punitive damages award, it must address the **Gore** due process factors.

15. Section 13-25-127(2) provides that in order to recover punitive damages, the conduct complained of must be established “beyond a reasonable doubt.”

16. Under section 13-21-102(1.5)(a), “[a] claim for exemplary damages in an action governed by this section [13-21-102] may not be included in any initial claim for relief. A claim for [such damages] may be allowed by amendment to the pleadings only after the exchange of

initial disclosures pursuant to Rule 26 of the Colorado Rules of Civil Procedure and the plaintiff establishes prima facie proof of a triable issue. After the plaintiff establishes the existence of a triable issue . . . , the court may, in its discretion, allow additional discovery on the issue of exemplary damages as the court deems appropriate.” For procedural and substantive limitations applicable to claims for punitive damages in wrongful death actions, see section 13-21-203(3)–(5), C.R.S., and for such limitations in actions against health care professionals, see section 13-64-302.5, C.R.S. *See also* Notes on Use below under the heading, “Other Statutes.”

17. Additional limitations on the recovery of punitive damages may be applicable when such recovery is sought against a volunteer of a nonprofit organization or governmental entity “in an action brought for harm based on the action of a volunteer acting within the scope of the volunteer’s responsibilities to” the organization or entity. 42 U.S.C. § 14503(f)(1) (2018). For the applicable limitations, see 42 U.S.C. §§ 14503(f). When applicable, this and related instructions on damages must be modified as appropriate. *See generally* Volunteer Protection Act of 1997, 42 U.S.C. § 14501 to -505 (2018).

### **Sufficiency of Evidence**

18. Punitive damages may not be awarded if there is insufficient evidence to support them. **Coors**, 112 P.3d at 65-66 (Punitive damages may be awarded only “where the party asserting the claim proves beyond a reasonable doubt that the injury sustained was attended by circumstances of fraud, malice, or willful and wanton conduct. . . . Where the defendant is conscious of his conduct and the existing conditions and knew or should have known that injury would result, the statutory requirements of section 13-21-102 are met.”); **Tri-Aspen Constr. Co. v. Johnson**, 714 P.2d 484, 488 (Colo. 1986) (conduct “that is merely negligent . . . cannot serve as the basis for exemplary damages”); **Pizza v. Wolf Creek Ski Dev. Corp.**, 711 P.2d 671 (Colo. 1985) (to recover punitive damages, plaintiff must show beyond a reasonable doubt that the defendant knew or should have known that injury would probably result from his or her actions, or that the defendant acted with an evil intent and with the purpose of injuring the plaintiff or with such a wanton and reckless disregard of the plaintiff’s rights as to demonstrate a wrongful motive); **Palmer v. A.H. Robins Co.**, 684 P.2d 187 (Colo. 1984) (defendant’s action was purposefully performed with an awareness of the risk and in disregard of the consequences); **Blood**, 224 P.3d at 314 (although simple negligence may not support an award of punitive damages, “where a defendant is conscious of both its conduct and the existing conditions, and knew or should have known that injury would result, the requirements of section 13-21-102 are met”); **Miller v. Byrne**, 916 P.2d 566, 580 (Colo. App. 1995) (“[w]illful and wanton conduct means conduct purposefully committed which the actor must have realized is dangerous, done heedlessly and recklessly, without regard to consequences, or of the rights and safety of others, particularly of the plaintiff”); *see also* **Eurpac Serv. Inc. v. Republic Acceptance Corp.**, 37 P.3d 447 (Colo. App. 2000) (mere taking of another’s property under an erroneous claim of right and over the protest of the owners was insufficient to permit an award of punitive damages); **Webster v. Boone**, 992 P.2d 1183 (Colo. App. 1999); **Miller v. Solaglas Cal., Inc.**, 870 P.2d 559 (Colo. App. 1993) (declining to apply a “knew or should have known” standard in determining whether an award of punitive damages is justified).

19. Whether the evidence is sufficient to justify an award of punitive damages is a question of law. **Qwest Servs. Corp.**, 252 P.3d at 1092; **Coors**, 112 P.3d at 66; **Archer v. Farmer Bros. Co.**, 70 P.3d 495 (Colo. App. 2002), *aff’d on other grounds*, 90 P.3d 228 (Colo.

2004); **Razi v. Schmitt**, 36 P.3d 102 (Colo. App. 2001) (punitive damages were properly awarded against arsonist even though arsonist had been punished in criminal justice system for the arson); **Ajay Sports, Inc. v. Casazza**, 1 P.3d 267 (Colo. App. 2000); **Miller**, 870 P.2d at 568. In deciding this question, the court must consider the totality of the evidence viewed in the light most supportive of the punitive damages award. **Qwest Servs. Corp.**, 252 P.3d at 1092; **Coors**, 112 P.3d at 66; **Eurpac Serv. Inc.**, 37 P.3d at 452. However, where the evidence is sufficient, whether to award such damages rests in the discretion of the trier of fact. **Coors**, 112 P.3d at 67; **Ballow v. PHICO Ins. Co.**, 878 P.2d 672 (Colo. 1994); **Messler v. Phillips**, 867 P.2d 128 (Colo. App. 1993); *see also* **Qwest Servs. Corp.**, 252 P.3d at 1076 (jury could find, beyond a reasonable doubt, that the defendant consciously forewent a periodic pole inspection program and knew or should have known that this conduct would probably result in injury); **Mince v. Butters**, 200 Colo. 501, 616 P.2d 127 (1980); **Eads v. Dearing**, 874 P.2d 474 (Colo. App. 1993).

20. Also, if there is insufficient evidence to support a finding of “fraud” or “malice,” these elements should be omitted from the instruction. The “circumstances of fraud” referred to in the instruction are identical to the elements of a claim based on fraud. *See, e.g.*, **Berger v. Sec. Pac. Info. Sys., Inc.**, 795 P.2d 1380 (Colo. App. 1990) (jury’s finding that elements of fraud were established also established the “circumstances of fraud” required for punitive damages); *see also* **Amber Props., Ltd. v. Howard Elec. & Mech. Co.**, 775 P.2d 43 (Colo. App. 1988). “Malice” may include vindictiveness and retaliatory motives. **Bonidy v. Vail Valley Ctr. for Aesthetic Dentistry, P.C.**, 232 P.3d 277 (Colo. App. 2010).

21. Ordinarily, in determining punitive damages, a jury should not be permitted to consider evidence of a defendant’s conduct that occurred after the events giving rise to liability. **Bennett v. Greeley Gas Co.**, 969 P.2d 754 (Colo. App. 1998). *But see* **Jones v. Cruzan**, 33 P.3d 1262 (Colo. App. 2001) (defendant’s conduct in fleeing scene of automobile accident was admissible on issue of punitive damages because it was relevant to show defendant’s state of mind at time of accident). However, the court may permit evidence of offenses that occurred before the events giving rise to liability for purposes of exemplary damages. *See* **Alhilo v. Kliem**, 2016 COA 142, ¶ 40, 412 P.3d 902 (no abuse of trial court’s discretion in permitting evidence of defendant’s prior alcohol offenses for purposes of exemplary damages).

### **Breach of Contract**

22. Punitive damages are not recoverable for breach of contract. **Decker v. Browning-Ferris Indus., Inc.**, 947 P.2d 937 (Colo. 1997); **Decker v. Browning-Ferris Indus., Inc.**, 931 P.2d 436 (Colo. 1997); **Ballow**, 878 P.2d at 682; **Mortg. Fin., Inc. v. Podleski**, 742 P.2d 900 (Colo. 1987); **Watson v. Cal-Three, LLC**, 254 P.3d 1189 (Colo. App. 2011) (award of punitive damages vacated where counterclaim plaintiff prevailed only on its claim for breach of contract and breach of covenant of good faith and fair dealing, and did not prevail on its claim for tortious interference with contract); **Parr v. Triple L & J Corp.**, 107 P.3d 1104 (Colo. App. 2004) (trial court properly awarded punitive damages on tort claim for intentional interference with contract and not on breach of contract claim); **Hensley v. Tri-QSI Denver Corp.**, 98 P.3d 965 (Colo. App. 2004); **Wells Fargo Realty Advisors Funding, Inc. v. Uioli, Inc.**, 872 P.2d 1359 (Colo. App. 1994); **William H. White Co. v. B & A Mfg. Co.**, 794 P.2d 1099 (Colo. App. 1990); **Surdyka v. DeWitt**, 784 P.2d 819 (Colo. App. 1989) (punitive damages are not recoverable for

breach of contract; however, if the same conduct also constitutes a tort, punitive damages are recoverable on the tort claim).

23. Punitive damages are recoverable on a claim of bad faith breach of an insurance contract if the breach is accompanied by circumstances of fraud, malice, or willful and wanton conduct. **Ballow**, 878 P.2d at 682; **South Park Aggregates, Inc. v. Nw. Nat'l Ins. Co.**, 847 P.2d 218 (Colo. App. 1992); **Farmers Grp., Inc. v. Trimble**, 768 P.2d 1243 (Colo. App. 1988). However, establishing a claim for bad faith breach of an insurance contract is not necessarily sufficient to establish a claim for exemplary damages. *Id.*

### **Equitable Claims**

24. Punitive damages are not recoverable on claims that are equitable rather than legal in nature. **Kaitz v. Dist. Court**, 650 P.2d 553 (Colo. 1982); **Double Oak Constr., L.L.C. v. Cornerstone Dev. Int'l, L.L.C.**, 97 P.3d 140 (Colo. App. 2003) (fraudulent conveyance claim); **Morris v. Askeland Enters., Inc.**, 17 P.3d 830 (Colo. App. 2000) (punitive damages not recoverable on a fraudulent conveyance claim under sections 38-8-101 to -112, C.R.S.); **Defeyter v. Riley**, 671 P.2d 995 (Colo. App. 1983); **Seal v. Hart**, 755 P.2d 462 (Colo. App. 1988). *But see* **Peterson v. McMahon**, 99 P.3d 594 (Colo. 2004) (exemplary damages properly awarded in action against trustee for misappropriation of funds; action was legal in nature since remedy sought was immediate repayment of trust funds); **Paine, Webber, Jackson & Curtis, Inc. v. Adams**, 718 P.2d 508 (Colo. 1986) (not all claims for damages for breach of duty by a fiduciary are equitable in nature); **Virdanco, Inc. v. MTS Int'l**, 820 P.2d 352 (Colo. App. 1991) (punitive damages recoverable where equitable claim for accounting was ancillary to legal claim for breach of fiduciary duty).

### **Wrongful Death**

25. Punitive damages are recoverable under section 13-21-203(3) in wrongful death actions that accrued on or after August 8, 2001. This instruction applies to these claims, subject to the special pleading rules set out in section 13-21-203(3)(c) and the special substantive provisions set out in section 13-21-203(4) through (7).

26. Punitive damages are not recoverable under section 13-20-101(1), C.R.S., in a survival action being maintained (a) after the death of a wrongdoer or (b) after the death of the person for the benefit of whose estate the action is being maintained, if the action is a tort action "based upon personal injury." **Estate of Burron v. Edwards**, 42 Colo. App. 141, 594 P.2d 1064 (1979) (construing section 13-20-101(1)).

### **Product Liability**

27. Punitive damages may be recoverable in a product liability action even though such an action is based on a theory of strict liability rather than fault. **Palmer**, 684 P.2d at 217-18.

### **Invasion of Privacy**

28. Punitive damages may be awarded on a claim for invasion of privacy. **Borquez v. Robert C. Ozer, P.C.**, 923 P.2d 166 (Colo. App. 1995), *aff'd in part, rev'd in part on other grounds*, 940 P.2d 371 (Colo. 1997).

### Civil Conspiracy

29. Punitive damages may be recoverable on a claim for civil conspiracy. *See Double Oak Constr.*, 97 P.3d at 149.

### Treble Damages

30. Generally, treble damages and punitive damages are not recoverable if both are premised on the same facts. **Coors**, 112 P.3d at 65 (“A plaintiff is not entitled to recover both treble damages under the Colorado Consumer Protection Act and punitive damages under section 13-21-102.”); **Lexton-Ancira Real Estate Fund, 1972 v. Heller**, 826 P.2d 819 (Colo. 1992) (plaintiff could not recover both punitive damages and treble damages on deceptive trade practices claim where both claims were predicated on the same conduct); **Hall v. Walter**, 969 P.2d 224 (Colo. 1998) (same); *cf.* **Becker & Tenenbaum v. Eagle Rest. Co.**, 946 P.2d 600 (Colo. App. 1997). The cap on punitive damages limits the damages in an action for outrageous conduct and abuse of process based on retaliatory conduct, even though the retaliation statute itself provides for treble damages and expressly does not limit the amount of recovery available in a civil action. **Palmer**, 214 P.3d at 556.

31. The appropriate standard of proof to recover treble damages under section 10-4-708(1), C.R.S., of the now-repealed No-Fault Act is by a preponderance of the evidence rather than by proof beyond a reasonable doubt as is required under section 13-25-127 to recover punitive damages. **Farmers Grp., Inc. v. Williams**, 805 P.2d 419 (Colo. 1991).

32. A trial court’s order trebling exemplary damages under section 13-21-102(3)(c) is reviewed for an abuse of discretion, rather than de novo. *See General Steel Domestic Sales, LLC v. Bacheller*, 2012 CO 68, ¶ 41, 291 P.3d 1.

### Comparative Negligence

33. Punitive damages are not subject to reduction by application of the comparative negligence or pro rata liability statutes. **Lira v. Davis**, 832 P.2d 240 (Colo. 1992). However, under section 13-21-102, punitive damages are limited to the amount of compensatory damages awarded after any reductions required by the comparative negligence and pro rata liability statutes. **Lira**, 832 P.2d at 245; *see also White*, 837 P.2d at 1236-37; **Sprung v. Adcock**, 903 P.2d 1224 (Colo. App. 1995). In addition, in the absence of a successful underlying claim for actual damages, there can be no award of punitive damages. **Concord Realty Co. v. Cont’l Funding Corp.**, 776 P.2d 1114 (Colo. 1989). Also, it is permissible to permit the jury to apportion exemplary damages among multiple defendants based upon varying degrees of culpability. **Ajay Sports**, 1 P.3d at 279.

34. In cases involving multiple plaintiffs in which each plaintiff suffers a unique and different harm, there is no requirement that the same percentage of actual damages be awarded for punitive damages as to each plaintiff. **Bennett**, 969 P.2d at 765.

### Prejudgment Interest

35. Prejudgment interest is not allowed on punitive damages. **Ballow**, 878 P.2d at 683; **Lira**, 832 P.2d at 246; **Seaward Constr. Co. v. Bradley**, 817 P.2d 971 (Colo. 1991); *cf.* **Becker & Tenenbaum**, 946 P.2d at 602 (prejudgment interest not allowed on award of treble damages).

### Governmental Immunity

36. Except as otherwise authorized under section 24-10-118(5), C.R.S., a public entity may not be held liable for punitive damages under section 24-10-114(4), C.R.S., of the Governmental Immunity Act. **Martin v. Weld County**, 43 Colo. App. 49, 598 P.2d 532 (1979); *see* **Subryan v. Regents of the Univ. of Colo.**, 789 P.2d 472 (Colo. App. 1989) (the Board of Regents is a “public entity” and, therefore, exempt from liability for punitive damages in actions brought under the Governmental Immunity Act). A public employee, however, may be liable for punitive damages if his or her acts were willful and wanton. § 24-10-118(1)(c); **Gray v. Univ. of Colo. Hosp. Auth.**, 2012 COA 113, ¶ 27, 284 P.3d 191. In an action for injuries resulting from the operation of a correctional facility or jail, because public employees are not immune from liability pursuant to section 24-10-106(1), C.R.S., the question of whether an employee’s conduct was willful and wanton for purposes of punitive damages is not for the district court to determine before trial via Rule 12(b)(1) and a **Trinity** hearing. **Hernandez v. City & Cty. of Denver**, 2018 COA 151, ¶¶ 26, 30, 439 P.3d 57.

### Corporations

37. Under certain circumstances, a corporation can be held liable for punitive damages because of an act of an agent. *See, e.g.*, **Fitzgerald v. Edelen**, 623 P.2d 418 (Colo. App. 1980) (applying RESTATEMENT (SECOND) OF AGENCY § 217C (1958)); *see also* **Jacobs v. Commonwealth Highland Theatres, Inc.**, 738 P.2d 6 (Colo. App. 1986) (corporation liable where acts upon which punitive damages are based are those of a managerial employee acting within scope of that employment); **Appel v. Sentry Life Ins. Co.**, 701 P.2d 634 (Colo. App. 1985) (principal authorizing or approving act of agent, for which punitive damages may properly be awarded, may be held liable for such damages), *aff’d on other grounds*, 739 P.2d 1380 (Colo. 1987). *But see* **Voight v. Colo. Mountain Club**, 819 P.2d 1088 (Colo. App. 1991) (where there was no evidence that tortfeasor was an officer or managing agent of the defendant corporation, the defendant could not be held liable for punitive damages).

### Statute of Limitations

38. The one-year statute of limitations set out in section 13-80-103(1)(d), C.R.S., applicable to “[a]ll actions for any penalty or forfeiture of any penal statutes,” does not apply to a claim for punitive damages, because the statute authorizing such damages, § 13-21-102, does not create an independent claim for relief. **Kirk v. Denver Publ’g Co.**, 818 P.2d 262 (Colo. 1991); **Palmer**, 684 P.2d at 213. Rather, the statute authorizes additional damages in certain circumstances when another claim for relief resulting in actual damages has been established. **Adams v. Paine, Webber, Jackson & Curtis, Inc.**, 686 P.2d 797 (Colo. App. 1983), *aff’d*, 718 P.2d 508 (Colo. 1986).

### Other Statutes

39. 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 section 13-64-302.5. To the extent any of these statutory provisions are applicable, appropriate modifications may be required in this instruction. *See, e.g.*, § 13-64-302.5(4), (5).

40. The Ski Safety Act of 1979, §§ 33-44-101 to -114, C.R.S., did not abolish punitive damages in civil actions arising out of skiing injuries. **Pizza**, 711 P.2d at 684.

41. Punitive damages may be recovered against a defendant who made illegal drugs available to an illegal user and the use of such drugs caused damages to others. *See* §§ 13-21-801 to -813, C.R.S. As to the persons who may recover such damages, see section 13-21-804(1), C.R.S., and as to the persons who may be held liable for such damages, see section 13-21-804(2)(a) and (b), C.R.S.

### **Survival**

42. Under Colorado's survival statute, § 13-20-101(1) C.R.S., punitive damages cannot be awarded against a defendant who has died. In the event a plaintiff is awarded punitive damages at trial, but dies before formal entry of judgment, plaintiff's estate is entitled to recover the punitive damages awarded before the plaintiff's death. **Guar. Tr. Life Ins. Co. v. Estate of Casper**, 2018 CO 43, ¶¶ 19-21, 418 P.3d 1163.

### **Employer Liability**

43. When an employer has acknowledged respondeat superior liability for the negligence of its employee, punitive damages cannot be asserted against the employer based on a direct negligence claim, such as negligent supervision, hiring, retention, or entrustment. **Ferrer v. Okbamicael**, 2017 CO 14M, ¶ 45, 390 P.3d 836 (subsequently abrogated by section 13-21-111.5(1.5), C.R.S., effective for cases filed on or after September 7, 2021).

## 5:5 DETERMINING LIFE EXPECTANCY — MORTALITY TABLE

**At the beginning of this trial, plaintiff, (*name*), had a life expectancy of (*insert appropriate number of years*) years. This expectancy is taken from the United States census bureau mortality table. This table is not conclusive but may be considered together with other evidence relating to the plaintiff's health, habits, and occupation.**

### Notes on Use

1. This instruction assumes the age of the party seeking to use this instruction is not in dispute. If the party's age is disputed, this instruction must be appropriately modified.
2. This instruction should not be given unless there is sufficient evidence that the plaintiff's injuries will be permanent. *See Alcon v. Spicer*, 113 P.3d 735 (Colo. 2005); **Rio Grande S. R.R. v. Nichols**, 52 Colo. 300, 123 P. 318 (1912).
3. In a wrongful death case, when this instruction is given in reference to the deceased, the word "decedent," "deceased," or the name of the deceased should be substituted for the word "plaintiff," and the date of death should be used as the beginning measuring date for the life expectancy.
4. The use of the most recent United States census bureau mortality table is mandated by section 13-25-102, C.R.S.

### Source and Authority

This instruction is supported by section 13-25-102 and the cases cited in the Notes on Use. *See also Colo. Fuel & Iron Corp. v. Indus. Comm'n*, 148 Colo. 557, 367 P.2d 597 (1961); **City of Ft. Collins v. Smith**, 84 Colo. 511, 272 P. 6 (1928).

## 5:6 UNCERTAINTY AS TO AMOUNT OF DAMAGES

**Difficulty or uncertainty in determining the precise amount of any damages does not prevent you from deciding an amount. You should use your best judgment based on the evidence.**

### Notes on Use

1. In most cases, this instruction should be given only when there is sufficient evidence of the cause and existence of damages. **Donahue v. Pikes Peak Auto. Co.**, 150 Colo. 281, 372 P.2d 443 (1962). When there is such evidence, the proper test for then determining the sufficiency of the evidence for calculating the amount of such damages is “whether there is a reasonable basis in the evidence from which the finders of fact may compute damages.” **Accutool Precision Machining, Inc. v. Denver Metal Finishing**, 680 P.2d 861, 864 (Colo. App. 1984). “The law permits the approximation of the amount of damages provided the fact of damage is certain.” **W. Conference Resorts, Inc. v. Pease**, 668 P.2d 973, 977 (Colo. App. 1983).

2. This instruction applies to amounts of damages that may be involved in issues of mitigation under Instruction 5:2, as well as amounts that may be involved for various elements of damage under the plaintiff’s claim for relief.

3. This instruction does not apply to breach of contract claims for liquidated damages. *See* Instruction 30:40.

4. When this instruction is given, Instruction 3:4 should also be given. **Cox v. Public Serv. Co.**, 30 Colo. App. 350, 494 P.2d 1302 (1971).

### Source and Authority

This instruction is supported by **Denny Construction, Inc. v. City & County of Denver**, 199 P.3d 742 (Colo. 2009) (lost profits in contract case due to impaired bonding capacity not speculative as a matter of law); **Acoustic Marketing Research, Inc. v. Technics, LLC**, 198 P.3d 96 (Colo. 2008) (future lost royalties not speculative as a matter of law, and proved with reasonable certainty); **Vanderbeek v. Vernon Corp.**, 50 P.3d 866 (Colo. 2002) (rule precluding recovery of uncertain or speculative damages applies only when the fact of damages is uncertain, not where amount is uncertain); **Peterson v. Colorado Potato Flake & Manufacturing Co.**, 164 Colo. 304, 435 P.2d 237 (1967); **Riggs v. McMurry**, 157 Colo. 33, 400 P.2d 916 (1965); **Donahue**, 150 Colo. at 287, 372 P.2d at 447; **Colorado National Bank v. Ashcraft**, 83 Colo. 136, 263 P. 23 (1927); **Schuessler v. Wolter**, 2012 COA 86, ¶ 48, 310 P.3d 151 (amount of damages need not be determined by mathematical formula; it may be an approximation if the fact of damages is certain and there is some evidence from which the jury could make a reasonable estimation); **Sterenbuch v. Goss**, 266 P.3d 428 (Colo. App. 2011); **Margenau v. Bowlin**, 12 P.3d 1214 (Colo. App. 2000) (amount of damages need not be determined by mathematical formula); **Phillips v. Monarch Recreation Corp.**, 668 P.2d 982 (Colo. App. 1983); and **Brittis v. Freemon**, 34 Colo. App. 348, 527 P.2d 1175 (1974).

## 5:7 DAMAGES FOR WRONG OF ANOTHER

**If you find that the natural and probable consequence of a wrongful act by the defendant, (*name*), was to involve the plaintiff, (*name*), in litigation with others, the plaintiff may recover from the defendant the reasonable expenses of that litigation.**

### Notes on Use

1. This instruction, premised on the wrong-of-another doctrine, is an acknowledgement that the litigation costs incurred by a party in separate litigation may sometimes be an appropriate measure of compensatory damages against another party. It does not, however, establish a stand-alone cause of action. A wrong-of-another claim must be premised on either the existence of a duty owed by the defendant to the plaintiff or some other legal entitlement to recover, other than the mere fact that the plaintiff incurred damages in the form of attorneys' fees. **Rocky Mtn. Festivals, Inc. v. Parsons Corp.**, 242 P.3d 1067 (Colo. 2010).

2. Where the claims for which a plaintiff seeks wrong-of-another damages cannot be distinguished from the remainder of the underlying dispute, no damages are recoverable. If, however, one party's wrong results in the plaintiff's litigation of distinct and segregable claims against another party, the litigation costs associated with those claims are recoverable. *Id.*

3. This instruction may be given with Instruction 24:7, concerning damages arising from interference with contract.

### Source and Authority

This instruction is supported by **Rocky Mountain Festivals**, 242 P.3d at 1073-74 (damages under wrong-of-another doctrine may be recovered where one party's wrong results in the litigation of distinct and segregable claims against another party); **Bernhard v. Farmers Insurance Exchange**, 915 P.2d 1285 (Colo. 1996) (discussing the broad range of applications of the wrong-of-another doctrine in Colorado); **Brochner v. Western Insurance Co.**, 724 P.2d 1293 (Colo. 1986) (wrong-of-another doctrine is applicable only if the party seeking attorneys' fees was without fault as to the underlying action); **Elijah v. Fender**, 674 P.2d 946 (Colo. 1984) (adopting and applying wrong-of-another doctrine); **Publix Cab Co. v. Colorado National Bank**, 139 Colo. 205, 338 P.2d 702 (1959) (recognizing the wrong-of-another doctrine in principle); **Sun Indemnity Co. v. Landis**, 119 Colo. 191, 201 P.2d 602 (1948) (same); **International State Bank v. Trinidad Bean & Elevator Co.**, 79 Colo. 286, 245 P. 489 (1926); **Stevens v. Moore & Co. Realtor**, 874 P.2d 495 (Colo. App. 1994) (wrongful act need not be the sole cause of the prior litigation in order to recover wrongful damages due to wrong of another); and **McNeill v. Allen**, 35 Colo. App. 317, 534 P.2d 813 (Colo. App. 1975).