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**PREMISES LIABILITY**

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## Introductory Note

1. In **Vigil v. Franklin**, 103 P.3d 322 (Colo. 2004), the Colorado Supreme Court concluded that the premises liability statute, § 13-21-115, C.R.S., is the exclusive remedy for parties injured on the property of another. *See also Larrieu v. Best Buy Stores, L.P.*, 2013 CO 38, ¶ 4, 303 P.3d 558; **Sweeney v. United Artists Theatre Circuit, Inc.**, 119 P.3d 538 (Colo. App. 2005); **Henderson v. Master Klean Janitorial, Inc.**, 70 P.3d 612 (Colo. App. 2003); **Thornbury v. Allen**, 991 P.2d 335 (Colo. App. 1999). This is apparently the case regardless of whether the injured party was on public or private property. **Anderson v. Hyland Hills Park & Recreation Dist.**, 119 P.3d 533 (Colo. App. 2004).

2. The premises liability statute classifies those injured on the property of another as trespassers, licensees, or invitees. § 13-21-115(3). Under the statute, whether an injured party is a trespasser, licensee, or invitee must be determined by the trial court. The fact finder determines the ultimate issues of liability and damages. § 13-21-115(4).

3. Part A of this chapter contains instructions for claims by parties who were injured on the premises of another. Instructions 12:1, 12:2, and 12:3 apply to claims involving trespassers, licensees, and invitees, respectively. Instructions 12:4 and 12:5 apply to claims based on the attractive nuisance doctrine, which the statute expressly does not abrogate. § 13-21-115(2), C.R.S.

4. Part B of this chapter applies to claims by parties who were injured off the premises by activities or conditions on the premises of another. The premises liability statute does not apply to these kinds of claims because it applies only to injuries that occur on the premises. § 13-21-115(3). Accordingly, for off-premises injuries, the common-law rules still apply.

5. Part C contains instructions regarding the common-law duties of lessors with respect to persons injured on or off the premises. While these instructions are valid with respect to persons injured off the premises, because of the exclusive remedy provided by the premises liability statute, there is some question as to the applicability with respect to persons injured on the premises. *See generally Wilson v. Marchiondo*, 124 P.3d 837 (Colo. App. 2005) (in action against landlord, premises liability statute is plaintiff's only means of recovery).

6. Part D contained an instruction on the duty of care of operators of ski lifts and amusement park rides. The instruction was deleted based on the holding in **Anderson**, 119 P.3d at 536.

7. Part E provides an instruction on a landowner's right to lateral and subjacent support from adjoining property. The premises liability statute has no effect on this instruction.

8. Part F concerns the liability of public entities for injuries on or off the premises. For injuries on the premises, the instructions in Part A are applicable and for injuries off the premises, the instructions in Part B are applicable. In all cases against a public entity, the issue of sovereign immunity is for the court to determine. § 24-10-108, C.R.S. If the court determines that sovereign immunity has been waived, then, pursuant to section 24-10-107, C.R.S., "liability of the public entity shall be determined in the same manner as if the public entity were a private

person.” See e.g., **Anderson**, 119 P.3d at 535. Therefore, the same instructions that would be applicable in a case against a private person are also applicable in a case against a public entity.

9. The premises liability statute abrogates the common-law doctrine of negligence per se. **Lombard v. Colo. Outdoor Educ. Ctr., Inc.**, 187 P.3d 565 (Colo. 2008) (plaintiff may recover against landowner only under the statute and not on a negligence per se claim, but evidence of building code violation admissible as evidence of landowner’s unreasonable failure to exercise reasonable care).

10. The premises liability statute was amended effective April 5, 2006, to state that the defenses of assumption of risk, pro rata liability, and comparative negligence are available in premises liability actions. § 13-21-115(2). The Colorado Supreme Court has concluded that, even before the 2006 amendment, the premises liability statute did not preclude the defenses of comparative negligence or pro rata liability. **Union Pac. R.R. Co. v. Martin**, 209 P.3d 185 (Colo. 2009); see also **Reid v. Berkowitz**, 2013 COA 110M, ¶ 67, 315 P.3d 185 (remanding premises liability case to determine plaintiff’s comparative negligence); **Tucker v. Volunteers of Am. Colo. Branch**, 211 P.3d 708 (Colo. App. 2008) (both before and after the 2006 amendment, defenses of comparative negligence and assumption of risk could be asserted in premises liability claim), *aff’d on other grounds sub nom. Volunteers of Am. Colo. Branch v. Gardenswartz*, 242 P.3d 1080 (Colo. 2010); **DeWitt v. Tara Woods Ltd. P’ship**, 214 P.3d 466 (Colo. App. 2008) (same); **Paris ex rel. Paris v. Dance**, 194 P.3d 404 (Colo. App. 2008) (nonparty mother’s fault properly considered in dog bite case under premises liability statute).

11. A defendant may waive the right to the application of the premises liability statute and the right for a judicial determination as to whether the plaintiff is an invitee, licensee, or trespasser by failing to raise the application of the premises liability statute before or during trial. **Blood v. Qwest Servs. Corp.**, 224 P.3d 301 (Colo. App. 2009), *aff’d on other grounds*, 252 P.3d 1071 (Colo. 2011).

## A. PERSONS INJURED ON THE PREMISES

### 12:1 LIABILITY OF OWNER OR OCCUPANT TO A TRESPASSER INJURED ON PREMISES — ELEMENTS OF LIABILITY

For the plaintiff, (*name*), to recover from the defendant, (*name*), on (his) (her) claim of premises liability, you must find all the following have been proved by a preponderance of the evidence:

1. The plaintiff had (injuries) (damages) (losses);
2. The defendant acted willfully or deliberately; and
3. The defendant's willful or deliberate conduct was a cause of the plaintiff's (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) (any one or more of these affirmative defenses) (has) (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) (none of these affirmative defenses) (has not) (have) been proved, then your verdict must be for the plaintiff.

#### Notes on Use

1. This instruction must be used in any action involving premises liability to persons on the premises to which section 13-21-115(3)(a), C.R.S. (quoted below in Source and Authority), is applicable, as determined by the court under section 13-21-115(4). In general, section 13-21-115 applies in “any civil action brought against a landowner by a person who alleges injury occurring while on the real property of another and by reason of the condition of such property, or activities conducted or circumstances existing on such property . . . .” § 13-21-115(2); *see Larrieu v. Best Buy Stores, L.P.*, 2013 CO 38, ¶ 4, 303 P.3d 558, 559 (The relevant “analysis necessitates a fact-specific, case-by-case inquiry into whether: (a) the plaintiff’s alleged injury occurred while on the landowner’s real property; and (b) the alleged injury occurred by reason of the property’s condition or as a result of activities conducted or circumstances existing on the property.”); *see also Tancrede v. Freund*, 2017 COA 36, ¶ 15, 401 P.3d 132 (motor vehicle collision arose out of activities conducted on defendants’ private property, so premises liability statute governed); *Thornbury v. Allen*, 991 P.2d 335, 340 (Colo. App. 1999) (housekeeper injured when glass shelf fell on her foot while supervising cleaning of condominium could

recover against condominium owner only under premises liability statute and “not under any other theory of negligence, general, or otherwise”). Under section 13-21-115(1), a “landowner” includes “an authorized agent or a person in possession of real property and a person legally responsible for the condition of real property or for the activities conducted or circumstances existing on real property.” See **Pierson v. Black Canyon Aggregates, Inc.**, 48 P.3d 1215 (Colo. 2002) (operators of gravel pit that had contract with county to mine gravel on land leased by county from third party were “landowners” because a “landowner” under the premises liability statute is any person in possession of real property and such possession need not be exclusive); see also **Lucero v. Ulvestad**, 2015 COA 98, ¶¶ 23-28 (based on language in installment land contract, seller was not a “landowner”); **Jordan v. Panorama Orthopedics & Spine Ctr., PC**, 2015 CO 24, ¶¶ 35, 37, 346 P.3d 1035 (tenant in multi-unit office building was not a “landowner” of the common-area sidewalk even though its patrons used the sidewalk and it alerted the landlord whenever the sidewalk needed repairs); **Collard v. Vista Paving Corp.**, 2012 COA 208, ¶ 25, 292 P.3d 1232 (road contractor ceased to be “landowner” over project when the city accepted the project as finished); see also **Andrade v. Johnson**, 2016 COA 147, ¶ 19 (homeowner is not landowner of public sidewalk adjacent to property); **Burbach v. Canwest Invs., LLC**, 224 P.3d 437 (Colo. App. 2009) (public sidewalk is not the property of adjacent landowners because they have no legally cognizable interest in the sidewalk or a personal right to the sidewalk that is distinguishable from any right held by the public generally); **Henderson v. Master Klean Janitorial, Inc.**, 70 P.3d 612 (Colo. App. 2003) (janitorial contractor of building owner was “landowner” for purposes of premises liability statute in connection with slip on building stairwell by employee of building lessee). For a discussion as to when a landlord is a “landowner” for purposes of the premises liability statute, see **Nordin v. Madden**, 148 P.3d 218 (Colo. App. 2006). See also **Land-Wells v. Rain Way Sprinkler & Landscape, LLC**, 187 P.3d 1152 (Colo. App. 2008).

2. In cases involving multiple defendants or designated nonparties where the pro rata liability statute, § 13-21-111.5, C.R.S., is applicable, see the Notes on Use to Instruction 4:20 (model unified verdict form). The premises liability statute was amended effective April 5, 2006, to state that the defenses of assumption of risk, pro rata liability, and comparative negligence are available in premises liability actions. § 13-21-115(2). The Colorado Supreme Court has concluded that, even before the 2006 amendment, the premises liability statute did not preclude the defenses of comparative negligence or pro rata liability. **Union Pac. R.R. v. Martin**, 209 P.3d 185 (Colo. 2009); see also **Reid v. Berkowitz**, 2013 COA 110M, ¶ 67, 315 P.3d 185 (remanding premises liability case to determine plaintiff’s comparative negligence); **Tucker v. Volunteers of Am. Colo. Branch**, 211 P.3d 708 (Colo. App. 2008) (both before and after the 2006 amendment, defenses of comparative negligence and assumption of risk could be asserted in premises liability claim), *aff’d on other grounds sub nom. Volunteers of Am. Colo. Branch v. Gardenswartz*, 242 P.3d 1080 (Colo. 2010); **DeWitt v. Tara Woods Ltd. P’ship**, 214 P.3d 466 (Colo. App. 2008) (same); **Paris ex rel. Paris v. Dance**, 194 P.3d 404 (Colo. App. 2008) (nonparty mother’s fault properly considered in dog bite case under premises liability statute).

3. Omit any numbered paragraph the facts of which are not in dispute, and make such other changes as are necessary in such circumstances to make the instruction understandable.

4. Use whichever parenthesized words are 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.

5. Because liability under this instruction depends on what amounts to intentional conduct, contributory negligence on the plaintiff's part would appear not to be a defense. *See Carman v. Heber*, 43 Colo. App. 5, 601 P.2d 646 (1979).

6. Though mitigation of damages is an affirmative defense, *see* Instruction 5:2, only rarely, if ever, when established 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.

7. For the appropriate instructions relating to causation, see Instructions 9:18 to 9:21.

8. No further definition of the statutory words "willfully" and "deliberately" has been prepared, the words alone being sufficient to convey their meaning.

9. In certain cases, if evidence is sufficient, the plaintiff may be entitled to have the case submitted to the jury on the alternative or additional theory of attractive nuisance. *See* Instructions 12:4 & 12:5.

10. Because under section 13-21-115(4), it is for the court and not for the jury to determine whether the person injured on the premises was a trespasser, a licensee, or an invitee, as defined in section 13-21-115(5) (quoted below in Source and Authority), it is not necessary to use the word "trespasser" in this instruction nor to provide the jury with its statutory definition.

11. The premises liability statute only applies if the injury occurs on the real property of another. § 13-21-115(2); **Trailside Townhome Ass'n v. Acierno**, 880 P.2d 1197 (Colo. 1994) (where ownership of common areas in townhouse complex was vested in individual owners as tenants in common, premises liability statute was not applicable to injuries sustained by townhouse owner when she dove into pool in common area of townhouse property); *see also* **Jordan**, 2015 CO 24, ¶¶ 35, 37 (tenant in multi-unit office building was not a "landowner" of the common-area sidewalk even though its patrons used the sidewalk and it alerted the landlord whenever the sidewalk needed repairs); **Collard**, 2012 COA 208, ¶ 25 (road contractor ceased to be "landowner" over project when the city reassumed responsibility for the conditions and physical control over the site); **deBoer v. Jones**, 996 P.2d 754 (Colo. App. 2000) (landowners had no liability under premises liability statute to person injured as a result of a water meter pit located on landowners' property where water district owned meter and was obligated to maintain it).

12. The premises liability statute, § 13-21-115, rather than the common-law "no duty" rule applied to spectator's claim for personal injuries sustained when he was struck by a puck at a roller hockey game. **Teneyck v. Roller Hockey Colo., Ltd.**, 10 P.3d 707 (Colo. App. 2000).

13. The common-law “open and obvious danger” doctrine, which provides that landowners are not liable for injuries caused by open and obvious dangers on their property, does not apply in actions governed by the premises liability statute, § 13-21-115. **Vigil v. Franklin**, 103 P.3d 322 (Colo. 2004). *See also* **Lombard v. Colo. Outdoor Educ. Ctr., Inc.**, 187 P.3d 565 (Colo. 2008) (premises liability statute abrogates common-law doctrine of negligence per se).

### Source and Authority

1. This instruction is supported by section 13-21-115, in particular, section 13-21-115(3)(a), which provides:

A trespasser may recover only for damages willfully or deliberately caused by the landowner.

Section 13-21-115(4), provides:

In any action to which this section applies, the judge shall determine whether the plaintiff is a trespasser, a licensee, or an invitee, in accordance with the definitions set forth in subsection (5) of this section. If two or more landowners are parties defendant to the action, the judge shall determine the application of this section to each such landowner. The issues of liability and damages in any such action shall be determined by the jury or, if there is no jury, by the judge.

Section 13-21-115(5), provides:

As used in this section:

(a) “Invitee” means a person who enters or remains on the land of another to transact business in which the parties are mutually interested or who enters or remains on such land in response to the landowner’s express or implied representation that the public is requested, expected, or intended to enter or remain.

(b) “Licensee” means a person who enters or remains on the land of another for the licensee’s own convenience or to advance his own interests, pursuant to the landowner’s permission or consent. “Licensee” includes a social guest.

(c) “Trespasser” means a person who enters or remains on the land of another without the landowner’s consent.

2. For cases discussing the distinction between invitees, licensees, and trespassers, see **Rucker v. Federal National Mortgage Ass’n**, 2016 COA 114, ¶ 36; **Corder v. Folds**, 2012 COA 174, ¶¶ 9-18, 292 P.3d 1177; and **Vigil v. Franklin**, 81 P.3d 1084 (Colo. App. 2003), *rev’d on other grounds*, 103 P.3d 322 (Colo. 2004). *See also* **Tancrede**, 2017 COA 36, ¶ 15 (holding motor vehicle passenger was a trespasser on private property and had to allege willful and deliberate conduct).

3. A “licensee” or “invitee” may become a “trespasser” by exceeding the scope of the landowner’s consent. **Chapman v. Willey**, 134 P.3d 568 (Colo. App. 2006).



4. For a statutory limitation on the liability of landowners who, without charge, invite or allow others to use their property for recreational purposes, see sections 33-41-101 to -106, C.R.S.

5. For a discussion of the interplay between section 13-21-115, and the Workers' Compensation Act, §§ 8-40-101 to 8-47-209, C.R.S., see **Barron v. Kerr-McGee Rocky Mtn. Corp.**, 181 P.3d 348 (Colo. App. 2007). *See also* **Cavaleri v. Anderson**, 2012 COA 122, ¶¶ 4-17, 298 P.3d 237.

**12:2 LIABILITY OF OWNER OR OCCUPANT TO A LICENSEE INJURED ON PREMISES — ELEMENTS OF LIABILITY**

For the plaintiff, (*name*), to recover from the defendant, (*name*), on (his) (her) claim of premises liability, you must find all the following have been proved by a preponderance of the evidence:

1. The plaintiff had (injuries) (damages) (losses);

2. The defendant (either)

(a) (failed to use reasonable care with respect to a danger on the property which (1) [he] [she] created and (2) [he] [she] actually knew about before the plaintiff incurred any [injuries] [damages] [losses],)

or

(b) (failed to use reasonable care to warn of a danger on the property (1) which [he] [she] did not create, (2) but which [he] [she] actually knew about, and (3) the danger was one not ordinarily present on property of the type involved in this case); and

3. The defendant’s failure was a cause of the plaintiff’s (injuries) (damages) (losses).

If you find that any one or more of these (*number*) statements has not been proved by a preponderance of the evidence, 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) (any one or more of these affirmative defenses) (has) (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) (none of these affirmative defenses) (has not) (have) been proved, then your verdict must be for the plaintiff.

**Notes on Use**

1. This instruction must be used in any action involving premises liability to persons on the premises to which section 13-21-115(3)(a), C.R.S. (quoted below in Source and Authority), is applicable, as determined by the court under section 13-21-115(4). In general, section 13-21-115 applies in “any civil action brought against a landowner by a person who alleges injury occurring while on the real property of another and by reason of the condition of such property, or activities conducted or circumstances existing on such property . . . .” § 13-21-115(2); *see Larrieu v. Best Buy Stores, L.P.*, 2013 CO 38, ¶ 4, 303 P.3d 558, 559 (The relevant “analysis

necessitates a fact-specific, case-by-case inquiry into whether: (a) the plaintiff's alleged injury occurred while on the landowner's real property; and (b) the alleged injury occurred by reason of the property's condition or as a result of activities conducted or circumstances existing on the property."); *see also* **Tancrede v. Freund**, 2017 COA 36, ¶ 15, 401 P.3d 132 (motor vehicle collision arose out of activities conducted on defendants' private property, so premises liability statute governed); **Thornbury v. Allen**, 991 P.2d 335, 340 (Colo. App. 1999) (housekeeper injured when glass shelf fell on her foot while supervising cleaning of condominium could recover against condominium owner only under premises liability statute and "not under any other theory of negligence, general, or otherwise"). Under section 13-21-115(1), a "landowner" includes "an authorized agent or a person in possession of real property and a person legally responsible for the condition of real property or for the activities conducted or circumstances existing on real property." *See* **Pierson v. Black Canyon Aggregates, Inc.**, 48 P.3d 1215 (Colo. 2002) (operators of gravel pit that had contract with county to mine gravel on land leased by county from third party were "landowners" because a "landowner" under the premises liability statute is any person in possession of real property and such possession need not be exclusive); *see also* **Lucero v. Ulvestad**, 2015 COA 98, ¶¶ 23-28 (based on language in installment land contract, seller was not a "landowner"); **Jordan v. Panorama Orthopedics & Spine Ctr., PC**, 2015 CO 24, ¶¶ 35, 37, 346 P.3d 1035 (tenant in multi-unit office building was not a "landowner" of the common-area sidewalk even though its patrons used the sidewalk and it alerted the landlord whenever the sidewalk needed repairs); **Collard v. Vista Paving Corp.**, 2012 COA 208, ¶ 25, 292 P.3d 1232 (road contractor ceased to be "landowner" over project when the city accepted the project as finished); *see also* **Andrade v. Johnson**, 2016 COA 147, ¶ 19 (homeowner is not landowner of public sidewalk adjacent to property); **Burbach v. Canwest Invs., LLC**, 224 P.3d 437 (Colo. App. 2009) (public sidewalk is not the property of adjacent landowners because they have no legally cognizable interest in the sidewalk or a personal right to the sidewalk that is distinguishable from any right held by the public generally); **Henderson v. Master Klean Janitorial, Inc.**, 70 P.3d 612 (Colo. App. 2003) (janitorial contractor of building owner was "landowner" for purposes of premises liability statute in connection with slip on building stairwell by employee of building lessee). For a discussion as to when a landlord is a "landowner" for purposes of the premises liability statute, *see* **Nordin v. Madden**, 148 P.3d 218 (Colo. App. 2006). *See also* **Land-Wells v. Rain Way Sprinkler & Landscape, LLC**, 187 P.3d 1152 (Colo. App. 2008).

2. In cases involving multiple defendants or designated nonparties where the pro rata liability statute, § 13-21-111.5, C.R.S., is applicable, *see* the Notes on Use to Instruction 4:20 (model unified verdict form). The premises liability statute was amended effective April 5, 2006, to state that the defenses of assumption of risk, pro rata liability, and comparative negligence are available in premises liability actions. § 13-21-115(2). The Colorado Supreme Court has concluded that, even before the 2006 amendment, the premises liability statute did not preclude the defenses of comparative negligence or pro rata liability. **Union Pac. R.R. v. Martin**, 209 P.3d 185 (Colo. 2009); *see also* **Reid v. Berkowitz**, 2013 COA 110M, ¶ 67, 315 P.3d 185 (remanding premises liability case to determine plaintiff's comparative negligence); **Tucker v. Volunteers of Am. Colo. Branch**, 211 P.3d 708 (Colo. App. 2008) (both before and after the 2006 amendment, defenses of comparative negligence and assumption of risk could be asserted in premises liability claim), *aff'd on other grounds sub nom. Volunteers of Am. Colo. Branch*

**v. Gardenswartz**, 242 P.3d 1080 (Colo. 2010); **DeWitt v. Tara Woods Ltd. P’ship**, 214 P.3d 466 (Colo. App. 2008) (same).

3. Omit any numbered paragraph the facts of which are not in dispute, and make such other changes as are necessary in such circumstances to make the instruction understandable.

4. Use whichever parenthesized words are 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.

5. Though mitigation of damages is an affirmative defense, *see* Instruction 5:2, only rarely, if ever, when established 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.

6. For the appropriate instructions relating to causation, see Instructions 9:18 to 9:21, and for the definition of “reasonable care,” see Instruction 9:8.

7. Because under section 13-21-115(4), it is for the court and not the jury to determine whether the person injured on the premises was a trespasser, licensee, or invitee, as defined in section 13-21-115(5) (quoted in Source and Authority), it is not necessary to use the word “licensee” in this instruction nor provide the jury with its statutory definition.

8. Because section 13-21-115(3.5), provides “that the circumstances under which a licensee may recover include all of the circumstances under which a trespasser could recover and that the circumstances under which an invitee may recover include all of the circumstances under which a trespasser or a licensee could recover,” this instruction must be appropriately modified to include any applicable additional alternative of which there is sufficient evidence.

9. The premises liability statute applies only if the injury occurs on the real property of another. § 13-21-115(2); **Trailside Townhome Ass’n v. Acierno**, 880 P.2d 1197 (Colo. 1994) (where ownership of common areas in townhouse complex was vested in individual owners as tenants in common, premises liability statute was not applicable to injuries sustained by townhouse owner when she dove into pool in common area of townhouse property); *see also* **Jordan**, 2015 CO 24, ¶¶ 35, 37 (tenant in multi-unit office building was not a “landowner” of the common-area sidewalk even though its patrons used the sidewalk and it alerted the landlord whenever the sidewalk needed repairs); **Collard**, 2012 COA 208, ¶ 25 (road contractor ceased to be “landowner” over project when the city reassumed responsibility for the conditions and physical control over the site); **deBoer v. Jones**, 996 P.2d 754 (Colo. App. 2000) (landowners had no liability under premises liability statute to person injured as a result of water meter pit located on landowners’ property where water district owned meter and was obligated to maintain it).

10. In certain cases if the evidence is sufficient, the plaintiff may be entitled to have the case submitted to the jury on the alternative or additional theory of attractive nuisance. *See* Instructions 12:4 & 12:5.

11. The common-law “open and obvious danger” doctrine, which provides that landowners are not liable for injuries caused by open and obvious dangers on their property, does not apply in actions governed by the premises liability statute, § 13-21-115. **Vigil v. Franklin**, 103 P.3d 322 (Colo. 2004). *See also* **Lombard v. Colo. Outdoor Educ. Ctr., Inc.**, 187 P.3d 565 (Colo. 2008) (premises liability statute abrogates common-law doctrine of negligence per se).

### Source and Authority

1. This instruction is supported by section 13-21-115, in particular, section 13-21-115(3)(b), which provides:

A licensee may recover only for damages caused:

(I) By the landowner’s unreasonable failure to exercise reasonable care with respect to dangers created by the landowner of which the landowner actually knew; or

(II) By the landowner’s unreasonable failure to warn of dangers not created by the landowner which are not ordinarily present on property of the type involved and of which the landowner actually knew.

Section 13-21-115(4), provides:

In any action to which this section applies, the judge shall determine whether the plaintiff is a trespasser, a licensee, or an invitee, in accordance with the definitions set forth in subsection (5) of this section. If two or more landowners are parties defendant to the action, the judge shall determine the application of this section to each such landowner. The issues of liability and damages in any such action shall be determined by the jury or, if there is no jury, by the judge.

Section 13-21-115(5) provides:

As used in this section:

(a) “Invitee” means a person who enters or remains on the land of another to transact business in which the parties are mutually interested or who enters or remains on such land in response to the landowner’s express or implied representation that the public is requested, expected, or intended to enter or remain.

(b) “Licensee” means a person who enters or remains on the land of another for the licensee’s own convenience or to advance his own interests, pursuant to the landowner’s permission or consent. “Licensee” includes a social guest.

(c) “Trespasser” means a person who enters or remains on the land of another without the landowner’s consent.

2. For cases discussing licensees, see **Legro v. Robinson**, 2015 COA 183, ¶ 30, 369 P.3d 785 (bike racer on federal land is a licensee where landowner held grazing permit and consented

to entry by people who had the Forest Service's consent); **Reid v. Berkowitz**, 2013 COA 110M, ¶¶ 9-17, 315 P.3d 185 (a friend of a subcontractor was a licensee on the general contractor's construction site because of: (1) the parties' ongoing business relationship, (2) the general contractor maintaining an "open worksite," and (3) the custom of friends helping subcontractors with their work on the construction site); and **Corder v. Folds**, 2012 COA 174, ¶¶ 9-19, 292 P.3d 1177 (term "consent" as used regarding a licensee in the Premises Liability Act includes implied consent). For a discussion of the standard of care that the premises liability act, § 13-21-115, imposes on a landowner with regard to a licensee, see **Wright v. Vail Run Resort Cmty. Ass'n**, 917 P.2d 364 (Colo. App. 1996).

3. For other cases discussing distinction between licensee and invitee under premises liability statute, see **Rieger v. Wat Buddhawararam of Denver, Inc.**, 2013 COA 156, ¶ 17-25, 338 P.3d 404 (volunteer working on property of landowner is a licensee); **Wycoff v. Seventh Day Adventist Ass'n of Colo.**, 251 P.3d 1258 (Colo. App. 2010) (plaintiff was an invitee, not a licensee, when she paid to stay on the premises, even if the payment was through an intermediary); **Wycoff v. Grace Community Church of the Assemblies of God**, 251 P.3d 1260 (Colo. App. 2010) (plaintiff was an invitee, not a licensee, when church sponsored event and encouraged youth attendees by securing access to land and lodging, providing meals, and affirmatively facilitating attendance and participation, such as by driving attendees to the site); **Lakeview Assocs., Ltd. v. Maes**, 907 P.2d 580 (Colo. 1995) (tenant of apartment building who slipped and fell in apartment parking lot was invitee, not a licensee); **Henderson**, 70 P.3d at 616 (employee of lessee of building was an invitee at building in which he worked); and **Grizzell v. Hartman Enters., Inc.**, 68 P.3d 551 (Colo. App. 2003) (child who was let into sandwich shop by employee after shop was closed for business to the general public was a licensee).

4. Where plaintiff was allegedly injured because of a dangerous condition on the premises of a landowner, the landowner could be held liable for the negligent hiring, supervision, or retention of a maintenance employee, who was allegedly responsible for the condition only if the plaintiff could establish that the landowner had violated the standard of care set forth in section 13-21-115(3). **Casey v. Christie Lodge Owners Ass'n**, 923 P.2d 365 (Colo. App. 1996); *see also* **Reid v. Berkowitz**, 2016 COA 28, ¶ 30, 370 P.3d 644 (landowner (general contractor) cannot be liable for default judgments on common law negligence claims against subcontractors); **Thornbury**, 991 P.2d at 340 (housekeeper injured when glass shelf fell on her foot while supervising cleaning of condominium could recover against condominium owner only under premises liability statute, § 13-21-115, and "not under any other theory of negligence, general, or otherwise").

5. The statutory duty of a landowner in possession of property to maintain the premises in a safe condition may not be delegated. *See* **Springer v. City and Cty. of Denver**, 13 P.3d 794, 804 (Colo. 2000) ("the General Assembly intended to retain the doctrine of nondelegation of premises liability"); **Kidwell v. K-Mart Corp.**, 942 P.2d 1280 (Colo. App. 1997) (trial court erred in not instructing jury that negligence of independent contractor hired to maintain sidewalk in safe condition was imputable to department store owner if negligence of independent contractor created danger to invitees such as the plaintiff and store owner knew or should have known of the danger); and **Jules v. Embassy Props., Inc.**, 905 P.2d 13 (Colo. App. 1995) (owner of office building could not delegate statutory duty by transferring exclusive control of the maintenance of building to property manager).

6. For a discussion of the interplay between section 13-21-115 and the Workers' Compensation Act, §§ 8-40-101 to 8-47-209, C.R.S., see **Barron v. Kerr-McGee Rocky Mountain Corp.**, 181 P.3d 348 (Colo. App. 2007). *See also* **Cavaleri v. Anderson**, 2012 COA 122, ¶¶ 4-17, 298 P.3d 237.

7. For a discussion of the interplay between section 13-21-115, and the Volunteer Service Act, § 13-21-115.5, C.R.S., see **Rieger**, 2013 COA 156, ¶¶ 26-49.

### **12:3 LIABILITY OF OWNER OR OCCUPANT TO AN INVITEE INJURED ON PREMISES — ELEMENTS OF LIABILITY**

For the plaintiff, (*name*), to recover from the defendant, (*name*), on (his) (her) claim of premises liability, you must find all the following have been proved by a preponderance of the evidence:

- 1. The plaintiff had (injuries) (damages) (losses);**
- 2. The defendant actually knew about a danger on the property (or, as a person using reasonable care, should have known about it);**
- 3. The defendant failed to use reasonable care to protect against the danger on the property; and**
- 4. The defendant’s failure was a cause of the plaintiff’s (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) (any one or more of these affirmative defenses) (has) (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) (none of these affirmative defenses) (has not) (have) been proved, then your verdict must be for the plaintiff.

#### **Notes on Use**

1. This instruction must be used in any action involving premises liability to persons on the premises to which section 13-21-115(3)(c), C.R.S. (quoted below in Source and Authority), is applicable, as determined by the court under section 13-21-115(4). In general, section 13-21-115 applies in “any civil action brought against a landowner by a person who alleges injury occurring while on the real property of another and by reason of the condition of such property, or activities conducted or circumstances existing on such property . . . .” § 13-21-115(2); *see Larrieu v. Best Buy Stores, L.P.*, 2013 CO 38, ¶ 4, 303 P.3d 558, 559 (The relevant “analysis necessitates a fact-specific, case-by-case inquiry into whether: (a) the plaintiff’s alleged injury occurred while on the landowner’s real property; and (b) the alleged injury occurred by reason of the property’s condition or as a result of activities conducted or circumstances existing on the property.”); *see also Tancrede v. Freund*, 2017 COA 36, ¶ 15, 401 P.3d 132 (motor vehicle collision arose out of activities conducted on defendants’ private property, so premises liability statute governed); *Thornbury v. Allen*, 991 P.2d 335, 340 (Colo. App. 1999) (housekeeper



injured when glass shelf fell on her foot while supervising cleaning of condominium could recover against condominium owner only under premises liability statute and “not under any other theory of negligence, general, or otherwise”). Under section 13-21-115(1), a “landowner” includes “an authorized agent or a person in possession of real property and a person legally responsible for the condition of real property or for the activities conducted or circumstances existing on real property.” See **Pierson v. Black Canyon Aggregates, Inc.**, 48 P.3d 1215 (Colo. 2002) (operators of gravel pit that had contract with county to mine gravel on land leased by county from third party were “landowners” because a “landowner” under the premises liability statute is any person in possession of real property and such possession need not be exclusive); see also **Lucero v. Ulvestad**, 2015 COA 98, ¶¶ 23-28 (based on language in installment land contract, seller was not a “landowner”); **Jordan v. Panorama Orthopedics & Spine Ctr., PC**, 2015 CO 24, ¶¶ 35, 37, 346 P.3d 1035 (tenant in multi-unit office building was not a “landowner” of the common-area sidewalk even though its patrons used the sidewalk and it alerted the landlord whenever the sidewalk needed repairs); **Collard v. Vista Paving Corp.**, 2012 COA 208, ¶ 25, 292 P.3d 1232 (road contractor ceased to be “landowner” over project when the city accepted the project as finished); see also **Andrade v. Johnson**, 2016 COA 147, ¶ 19 (homeowner is not landowner of public sidewalk adjacent to property); **Burbach v. Canwest Invs., LLC**, 224 P.3d 437 (Colo. App. 2009) (public sidewalk is not the property of adjacent landowners because they have no legally cognizable interest in the sidewalk or a personal right to the sidewalk that is distinguishable from any right held by the public generally); **Henderson v. Master Klean Janitorial, Inc.**, 70 P.3d 612 (Colo. App. 2003) (janitorial contractor of building owner was “landowner” for purposes of premises liability statute in connection with slip on building stairwell by employee of building lessee). For a discussion as to when a landlord is a “landowner” for purposes of the premises liability statute, see **Nordin v. Madden**, 148 P.3d 218 (Colo. App. 2006). See also **Land-Wells v. Rain Way Sprinkler & Landscape, LLC**, 187 P.3d 1152 (Colo. App. 2008).

2. In cases involving multiple defendants or designated nonparties where the pro rata liability statute, § 13-21-111.5, C.R.S., is applicable, see the Notes on Use to Instruction 4:20 (model unified verdict form). The premises liability statute was amended effective April 5, 2006, to state that the defenses of assumption of risk, pro rata liability, and comparative negligence are available in premises liability actions. § 13-21-115(2). The Colorado Supreme Court has concluded that, even before the 2006 amendment, the premises liability statute did not preclude the defenses of comparative negligence or pro rata liability. **Union Pac. R.R. v. Martin**, 209 P.3d 185 (Colo. 2009); see also **Reid v. Berkowitz**, 2013 COA 110M, ¶ 67, 315 P.3d 185 (remanding premises liability case to determine plaintiff’s comparative negligence); **Tucker v. Volunteers of Am. Colo. Branch**, 211 P.3d 708 (Colo. App. 2008) (both before and after the 2006 amendment, defenses of comparative negligence and assumption of risk could be asserted in premises liability claim), *aff’d on other grounds sub nom. Volunteers of Am. Colo. Branch v. Gardenswartz*, 242 P.3d 1080 (Colo. 2010); **DeWitt v. Tara Woods Ltd. P’ship**, 214 P.3d 466 (Colo. App. 2008) (same).

3. Omit any numbered paragraph the facts of which are not in dispute, and make such other changes as are necessary in such circumstances to make the instruction understandable.

4. Use whichever parenthesized words are 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.

5. Though mitigation of damages is an affirmative defense, *see* Instruction 5:2, only rarely, if ever, when established 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.

6. For the appropriate instructions relating to causation, see Instructions 9:18 to 9:21, and for the definition of “reasonable care,” see Instruction 9:8.

7. The parenthetical clause in numbered paragraph 2 must be given in all cases, except when the “landowner’s real property is classified for property tax purposes as agricultural land or vacant land,” in which circumstance, the parenthetical clause must be omitted. *See* § 13-21-115(3)(c)(II) (quoted in full in Source and Authority).

8. Because under section 13-21-115(4) it is for the court and not the jury to determine whether the person injured on the premises was a trespasser, licensee, or invitee, as defined in section 13-21-115(5) (quoted below in Source and Authority), it is not necessary to use the word “invitee” in this instruction nor provide the jury with its statutory definition.

9. Because section 13-21-115(3.5), provides “that the circumstances under which a licensee may recover include all of the circumstances under which a trespasser could recover and that the circumstances under which an invitee may recover include all of the circumstances under which a trespasser or a licensee could recover,” this instruction must be appropriately modified to include any applicable additional alternative of which there is sufficient evidence.

10. The premises liability statute only applies if the injury occurs on the real property of another. § 13-21-115(2); **Trailside Townhome Ass’n v. Acierno**, 880 P.2d 1197 (Colo. 1994) (where ownership of common areas in townhouse complex was vested in individual owners as tenants in common, premises liability statute was not applicable to injuries sustained by townhouse owner when she dove into pool in common area of townhouse property); *see also* **Jordan**, 2015 CO 24, ¶¶ 35, 37 (tenant in multi-unit office building was not a “landowner” of the common-area sidewalk even though its patrons used the sidewalk and it alerted the landlord whenever the sidewalk needed repairs); **Collard**, 2012 COA 208, ¶ 25 (road contractor ceased to be “landowner” when the city reassumed responsibility for the conditions and physical control over the site); **deBoer v. Jones**, 996 P.2d 754 (Colo. App. 2000) (landowners had no liability under premises liability statute to person injured as a result of water meter pit located on landowners’ property where water district owned meter and was obligated to maintain it).

11. In certain cases if the evidence is sufficient, the plaintiff may be entitled to have the case submitted to the jury on the alternative or additional theory of attractive nuisance. *See* Instructions 12:4 & 12:5.

12. In drafting this instruction, the Committee concluded that there was no meaningful difference between a failure to exercise reasonable care and an unreasonable failure to exercise reasonable care. In **Lawson v. Safeway, Inc.**, 878 P.2d 127 (Colo. App. 1994), the defendant tendered instructions that included the exact language of the statute requiring the jury to determine whether there had been an unreasonable failure to exercise reasonable care. The trial court rejected the defendant's tendered instructions and instructed the jury in accordance with this Instruction 12:3. On appeal, the court held that: "[a]ssuming, without deciding, that there is a meaningful difference between a failure to exercise reasonable care and an unreasonable failure to exercise reasonable care, we conclude that, under the circumstances presented here, any error in the court's instruction to the jury did not result in 'substantial prejudicial error.'" *Id.* at 130 (quoting **Armentrout v. FMC Corp.**, 842 P.2d 175, 186 (Colo. 1992)); *see also* **Lombard v. Colo. Outdoor Educ. Ctr.**, 179 P.3d 16, 21 (Colo. App. 2007) ("The phrase 'unreasonable failure to exercise reasonable care' appears to be redundant in that the failure to exercise reasonable care is, almost by definition, unreasonable."), *rev'd on other grounds*, 187 P.3d 565 (Colo. 2008).

13. The common-law "open and obvious danger" doctrine, which provides that landowners are not liable for injuries caused by open and obvious dangers on their property, does not apply in actions governed by the premises liability statute, § 13-21-115. **Vigil v. Franklin**, 103 P.3d 322 (Colo. 2004); *see also* **Lombard**, 187 P.3d at 574-75 (premises liability statute abrogates common-law doctrine of negligence per se).

#### **Source and Authority**

1. This instruction is supported by section 13-21-115, in particular, section 13-21-115(3)(c), which provides:

(I) Except as otherwise provided in subparagraph (II) of this paragraph (c), an invitee may recover for damages caused by the landowner's unreasonable failure to exercise reasonable care to protect against dangers of which he actually knew or should have known.

(II) If the landowner's real property is classified for property tax purposes as agricultural land or vacant land, an invitee may recover for damages caused by the landowner's unreasonable failure to exercise reasonable care to protect against dangers of which he actually knew.

Section 13-21-115(4), provides:

In any action to which this section applies, the judge shall determine whether the plaintiff is a trespasser, a licensee, or an invitee, in accordance with the definitions set forth in subsection (5) of this section. If two or more landowners are parties defendant to the action, the judge shall determine the application of this section to each such landowner. The issues of liability and damages in any such action shall be determined by the jury or, if there is no jury, by the judge.

Section 13-21-115(5), provides:

As used in this section:

(a) “Invitee” means a person who enters or remains on the land of another to transact business in which the parties are mutually interested or who enters or remains on such land in response to the landowner’s express or implied representation that the public is requested, expected, or intended to enter or remain.

(b) “Licensee” means a person who enters or remains on the land of another for the licensee’s own convenience or to advance his own interests, pursuant to the landowner’s permission or consent. “Licensee” includes a social guest.

(c) “Trespasser” means a person who enters or remains on the land of another without the landowner’s consent.

2. This instruction was held to be a correct statement of the law in **Lombard v. Colorado Outdoor Education Center, Inc.**, 266 P.3d 412 (Colo. App. 2011).

3. A tenant of an apartment building who slipped and fell in apartment parking lot was “invitee” on premises rather than “licensee” under premises liability statute. **Lakeview Assocs., Ltd. v. Maes**, 907 P.2d 580 (Colo. 1995). For other cases discussing the distinction between invitee, licensee, and trespasser under the premises liability statute, see **Rucker v. Federal National Mortgage Ass’n**, 2016 COA 114, ¶ 36 (plaintiff was a trespasser, not an invitee, because “‘For Sale’ sign did not constitute an implied representation to the public to enter or remain on the property”); **Rieger v. Wat Buddhawararam of Denver, Inc.**, 2013 COA 156, ¶¶ 17-25, 338 P.3d 404 (volunteer working on property of landowner is a licensee, not an invitee); **Wycoff v. Seventh Day Adventist Ass’n of Colo.**, 251 P.3d 1258 (Colo. App. 2010) (plaintiff was an invitee, not a licensee, when she paid to stay on the premises, even if the payment was through an intermediary); **Wycoff v. Grace Community Church of the Assemblies of God**, 251 P.3d 1260 (Colo. App. 2010) (plaintiff was an invitee, not a licensee, when church sponsored event and encouraged youth attendees by securing access to land and lodging, providing meals, and affirmatively facilitating attendance and participation, such as by driving attendees to the site); **Henderson**, 70 P.3d at 616 (employee of lessee of building was an invitee at building in which he worked); and **Grizzell v. Hartman Enterprises, Inc.**, 68 P.3d 551 (Colo. App. 2003) (child who was let into sandwich shop by employee after shop was closed for business to the general public was a licensee under premises liability statute). *See also* **Pedge v. R.M. Holdings, Inc.**, 75 P.3d 1126 (Colo. App. 2002) (president and owner of corporate tenant of office complex was invitee of landlord and manager of office complex).

4. Where plaintiff was allegedly injured because of a dangerous condition on the premises of a landowner, the landowner could be held liable for the negligent hiring, supervision, or retention of a maintenance employee, who was allegedly responsible for the condition only if the plaintiff could establish that the landowner had violated the standard of care set forth in section 13-21-115(3). **Casey v. Christie Lodge Owners Ass’n**, 923 P.2d 365 (Colo. App. 1996); *see also* **Reid v. Berkowitz**, 2016 COA 28, ¶ 30, 370 P.3d 644 (general contractor landowner cannot be liable for default judgments on common law negligence claims against subcontractors); **Thornbury**, 991 P.2d at 340 (housekeeper injured when glass shelf fell on her foot while supervising cleaning of condominium could recover against condominium owner only

under premises liability statute, § 13-21-115, and “not under any other theory of negligence, general, or otherwise”).

5. The statutory duty of a landowner in possession of property to maintain the premises in a safe condition may not be delegated. *See* **Springer v. City and County of Denver**, 13 P.3d 794, 804 (Colo. 2000) (“the General Assembly intended to retain the doctrine of nondelegation of premises liability”); **Kidwell v. K-Mart Corp.**, 942 P.2d 1280 (Colo. App. 1997) (trial court erred in not instructing jury that negligence of independent contractor hired to maintain sidewalk in safe condition was imputable to department store owner if negligence of independent contractor created danger to invitees such as the plaintiff and store owner knew or should have known of the danger); and **Jules v. Embassy Props., Inc.**, 905 P.2d 13 (Colo. App. 1995) (owner of office building could not delegate statutory duty by transferring exclusive control of the maintenance of building to property manager).

6. For a discussion of the interplay between section 13-21-115, and the Workers’ Compensation Act, §§ 8-40-101 to 8-47-209, C.R.S., see **Barron v. Kerr-McGee Rocky Mountain Corp.**, 181 P.3d 348 (Colo. App. 2007). *See also* **Cavaleri v. Anderson**, 2012 COA 122, ¶¶ 4-17, 298 P.3d 237.

7. For a discussion of the interplay between section 13-21-115 and the Volunteer Service Act, § 13-21-115.5, C.R.S., see **Rieger**, 2013 COA 156, ¶¶ 26-49.

**12:4 LIABILITY OF OWNER OR OCCUPANT TO CHILDREN INJURED ON PREMISES — ATTRACTIVE NUISANCE DOCTRINE — ELEMENTS OF LIABILITY**

**For the plaintiff, (*name of child*), to recover from the defendant, (*name*), on (his) (her) claim of attractive nuisance, you must find all the following have been proved by a preponderance of the evidence:**

- 1. The plaintiff had (injuries) (damages) (losses);**
- 2. The plaintiff's (injuries) (damages) (losses) were caused (by an unusual activity on the premises) (or) (by an unusual condition, other than a natural condition, existing on the premises);**
- 3. The plaintiff was on the premises at the time (he) (she) was injured;**
- 4. The (activity) (or) (condition) was unusually attractive to children;**
- 5. The (activity) (or) (condition) created an unreasonable risk of injury to children which the defendant knew, or, as a reasonably careful person, should have known;**
- 6. The plaintiff was too young to appreciate or realize the risk of injury to (himself) (herself) from the (activity) (or) (condition); and**
- 7. The defendant failed to exercise reasonable care to protect persons like the plaintiff from injury.**

**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) (any one or more of these affirmative defenses) (has) (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) (none of these affirmative defenses) (has not) (have) been proved, then your verdict must be for the plaintiff.**

**Notes on Use**

1. When supported by sufficient evidence, this instruction should be given as an alternative to, or in addition to, Instructions 12:1, 12:2, or 12:3.

2. In cases involving multiple defendants or designated nonparties where the pro rata liability statute, § 13-21-111.5, C.R.S., is applicable, see the Notes on Use to Instruction 4:20 (model unified verdict form).

3. Omit any numbered paragraph the facts of which are not in dispute, and use whichever parenthesized and bracketed words and phrases are appropriate to the evidence in the case.

4. If the defendant has put no affirmative defense in issue or there is insufficient evidence to support a defense, the last two paragraphs should be omitted. If the affirmative defense of comparative negligence has been put in issue, the elements of this instruction should be incorporated into Instruction 9:22, as well as the applicable comparative negligence instructions, *see* Instructions 9:26 to 9:28D, with such further modifications being made in those instructions as are necessary.

5. If the plaintiff is 14 years of age or more, or that fact is in dispute, Instruction 12:5 must also be given with this instruction.

6. Though mitigation of damages is an affirmative defense, *see* Instruction 5:2, only rarely, if ever, when established 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.

7. Other appropriate instructions defining the terms used in this instruction must also be given with this instruction, in particular Instruction 9:8, defining “reasonable care,” and appropriate instructions relating to causation. *See* Instructions 9:18 to 9:21.

8. The implication of section 13-21-115(2), C.R.S., is that the doctrine of attractive nuisance is not applicable to a child who is 18 or more years of age.

### Source and Authority

1. This instruction is supported by section 13-21-115(2), and **S.W. ex rel. Wacker v. Towers Boat Club, Inc.**, 2013 CO 72, ¶ 24, 315 P.3d 1257.

2. Though the doctrine of attractive nuisance usually relates to a condition on the premises, its logic extends to activities which meet the same criteria, such as “unusual,” “attractive,” “not natural,” etc.

3. The doctrine is designed to protect children who are attracted to the conditions, premises, or object that caused their injuries, regardless whether the children are legally classified as invitees, licensees, or trespassers on the premises where the injury occurs. **S.W. ex rel. Wacker**, 2013 CO 72, ¶ 24.

4. The requirements for the attractive nuisance doctrine have been considered in several cases. *See S.W. ex rel. Wacker*, 2013 CO 72, ¶ 24 (doctrine may apply to eleven-year-old child who was lawfully on premises to attend a private party when he was injured on an inflatable bungee run); **Denver Tramway Corp. v. Garcia**, 154 Colo. 417, 390 P.2d 952 (1964) (doctrine

not applicable to nine-year-old child because of inadequate evidence of defendant's negligence as well as the facts that the bus which caused the injury did not "invite" the trespass, it was not an unusual thing, and the child was aware of the risk involved); **Staley v. Sec. Athletic Ass'n**, 152 Colo. 19, 380 P.2d 53 (1963) (doctrine not applicable to four-year-old child because of inadequate evidence of defendant's negligence and because the swimming pool which caused the injury was not sufficiently unusual); **Niernberg v. Gavin**, 123 Colo. 1, 224 P.2d 215 (1950) (doctrine inapplicable to six-year-old child where defendant had acted reasonably in giving a warning of the danger); **Phipps v. Mitze**, 116 Colo. 288, 180 P.2d 233 (1947) (doctrine inapplicable to nine-year-old child who was aware of the risk and had been warned to avoid it); **Esquibel v. City & Cty. of Denver**, 112 Colo. 546, 151 P.2d 757 (1944) (doctrine inapplicable to eleven-year-old child because the junk auto body that caused the injury had not "invited" the trespass and was not sufficiently unusual, and plaintiff had also been warned and appreciated the risk); **Denver Tramway Corp. v. Callahan**, 112 Colo. 460, 150 P.2d 798 (1944) (doctrine inapplicable to eleven-year-old child because of inadequate evidence of negligence); **Dunbar v. Olivieri**, 97 Colo. 381, 50 P.2d 64 (1935) (doctrine inapplicable to nine-year-old child since rubbish fire which caused the injury was not sufficiently unusual); **Hayko v. Colo. & Utah Coal Co.**, 77 Colo. 143, 146, 235 P. 373, 374 (1925) (doctrine inapplicable to ten-year-old child because the dynamite caps which caused the injury did not "invite" the trespass and the shack which did invite the trespass was ordinary and not "an unusual thing, unusually, extraordinarily attractive").



**12:5 ATTRACTIVE NUISANCE DOCTRINE — CHILD BETWEEN 14 AND 18 — PRESUMPTION OF COMPETENCY**

**“Presumptions” are rules based on experience or public policy and are established in the law to assist the jury in ascertaining the truth.**

**In this case, if you find by a preponderance of the evidence that the plaintiff, (*name of child*), was 14 years of age or more, then the law presumes and you must find, (he) (she) was capable of appreciating or realizing any risks of harm to (himself) (herself) from (the activities) (or) (the conditions existing) on the premises of the defendant, (*name*).**

**Notes on Use**

1. This instruction should be used only in conjunction with Instruction 12:4. It should also be used only when there is sufficient evidence that the plaintiff was “at least fourteen years of age but . . . less than eighteen years of age . . . .” § 13-21-115(2), C.R.S. In addition, as explained in the Notes on Use to Instruction 3:5, this instruction has been prepared on the assumption that the statutory presumption created by section 13-21-115(2) is one that shifts only the burden of going forward with the evidence, and is also one that “disappears” from the case if there is sufficient evidence in the case rebutting the presumed facts. For that reason, this instruction should only be given if its basic facts are supported by sufficient evidence, and there is no or insufficient evidence rebutting the presumed facts.

2. Use whichever parenthesized words and phrases are appropriate to the evidence in the case.

**Source and Authority**

This instruction is supported by section 13-21-115(2), and the authorities cited in the Source and Authority to Instruction 3:5. *See also* **SW ex rel. Wacker v. Towers Boat Club, Inc.**, 2013 CO 72, 315 P.3d 1257.

## B. PERSONS INJURED OFF THE PREMISES

### 12:6 LIABILITY OF OWNER OR OCCUPANT TO PERSONS INJURED OFF THE PREMISES — ELEMENTS OF LIABILITY

For the plaintiff, (*name*), to recover from the defendant, (*name*), on (his) (her) claim of negligence, you must find all the following numbered propositions have been proved:

1. At the time of the occurrence, the defendant (owned) (occupied) (controlled) (conducted activities on) the premises;

2. (A condition existed) (An activity was conducted) on the premises which created an unreasonable risk of (injury) (damage) (loss) to (persons such as the plaintiff) (the property of persons such as the plaintiff);

(3. [Either]

[a. This condition (was created by the defendant) (or) (was of a continuous nature or was reasonably foreseeable because of the defendant's operating methods)]

[or]

[b. This condition was one the defendant knew of, or reasonably should have known of, in sufficient time to have (removed it) (corrected it) (or) (adequately warned persons that the condition was there) so that injury could have been prevented, and [he] [she] failed to do so];)

4. The defendant was negligent because (he) (she) failed to use reasonable care (in the management or maintenance of [his] [her] premises) (with respect to the operation of [his] [her] business on the premises) (with respect to the conduct of [his] [her] activities on the premises) (or) (to [remove] [correct] [or] [give adequate warning of] the condition);

5. The plaintiff had (injuries) (damages) (losses); and

6. The defendant's negligence was a cause of the plaintiff's (injuries) (damages) (losses).

If you find that any one or more of these (*number*) statements has not been proved by a preponderance of the evidence, 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) (any one or more of these affirmative defenses) (has) (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) (none of these affirmative defenses) (has not) (have) been proved, then your verdict must be for the plaintiff.**

### Notes on Use

1. Whenever this instruction is given, Instruction 12:7 must also be given. In addition, the appropriate instruction or instructions relating to causation, *see* Instructions 9:18 to 9:21, and instructions defining the terms used in this instruction, for example, Instruction 9:6, defining “negligence,” must also be given.

2. In cases involving multiple defendants or designated nonparties where the pro rata liability statute, § 13-21-111.5, C.R.S., is applicable, see the Notes on Use to Instruction 4:20 (model unified verdict form).

3. Omit any numbered paragraphs, the facts of which are not in dispute.

4. Use whichever parenthesized or bracketed words and phrases 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.

5. Though mitigation of damages is an affirmative defense, *see* Instruction 5:2, only rarely, if ever, when established 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.

6. If the affirmative defense of comparative negligence has been properly raised, the beginning unnumbered paragraph as well as the numbered paragraphs of this instruction should be substituted for the beginning unnumbered and numbered paragraphs in Instruction 9:22, and that instruction should then be used in accord with its Notes on Use. As to the possible comparative negligence of the plaintiff, the plaintiff’s knowledge and appreciation of a danger on the premises may be relevant to the plaintiff’s own negligence, but it is not negligence as a matter of law; neither does it relieve an owner or possessor of the land of the general duty to act or to have acted with reference to the danger as a reasonable person would have under the same or similar circumstances. **Brown v. Martin Marietta Corp.**, 690 P.2d 889 (Colo. App. 1984).

7. Parenthesized numbered paragraph 3 of this instruction must be omitted if the only evidence of defendant’s negligence relates to the carrying on of an activity and not to the existence of a condition which would be covered by the rules set out in either subparagraph a or subparagraph b.

8. When the claimed negligence relates to the failure of the owner or occupant to have dealt adequately with an unreasonably dangerous condition, the plaintiff must prove that the owner or occupant (1) had actual knowledge of it, because he or she created it, or for some other reason; (2) had constructive notice of it (subparagraph b of parenthesized numbered paragraph 3); or (3) operated his or her business or carried on other activities in a way that such conditions

were continuous or readily foreseeable (second parenthesized part of subparagraph a of parenthesized numbered paragraph 3).

9. When proof of constructive notice is required, it may be established by circumstantial evidence. **Bodeman v. Shutto Super Markets, Inc.**, 197 Colo. 393, 395, 593 P.2d 700, 701 (1979) (“The circumstances surrounding the injury, including the facts which demonstrate the existence of the dangerous condition itself, may give rise to a reasonable inference of constructive notice”).

10. The rules stated in the Notes on Use to Instruction 9:21 are also applicable to this instruction.

### Source and Authority

1. This instruction is supported by **Mile High Fence Co. v. Radovich**, 175 Colo. 537, 489 P.2d 308 (1971), *superseded in part by statute*, § 13-21-115.

2. Bracketed subparagraph a of parenthesized numbered paragraph 3 is supported by **Safeway Stores, Inc. v. Smith**, 658 P.2d 255 (Colo. 1983).

3. Bracketed subparagraph b of parenthesized numbered paragraph 3 is supported by **CeBuzz, Inc. v. Sniderman**, 171 Colo. 246, 466 P.2d 457 (1970) (defendant held to have had sufficient notice of dangerous condition); **Adkins v. Denver Dry Goods Co.**, 167 Colo. 545, 448 P.2d 957 (1969) (insufficient evidence that the defendant knew or by the exercise of reasonable care should have known of the condition which caused the plaintiff’s injuries); **Miller v. Crown Mart, Inc.**, 162 Colo. 281, 425 P.2d 690 (1967) (insufficient evidence that defendant by exercising reasonable care could have discovered popcorn on floor in time to prevent plaintiff’s injuries); **King Soopers, Inc. v. Mitchell**, 140 Colo. 119, 342 P.2d 1006 (1959) (defendant had sufficient time by reasonably performing duty to inspect to discover accumulation of ice on parking lot and to eliminate it or warn plaintiff of it); **F.W. Woolworth Co. v. Peet**, 132 Colo. 11, 284 P.2d 659 (1955) (insufficient evidence that defendant by exercising reasonable care in performing duty to inspect could have discovered defect); and **Denver Dry Goods Co. v. Pender**, 128 Colo. 281, 262 P.2d 257 (1953) (no liability for slippery spot on floor unless defendant knew or should have known of it and reasonably could have prevented it or warned plaintiff of it).

4. The conditions which cause the plaintiff’s injuries must have created an unreasonable risk of harm. **Montgomery Ward & Co. v. Kerns**, 172 Colo. 59, 470 P.2d 34 (1970); **Salazar v. City of Sheridan**, 44 Colo. App. 443, 618 P.2d 708 (1980).

5. Under certain circumstances, a lessor may be liable to persons off the premises for physical harm caused by dangerous conditions on the leased premises. *See Salazar v. Webb*, 44 Colo. App. 429, 618 P.2d 706 (1980).

## **12:7 DUTY OF OWNER OR OCCUPANT TO PERSONS INJURED OFF THE PREMISES**

**The (owner) (occupant) of premises has a duty to use reasonable care (to maintain the premises in a reasonably safe condition) (and) (to carry on any activities conducted on the premises in a reasonably safe manner) in view of the foreseeability, if any, of injury to others.**

### **Notes on Use**

1. This instruction must be given with Instruction 12:6 whenever that instruction is given.
2. Use whichever parenthesized words are appropriate.
3. Whenever this instruction is given, Instruction 9:8, defining “reasonable care” must also be given.
4. The rules set out in the Notes on Use to Instruction 9:21 also apply to this instruction.

### **Source and Authority**

1. This instruction is supported by **Mile High Fence Co. v. Radovich**, 175 Colo. 537, 489 P.2d 308 (1971), *superseded in part by statute*, § 13-21-115.

2. The scope of a duty owed by a lessee of premises may depend on whether the lessee constructed, controlled, or maintained the portion of the premises that allegedly resulted in the dangerous condition. *See Woods v. Delgar Ltd.*, 226 P.3d 1178 (Colo. App. 2009) (lessee of property owes no duty of care to pedestrians to guard against the risk of snow naturally falling on an awning attached to the outside of the leased premises and melting, resulting in water dripping onto the sidewalk and freezing absent evidence that the lessee controlled, constructed, or maintained the awning).

## C. LESSOR'S DUTY OF CARE

### 12:8 NO IMPLIED WARRANTY OF FITNESS

**Instruction deleted.**

#### **Note**

This instruction has been deleted in its entirety due to the enactment of Part 5 of the Tenants and Landlords Statute, which addresses tenant and landlord obligations for maintaining residential premises. *See* §§ 38-12-501 to -511, C.R.S. In particular, section 38-12-503, C.R.S. imposes a statutory warranty of habitability in every rental agreement.

## **12:9 LESSOR'S LIABILITY FOR INJURY FROM LATENT DEFECT**

**No instruction provided.**

### **Note**

The premises liability statute, § 13-21-115, C.R.S., does not expand or otherwise change the general common-law rule that, in the absence of certain recognized exceptions, a lessor who has transferred possession and control over leased premises to a lessee has no liability for injuries resulting from a dangerous condition of the premises. **Perez v. Grovert**, 962 P.2d 996 (Colo. App. 1998). In cases where such recognized exceptions may exist and an instruction dealing with this subject is required, Instructions 12:1, 12:2, and 12:3, appropriately modified, may be used.

**12:10 LESSOR'S LIABILITY FOR INJURY WHEN PREMISES LEASED FOR PUBLIC OR SEMI-PUBLIC USE AND WERE DEFECTIVE AT TIME OF LEASE**

**A lessor is legally responsible for (injuries) (damages) (losses) caused by a condition of leased property if:**

- (1) The property is leased for (public) (semi-public) purposes; and**
- (2) At the time the property was leased, the lessor knew or reasonably should have known that the property was not reasonably safe for its intended purposes.**

**Notes on Use**

1. Under the provisions of section 13-21-115, C.R.S., this instruction may not be appropriate or may require modification. *See* Instructions 12:1, 12:2, and 12:3; *see also* **Jordan v. Panorama Orthopedics & Spine Center, PC**, 2015 CO 24, ¶ 37, 346 P.3d 1035, 1044 (“the fact that the public must pass through common areas to access a tenant’s business does not necessarily mean that the tenant is conducting an activity in the common areas”).

2. Use whichever parenthesized words are most appropriate.

3. Whenever this instruction is given, the appropriate instructions relating to causation (Instructions 9:18 to 9:21) must also be given.

**Source and Authority**

This instruction is supported by **Gilligan v. Blakesley**, 93 Colo. 370, 26 P.2d 808 (1933) (lessor held liable for injuries to invitee of tenant for defect which amounted to a nuisance); **Colorado Mortgage & Investment Co. v. Giacomini**, 55 Colo. 540, 136 P. 1039 (1913) (lessor liable to guest of hotel for injuries caused by defective elevator which was unsafe at time of lease); RESTATEMENT (SECOND) OF TORTS § 359 (1965); and W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 63, at 437-40 (5th ed. 1984). *Cf.* **Volz v. Williams**, 112 Colo. 592, 152 P.2d 996 (1944) (lessor not liable where condition not dangerous but for lessee’s subsequent negligence in not using protective devices provided).



## **12:11 LESSOR'S LIABILITY AS AFFECTED BY LESSOR'S PROMISE TO REPAIR PREMISES**

**A lessor is legally responsible for (injuries) (damages) (losses) caused by the lessor's failure to use reasonable care to perform an agreement to make specific repairs or to keep the premises in repair when:**

**(1) A state of disrepair creates an unreasonable risk of injury to persons upon the premises; and**

**(2) The (injuries) (damages) (losses) would have been prevented if the lessor had made the agreed repairs.**

### **Notes on Use**

1. Under the provisions of section 13-21-115, C.R.S., this instruction may not be appropriate or may require modification. *See* Instructions 12:1, 12:2, and 12:3; *see also* **Jordan v. Panorama Orthopedics & Spine Center, PC**, 2015 CO 24, ¶ 37, 346 P.3d 1035.

2. Use whichever parenthesized words are appropriate.

3. This instruction is applicable when the lessor's promise would be otherwise enforceable in a contract action. When such is not the case, the lessor may still be liable under the rule set out in Instruction 12:12.

4. When this instruction is given, Instruction 9:8 defining "reasonable care" should also be given, as well as the appropriate instructions relating to causation (Instructions 9:26 to 9:30).

### **Source and Authority**

1. This instruction is supported by **Davis v. Marr**, 160 Colo. 27, 413 P.2d 707 (1966) (adopting RESTATEMENT (SECOND) OF TORTS § 357 (1965)). *See also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 63, at 443-45 (5th ed. 1984).

2. As to when a lessor may be liable for work undertaken by an independent contractor, see **Western Stock Center, Inc. v. Sevit, Inc.**, 195 Colo. 372, 578 P.2d 1045 (1978).

## 12:12 LIABILITY OF LESSOR WHO COMMENCES REPAIR OF PREMISES

Whether or not a lessor has agreed to repair or maintain leased premises, if the lessor commences or attempts to (repair) (maintain) the premises, the lessor is under a duty to use reasonable care as to such (repairs) (maintenance) and proceed diligently, and if the lessor fails to do so, the lessor is negligent.

### Notes on Use

1. Under the provisions of section 13-21-115, C.R.S., this instruction may not be appropriate or may require modification. *See* Instructions 12:1, 12:2, and 12:3; *see also* **Jordan v. Panorama Orthopedics & Spine Center, PC**, 2015 CO 24, ¶ 37, 346 P.3d 1035.
2. Use whichever parenthesized words are appropriate.
3. Whenever this instruction is given, Instruction 9:8 defining “reasonable care” should also be given.

### Source and Authority

1. This instruction is supported by RESTATEMENT (SECOND) OF TORTS § 362 (1965); and W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 63, at 445-46 (5th ed. 1984). As to the general obligation to use reasonable care in performing a duty voluntarily assumed, see the Source and Authority to Instruction 9:10, and **Lester v. Marshall**, 143 Colo. 189, 352 P.2d 786 (1960).
2. As to when a lessor may be liable for work undertaken by an independent contractor, see **Western Stock Center, Inc. v. Sevit, Inc.**, 195 Colo. 372, 578 P.2d 1045 (1978).
3. “Absent retention of control or an agreement to maintain, a landlord is not obligated to make repairs on leased premises, even if the premises are in a dangerous condition and repairs are necessary to render it safe and suitable for tenant’s use and occupancy.” **Ogden v. McChesney**, 41 Colo. App. 191, 193, 584 P.2d 636, 637 (1978).

**D. AMUSEMENT PARK DEVICES — SKI LIFTS — OPERATOR’S DUTY OF CARE**

**12:13 AMUSEMENT DEVICES AND SKI LIFTS — DUTY OF CARE WHERE USER LACKS FREEDOM OF MOVEMENT**

**Instruction deleted.**

**Note**

This instruction has been deleted in its entirety for the reason stated in paragraph 6 of the Introductory Note to this Chapter.

## E. LATERAL AND SUBJACENT SUPPORT

### 12:14 LANDOWNER'S RIGHT TO LATERAL AND SUBJACENT SUPPORT

The owner of the surface of the land is entitled to have that land remain in its natural state, both laterally and subjacently. Laterally means the right to support the land from the owner of adjoining land. Subjacently means the right to support from the soil beneath the surface of the land.

The right of support for a person's land means that neither the owner of the surface, nor the owner of the subjacent rights can destroy, interfere with or damage rights to lateral or subjacent support of another.

#### Notes on Use

1. When the plaintiff is claiming damages for injuries to improvements, as opposed only to damages for injuries to the natural state of the land, a different rule may be applicable. *See* Source and Authority below.

2. In some communities, local ordinances, such as notice requirements, may have an effect on one's liability to adjoining landowners.

#### Source and Authority

1. This instruction is supported by **Gladin v. Von Engeln**, 195 Colo. 88, 575 P.2d 418 (1978); and **Vikell Investors Pacific, Inc. v. Kip Hampden, Ltd.**, 946 P.2d 589 (Colo. App. 1997).

2. A landowner has an absolute right to the natural lateral and subjacent support of the surface of the owner's land, and anyone destroying that support is strictly liable for damages caused to the land and improvements, unless the weight of any improvements (e.g., buildings, fills, etc.) materially contributed to the subsidence, in which event, liability must be based on negligence. To establish strict liability if improvements have been made, the plaintiff must prove that the subsidence would have occurred even if the land had remained in its natural state, and the plaintiff has the burden of overcoming the presumption that the weight of improvements contributed materially to the subsidence. *See Gladin*, 195 Colo. at 93-94, 575 P.2d at 422; **Vikell Inv'rs Pac., Inc.**, 946 P.2d at 593; *see also Burt v. Rocky Mtn. Fuel Co.*, 71 Colo. 205, 205 P. 741 (1922).

## F. PUBLIC PLACES

### 12:15 COLORADO GOVERNMENTAL IMMUNITY ACT

#### No Instruction given.

#### Note

1. When the defense of immunity has been waived, “liability of the public entity shall be determined in the same manner as if the public entity were a private person.” § 24-10-107, C.R.S.; *see also* Introductory Note to this Chapter. Use any instructions in this chapter and in Chapter 8 that are appropriate in light of the evidence in the case.

2. When properly raised, issues of sovereign immunity are to be decided by the trial court, which is the finder of fact with respect to such issues. *See* § 24-10-108, C.R.S.; **Trinity Broad. of Denver, Inc. v. City of Westminster**, 848 P.2d 916 (Colo. 1993); **Daley v. Univ. of Colo. Health Scis. Ctr.**, 111 P.3d 554 (Colo. App. 2005) (waiver of sovereign immunity is issue of subject matter jurisdiction to be determined by trial court); **Kittinger v. City of Colo. Springs**, 872 P.2d 1265 (Colo. App. 1993) (trial court erred in concluding that “business invitee” was not member of public for purposes of “dangerous condition” waiver of sovereign immunity).

3. “[W]hen a plaintiff sues a governmental entity and that entity moves to dismiss for lack of jurisdiction, the plaintiff has the burden of proving jurisdiction under C.R.C.P. 12(b)(1). The court may conduct a **Trinity** hearing at which the parties may present evidence related to all issues of immunity, including facts not in dispute. After the hearing, the court must ‘weigh the evidence and decide the facts’ to satisfy itself of its power to hear the case. In doing so, it must afford the plaintiff the reasonable inferences from his or her evidence. This same lenient standard applies to facts related to both the jurisdictional issue and the merits of the case.” **Dennis v. City and Cty. of Denver**, 2016 COA 140, ¶ 25 (citations omitted) (*cert granted* May 30, 2017).

4. As to what public entities may be held liable under the Colorado Governmental Immunity Act, §§ 24-10-101 to -120, C.R.S., (CGIA) for injuries caused by dangerous conditions, see section 24-10-103(5), C.R.S. (defining “public entity”), section 24-10-103(1) (defining “dangerous condition”), and section 24-10-106(1)(c), (d), (e), (f), and (g), C.R.S. (defining more specifically the circumstances when a dangerous condition in a public building, public highway, public facility, etc. will give rise to liability).

5. Under the CGIA, claims based on an inadequate or negligent design of a public facility are barred. **Willer v. City of Thornton**, 817 P.2d 514 (Colo. 1991) (city’s alleged negligent failure to post signs warning of a dip at intersection constituted inadequate or negligent design, and therefore, claims based on any such negligence were barred); **Szymanski v. Dep’t of Highways**, 776 P.2d 1124 (Colo. App. 1989) (allegations of “blind spot” in intersection, improper sight lines, an excessive speed limit, and a lack of warning signs were all related to inadequate design and claims based on such allegations were barred).

6. To establish that a dangerous condition exists under the CGIA, the injured party must show that: (1) the injury occurred as a result of a dangerous condition of a public facility; (2) the condition constituted an unreasonable risk to the health or safety of the public; (3) the public entity knew, or in the exercise of reasonable care should have known, that the dangerous condition existed; and (4) the dangerous condition was proximately caused by the negligent act or omission of the public entity in constructing or maintaining the facility. § 24-10-103(1); **Walton v. State**, 968 P.2d 636 (Colo. 1998); **Martinez v. Weld Cty. Sch. Dist. RE-1**, 60 P.3d 736 (Colo. App. 2002); **Luenberger v. City of Golden**, 990 P.2d 1145 (Colo. App. 1999); **Smith v. Town of Snowmass Village**, 919 P.2d 868 (Colo. App. 1996).

7. The decisions of the Colorado Supreme Court in **City of Longmont v. Henry-Hobbs**, 50 P.3d 906 (Colo. 2002) (waiver of sovereign immunity for death of child who drowned in irrigation ditch that city had agreement to maintain within city limits), and **City of Colorado Springs v. Powell**, 48 P.3d 561 (Colo. 2002) (waiver of sovereign immunity for death of one child and injuries to another when they fell into drainage ditch owned and maintained by city), were effectively nullified by the general assembly when it added new definitions of “maintenance,” “public sanitation facility,” and “public water facility” to the CGIA, effective July 1, 2003. § 24-10-103 (2.5), (5.5), and (5.7). This statutory amendment applies only prospectively. **City of Colo. Springs v. Powell**, 156 P.3d 461 (Colo. 2007).

8. Before a municipality may be held liable for defects in a public way caused by a third person, the city must have been on notice of the defect. *See, e.g.*, **Wold v. City of Boulder**, 91 Colo. 44, 9 P.2d 931 (1932); *see also* § 24-10-103(1); **Stephen v. City & Cty. of Denver**, 659 P.2d 666 (Colo. 1983) (interpreting, prior to 1986 amendment, section 24-10-106(1)(d) relating to dangerous conditions of public highways, etc.); **Broderick v. City & Cty. of Denver**, 727 P.2d 881 (Colo. App. 1986) (insufficient evidence that icy condition of sidewalk existed long enough for city to have had constructive notice of it).

9. Once a public entity takes affirmative steps to alleviate a problem, it has a duty to use reasonable care to protect foreseeable plaintiffs. **Martinez v. City of Lakewood**, 655 P.2d 1388 (Colo. App. 1982).

10. Proof of negligence is required in any action against a public entity for injuries resulting from a dangerous condition of, or the operation and maintenance of, a public water facility or sanitation facility. § 24-10-106(4). Therefore, in these kinds of actions, a claim for trespass is barred. **Lawrence v. Buena Vista Sanitation Dist.**, 989 P.2d 254 (Colo. App. 1999).

11. Independent contractors are not “public employees” under the CGIA. § 24-10-103(4)(a); **Henisse v. First Transit, Inc.**, 247 P.3d 577 (Colo. 2011) (employee of independent contractor was not protected by CGIA even when independent contractor contracted with a public entity); *see also* **Moran v. Standard Ins. Co.**, 187 P.3d 1162 (Colo. App. 2008) (private corporation with contract to administer program for public retirement system did not act as instrumentality of public entity and was not entitled to CGIA immunity); **Safari 300, Ltd. v. Hamilton Family Enters., Inc.**, 181 P.3d 278 (Colo. App. 2007) (only natural persons are entitled to CGIA immunity for public employees); **Robinson v. Colo. State Lottery Div.**, 155 P.3d 409 (Colo. App. 2006) (private store licensed to sell lottery tickets was not instrumentality of the State for CGIA purposes), *aff’d in part and rev’d in part on other grounds*, 179 P.3d 998

(Colo. 2008); **Podboy v. Fraternal Order of Police**, 94 P.3d 1226 (Colo. App. 2004) (labor organization with authority under municipal code to act as sole collective bargaining agent for sheriff's department is not public entity under the CGIA, and its members and officers are not public employees).

### **Sovereign Immunity Waived**

12. For Colorado Supreme Court cases holding that sovereign immunity was waived, see **Dennis**, 2016 COA 140, ¶ 36 (holding “plaintiff satisfies his or her burden of proving an ‘unreasonable risk to the health or safety of the public’ under section 24-10-103(1.3) when he or she shows that a governmental entity failed to restore a damaged road to its ‘same state of efficiency or repair as initially constructed’”); **St. Vrain Valley School District RE-1J v. A.R.L.**, 2014 CO 33, ¶¶ 35-36, 325 P.3d 1014 (playground of public elementary school is a “public facility” located in a “recreation area” under CGIA); **Daniel v. City of Colorado Springs**, 2014 CO 34, ¶¶ 32-33, 327 P.3d 891 (parking lot of public golf course is “public facility” located in a “recreation area” under CGIA); **Powell**, 48 P.3d at 563-64 (death of one child and injuries to another when they fell into drainage ditch owned and maintained by city); **Medina v. State**, 35 P.3d 443 (Colo. 2001) (distinguishing between “maintenance” and “design” of public way and holding that immunity is waived for negligent maintenance but not for negligent design or failure to warn); **Springer v. City & County of Denver**, 13 P.3d 794 (Colo. 2000) (negligent failure to detect physical defects in building constructed by independent contractor); **Corsentino v. Cordova**, 4 P.3d 1082 (Colo. 2000) (sheriff's deputy who endangered life in driving vehicle responding to burglary alarm not entitled to benefit of emergency vehicle exception to waiver of immunity); **State v. Nieto**, 993 P.2d 493 (Colo. 2000) (acts of public employees in course of operating state's correctional facilities); **Walton**, 968 P.2d at 645-46 (injuries sustained by plaintiff when ladder used to clean storage space in public facility slipped out from under her); **State v. Moldovan**, 842 P.2d 220 (Colo. 1992) (highway department failed to maintain fence so as to prevent calf from running onto highway); **City of Aspen v. Meserole**, 803 P.2d 950 (Colo. 1990) (dangerous condition on municipal sidewalk); and **Stephen**, 659 P.2d at 667-68 (stop sign facing improper direction).

13. For recent Colorado Court of Appeals cases holding that sovereign immunity was waived, see **McKinley v. City of Glenwood Springs**, 2015 COA 126, ¶¶ 6-7, 11, 361 P.3d 1080 (five-inch depression in municipal parking lot was a dangerous condition that interfered with the movement of traffic); **Colucci v. Town of Vail**, 232 P.3d 218 (Colo. App. 2009) (“sidewalk” included pedestrian way perpendicular to roadway); **Herrera v. City & County of Denver**, 221 P.3d 423 (Colo. App. 2009) (snowplow is motor vehicle under CGIA); **Douglas v. City & County of Denver**, 203 P.3d 615 (Colo. App. 2008) (in wrongful death claim arising from weight lifting accident, city waived immunity by constructing weight room in recreation center without adequate warning signs, by failing to observe, assist, or warn plaintiff of risks of weightlifting, and by failing to monitor and supervise the weight room adequately); **Lauck v. E-470 Public Highway Authority**, 187 P.3d 1148 (Colo. App. 2008) (E-470 a type of federal road included within immunity waiver); **Montoya v. City of Westminster Department of Public Works**, 181 P.3d 1197 (Colo. App. 2008) (open water meter pit in parking lot part of structure used in collection, treatment, and distribution of domestic water); **Lin v. City of Golden**, 97 P.3d 303 (Colo. App. 2004) (wrongful death of pedestrian killed by automobile after dark in intersection where street light was not lit); **Ellis v. Town of Estes Park**, 66 P.3d 178 (Colo. App. 2002) (injuries allegedly sustained by plaintiff when she tripped over manhole cover of electric

vault owned, operated, and maintained by town as part of its electrical supply system); **Booth v. University of Colorado**, 64 P.3d 926 (Colo. App. 2002) (injuries sustained by student at state university when dry erase board fell over), *aff'd on other grounds*, 78 P.3d 1098 (Colo. 2003); **Wisdom v. City of Sterling**, 36 P.3d 106 (Colo. App. 2001) (water meter pit owned by city, located on property owned, operated, and maintained by city, constituted “public water facility” within meaning of statute waiving sovereign immunity); **Flores v. Colorado Department of Corrections**, 3 P.3d 464 (Colo. App. 1999) (injuries sustained by prison visitor when she slipped and fell on wet floor); **DeForrest v. City of Cherry Hills Village**, 990 P.2d 1139 (Colo. App. 1999) (dangerous condition created by city when it erected temporary stop signs that might have conflicted with traffic light); **Mason v. Adams**, 961 P.2d 540 (Colo. App. 1997) (dangerous condition of sand and gravel on roadway); **Denmark v. State**, 954 P.2d 624 (Colo. App. 1997) (injuries sustained as a result of dangerous condition of athletic field on higher education campus because athletic field was “recreation area”); **Jilot v. State**, 944 P.2d 566 (Colo. App. 1997) (damages caused by gasoline leakage from underground storage tanks if, on remand, trial court determined that storage tanks were fixtures); and **Smith v. Town of Estes Park**, 944 P.2d 571 (Colo. App. 1996) (injuries sustained when plaintiff slipped and fell on ice that had accumulated in cross-pan of town’s storm drainage system).

14. For earlier Colorado Court of Appeals cases holding that sovereign immunity was waived, see **Scott v. City of Greeley**, 931 P.2d 525 (Colo. App. 1996) (property damage resulting from storm sewer flooding which occurred because city departed from design plan when it connected larger pipe to existing smaller pipe); **Johnson v. Regional Transportation District**, 916 P.2d 619 (Colo. App. 1995) (injuries sustained by bus passenger who was injured when she was struck by another vehicle after disembarking from bus while bus was stopped in traffic lane); **Hallam v. City of Colorado Springs**, 914 P.2d 479 (Colo. App. 1995) (injuries allegedly sustained as a result of city’s failure to properly maintain barricades because barricades were traffic safety devices, not traffic markings); **Hendricks v. Weld County School District No. 6**, 895 P.2d 1120 (Colo. App. 1995) (injuries sustained by student when he slid into unpadded wall of school gymnasium); **Longbottom v. State Board of Community Colleges & Occupational Education**, 872 P.2d 1253 (Colo. App. 1993) (injuries sustained by student while operating “jointer” machine in junior college building); **Belfiore v. Colorado State Department of Highways**, 847 P.2d 244 (Colo. App. 1993) (injuries sustained when boulder struck automobile on public highway); **Morgan v. Board of Water Works of Pueblo**, 837 P.2d 300 (Colo. App. 1992) (danger posed by protruding water valve covers in street); and **Schlitters v. State**, 787 P.2d 656 (Colo. App. 1989) (dangerous condition resulting from boulder falling onto public highway).

### **Sovereign Immunity Not Waived**

15. For Colorado Supreme Court cases holding that sovereign immunity was not waived, see **St. Vrain Valley School District RE-1J v. Loveland**, 2017 CO 54, ¶ 24, 395 P.3d 751, 757 (“A non-negligently constructed and maintained piece of playground equipment cannot be a ‘dangerous condition’ under the CGIA’s recreation-area waiver.”); **Burnett v. State Department of Natural Resources**, 2015 CO 19, ¶¶ 24, 36, 44, 46, 346 P.3d 1005 (in case where camper sustained injuries in state park when tree branch fell on her, the court held that a tree is a “natural condition of . . . unimproved property” regardless of proximity to public facility, and overruled the “public facility” test in **Rosales v. City & County of Denver**, 89 P.3d 507 (Colo. App. 2004)); **Young v. Brighton School District 27J**, 2014 CO 32, ¶¶ 34-35, 325



P.3d 571 (walkway not, in and of itself, a “public facility” for purposes of CGIA waiver of immunity for “recreation areas”); **Medina**, 35 P.3d at 454-55 (distinguishing between “maintenance” and “design” of public way and holding that immunity is waived for negligent maintenance but not for negligent design or failure to warn); **Padilla v. School District No. 1**, 25 P.3d 1176 (Colo. 2001) (injuries sustained by elementary school student when stroller tipped over); **Swieckowski v. City of Fort Collins**, 934 P.2d 1380 (Colo. 1997) (hazard created by improvement to roadway since hazard was solely result of inadequate design); **City & County of Denver v. Gallegos**, 916 P.2d 509 (Colo. 1996) (injuries sustained by pedestrian when he stepped on cover plate for water meter pit on private property); **Jenks v. Sullivan**, 826 P.2d 825 (Colo. 1992) (action by person shot in county courthouse), *overruled on other grounds by Bertrand v. Board of County Commissioners*, 872 P.2d 223 (Colo. 1994); and **Bloomer v. Board of County Commissioners**, 799 P.2d 942 (Colo. 1990) (dangerous conditions on county roads), *overruled on other grounds by Bertrand*, 872 P.2d at 227.

16. For recent Colorado Court of Appeals cases holding that sovereign immunity was not waived, see **Ackerman v. City & County of Denver**, 2015 COA 96M, ¶ 30, 373 P.3d 665 (in case involving injuries sustained by plaintiffs when rocks fell from rock formation abutting city amphitheater, the court held that a rock formation “is a natural condition of unimproved property”); **Wark v. Board of County Commissioners**, 47 P.3d 711 (Colo. App. 2002) (counties not included in statutory waiver of immunity for dangerous conditions of roadways); **Moore v. City & County of Denver**, 42 P.3d 82 (Colo. App. 2002) (injuries to pedestrian who was injured on crosswalk controlled by properly functioning pedestrian signal); **Richardson v. Starks**, 36 P.3d 168 (Colo. App. 2001) (injuries suffered by elementary school pupil who was assaulted by another pupil on school playground); **deBoer v. Ute Water Conservancy District**, 17 P.3d 187 (Colo. App. 2000) (injuries sustained by plaintiff when she fell into water meter pit owned and operated by district since pit was not “public facility”); **Jaffe v. City & County of Denver**, 15 P.3d 806 (Colo. App. 2000) (city’s alleged failure to establish medical assistance system, automatic lighting system, foul weather detection system, or evacuation plan on golf course); **Seder v. City of Fort Collins**, 987 P.2d 904 (Colo. App. 1999) (injuries sustained by plaintiff when she slipped and fell on icy sidewalk outside recreation center owned and maintained by city, unless city had actual knowledge of dangerous condition of sidewalk); and **Lyons v. City of Aurora**, 987 P.2d 900 (Colo. App. 1999) (dangerous condition allegedly resulting from failure of traffic signals to provide sufficient time for pedestrian to cross intersection).

17. For earlier Colorado Court of Appeals cases holding that sovereign immunity was not waived, see **Horrell v. City of Aurora**, 976 P.2d 315 (Colo. App. 1998) (injuries sustained by plaintiff when he fell into water pit owned and maintained by city); **Delk v. City of Grand Junction**, 958 P.2d 532 (Colo. App. 1998) (in case involving injuries sustained by plaintiff when he attempted to prevent trash dumpster located on restaurant’s property from rolling into car; dumpster was not “public sanitation facility”); **Stockwell v. Regional Transportation District**, 946 P.2d 542 (Colo. App. 1997) (injuries sustained by bus passenger allegedly attacked by other passengers); **Stanley v. Adams County School District 27J**, 942 P.2d 1322 (Colo. App. 1997) (injuries sustained by delivery person when she slipped and fell on school’s driveway because driveway did not constitute a public highway, road, or street, was not sidewalk and was not dangerous condition of public building); **Reynolds v. State Board for Community Colleges & Occupational Education**, 937 P.2d 774 (Colo. App. 1996) (injuries sustained by plaintiff while

cleaning printing press, unless plaintiff establishes that printing press was “fixture”); **Smith**, 919 P.2d at 871-72 (where town did not have actual or constructive notice of dangerous condition created by ice on lower landing of stairway); **Click v. Board of County Commissioners**, 923 P.2d 347 (Colo. App. 1996) (dangerous conditions on county roads); **DiPaolo v. Boulder Valley School District, RE-2**, 902 P.2d 439 (Colo. App. 1995) (injuries sustained when plaintiff exited damaged and inoperable school bus that was being used as immobile exhibit in safety display); **Pack v. Arkansas Valley Correctional Facility**, 894 P.2d 34 (Colo. App. 1995) (claim of correctional facility visitor who was injured when he slipped and fell on ice in handicapped zone of facility parking lot); **Lafitte v. State Highway Department**, 885 P.2d 338 (Colo. App. 1994) (claim based on alleged failure of highway department to provide adequate traffic warning signs), *overruled on other grounds by* **Regional Transportation District v. Lopez**, 916 P.2d 1187 (Colo. 1996); **Montes v. Hyland Hills Park & Recreation District**, 849 P.2d 852 (Colo. App. 1992) (injuries caused by negligently maintained golf cart rented to patron of public golf course); **Howard v. City & County of Denver**, 837 P.2d 255 (Colo. App. 1992) (claims by survivors of woman killed by her husband after he was released from county jail); **Odenbaugh v. County of Weld**, 809 P.2d 1059 (Colo. App. 1990) (dangerous condition on county road); and **Mentzel v. Judicial Department**, 778 P.2d 323 (Colo. App. 1989) (dispensing alcoholic beverages to public employees in public building).

## 12:16 DUTY OF CARE BY USER OF PUBLIC WAY

**A person using (sidewalks) (streets) (crosswalks) must use reasonable care for his or her own safety, under the circumstances and the conditions known or which should have been known to that person.**

### Notes on Use

1. Use whichever parenthesized word is most appropriate.
2. Whenever this instruction is given, Instruction 9:8, defining “reasonable care,” should also be given.
3. If the plaintiff is required under section 13-21-115, C.R.S., to establish liability by proving more than ordinary negligence, then this instruction, relating as it does to ordinary contributory negligence, may not be applicable, since such conduct on the plaintiff’s part may not be a defense to the more serious conduct the plaintiff would need to prove on the defendant’s part. *Compare Carman v. Heber*, 43 Colo. App. 5, 601 P.2d 646 (1979) (comparative negligence not a defense to an intentional tort), *with G.E.C. Minerals, Inc. v. Harrison W. Corp.*, 781 P.2d 115 (Colo. App. 1989) (comparative negligence a defense to “willful and reckless” negligence).
4. This instruction, appropriately modified, may also be used in cases involving other public facilities. *See Russo v. Birrenkott*, 770 P.2d 1335 (Colo. App. 1988) (hazardous conditions at public recreational area).

### Source and Authority

This instruction is supported by *City of Alamosa v. Johnson*, 99 Colo. 134, 60 P.2d 1087 (1936); and *City & County of Denver v. Caton*, 108 Colo. 170, 114 P.2d 553 (1941). *See also City & Cty. of Denver v. Willson*, 81 Colo. 134, 254 P. 153 (1927) (plaintiff’s knowledge of the defect alone does not make the plaintiff contributorily negligent).

## 12:17 NEGLIGENCE CHOICE OF ROUTE

**A person who takes a route when that person knows or ought reasonably to know of a safer route is negligent if a reasonably careful person would have taken the safer way under the same or similar circumstances to protect (himself)(herself) (or) (others) from (bodily injury) (death) (property damage).**

### Notes on Use

1. Use whichever parenthesized words and phrases are most appropriate.
2. As the cases in the Source and Authorities indicate, this instruction is not limited to situations involving only public ways.
3. The failure on the part of a plaintiff to comply with the duty set out in this instruction constitutes contributory negligence if such failure was a cause of the plaintiff's injuries. *See* cases cited in Source and Authority. Under comparative negligence, however, *see* Instructions 9:26 – 9:28D, the failure of the plaintiff to have taken the safer way does not necessarily relieve the defendant of liability for any negligence of the defendant relating to the way taken which also proximately caused the plaintiff's injuries. **Betoney v. Union Pac. R.R.**, 701 P.2d 62 (Colo. App. 1984).
4. This instruction should not be given unless there is sufficient evidence for the jury to find that the person knew or as a reasonably careful person ought to have known of the hazard involved in the route selected. **Martinez v. W.R. Grace Co.**, 782 P.2d 827 (Colo. App. 1989).

### Source and Authority

This instruction is supported by **City of Aurora v. Woolman**, 165 Colo. 377, 439 P.2d 364 (1968) (user must know or reasonably should have known the chosen route was unsafe); **Fox v. Martens**, 132 Colo. 208, 286 P.2d 628 (1955) (plaintiff negligent in not taking safer alternative route on own property to avoid condition allegedly created by defendant's negligence); and **Midland Terminal Railway v. Patton**, 74 Colo. 132, 219 P. 781 (1923) (employee contributorily negligent in taking more hazardous route on employer's premises). *See also* **Denver & Rio Grande R.R. v. Komfala**, 69 Colo. 318, 194 P. 615 (1920).

## G. VIOLATION OF STATUTE OR ORDINANCE

### 12:18 VIOLATION OF STATUTE OR ORDINANCE — EVIDENCE OF FAILURE TO EXERCISE REASONABLE CARE

At the time of the occurrence in question in this case, the following (statute[s]) (ordinance[s]) of the [name of municipal corporation], State of Colorado (was) (were) in effect:

*(insert quotation of applicable statute[s] or ordinance[s]).*

If you find the defendant, (*name*), violated (this) (these) (statute[s]) (ordinance[s]), you may consider this violation as evidence that the defendant failed to exercise reasonable care. You must consider this evidence along with all other evidence in determining whether the defendant exercised reasonable care.

#### Notes on Use

1. Under section 13-21-115, C.R.S., a failure to comply with a statute, ordinance, or building code may be considered as evidence of a failure to exercise reasonable care. **Lombard v. Colo. Outdoor Educ. Ctr., Inc.**, 187 P.3d 565 (Colo. 2008). However, a defendant's knowledge of a violation of the building code does not establish knowledge that the violation created a dangerous condition. **Lombard v. Colo. Outdoor Educ. Ctr., Inc.**, 266 P.3d 412 (Colo. App. 2011).

2. In premises liability cases brought under section 13-21-115, C.R.S., this instruction should be used instead of Instruction 9:14 (violation of statute or ordinance as negligence per se), which applies in negligence cases.

3. For a definition of reasonable care, see Instruction 9:8.

#### Source and Authority

This instruction is supported by **Lombard**, 266 P.3d at 416-17.