CHAPTER 19

DECEIT BASED ON FRAUD

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19:1 FALSE REPRESENTATION — ELEMENTS OF LIABILITY

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

1. The defendant made a false representation of a past or present fact;

2. The fact was material;

3. At the time the representation was made, the defendant:

(a) knew the representation was false; or

(b) was aware that (he) (she) did not know whether the representation was true or false;

4. The defendant made the representation with the intent that (the plaintiff) (a group of persons of which the plaintiff was a member) would rely on the representation;

5. The plaintiff relied on the representation;

6. The plaintiff's reliance was justified; and

7. This reliance caused (injuries) (damages) (losses) to the plaintiff.

If you find that any one or more of these *(number)* **statements has not been proved, then your verdict must be for the defendant.**

On the other hand, if you find that all of these *(number)* **statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of** *[insert any affirmative defense that would be a complete defense to plaintiff's claim]***).**

If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.

Notes on Use

1. When the alleged deceit is based on the concealment or nondisclosure of a material fact, rather than an overt misrepresentation, Instruction 19:2 should be used rather than this instruction. *See* **Ballow v. PHICO Ins. Co.**, 875 P.2d 1354 (Colo. 1993); **Colo. Interstate Gas**

Co. v. Chemco, Inc., 833 P.2d 786 (Colo. App. 1991), *aff'd on other grounds*, 854 P.2d 1232 (Colo. 1993).

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 words are most appropriate and omit the parenthesized clause of 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. Other appropriate instructions defining the terms used in this instruction, for example, Instruction 19:4, defining "material fact," must be given with this instruction, and, when necessary, an appropriate instruction or instructions relating to causation must be given. *See* Instructions 9:18 to 9:21.

7. In common-law actions for deceit or in statutory actions under what is now section 42-6-204, C.R.S., based on a misrepresentation in the mileage disclosure statement required by section 42-6-202(5), C.R.S., or created by concealing the actual mileage of a motor vehicle as prohibited by section 42-6-202(1), there is a rebuttable presumption that a purchaser who received the mileage representation justifiably relied on the representation and that the representation was material to the transaction. **Lurvey v. Phil Long Ford, Inc.**, 37 Colo. App. 11, 541 P.2d 114 (1975). In those cases, Instruction 3:5, incorporating this presumption, must be given with this instruction or, in a concealment case, with Instruction 19:2.

Source and Authority

1. This instruction is supported by and was cited with approval by the Colorado Supreme Court in **Bristol Bay Productions, LLC v. Lampack**, 2013 CO 60, ¶ 26, 312 P.3d 1155, 1160 ("For ease of understanding, Colorado's Model Jury Instructions unpack the fifth element into its three discrete sub-parts, requiring the plaintiff to prove separately actual reliance, the reasonableness of that reliance, and that the plaintiff's reliance caused its damages."). This instruction is also supported by **Knight v. Cantrell**, 154 Colo. 396, 390 P.2d 948 (1964); **Morrison v. Goodspeed**, 100 Colo. 470, 68 P.2d 458 (1937); **Colorado Springs Co. v. Wight**, 44 Colo. 179, 96 P. 820 (1908); and **Sellar v. Clelland**, 2 Colo. 532 (1875). *See also* **Vinton v. Virzi**, 2012 CO 10, ¶ 15, 269 P.3d 1242; **Concord Realty Co. v. Cont'l Funding Corp.**, 776 P.2d 1114 (Colo. 1989); **Alzado v. Blinder, Robinson & Co.**, 752 P.2d 544 (Colo. 1988); **Kinsey v. Preeson**, 746 P.2d 542 (Colo. 1987); **Trimble v. City & County of Denver**, 697 P.2d 716 (Colo. 1985); **Just in Case Bus. Lighthouse, LLC v. Murray**, 2013 COA 112M, ¶ 46, *aff'd*

in part, rev'd in part on other grounds, 2016 CO 47; **Barfield v. Hall Realty, Inc.**, 232 P.3d 286 (Colo. App. 2010) (citing this instruction); **Platt v. Aspenwood Condo. Ass'n**, 214 P.3d 1060 (Colo. App. 2009); **Nelson v. Gas Research Inst.**, 121 P.3d 340 (Colo. App. 2005); **Robert K. Schader, P.C. v. Etta Indus., Inc.**, 892 P.2d 363 (Colo. App. 1994); **Pittman v. Larson Distrib. Co.**, 724 P.2d 1379 (Colo. App. 1986); **Forsyth v. Associated Grocers of Colo., Inc.**, 724 P.2d 1360 (Colo. App. 1986) (citing with approval the elements as set out in this instruction); **Club Valencia Homeowners Ass'n v. Valencia Assocs.**, 712 P.2d 1024 (Colo. App. 1985); 2 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS § 7.1 (3d ed. 2006); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §§ 105-110 (5th ed. 1984).

2. Paragraph number 3 is supported by **Meredith v. Ramsdell**, 152 Colo. 548, 552, 384 P.2d 941, 944 (1963) ("[a] person who misleads another by word or act to believe a fact exists, when he knows it does not, is guilty of fraud, notwithstanding he entertains a belief and expectation that it will come into existence"); **Denver Business Sales Co. v. Lewis**, 148 Colo. 293, 365 P.2d 895 (1961) (trial court reversed in a deceit case based on nondisclosure for instructing the jury that the defendant was liable if he failed to disclose a fact which "by the exercise of reasonable prudence" he should have known); **Pattridge v. Youmans**, 107 Colo. 122, 126, 109 P.2d 646, 648 (1941) ("[h]e who makes a representation as of his own knowledge, not knowing whether it is true or false, and it is in fact untrue, is guilty of fraud as much as if he knew it to be untrue"); **Otis & Co. v. Grimes**, 97 Colo. 219, 221-22, 48 P.2d 788, 789 (1935) (actual knowledge of falsity not required and it is enough if the representation is made "with reckless ignorance of its truth or falsity" or "made . . . recklessly, careless [of] whether it be true or false," or is made with "no knowledge whether his assertion is true or false"); and **Lahay v. City National Bank of Denver**, 15 Colo. 339, 25 P. 704 (1891) (same). *See also* **Overland Dev. Co. v. Marston Slopes Dev. Co.**, 773 P.2d 1112 (Colo. App. 1989); HARPER, JAMES AND GRAY ON TORTS, *supra*, § 7.3; PROSSER AND KEETON ON THE LAW OF TORTS, *supra*, § 107. The language of paragraph 3 was cited with approval in **Sodal v. French**, 35 Colo. App. 16, 531 P.2d 972 (1974), *aff'd on other grounds sub nom.* **Slack v. Sodal**, 190 Colo. 411, 547 P.2d 923 (1976).

3. Numbered paragraph 5 is specifically supported by **Huston v. Ohio & Colorado Smelting & Refining Co.**, 63 Colo. 152, 165 P. 251 (1917) (plaintiff denied relief for damages caused by his reliance which was other than that intended by the defendant). *See also* **Nielson v. Scott**, 53 P.3d 777 (Colo. App. 2002) (summary judgment proper where no evidence that reliance on false representation was justified); **Soneff v. Harlan**, 712 P.2d 1084 (Colo. App. 1985) (no evidence of detrimental reliance); **Blinder, Robinson & Co. v. Alzado**, 713 P.2d 1314 (Colo. App. 1985), *aff'd in part, rev'd in part on other grounds*, 752 P.2d 544 (Colo. 1988).

4. The cases cited above in general support of this instruction do not use the phrase "justifiable reliance" as set out in numbered paragraph 6. In a deceit action, however, while the plaintiff's reliance need not be "reasonable" in the sense of the objective standard of the reasonably prudent man, **Foster v. O'Farrell**, 75 Colo. 170, 225 P. 217 (1924), it may not be wholly unwarranted. *See* Instructions 19:8, 19:9, 19:10, and 19:11; *see also* **Fasing v. LaFond**, 944 P.2d 608 (Colo. App. 1997) (element of claim is "reasonable reliance" on the alleged misrepresentation); **Frontier Expl., Inc. v. Am. Nat'l Fire Ins. Co.**, 849 P.2d 887 (Colo. App.

1992) (false representation requires justifiable reliance by the one to whom the representation is made).

5. In a deceit action, actual damages must be proved as an element of the tort. **W. Cities Broad., Inc. v. Schueller**, 849 P.2d 44 (Colo. 1993); **Black v. First Fed. Sav. & Loan Ass'n**, 830 P.2d 1103 (Colo. App. 1992), *aff'd on other grounds sub nom.* **La Plata Med. Ctr. Assocs. v. United Bank of Durango**, 857 P.2d 410 (Colo. 1993); **Harrison v. Smith**, 821 P.2d 832 (Colo. App. 1991); **Dann v. Perrotti & Hauptman Dev. Co.**, 670 P.2d 448 (Colo. App. 1983); **Greenleaf, Inc. v. Manco Chem. Co.**, 30 Colo. App. 367, 492 P.2d 889 (1971).

6. In **Williams v. Boyle**, 72 P.3d 392 (Colo. App. 2003), the court held that expert testimony and a certificate of review were required to establish plaintiff's fraudulent misrepresentation and fraudulent concealment claims against a physician who had allegedly misinformed plaintiff regarding the effects of a medication that the physician had prescribed.

7. For fraud as a defense to a breach of contract action, see Instruction 30:18. For an excellent discussion of the various remedies and defenses which may be based on fraud, see PROSSER AND KEETON ON THE LAW OF TORTS, *supra*, § 105.

8. Under section 13-25-127, C.R.S., the plaintiff's burden of proof is by a preponderance of the evidence, rather than by "clear and convincing" evidence, as was the earlier rule. *See* **Wiley v. Byrd**, 158 Colo. 479, 408 P.2d 72 (1965) (evidence of "fraud" must be clear and convincing); **Wallick v. Eaton**, 110 Colo. 358, 363, 134 P.2d 727, 729 (1943) (proof of fraud must be "clear, precise and indubitable").

9. For recovery for financial losses arising out of a business relationship caused by a negligently made misrepresentation on which the plaintiff relied, see Instruction 9:4. Also, for the tort of negligent misrepresentation resulting in physical harm, see Instruction 9:3.

10. In certain cases, the usual common-law requirements for the tort of deceit may have been changed by statute. *See, e.g.*, § 13-21-109, C.R.S. (damages recoverable for writing checks or other instruments when no account or insufficient funds). *See also* **First Nat'l Bank of Durango v. Lyons**, 2015 COA 19, ¶ 28, 349 P.3d 1161, 1166 (a fraud claim under the Colorado Securities Act could lie in tort for purposes of the Colorado Governmental Immunity Act because section 11-51-604 (3) provides that "[a]ny person who recklessly, knowingly, or with an intent to defraud sells or buys a security in violation of [this section] . . . is liable to the person buying or selling such security"); **Barfield**, 232 P.3d at 291 (section 12-61-807, C.R.S., expressly provides that agent acting as real estate "transaction broker" has no duty to investigate whether property could be used as RV park or to verify accuracy of seller's representations, and failure to do so could not be basis for negligent misrepresentation or fraud claim); **Nelson**, 121 P.3d at 344 (elements to establish action for fraud under section 8-2-104, C.R.S., prohibiting obtaining workers by misrepresentation, are the same as those for common-law fraud). In other cases, common-law fraud requirements remain the same. *See, e.g.*, **In re Estate of Gattis**, 2013 COA 145, ¶ 16, 318 P.3d 549, 554 ("home sellers' common law duty to disclose known but latent defects in the property has long been recognized").

11. Where a plaintiff has been induced fraudulently to enter into two related contracts as part of the same general transaction, the plaintiff need not elect the same remedy for both contracts. The plaintiff may elect to affirm one and sue for damages in deceit, and rescind the other and seek restitution for any consideration paid. Plaintiff should not be required to elect the same remedy for both contracts unless necessary to prevent double recovery or because the assertion of different remedies would be so inconsistent that the assertion of one would necessarily be a repudiation of the other. **Stewart v. Blanning**, 677 P.2d 1382 (Colo. App. 1984).

12. Lack of privity with a remote purchaser does not insulate a seller of property from liability for false representation arising out of a failure to disclose a latent defect which materially affected the desirability of the property. **Iverson v. Solsbery**, 641 P.2d 314 (Colo. App. 1982); **Schnell v. Gustafson**, 638 P.2d 850 (Colo. App. 1981).

13. A disclosed principal may be held liable in deceit for a misrepresentation made by an agent within the scope of a transaction the agent was authorized to effect. **Erickson v. Oberlohr**, 749 P.2d 996 (Colo. App. 1987).

14. A fraud claim based on only vicarious liability is insufficient. **Just in Case Business Lighthouse**, 2013 COA 112M, ¶ 64.

15. There is authority for the proposition that if the plaintiff has access to information that would have led to the discovery of the true facts and such information was equally available to both parties, then plaintiff's reliance is not justified or reasonable as a matter of law. *See* **Colo. Coffee Bean, LLC v. Peaberry Coffee, Inc.**, 251 P.3d 9 (Colo. App. 2010); **Balkind v. Telluride Mtn. Title Co.**, 8 P.3d 581 (Colo. App. 2000); *see also* **Vinton**, 2012 CO 10, ¶ 17; **M.D.C./Wood, Inc. v. Mortimer**, 866 P.2d 1380 (Colo. 1994). However, for a different test, see the authority cited in the Source and Authority to Instructions 19:8 to 19:10.

16. The "economic loss rule" bars recovery on post-contractual claims for fraudulent concealment and fraudulent misrepresentation which arise out of contract rather than tort duties. **Hamon Contractors, Inc. v. Carter & Burgess, Inc.**, 229 P.3d 282 (Colo. App. 2009); *see also* **Top Rail Ranch Estates, LLC v. Walker**, 2014 COA 9, ¶ 39, 327 P.3d 321 (economic loss rule barred fraud claims); **In re Estate of Gattis**, 2013 COA 145, ¶ 14 (economic loss rule does not bar a nondisclosure claim against a home seller for latent defects known to the seller); **Makoto USA, Inc. v. Russell**, 250 P.3d 625 (Colo. App. 2009) (economic loss rule bars fraud and theft claims that are dependent on contractual duty).

19:2 NONDISCLOSURE OR CONCEALMENT — ELEMENTS OF LIABILITY

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

1. The defendant (concealed a past or present fact) (failed to disclose a past or present fact which [he] [she] had a duty to disclose);

2. The fact was material;

3. The defendant (concealed it) (failed to disclose it) with the intent of creating a false impression of the actual facts in the mind of the plaintiff;

4. The defendant (concealed) (failed to disclose) the fact with the intent that the plaintiff take a course of action (he) (she) might not take if (he) (she) knew the actual facts;

5. The plaintiff took such action or decided not to act relying on the assumption that the (concealed) (undisclosed) fact did not exist or was different from what it actually was;

6. The plaintiff's reliance was justified; and

7. This reliance caused (injuries) (damages) (losses) to the plaintiff.

If you find that any one or more of these *(number)* **statements has not been proved, then your verdict must be for the defendant.**

On the other hand, if you find that all of these *(number)* **statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of** *[insert any affirmative defense that would be a complete defense to plaintiff's claim]***).**

If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.

Notes on Use

1. With the exception of the first Note on Use, the remaining Notes on Use to Instruction 19:1 are also applicable to this instruction and should be read and applied accordingly.

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

3. When the alleged deceit is based on an overt misrepresentation, rather than a concealment or nondisclosure, Instruction 19:1 should be used rather than this instruction.

Source and Authority

1. In addition to the authority cited and discussed in the Source and Authority to Instruction 19:1, this instruction is supported by **BP America Production Co. v. Patterson**, 263 P.3d 103 (Colo. 2011); **Mallon Oil Co. v. Bowen/Edwards Associates, Inc.**, 965 P.2d 105 (Colo. 1998); **Ballow v. PHICO Insurance Co.**, 875 P.2d 1354 (Colo. 1993); **Kopeikin v. Merchants Mortgage & Trust Corp.**, 679 P.2d 599 (Colo. 1984) (direct evidence of plaintiff's reliance is not required); **Ackmann v. Merchants Mortgage & Trust Corp.**, 645 P.2d 7 (Colo. 1982) (fraud as defense to breach of contract and rescission and restitution); **Teodonno v. Bachman**, 158 Colo. 1, 404 P.2d 284 (1965); **Carpenter v. Donohoe**, 154 Colo. 78, 388 P.2d 399 (1964); **Cahill v. Readon**, 85 Colo. 9, 273 P. 653 (1928) (rescission action); **Patterson v. BP America Production Co.**, 2015 COA 28, ¶ 38, 360 P.3d 211; **Wainscott v. Centura Health Corp.**, 2014 COA 105, ¶ 77, 351 P.3d 513; **Maxwell v. United Services Automobile Ass'n**, 2014 COA 2, ¶ 19, 342 P.3d 474 (if all five elements can be resolved by common questions of law or fact, fraudulent concealment claim can be certified as a class action); **Jehly v. Brown**, 2014 COA 39, ¶ 9, 327 P.3d 351; **Just in Case Business Lighthouse, LLC v. Murray**, 2013 COA 112M, *aff'd in part, rev'd in part on other grounds*, 2016 CO 47; **In re Estate of Gattis**, 2013 COA 145, ¶ 9, 318 P.3d 549 (citing this instruction); **Colorado Coffee Bean, LLC v. Peaberry Coffee, Inc.**, 251 P.3d 9 (Colo. App. 2010); **Barfield v. Hall Realty, Inc.**, 232 P.3d 286 (Colo. App. 2010) (elements of fraudulent concealment); **Frontier Exploration, Inc. v. American National Fire Insurance Co.**, 849 P.2d 887 (Colo. App. 1992); **Black v. First Federal Savings & Loan Ass'n**, 830 P.2d 1103 (Colo. App. 1992) (deceit action based on nondisclosure), *aff'd sub nom.* **La Plata Medical Center Associates, Ltd. v. United Bank of Durango**, 857 P.2d 410 (Colo. 1993); **Colorado Interstate Gas Co. v. Chemco, Inc.**, 833 P.2d 786 (Colo. App. 1991), *aff'd on other grounds*, 854 P.2d 1232 (Colo. 1993); **Berger v. Security Pacific Information Systems, Inc.**, 795 P.2d 1380 (Colo. App. 1990); **Colorado Performance Corp. v. Mariposa Associates**, 754 P.2d 401 (Colo. App. 1987); **Basnett v. Vista Village Mobile Home Park**, 699 P.2d 1343 (Colo. App. 1984) (elements of deceit by nondisclosure), *rev'd on other grounds*, 731 P.2d 700 (Colo. 1987); **Carlson v. Garrison**, 689 P.2d 735 (Colo. App. 1984) (elements of deceit by nondisclosure); **Johnson v. Graham**, 679 P.2d 1090 (Colo. App. 1983), *rev'd in part on other grounds sub nom.* **Tri-Aspen Construction Co. v. Johnson**, 714 P.2d 484 (Colo. 1986); **Schnell v. Gustafson**, 638 P.2d 850 (Colo. App. 1981); **Xerox Corp. v. ISC Corp.**, 632 P.2d 618 (Colo. App. 1981) (fraud as defense to breach of contract and counterclaim for damages); 2 F. HARPER, ET AL., HARPER, JAMES, AND GRAY ON TORTS § 7.14 (3rd ed. 2006); and W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 106 (5th ed. 1984).

2. The element of intent in paragraph 3 of this instruction is supported by **Anson v. Trujillo**, 56 P.3d 114 (Colo. App. 2002).

3. Although the courts have generally used "concealment" to mean the same thing as "nondisclosure," "concealment" is used in these instructions to mean more than the simple act of remaining silent when there is a duty to speak, which is the usual meaning of "nondisclosure." *Compare* Instruction 19:6, *with* Instruction 19:5. *See also* **Wisehart v. Zions Bancorporation**,

49 P.3d 1200 (Colo. App. 2002) (fraudulent concealment and fraudulent nondisclosure are sometimes used interchangeably, and the two torts require essentially the same elements).

4. To establish a claim for fraudulent concealment or nondisclosure, the plaintiff must show that the defendant had a duty to disclose information. **Mallon Oil Co.**, 965 P.2d at 111; **Wainscott**, 2014 COA 105, ¶ 79; **Burman v. Richmond Homes Ltd.**, 821 P.2d 913 (Colo. App. 1991). Whether a defendant has a duty to disclose a particular fact is a question of law. **Burman**, 821 P.2d at 918; **Berger**, 795 P.2d at 1383; *see also* **Poly Trucking, Inc. v. Concentra Health Servs., Inc.**, 93 P.3d 561 (Colo. App. 2004); **Bair v. Pub. Serv. Employees Credit Union**, 709 P.2d 961 (Colo. App. 1985) (adopting the provisions of RESTATEMENT (SECOND) OF TORTS § 551(2)(e) (1977), for purposes of determining whether a duty to disclose exists in a business transaction).

5. For circumstances in which a duty of disclosure may arise, see Instruction 19:5 and its Notes on Use.

6. In **Williams v. Boyle**, 72 P.3d 392 (Colo. App. 2003), the court held that expert testimony and a certificate of review were required to establish plaintiff's fraudulent misrepresentation and fraudulent concealment claims against a physician who had allegedly misinformed plaintiff regarding the effects of a medication that the physician had prescribed.

7. Justifiable reliance is an element common to both fraudulent misrepresentation and fraudulent concealment claims. **Nielson v. Scott**, 53 P.3d 777 (Colo. App. 2002).

8. In a fraudulent concealment claim, an exculpatory clause may preclude reasonable reliance on nondisclosure if the clause explains why certain inferences should not be drawn. *See* **Colo. Coffee Bean, LLC**, 251 P.3d at 21-22.

9. The "economic loss rule" bars recovery on claims for post-contractual fraudulent concealment and fraudulent misrepresentation that arise out of the contract and not any independent tort duty. **Hamon Contractors, Inc. v. Carter & Burgess, Inc.**, 229 P.3d 282 (Colo. App. 2009); *see also* **Top Rail Ranch Estates, LLC v. Walker**, 2014 COA 9, ¶ 39, 327 P.3d 321 (economic loss rule barred fraud claims); **In re Estate of Gattis**, 2013 COA 145, ¶ 14 (economic loss rule does not bar a nondisclosure claim against a home seller for latent defects known to the seller); **Makoto USA, Inc. v. Russell**, 250 P.3d 625 (Colo. App. 2009) (economic loss rule bars fraud and theft claims that are dependent on contractual duty).

19:3 FALSE REPRESENTATION — DEFINED

A false representation is any oral or written words, conduct, or combination of words and conduct that creates an untrue or misleading impression in the mind of another.

Notes on Use

This instruction should be given with Instruction 19:1.

Source and Authority

This instruction is supported by **Meredith v. Ramsdell**, 152 Colo. 548, 552, 384 P.2d 941, 944 (1963) (rescission against principal and deceit against agent; "[a] person who misleads another by word or act to believe that a fact exists, when he knows it does not, is guilty of fraud"); **Corder v. Laws**, 148 Colo. 310, 366 P.2d 369 (1961) (creation of a false impression, by whatever means, is the gist of a false representation); **Cahill v. Readon**, 85 Colo. 9, 14, 273 P. 653, 655 (1928) ("[a] statement literally true is actionable, if made to create an impression substantially false"); **Nelson v. Gas Research Institute**, 121 P.3d 340 (Colo. App. 2005); 2 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS § 7.14 (3rd ed. 2006); and W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 106 (5th ed. 1984).

19:4 MATERIAL FACT — DEFINED

A fact is material if a reasonable person under the circumstances would regard it as important in deciding what to do.

A fact may also be material even though a reasonable person might not regard it as important, if (the person stating it knows that) (the person concealing it knows that) the person receiving the information would regard it as important in deciding what to do.

Notes on Use

1. Use whichever parenthesized phrase is more appropriate.

2. The second paragraph should be given only in cases where there is evidence to support it and, also, where there is evidence that the defendant may have deliberately taken advantage of the plaintiff's deficiencies or peculiarities.

3. This instruction should not be used for claims brought under sections 11-51-501(1)(b) and 11-51-604(4), C.R.S., for damages for fraud in the sale of securities. **Goss v. Clutch Exch., Inc.**, 701 P.2d 33, 36 (Colo. 1985) (The appropriate test for materiality under the Colorado Securities Act is whether there was a "substantial likelihood that a reasonable investor would consider the matter important in making an investment decision.").

Source and Authority

1. This instruction is supported by 2 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS § 7.9 (3d ed. 2006); and W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 108, at 753-54 (5th ed. 1984). *See also* **Wade v. Olinger Life Ins. Co.**, 192 Colo. 401, 560 P.2d 446 (1977) (citing instruction with approval); **Mullen v. Allstate Ins. Co.**, 232 P.3d 168 (Colo. App. 2009) (insurer was not required to provide information about business practices of other companies and therefore did not fail to disclose material fact); **Briggs v. Am. Nat'l Prop. & Cas. Co.**, 209 P.3d 1181 (Colo. App. 2009) (jury could conclude insurance policy purchaser might have made different decision if aware that an invalid exclusion was included in his policy); **Denberg v. Loretto Heights College**, 694 P.2d 375 (Colo. App. 1984) (using language of first paragraph). In addition, several Colorado cases have considered the definition of "material" as part of the definition of reliance. *See* Source and Authority to Instruction 19:7.

2. Many Colorado cases require that the representation be "material." *See* Source and Authority to Instructions 19:1 and 19:2.

19:5 NONDISCLOSURE — DUTY TO DISCLOSE

The defendant, *(name)***, had a duty to disclose material facts if (he) (she) knew about them and if:**

(1. The defendant and the plaintiff were in a [confidential] [or] [fiduciary] relationship) (or)

(2. The defendant stated some facts, but not all material facts, knowing that they would create a false impression in the mind of the plaintiff) (or)

(3. The defendant knew that by [his] [her] own unclear or deceptive words or conduct that [he] [she] created a false impression of the actual facts in the mind of the plaintiff) (or)

(4. The defendant knew that the plaintiff was not in a position to discover the facts for [himself] [herself]) (or)

(5. The defendant communicated material facts that were true or that [he] [she] believed were true at the time the time they were communicated. Later, the defendant learned that the material facts were [not] [no longer] true and knew that the plaintiff was acting under the impression that the facts were true) (or)

(6. The defendant promised to perform an act or communicated an intention to perform an act knowing that undisclosed facts made [his] [her] performance unlikely.)

Notes on Use

1. Only those parenthesized or bracketed portions of this instruction should be used as are appropriate to the evidence in the case. If the false representation was allegedly made to someone other than the plaintiff, then this instruction must be appropriately modified.

2. When appropriate, this instruction should be given with Instruction 19:2.

3. If reasonable minds could not differ as to the facts giving rise to a duty to disclose, the existence of that duty is a matter of law for the court to determine. *See, e.g.*, **Morrison v. Goodspeed**, 100 Colo. 470, 68 P.2d 458 (1937); **Colo. Interstate Gas Co. v. Chemco, Inc.**, 833 P.2d 786 (Colo. App. 1991), *aff'd on other grounds*, 854 P.2d 1232 (Colo. 1993); **Burman v. Richmond Homes, Ltd.**, 821 P.2d 913 (Colo. App. 1991). This instruction has been drafted to cover those specific situations that have so far been recognized by the courts. *See* Source and Authority below. It is not intended to be exhaustive of all possible situations.

4. For a definition of "confidential relationship," see Instruction 34:18. For a definition of "fiduciary relationship," see Instructions 26:2 and 26:3.

Source and Authority

1. The numbered paragraphs of this instruction are supported by the following cases. Paragraph 1: **Hanson v. Chamberlin**, 76 Colo. 562, 233 P. 830 (1925) (duty of disclosure between joint venturers); **Pouppirt v. Greenwood**, 48 Colo. 405, 110 P. 195 (1910) (agency relationship). Paragraph 2: **Mallon Oil Co. v. Bowen/Edwards Assocs., Inc.**, 965 P.2d 105 (Colo. 1998); **Corder v. Laws**, 148 Colo. 310, 366 P.2d 369 (1961); **Cahill v. Readon**, 85 Colo. 9, 14, 273 P. 653, 655 (1928) ("[a] statement literally true is actionable, if made to create an impression substantially false"); **Berger v. Sec. Pac. Info. Sys., Inc.**, 795 P.2d 1380 (Colo. App. 1990) (prospective employer's duty to disclose information to prospective employee). Paragraph 3: **Meredith v. Ramsdell**, 152 Colo. 548, 384 P.2d 941 (1963); **Feit v. Donahue**, 826 P.2d 407 (Colo. App. 1992); **H & H Distribs., Inc. v. BBC Int'l, Inc.**, 812 P.2d 659 (Colo. App. 1990). Paragraph 4: **Cohen v. Vivian**, 141 Colo. 443, 349 P.2d 366 (1960) (by implication); **Morrison**, 100 Colo. at 478, 68 P.2d at 462 (by implication); **McNeill v. Allen**, 35 Colo. App. 317, 534 P.2d 813 (1975). Paragraph 5: **Cahill**, 85 Colo. at 16, 273 P. at 656 (by implication); **Bohe v. Scott**, 83 Colo. 374, 265 P. 694 (1928). Paragraph 6: **Ackmann v. Merchs. Mortg. & Trust Corp.**, 645 P.2d 7 (Colo. 1982) (fraud as a defense to breach of contract and as basis of claim for rescission and restitution).

2. This instruction is also supported by 2 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS § 7.14 (3d ed. 2006); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 106 (5th ed. 1984).

3. In a deceit action, a person may have a duty to disclose a material fact only if the person knows that fact. **Johnson v. Graham**, 679 P.2d 1090 (Colo. App. 1983), *rev'd in part on other grounds sub nom.* **Tri-Aspen Constr. Co. v. Johnson**, 714 P.2d 484 (Colo. 1986). It is not sufficient that one should have known the fact as a reasonably prudent person. *See* **Denver Bus. Sales Co. v. Lewis**, 148 Colo. 293, 365 P.2d 895 (1961) (specifically rejecting the reasonable care standard suggested in **Cohen**, 141 Colo. at 446, 349 P.2d at 367).

4. The following cases have concluded that no duty existed in the context of particular relationships: **Mallon Oil Co.**, 965 P.2d at 112 (there was no special relationship or improper acquisition of information that would create duty on the part of geologist to disclose information about minerals on seller's property); **Barfield v. Hall Realty, Inc.**, 232 P.3d 286 (Colo. App. 2010) (section 12-61-807, C.R.S., expressly provides that agent acting as real estate "transaction broker" has no duty to investigate whether property could be used as RV park or to verify accuracy of seller's representations, and failure to do so could not be basis for negligent misrepresentation or fraud claim); **Mullen v. Allstate Ins. Co.**, 232 P.3d 168 (Colo. App. 2009) (insurer has no duty to disclose nature of policies offered by other insurers); **Poly Trucking, Inc. v. Concentra Health Servs., Inc.**, 93 P.3d 561 (Colo. App. 2004) (trucking company had no duty to disclose intent to sue doctor during negotiations for the release of other claims against doctor's employer).

5. A duty to disclose may be found in the context of the particular facts of the case. *See* **Bair v. Pub. Serv. Employees Credit Union**, 709 P.2d 961 (Colo. App. 1985) (lender requiring insurance of creditor has duty to disclose what kind of insurance is required).

6. In a nondisclosure claim against a home seller, there is an independent duty to disclose latent defects known to the seller. Further, "the disclosure terms in [a] Form Contract do not subsume a home seller's common law duty to disclose such defects . . . ." **In re Estate of Gattis**, 2013 COA 145, ¶ 32, 318 P.3d 549, 557.

19:6 CONCEALMENT — DEFINED

The defendant, *(name)***, concealed a fact that (he) (she) knew, if, by conduct, or by written or oral words, or by a combination of conduct and words, (he) (she) created a false impression of the actual fact in the mind of the plaintiff,** *(name)***:**

(1. By covering up the truth) (or)

(2. By preventing the plaintiff from discovering the actual fact for [himself] [herself]).

Notes on Use

1. When appropriate, this instruction should be used with Instruction 19:2.

2. This instruction covers the situation where it is claimed that the defendant, instead of failing to disclose a material fact that the defendant had a duty to disclose, took affirmative steps to mislead another by covering up a material fact or by making it difficult for the other person to discover the truth about a material fact, as for example, setting a speedometer back on a used car. Use only those parenthesized and bracketed portions of this instruction that are appropriate to the evidence.

3. If the false representation was allegedly made to someone other than the plaintiff, then this instruction must be appropriately modified.

Source and Authority

1. This instruction is supported by the broad language of **Meredith v. Ramsdell**, 152 Colo. 548, 384 P.2d 741 (1963), and by 2 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS § 7.14 (3d ed. 2006); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 106 (5th ed. 1984); and RESTATEMENT (SECOND) OF TORTS § 550 (1977).

2. No Colorado cases have been found involving affirmative acts of concealment. However, the spirit of the nondisclosure cases, *see* cases cited in Source and Authority to Instruction 19:5, supports this instruction. In those cases, where the courts used the word "concealment," they were referring to a knowing nondisclosure of a material fact that the speaker was under a duty to disclose rather than an affirmative act of concealment.

19:7 FALSE REPRESENTATION — RELIANCE — DEFINED

The plaintiff, *(name)***, relied on the claimed representation if (he) (she) believed it was true, and based on that representation:**

(1. Took action [he] [she] otherwise would not have taken) (or)

(2. Decided not to take action [he] [she] otherwise would have taken.)

Notes on Use

1. This instruction has been prepared for those cases where the misrepresentation is overt and Instruction 19:1 is used. When the misrepresentation is by way of concealment or nondisclosure, the requirement of reliance is adequately explained in Instruction 19:2 (numbered paragraph 5).

2. Use only those parenthesized or bracketed portions of this instruction that are appropriate to the evidence.

Source and Authority

1. The language of this instruction is supported by **Teare v. Sussman**, 120 Colo. 488, 210 P.2d 446 (1949), which appears to be in accord with cases from other jurisdictions. *See* 2 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS § 7.13 (3d ed. 2006); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 108 (5th ed. 1984). The plaintiff need not be compelled to act because of the misrepresentation; it is sufficient if the plaintiff is induced to act or refrain from acting.

2. The plaintiff must have believed the representation was true. **Sears v. Hicklin**, 13 Colo. 143, 21 P. 1022 (1889) (rescission action); HARPER, JAMES, AND GRAY ON TORTS, *supra*, § 7.13 (3d ed. 2006); PROSSER AND KEETON ON THE LAW OF TORTS, *supra*, § 108. *But see* **Fitzgerald v. McDonald**, 81 Colo. 413, 255 P. 989 (1927) (in false representation case, plaintiff's belief in truth of defendant's statement not required when plaintiff acted as if he accepted the truth of the statement).

3. In a deceit action, the plaintiff's reliance constitutes the causal connection between the defendant's alleged improper conduct and the plaintiff's claimed damages. While in some cases there is language suggesting that, before reliance can exist, the alleged misrepresentation must have been virtually the sole and only cause of the transaction, *see, e.g.*, **Wheeler v. Dunn**, 13 Colo. 428, 22 P. 827 (1889), in **Morrison v. Goodspeed**, 100 Colo. 470, 68 P.2d 458 (1937), it was suggested that it was sufficient if the misrepresentation "might" have influenced the transaction.

19:8 JUSTIFIABLE RELIANCE ON FALSE REPRESENTATION — DEFINED

A person is justified in assuming that a representation is true if a person of the same or similar intelligence, education, or experience would rely on that representation.

Notes on Use

1. This instruction should be appropriately modified when the person to whom the representation was made was of less than normal intelligence, education, or experience.

2. This instruction should be used in conjunction with Instruction 19:1. When the alleged deceit is based on a concealment or nondisclosure, *see* Instruction 19:2, Instruction 19:9 should be used in place of this instruction.

Source and Authority

1. This instruction is supported by **Zimmerman v. Loose**, 162 Colo. 80, 425 P.2d 803, 807 (1967) (A chronic alcoholic's reliance was justified even though defendants claimed that his actions were not that of a reasonably prudent person; "[t]he court must consider each case on its own merits as to the particular individual, his mentality, awareness and experience, in determining his ability and right to rely."); **Foster v. O'Farrell**, 75 Colo. 170, 225 P. 217 (1924) (error to instruct that plaintiff's reliance had to be that of a person of ordinary prudence, especially where plaintiff was ignorant and unable to read or write more than his own name); **Patterson v. BP America Production Co.**, 2015 COA 28, ¶ 70, 360 P.3d 211 (jury instruction properly explained that proving a fraudulent concealment claim based on ignorance requires plaintiff to show "ignorance" of the "material facts" giving rise to the claim); 2 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS §§ 7.8-7.12 (3d ed. 2006); and W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 108 (5th ed. 1984). *See also* authorities cited in Source and Authority to Instruction 19:10.

2. There is authority for the proposition that if the plaintiff has access to information that would have led to the discovery of the facts and that information was equally available to both parties, then plaintiff's reliance is not justified or reasonable as a matter of law. *See* **Colo. Coffee Bean, LLC v. Peaberry Coffee Inc.**, 251 P.3d 9 (Colo. App. 2010); **Balkind v. Telluride Mtn. Title Co.**, 8 P.3d 581 (Colo. App. 2000); *see also* **Vinton v. Virzi**, 2012 CO 10, ¶ 17, 269 P.3d 1242; **M.D.C./Wood, Inc. v. Mortimer**, 866 P.2d 1380 (Colo. 1994). However, for a different test, see the authority cited in the Source and Authority to this instruction and to Instructions 19:9 and 19:10.

19:9 JUSTIFIABLE RELIANCE — NONDISCLOSURE OR CONCEALMENT — DEFINED

When dealing with someone else, a person is justified in assuming that the other person will not intentionally (fail to disclose a past or present material fact which the other person knows and has a duty to disclose) (conceal a material fact).

However, a person is not justified in relying on this assumption when someone of the same or similar intelligence, education, or experience would not rely on it.

Notes on Use

1. This instruction should be appropriately modified when the person to whom the representation was made was of less than normal intelligence, education, or experience. *See* cases cited in the Source and Authority to Instruction 19:8.

2. This instruction should be used with Instruction 19:2. When the alleged deceit is based on an overt misrepresentation, *see* Instruction 19:1, Instruction 19:8 should be used in place of this instruction.

Source and Authority

1. This instruction is supported by necessary implication by the authorities cited in the Source and Authority to Instructions 19:8 and 19:10. *See also* **Glisan v. Smolenske**, 153 Colo. 274, 387 P.2d 260 (1963) (plaintiff not entitled to recover where undisclosed material fact was patent).

2. "Direct evidence of reliance [in a] fraudulent concealment [case] is not required." It "may be inferred from circumstantial evidence." **Kopeikin v. Merchs. Mortg. & Trust Corp.**, 679 P.2d 599, 602 (Colo. 1984).

3. In a class action context "the inference of reliance based on uniform nondisclosure can be rebutted with evidence of other explanations for the putative class members' behavior." Circumstantial evidence may be introduced to refute reliance inference and deny class certification." **Maxwell v. United Servs. Auto. Ass'n**, 2014 COA 2, ¶ 29, 342 P.3d 474.

4. In a fraudulent concealment claim, an exculpatory clause may preclude reasonable reliance on nondisclosure if the clause explains why certain inferences should not be drawn. *See* **Colo. Coffee Bean, LLC v. Peaberry Coffee Inc.**, 251 P.3d 9 (Colo. App. 2010).

5. There is authority for the proposition that if the plaintiff has access to information that would have led to the discovery of the facts and that information was equally available to both parties, then plaintiff's reliance is not justified or reasonable as a matter of law. *See* **Colo. Coffee Bean, LLC**, 251 P.3d at 18; **Balkind v. Telluride Mtn. Title Co.**, 8 P.3d 581 (Colo. App. 2000); *see also* **Vinton v. Virzi**, 2012 CO 10, ¶ 17, 269 P.3d 1242; **M.D.C./Wood, Inc. v. Mortimer**, 866 P.2d 1380 (Colo. 1994). However, for a different test, see the authority cited in the Source and Authority to this instruction and to Instructions 19:8 and 19:10.

19:10 JUSTIFIABLE RELIANCE — NO GENERAL DUTY TO INVESTIGATE

A person's reliance is justified even though (he) (she) did not make an investigation that would have revealed the facts unless:

1. (He) (she) knew specific facts that would have caused a person of the same or similar intelligence, education or experience to be suspicious and investigate; and

2. (He) (she) had a reasonable opportunity to investigate.

Notes on Use

1. When appropriate, this instruction should be used in conjunction with Instruction 19:8 or Instruction 19:9.

2. When appropriate, a more suitable word such as "examination" may be substituted for the word "investigation."

3. This instruction and the concept of "inquiry notice" that it embodies do not apply to a claim that an antenuptial agreement was unenforceable based upon the deceased spouse's fraud, concealment, and failure to make "fair disclosure." **In re Estate of Lebsock**, 44 Colo. App. 220, 618 P.2d 683 (1980) (citing section 15-11-204, C.R.S.). The duty of fair disclosure with regard to premarital agreements is now addressed in section 14-2-309, C.R.S.

4. There is authority for the proposition that if the plaintiff has access to information that would have led to the discovery of the true facts and such information was equally available to both parties, then plaintiff's reliance is not justified or reasonable as a matter of law. *See* **Colo. Coffee Bean, LLC v. Peaberry Coffee, Inc.**, 251 P.3d 9 (Colo. App. 2010); **Balkind v. Telluride Mtn. Title Co.**, 8 P.3d 581 (Colo. App. 2000); *see also* **Vinton v. Virzi**, 2012 CO 10, ¶ 17, 269 P.3d 1242; **M.D.C./Wood, Inc. v. Mortimer**, 866 P.2d 1380 (Colo. 1994). However, for a different test, see the authority cited in the Source and Authority to Instructions 19:8 to 19:10.

Source and Authority

1. This instruction is supported by **Sellar v. Clelland**, 2 Colo. 532, 545 (1875) ("[A] man to whom a particular and distinct representation has been made is entitled to rely on the representation, and need not make any further inquiry. He is not bound to inquire, unless something has happened to excite suspicion, or unless there is something in the case, or in the terms of the representation, to put him on inquiry"; it is no defense that the party receiving the incorrect statement was negligent in not making an inquiry.). *See also* **Nielson v. Scott**, 53 P.3d 777, 780 (Colo. App. 2002) ("If the circumstances surrounding a transaction would arouse a reasonable person's suspicion, then equity will not relieve a party from the consequences of inattention and negligence in failing to pursue an investigation." (citing **Brassford v. Cook**, 152 Colo. 136, 380 P.2d 907 (1963))).

2. Other Colorado cases that also support this instruction include **Hayden v. Perry**, 110 Colo. 347, 351, 134 P.2d 212, 214 (1943) ("where one party to a transaction induces the other party to enter it by willful misrepresentations, the representor cannot escape liability for his fraud by claiming that the representee could have investigated the representations made and would then have found that they were untrue"); **Pattridge v. Youmans**, 107 Colo. 122, 126, 109 P.2d 646, 648 (1941) ("'However negligent the party may have been to whom the incorrect statement has been made, yet that is a matter affording no ground of defense to the other." (quoting **Sellar**, 2 Colo. at 545)); **Bucci v. Pizza**, 90 Colo. 30, 31, 6 P.2d 5, 5 (1931) (where parties were friends, "[p]laintiff's credulity and lack of greater diligence does not absolve defendant from the consequences of his misrepresentations"); **Masser v. Foxworthy**, 86 Colo. 313, 281 P. 360 (1929) (plaintiff who was 65, ignorant, and chronic asthmatic had no duty to investigate condition of property where defendant made false representations about it); **Schtul v. Wilson**, 83 Colo. 528, 266 P. 1112 (1928) (not error to deny instruction saying plaintiff had duty to investigate); **Colorado Mortgage Co. v. Wilson**, 83 Colo. 254, 263 P. 406 (1928) (negligence of old and inexperienced plaintiffs who failed to examine promissory notes no excuse for defendant's deceit); **American National Bank of Denver v. Hammond**, 25 Colo. 367, 371-72, 55 P. 1090, 1091 (1898) ("There was nothing in the transaction, nor does [plaintiff] appear to have possessed any information, which would have aroused his suspicions, or cast doubt upon the truth of the statements claimed to have been made . . . and he was therefore justified in relying upon them."), **Zang v. Adams**, 23 Colo. 408, 412, 48 P. 509, 511 (1897) ("Where a willful wrong has been committed, courts are not keen to find an avenue of escape for the wrongdoer, merely because the victim has been unsuspecting."); **Sears v. Hicklin**, 13 Colo. 143, 21 P. 1022 (1889) (no duty where parties in a confidential relationship); **Herefort v. Cramer**, 7 Colo. 483, 4 P. 896 (1884) (no duty where information was peculiarly within the misrepresentor's knowledge); and **Barfield v. Hall Realty, Inc.**, 232 P.3d 286 (Colo. App. 2010) (agent acting as real estate "transaction broker" has no duty to investigate whether property could be used as RV park or to verify accuracy of seller's representations, and failure to do so could not be basis for negligent misrepresentation or fraud claim).

3. The court stated as dictum in **Sellar**, 2 Colo. at 544: "When the means of knowledge are at hand, and equally available to both parties, and the subject about which the representations are made is open to their inspection, if the party to whom the representations are made does not avail himself of these means and opportunities, he will not be heard to say that he has been deceived." Colorado cases have expressly or impliedly approved this rule, but not all have noted that the dictum as originally stated was in reference to matters that were patent. *See* **Colo. Coffee Bean, LLC**, 251 P.3d at 19 (publicly available and equally accessible store profit information prevents a claim that nondisclosure of net losses at some company stores is unreasonable); *see also* **Vinton**, 2012 CO 10, ¶ 17 (a recorded deed of title is precisely the kind of information that is equally accessible); **M.D.C./Wood, Inc. v. Mortimer**, 866 P.2d at 1382 (where both parties had equal access to information that would have led to true facts, reliance not justified); **Bassford v. Cook**, 152 Colo. 136, 380 P.2d 907 (1963) (where rescission action is based on innocent misrepresentation as opposed to a fraudulent one, and plaintiffs have been put on notice by facts known to them, no relief if they were negligent in not making further inquiry); **Cherrington v. Woods**, 132 Colo. 500, 290 P.2d 226 (1955) (recovery not allowed where plaintiffs made partial inspection and information was immediately before them because notice that excites attention, puts party on guard, and calls for inquiry, is sufficient notice for a

reasonable inquiry); **Ringsby v. Timpte**, 105 Colo. 356, 98 P.2d 287 (1939) (rule approved in dictum where insufficient evidence of reliance); **Bosick v. Youngblood**, 95 Colo. 532, 37 P.2d 1095 (1934) (rule approved in dictum, and supreme court held there was no reliance because plaintiff made own inspection and was relying on it); **Troutman v. Stiles**, 87 Colo. 597, 290 P. 281 (1930) (applied dictum in **Sellar**, and concluded that plaintiff made a partial examination); **Jasper v. Bicknell**, 62 Colo. 318, 162 P. 144 (1916) (rule approved in dictum, but held not to be applicable).

4. In support of the general rule that one may rely on a deliberately made, false representation without making an independent investigation even though a reasonable man might not, see 2 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS § 7.12 (3d ed. 2006); and W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 108 (5th ed. 1984).

19:11 RELIANCE AFTER INVESTIGATION

The defendant's (representation) (or) (concealment of a material fact) is not the cause of plaintiff's damages if the plaintiff substantially relied and acted on (his) (her) own investigation rather than on the defendant's (representation) (or) (concealment).

Notes on Use

This instruction should be used only when there is some evidence in the case that the plaintiff may have made his or her own investigation or examination. When applicable, this instruction should be given with Instruction 19:8 or 19:9.

Source and Authority

This instruction is supported by **Greathouse v. Jones**, 167 Colo. 406, 447 P.2d 985 (1968); **Brannan v. Collins**, 89 Colo. 492, 4 P.2d 684 (1931); **Nelson v. Van Schaack & Co.**, 87 Colo. 199, 286 P. 865 (1930); **Johnson v. Graham**, 679 P.2d 1090 (Colo. App. 1983), *rev'd in part on other grounds sub nom.* **Tri-Aspen Construction Co. v. Johnson**, 714 P.2d 484 (Colo. 1986); 2 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS § 7.13 (3d ed. 2006); and W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 108 (5th ed. 1984). *See also* **Cohen v. Vivian**, 141 Colo. 443, 349 P.2d 366 (1960) (inspection which did not reveal to the plaintiffs a latent defect which the defendant was under a duty to disclose does not absolve defendant).

19:12 STATEMENTS OF FUTURE INTENTION OR PROMISES AS FALSE REPRESENTATIONS

(A promise to do something in the future is a false representation if the person making the promise did not intend to keep the promise when (he) (she) made it.)

(A statement of intent to do something in the future is a false representation if the person making the statement did not intend to do it when (he) (she) made the statement.)

Notes on Use

1. Use whichever parenthesized phrases are appropriate.

2. When appropriate, this instruction should be given with Instruction 19:3.

Source and Authority

This instruction is supported by **Brody v. Bock**, 897 P.2d 769 (Colo. 1995) (promise concerning future event coupled with present intention not to fulfill promise is actionable as fraud); **Ballow v. PHICO Insurance Co.**, 875 P.2d 1354 (Colo. 1993); **Kinsey v. Preeson**, 746 P.2d 542 (Colo. 1987); **H & H Distributors, Inc. v. BBC International, Inc.**, 812 P.2d 659 (Colo. App. 1990); **State Bank of Wiley v. States**, 723 P.2d 159, 160 (Colo. App. 1986) ("[f]raud cannot be predicated upon the mere non-performance of a promise or contractual obligation . . . or upon failure to fulfill an agreement to do something at a future time"); **Stalos v. Booras**, 34 Colo. App. 252, 528 P.2d 254 (1974); and **Teare v. Sussman**, 120 Colo. 488, 491, 210 P.2d 446, 447 (1949) ("[w]here a present intention, even though as to future conduct, is predicated upon or evidenced by false statements as to existing facts, such statements, if relied on, constitute actionable fraud").

19:13 STATEMENTS ABOUT THE FUTURE AS FALSE REPRESENTATIONS

A statement about what (will) (or) (will not) happen in the future is a false representation only if it turns out to be false and the person making the statement:

(1. Claimed to have special knowledge to support the statement that he or she did not have;) (or)

(2. Had special knowledge that he or she failed to disclose and that he or she knew would make the future event unlikely to happen).

Notes on Use

1. Use whichever parenthesized words are appropriate.

2. When appropriate, this instruction should be given with Instruction 19:3.

3. When the statement about the future relates to the defendant's conduct, Instruction 19:12 should be used rather than this instruction.

Source and Authority

This instruction, stating the general rule that a false statement about a future event does not constitute an actionable misrepresentation, is supported by **Ackmann v. Merchants Mortgage & Trust Corp.**, 645 P.2d 7 (Colo. 1982) (fraud as defense to breach of contract and rescission and restitution); **United Fire & Casualty Co. v. Nissan Motor Corp.**, 164 Colo. 42, 433 P.2d 769 (1967); **Leece v. Griffin**, 150 Colo. 132, 371 P.2d 264 (1962); **Bell Press, Inc. v. Phillips**, 147 Colo. 461, 364 P.2d 398 (1961) (fraud as defense to breach of contract); and **Burman v. Richmond Homes, Ltd.**, 821 P.2d 913 (Colo. App. 1991) (statement that is only an expression of opinion about the happening of a future event is not actionable fraud). The exceptions to the general rule are supported by 2 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS § 7.10 (3d ed. 2006); and W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 109 (5th ed. 1984).

19:14 STATEMENTS OF LAW AS FALSE REPRESENTATIONS

A statement about the law is an expression of opinion and is not a false representation of fact.

Notes on Use

None.

Source and Authority

1. This instruction is supported by 2 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS § 7.8 (3d ed. 2006); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 109 (5th ed. 1984); **Chacon v. Scavo**, 145 Colo. 222, 358 P.2d 614 (1960); **Seal v. Hart**, 755 P.2d 462 (Colo. App. 1988); and **Kunz v. Warren**, 725 P.2d 794 (Colo. App. 1986).

2. There may be an issue as to whether a statement is a statement of law or fact. **Brodeur v. Am. Home Assurance Co.**, 169 P.3d 139 (Colo. 2007); **Feit v. Donahue**, 826 P.2d 407 (Colo. App. 1992); **Two, Inc. v. Gilmore**, 679 P.2d 116 (Colo. App. 1984).

3. The general rule set forth in this instruction is subject to certain qualifications such as special knowledge possessed by one and not available to the other, a fiduciary relationship, and representations as to the law of a foreign state. **Brodeur**, 169 P.3d at 154; **Metzger v. Baker**, 93 Colo. 165, 24 P.2d 748 (1933).

19:15 STATEMENTS OF OPINION AS FALSE REPRESENTATIONS

A statement that is made and reasonably understood to be only an opinion is not a false representation of a past or present fact.

However, a statement in the form of an opinion is a false representation of a past or present fact if:

1. The statement is intended by the speaker and reasonably understood by the listener to be a statement of a past or present fact; and

2. The statement is false.

Notes on Use

1. When appropriate, this instruction should be given with Instruction 19:3.

2. This instruction is intended primarily for use in two situations: (1) where the statement of the defendant might or might not reasonably be considered one of fact or opinion and the court cannot say as a matter of law that it is a statement of opinion, and (2) where the plaintiff has charged the defendant with having made several false statements, both of fact and of opinion, and those statements of opinion are, under the particular circumstances, insufficient to support a claim for relief for deceit. In the latter case, if appropriate, the court should add to this instruction by specifying those particular statements of opinion on which the jury may not base a verdict.

Source and Authority

1. The first paragraph of this instruction is supported by **Knight v. Cantrell**, 154 Colo. 396, 390 P.2d 948 (1964).

2. The second paragraph of this instruction is supported by **Powell v. Landis**, 95 Colo. 375, 36 P.2d 462 (1934) (misrepresentation as to weekly profits of a business); **Lesser v. Porter**, 94 Colo. 348, 30 P.2d 318 (1934) (misrepresentation of market value of farm); **Cahill v. Readon**, 85 Colo. 9, 273 P. 653 (1928) (misrepresentation of rental value of property); **Lewis v. Winslow**, 77 Colo. 95, 98, 234 P. 1070, 1071 (1925) ("representations of value, or cost or quality, of property, if made with the purpose of having them accepted by the party to whom they are made, as of fact, and so relied upon, are to be treated as representations of fact"); **Highfill v. Ermence**, 73 Colo. 478, 216 P. 533 (1923) (misrepresentation that lease could be extended); and **American National Bank of Denver v. Hammond**, 25 Colo. 367, 372, 55 P. 1090, 1091-92 (1898) (In a case involving misrepresentation of the value of corporate stock, the supreme court held: "The true rule appears to be that a fraudulent misrepresentation cannot itself be the mere expression of an opinion entertained by the party making it; but where such party makes a statement which might otherwise be only an opinion, and does not state it as the mere expression of his opinion, but affirms it as a fact . . . so that the person to whom it is addressed may reasonably treat it as a fact . . ., then such statement becomes an affirmation of fact, within the meaning of the general rule, and may be a fraudulent misrepresentation.").

3. Also supporting this instruction are **Ballow v. PHICO Insurance Co.**, 875 P.2d 1354 (Colo. 1993); **Colorado Interstate Gas Co. v. Chemco, Inc.**, 833 P.2d 786 (Colo. App. 1991), *aff'd on other grounds*, 854 P.2d 1232 (Colo. 1993); 2 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS §§ 7.8, 7.11 (3d ed. 2006); and W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 109 (5th ed. 1984).

4. Where a statement can reasonably be construed as an opinion or a representation of fact, it is for the jury to decide which it is. **Lesser**, 94 Colo. at 350, 30 P.2d at 319; **Highfill**, 73 Colo. at 480, 216 P. at 533; **Hammond**, 25 Colo. at 372, 55 P. at 1092.

19:16 AFFIRMATIVE DEFENSE — WAIVER BY PLAINTIFF BEFORE PLAINTIFF'S COMPLETE PERFORMANCE

The defendant, *(name)***, is not legally responsible to the plaintiff,** *(name)***, on (his) (her) claim of deceit based on fraud if the affirmative defense of waiver is proved. This defense is proved if you find both of the following:**

1. The plaintiff learned the actual facts after (he) (she) began *[insert description of course of action]***, but before (he) (she) completed** *[insert description of course of action]***; and**

2. The plaintiff continued *[insert description of course of action]* **with full knowledge of the actual facts when a reasonable person under the same or similar circumstances would not have done so.**

Notes on Use

Use whichever parenthesized words are appropriate.

Source and Authority

1. This instruction is supported by **Tisdel v. Central Sav. Bank & Trust Co.**, 90 Colo. 114, 6 P.2d 912 (1931) (fraud as defense to breach of contract); **Lewis v. Carsh**, 79 Colo. 51, 244 P. 598 (1926); **Ponder v. Altura Farms Co.**, 57 Colo. 519, 143 P. 570 (1914).

2. For an effective waiver, the plaintiff must have elected to continue after receiving full knowledge of the true facts. **Holland Furnace Co. v. Robson**, 157 Colo. 347, 402 P.2d 628 (1965); **Elk River Assocs. v. Huskin**, 691 P.2d 1148 (Colo. App. 1984); **Adams v. Paine, Webber, Jackson & Curtis, Inc.**, 686 P.2d 797 (Colo. App. 1983), *aff'd on other grounds*, 718 P.2d 508 (Colo. 1986). Even with full knowledge, continuing performance does not constitute a waiver if, under the circumstances, a reasonably prudent person would have done so. **Sellar v. Clelland**, 2 Colo. 532 (1875).

3. If the plaintiff learned of the actual facts before the plaintiff took any action in reliance, for example, entering into a contract with another person, then the plaintiff's claim must fail not because of waiver but because the plaintiff cannot meet his or her own burden of proof on the issue of reliance. *See* Instructions 19:7 and 19:11.

19:17 ACTUAL DAMAGES

Plaintiff, *(name)***, has the burden of proving the nature and extent of (his) (her) damages by a preponderance of the evidence. If you find in favor of the plaintiff, you must determine the total dollar amount of the plaintiff's damages, if any, that were caused by the** *(insert appropriate description, e.g., "false representation[s]" or "deceit")* **of the defendant(s),** *(name[s])***, (and the** *[insert appropriate description, e.g., "negligence"]***, if any, of any designated nonparties).**

In determining these damages, you shall consider the following:

(1. The difference between the market value of the property and what its value would have been had the representation been true) (and)

(2. *[Insert any other consequential damages the jury might reasonably find the plaintiff sustained as a proximate result of the defendant's false representation, concealment or nondisclosure.]***).**

Notes on Use

1. Use whichever parenthesized portions are appropriate.

2. Paragraph 1 states the proper measure of damages in the typical contract situation where the plaintiff has suffered actual damages in the sense that the plaintiff has given something of value by performing the contract.

3. Under Paragraph 2, in a contract situation, the plaintiff may also recover any consequential damages which were the proximate result of his or her reliance. For example, a plaintiff who bought a warehouse falsely represented as being fireproof could recover the difference in value between a fireproof and a nonfireproof warehouse under Paragraph 1, and if, in reliance, the plaintiff also stored goods in the warehouse which subsequently burned, destroying the goods, the plaintiff could also recover their value under Paragraph 2. If the plaintiff has been induced to part with something of value in a non-contract situation, for example, making a gift of money to a third person, recovery would be had under Paragraph 2, and Paragraph 1 should be omitted. In the typical contract case, where plaintiff's principal recovery will be under Paragraph 1, the plaintiff cannot under Paragraph 2 also recover what the plaintiff may have given as his or her performance under the contract, since by suing in deceit the plaintiff has affirmed the contract.

4. When Paragraph 2 is given, the consequential damages the plaintiff may be entitled to recover should be identified with some specificity, and care should be taken that such damages, as described, do not include any damages recoverable under Paragraph 1. *See* **Forsyth v. Associated Grocers of Colo., Inc.**, 724 P.2d 1360 (Colo. App. 1986).

5. As an alternative to the "out of bargain" rule set out as Paragraph 1, the court, in a deceit case involving deterioration of a house because of a concealed defect, approved the measure of damages as being the cost to the plaintiff of putting "the property in the condition

that would bring it into conformity with the value of the property as it was represented." **Carpenter v. Donohoe**, 154 Colo. 78, 81, 388 P.2d 399, 401 (1964); *accord* **Slack v. Sodal**, 190 Colo. 411, 547 P.2d 923 (1976); *see also* **McNeill v. Allen**, 35 Colo. App. 317, 534 P.2d 813 (1975).

Source and Authority

1. The "out of bargain" rule, set out in Paragraph 1, is supported by **Ballow v. PHICO Insurance Co.**, 878 P.2d 672 (Colo. 1994) (measure of damages in both breach of contract actions and tort actions for fraud involving contract between the parties is "benefit of bargain" rule); **Trimble v. City & County of Denver**, 697 P.2d 716 (Colo. 1985); **Greathouse v. Jones**, 158 Colo. 516, 408 P.2d 439 (1965); **Corder v. Laws**, 148 Colo. 310, 366 P.2d 369 (1961); **Shirley v. Merritt**, 147 Colo. 301, 364 P.2d 192 (1961); **Otis & Co. v. Grimes**, 97 Colo. 219, 48 P.2d 788 (1935) (specifically rejecting the "out of pocket" rule approved in two earlier cases); **Herefort v. Cramer**, 7 Colo. 483, 4 P. 896 (1884); **Club Matrix, LLC v. Nassi**, 284 P.3d 93 (Colo. App. 2011); **Black v. First Federal Savings & Loan Ass'n**, 830 P.2d 1103 (Colo. App. 1992) (recognizing "benefit of bargain" rule, but concluding that proper measure of damages for fraudulently inducing bank to lend money was amount lent plus interest), *aff'd on other grounds sub nom.* **La Plata Medical Center Associates v. United Bank of Durango**, 857 P.2d 410 (Colo. 1993); **Feit v. Donahue**, 826 P.2d 407 (Colo. App. 1992); **Harrison v. Smith**, 821 P.2d 832 (Colo. App. 1991); **Colorado Performance Corp. v. Mariposa Associates**, 754 P.2d 401 (Colo. App. 1987) (illustrating application of rule in a nondisclosure case); and **Elk River Associates v. Huskin**, 691 P.2d 1148 (Colo. App. 1984).

2. For illustrations of the kind of consequential damages the plaintiff may or may not be able to recover under Paragraph 2, see **Teare v. Sussman**, 120 Colo. 488, 210 P.2d 446 (1949); **Chandler v. Ziegler**, 88 Colo. 1, 291 P. 822 (1930); **Intermountain Lumber Co. v. Radetsky**, 75 Colo. 570, 227 P. 564 (1924); **Flora v. Hoeft**, 71 Colo. 273, 206 P. 381 (1922); **Peppers v. Metzler**, 71 Colo. 234, 205 P. 945 (1922); **American National Bank of Denver v. Hammond**, 25 Colo. 367, 55 P. 1090 (1898); **Sellar v. Clelland**, 2 Colo. 532 (1875); **Club Matrix, LLC**, 284 P.3d at 96; **Feit v. Donahue**, 826 P.2d at 413; **Russell v. First American Mortgage Co.**, 39 Colo. App. 360, 565 P.2d 972 (1977); **McNeill**, 35 Colo. App. at 326, 534 P.2d at 819-20; **Wagner v. Dan Unfug Motors, Inc.**, 35 Colo. App. 102, 529 P.2d 656 (1974); and **Stamp v. Rippe**, 29 Colo. App. 185, 483 P.2d 420 (1971).

3. Actual damages are a necessary element of the plaintiff's cause of action in deceit. **W. Cities Broad., Inc. v. Schueller**, 849 P.2d 44 (Colo. 1993); **Sposato v. Heggs**, 123 Colo. 553, 233 P.2d 385 (1951); **Slide Mines, Inc. v. Denver Equip. Co.**, 112 Colo. 285, 148 P.2d 1009 (1944); **N. Am. Sav. & Loan Ass'n v. Phillips**, 94 Colo. 554, 31 P.2d 492 (1934); **Hart v. Zaitz**, 72 Colo. 315, 211 P. 391 (1922); **Dann v. Perrotti & Hauptman Dev. Co.**, 670 P.2d 448 (Colo. App. 1983) (When not only the amount of damages is uncertain, but the fact of damages is uncertain as well, there can be no recovery for deceit.).

4. Damages, to be recoverable, must have been a proximate result of the plaintiff's reliance on the false representation. **Intermountain Lumber Co.**, 75 Colo. at 573, 227 P. at 565 ("natural and obvious"); **Flora**, 71 Colo. at 274, 206 P. at 381 ("directly and proximately");

Hammond, 25 Colo. at 374, 55 P. at 1092 ("natural and proximate consequences"); **Sellar**, 2 Colo. at 551 ("fairly and directly the result").

5. Noneconomic damages for mental suffering and emotional distress may be awarded on a claim for fraudulent concealment even though recovery of such damages is generally not available in connection with an injury to property. **Anson v. Trujillo**, 56 P.3d 114 (Colo. App. 2002).

6. When the plaintiff rescinds a contract because of fraud and seeks restitution of the consideration paid, rather than affirming the contract and suing for damages in deceit, the plaintiff cannot recover exemplary damages. **Dodds v. Frontier Chevrolet Sales & Serv., Inc.**, 676 P.2d 1237 (Colo. App. 1983).