CHAPTER 23

EXTREME AND OUTRAGEOUS CONDUCT — EMOTIONAL DISTRESS

23:1 ELEMENTS OF LIABILITY

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

1. The defendant engaged in extreme and outrageous conduct;

2. The defendant did so recklessly or with the intent of causing the plaintiff severe emotional distress; and

3. The defendant's conduct caused the plaintiff severe emotional distress.

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

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

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

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

Notes on Use

1. Omit any numbered paragraph, the facts of which are not in dispute.

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.

3. If the defendant has put no affirmative defense in issue or there is insufficient evidence to support a defense, the two last paragraphs should be omitted.

4. Though mitigation of damages is an affirmative defense, *see* Instruction 5:2, only rarely, if ever, will it be a complete defense. For this reason, mitigation should not be identified as an affirmative defense in the concluding paragraphs of this instruction. Instead, if supported by sufficient evidence, Instruction 5:2 should be given along with the actual damages instruction appropriate to the claim and the evidence in the case.

5. Other appropriate instructions defining the terms used in this instruction must also be given with this instruction, in particular an instruction or instructions relating to causation. *See* Instructions 9:18-9:21.

6. This instruction does not apply when the conduct was not directed toward the plaintiff and the plaintiff was not present. **Bradshaw v. Nicolay**, 765 P.2d 630 (Colo. App. 1988).

Source and Authority

1. This instruction is supported by **Rugg v. McCarty**, 173 Colo. 170, 476 P.2d 753 (1970), which recognized the tort of intentional infliction of emotional distress as set out in RESTATEMENT (SECOND) OF TORTS § 46(1) (1965). The court specifically noted that proof of accompanying physical injury is not required. Proof of severe emotional distress, however, is required. **Espinosa v. Sheridan United Tire**, 655 P.2d 424 (Colo. App. 1982); *see also* **Coors Brewing Co. v. Floyd**, 978 P.2d 663 (Colo. 1999); **Culpepper v. Pearl Street Bldg., Inc.**, 877 P.2d 877 (Colo. 1994); **Reigel v. SavaSeniorCare L.L.C.**, 292 P.3d 977 (Colo. App. 2011); **Green v. Qwest Servs. Corp.**, 155 P.3d 383 (Colo. App. 2006); **Archer v. Farmer Bros. Co.**, 70 P.3d 495 (Colo. App. 2002), *aff'd on other grounds*, 90 P.3d 228 (Colo. 2004); **English v. Griffith**, 99 P.3d 90 (Colo. App. 2004); **Pearson v. Kancilia**, 70 P.3d 594 (Colo. App. 2003); **McCarty v. Kaiser-Hill Co., L.L.C.**, 15 P.3d 1122 (Colo. App. 2000); **Tracz v. Charter Centennial Peaks Behavioral Health Sys., Inc.**, 9 P.3d 1168 (Colo. App. 2000); **Tonnessen v. Denver Publ'g Co.**, 5 P.3d 959 (Colo. App. 2000); **Roget v. Grand Pontiac, Inc.**, 5 P.3d 341 (Colo. App. 1999); **Bohrer v. DeHart**, 943 P.2d 1220 (Colo. App. 1996); **Card v. Blakeslee**, 937 P.2d 846 (Colo. App. 1996) (alleged conduct not extreme and outrageous); **Spencer v. United Mortg. Co.**, 857 P.2d 1342 (Colo. App. 1993); **Corcoran v. Sanner**, 854 P.2d 1376 (Colo. App. 1993); **Ellis v. Buckley**, 790 P.2d 875 (Colo. App. 1989); **Montgomery Ward & Co. v. Andrews**, 736 P.2d 40 (Colo. App. 1987); **Hansen v. Hansen**, 43 Colo. App. 525, 608 P.2d 364 (1979).

2. For a historical discussion, see W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 12 (5th ed. 1984).

3. Whether the alleged outrageous conduct was sufficiently heinous to create a submissible claim is a threshold matter of law for the court to determine. **Coors Brewing Co.**, 978 P.2d at 665-66; **Reigel**, 292 P.3d at 991; **Lee v. Colo. Times, Inc.**, 222 P.3d 957 (Colo. App. 2009); **Green**, 155 P.3d at 385; **Bob Blake Builders, Inc. v. Gramling**, 18 P.3d 859 (Colo. App. 2001); **McCarty**, 15 P.3d at 1126; **Tracz**, 9 P.3d at 1175; **Tonnessen**, 5 P.3d at 967; **Roget**, 5 P.3d at 345; **Hewitt v. Pitkin Cty. Bank & Tr. Co.**, 931 P.2d 456 (Colo. App. 1995); **Hutton v. Mem'l Hosp.**, 824 P.2d 61 (Colo. App. 1991); **Bauer v. Sw. Denver Mental Health Ctr., Inc.**, 701 P.2d 114 (Colo. App. 1985).

4. Except in the form of punitive damages, and then only as authorized under section 24-10-118(5), C.R.S., "[a] public entity shall not be liable either directly or by indemnification . . . for damages for outrageous conduct." § 24-10-114(4), C.R.S.; *see, e.g.*, **Hutton**, 824 P.2d at 65.

5. "[P]ublic figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications [made to third persons] without showing [as in defamation cases] that the publication contains a false statement of fact which was made . . . with knowledge that the statement was false or with reckless disregard as to whether or not it was true." **Hustler Magazine v. Falwell**, 485 U.S. 46, 56 (1988); *see also* **Pierce v. St. Vrain Valley Sch. Dist.**, 944 P.2d 646 (Colo. App. 1997), *rev'd on other grounds*,

981 P.2d 600 (Colo. 1999); **Brooks v. Paige**, 773 P.2d 1098 (Colo. App. 1988). In such cases, this instruction must be appropriately modified to include these additional elements of liability. By way of illustration, see Instructions 22:1 and 22:3.

6. A spouse may maintain an action against the other spouse for intentional infliction of emotional distress committed during the marriage. **Simmons v. Simmons**, 773 P.2d 602 (Colo. App. 1988).

7. "The [Workers'] Compensation Act constitutes the exclusive remedy available to an employee for a co-employee's commission of intentional infliction of emotional distress during the scope of employment." **Hoffsetz v. Jefferson Cty. Sch. Dist. No. R-1**, 757 P.2d 155, 159 (Colo. App. 1988). However, the exclusive remedy provision of the Workers' Compensation Act does not preempt an employee's action against his or her employer and its agents for outrageous conduct in terminating the employment when the injury was not inflicted in the course of the employment. **Archer**, 70 P.3d at 498-99.

8. An insurer may be liable for both outrageous conduct and a bad faith breach of insurance contract as a result of its mishandling of a worker's compensation claim. **McKelvy v. Liberty Mut. Ins. Co.**, 983 P.2d 42 (Colo. App. 1998). However, a claim for outrageous conduct must be based upon conduct that is more egregious than either the conduct underlying a bad faith claim or a willful and wanton breach of contract claim under the former No-Fault Act. **Munoz v. State Farm Mut. Auto. Ins. Co.**, 968 P.2d 126 (Colo. App. 1998).

9. For the tort of interfering with the parent-child relationship by abducting or inducing a minor child to leave a parent entitled to legal custody, see **D & D Fuller CATV Constr., Inc. v. Pace**, 780 P.2d 520 (Colo. 1989), specifically adopting the tort as set out in RESTATEMENT (SECOND) OF TORTS § 770 (1977). *See also* § 13-21-106.5, C.R.S. (authorizing civil damages for bias-motivated crime (formerly ethnic intimidation), including recovery of punitive damages).

10. In **Vikman v. International Brotherhood of Electrical Workers**, 889 P.2d 646 (Colo. 1995), the court held that the National Labor Relations Act, 29 U.S.C. §§ 151 to -169, did not preempt outrageous conduct claims against a union arising out of a union activity against union member who crossed a picket line.

11. The tort of outrageous conduct may be premised on conduct that also constitutes a battery. **Winkler v. Rocky Mtn. Conference of United Methodist Church**, 923 P.2d 152 (Colo. App. 1995).

12. The firing of an employee because of a disability, in violation of the Colorado Anti-Discrimination Act, § 24-34-402, C.R.S., is not sufficient, in and of itself, to support a claim of outrageous conduct. **Bigby v. Big 3 Supply Co.**, 937 P.2d 794 (Colo. App. 1996).

13. An outrageous conduct claim may not be stated against an employer providing alcohol as a social host to adults, in light of the protection offered by section 12-47-801(4)(a), C.R.S. **Rojas v. Engineered Plastic Designs, Inc.**, 68 P.3d 591 (Colo. App. 2003).

14. A claim for outrageous conduct may be based on unwanted and egregious sexual harassment in the workplace. **Pearson**, 70 P.3d at 597-98.

15. The First Amendment may bar an outrageous conduct claim under some circumstances. *See* **Seefried v. Hummel**, 148 P.3d 184 (Colo. App. 2005) (First Amendment's Free Exercise Clause prohibited court from hearing outrageous conduct claims brought by former senior pastor of church, former associate pastor, and limited liability company (LLC) owned by associate pastor, against church, members of church's board of directors, individually and as directors, and three church members formerly employed by LLC).

16. Although not a holding, the court in **Moore v. Western Forge Corp.**, 192 P.3d 427 (Colo. App. 2007), noted that other jurisdictions allow a wrongful-death claimant to recover for a decedent's suicide when the claimant can prove that the defendant's outrageous conduct caused the suicide.

17. A trial court's refusal to grant a motion for directed verdict in favor of an injured party on his or her claim for outrageous conduct does not bar or preclude a later jury verdict against the tortfeasor. **Palmer v. Diaz**, 214 P.3d 546 (Colo. App. 2009).

18. In the context of a publication that is found to constitute outrageous conduct, the jury may consider a retraction when calculating damages. The jury should consider whether the retraction was full and complete, the timing and placement of the retraction, whether defendants admitted a mistake, whether defendants apologized, the audience the retraction reached, and the effect the retraction had on lessening the harm to the plaintiff. **Lee**, 222 P.3d at 965-66.

19. A casino patron's claim against a casino and slot machine manufacturer for extreme and outrageous conduct fell within the Colorado Limited Gaming Control Commission's exclusive regulatory authority and, thus, such claim was properly dismissed by the court. **Barry v. Bally Gaming, Inc.**, 2013 COA 176, ¶ 27**,** 320 P.3d 387.

23:2 EXTREME AND OUTRAGEOUS CONDUCT — DEFINED

Extreme and outrageous conduct is conduct that is so outrageous in character, and so extreme in degree, that a reasonable member of the community would regard the conduct as atrocious, going beyond all possible bounds of decency and utterly intolerable in a civilized community. Such outrageous conduct occurs when knowledge of all the facts by a reasonable member of the community would arouse that person's resentment against the defendant, and lead that person to conclude that the conduct was extreme and outrageous.

(A series of acts may constitute outrageous conduct, even though any one of the acts might be considered only an isolated unkindness or insult.) (A simple act of unkindness or insult, standing alone, does not constitute outrageous conduct. However, a single incident may constitute outrageous conduct if the incident would be so regarded by a reasonable member of the community.)

(The extreme and outrageous character of conduct may arise from a person's knowledge that another is peculiarly susceptible to emotional distress because of some physical or mental condition or peculiarity. The same conduct without that knowledge might not be extreme and outrageous. However, the fact that a person knows that another person will consider the conduct to be insulting or will have his or her feelings hurt does not, by itself, make the conduct extreme and outrageous.)

Notes on Use

1. Only so much of the parenthesized portions should be given, with such modifications as are necessary, as is consistent with the evidence in the case.

2. When the third paragraph of this instruction is given, the second paragraph in Instruction 23:4 should also be given.

3. When Instruction 23:1 is given, this instruction must also be given if the issue of extreme and outrageous conduct is in dispute.

4. Under section 24-10-118(2)(a), C.R.S., of the Colorado Governmental Immunity Act, public employees, such as a supervisor, are entitled to immunity for claims of outrageous conduct unless their conduct is willful and wanton. In such circumstances, a fourth element — that the conduct was willful and wanton — should be included in the instruction. **Smith v. Bd. of Educ.**, 83 P.3d 1157 (Colo. App. 2003).

Source and Authority

1. This instruction is supported by **Rugg v. McCarty**, 173 Colo. 170, 476 P.2d 753 (1970) (approving the definition from the RESTATEMENT (SECOND) OF TORTS § 46 (1965)). *See also* **Coors Brewing Co. v. Floyd**, 978 P.2d 663 (Colo. 1999) (allegations of extreme and outrageous conduct insufficient); **Culpepper v. Pearl Street Bldg., Inc.**, 877 P.2d 877 (Colo. 1994); **Destefano v. Grabrian**, 763 P.2d 275 (Colo. 1988) (allegation of extreme and outrageous conduct sufficient); **Churchey v. Adolph Coors Co.**, 759 P.2d 1336 (Colo. 1988) (allegation of

extreme and outrageous conduct insufficient); **Reigel v. SavaSeniorCare, L.L.C.**, 292 P.3d 977 (Colo. App. 2011) (conduct not extreme and outrageous); **English v. Griffith**, 99 P.3d 90 (Colo. App. 2004) (conduct not extreme and outrageous); **Gordon v. Boyles**, 99 P.3d 75 (Colo. App. 2004) (conduct not extreme and outrageous); **Tracz v. Charter Centennial Peaks Behavioral Health Sys., Inc.**, 9 P.3d 1168 (Colo. App. 2000); **Tonnessen v. Denver Publ'g Co.**, 5 P.3d 959 (Colo. App. 2000); **Roget v. Grand Pontiac, Inc.**, 5 P.3d 341 (Colo. App. 1999); **Munoz v. State Farm Mut. Auto. Ins. Co.**, 968 P.2d 126 (Colo. App. 1998); **Bohrer v. DeHart**, 943 P.2d 1220 (Colo. App. 1996); **Zick v. Krob**, 872 P.2d 1290 (Colo. App. 1993) (conduct not extreme and outrageous); **Ellis v. Buckley**, 790 P.2d 875 (Colo. App. 1989) (evidence of extreme and outrageous conduct sufficient); **Lindemuth v. Jefferson Cty. Sch. Dist. R-1**, 765 P.2d 1057 (Colo. App. 1988) (conduct not extreme and outrageous); **Rubenstein v. S. Denver Nat'l Bank**, 762 P.2d 755 (Colo. App. 1988) (conduct not extreme and outrageous); **Montoya v. Bebensee**, 761 P.2d 285 (Colo. App. 1988) (allegation of extreme and outrageous conduct sufficient); **Bauer v. Sw. Denver Mental Health Ctr., Inc.**, 701 P.2d 114 (Colo. App. 1985) (insufficient allegations of extreme and outrageous conduct); **Moore v. Georgeson**, 679 P.2d 1099 (Colo. App. 1983) (evidence of extreme and outrageous conduct insufficient); **Danyew v. Phelps**, 676 P.2d 707 (Colo. App. 1983) (evidence of extreme and outrageous conduct sufficient); **Widdifield v. Robertshaw Controls Co.**, 671 P.2d 989 (Colo. App. 1983) (evidence of extreme and outrageous conduct insufficient); **Hansen v. Hansen**, 43 Colo. App. 525, 608 P.2d 364 (1979) (conduct not extreme and outrageous); **Deming v. Kellogg**, 41 Colo. App. 264, 583 P.2d 944 (1978) (insufficient allegations of extreme and outrageous conduct); **Meiter v. Cavanaugh**, 40 Colo. App. 454, 580 P.2d 399; **DeCicco v. Trinidad Area Health Ass'n**, 40 Colo. App. 63, 573 P.2d 559 (1977); **Enright v. Groves**, 39 Colo. App. 39, 560 P.2d 851 (1977); **Blackwell v. Del Bosco**, 35 Colo. App. 399, 536 P.2d 838 (1975) (conduct not extreme and outrageous), *aff'd on other grounds*, 191 Colo. 344, 558 P.2d 563 (1976).

2. "The extreme and outrageous character of the conduct may arise from an abuse by the actor of a position, or a relation with the other, which gives him actual or apparent authority over the other, or power to affect his interests." RESTATEMENT (SECOND) OF TORTS § 46 cmt. e (1965); *see also* **Roget**, 5 P.3d at 345; **Gorab v. Equity Gen. Agents, Inc.**, 661 P.2d 1196 (Colo. App. 1983); **Farmers Grp., Inc. v. Trimble**, 658 P.2d 1370 (Colo. App. 1982), *aff'd on other grounds*, 691 P.2d 1138 (Colo. 1984); **Zalnis v. Thoroughbred Datsun Car Co.**, 645 P.2d 292 (Colo. App. 1982). If there is evidence in the case of these circumstances, this instruction should be appropriately modified, setting forth the rules in a manner similar to that in the parenthesized third paragraph. However, liability for outrageous conduct does not extend to "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." **Bob Blake Builders, Inc. v. Gramling**, 18 P.3d 859, 866 (Colo. App. 2001); *accord* **Pearson v. Kancilia**, 70 P.3d 594 (Colo. App. 2003); **Archer v. Farmer Bros. Co.**, 70 P.3d 495 (Colo. App. 2002), *aff'd on other grounds*, 90 P.3d 228 (Colo. 2004).

3. A series of incidents or a course of conduct will more frequently give rise to outrageous conduct than a single incident. *See* **Lee v. Colo. Times, Inc.**, 222 P.3d 957 (Colo. App. 2009). However, a single incident will give rise to outrageous conduct if that incident involves conduct that meets the definition of outrage as expressed in this instruction. *See* **DeCicco**, 40 Colo. App. at 66, 573 P.2d at 562 (refusal of ambulance service to critically ill plaintiff could meet test for outrageous conduct).

4. Whether the defendant's behavior is viewed as a course of conduct or as a single incident, "it is the totality of conduct that must be evaluated to determine whether outrageous conduct has occurred." **Zalnis**, 645 P.2d at 294; *see also* **Vogel v. Carolina Int'l, Inc.**, 711 P.2d 708 (Colo. App. 1985) (discussing, but not deciding, whether a single act or event is sufficient to constitute extreme and outrageous conduct).

5. The Colorado Court of Appeals has recognized a claim for outrageous conduct based on an unwanted and egregious sexual harassment in the workplace. **Pearson**, 70 P.3d at 597-98.

23:3 RECKLESSLY OR WITH INTENT — DEFINED

A person intends to cause another severe emotional distress if that person engages in conduct for the purpose, in whole or in part, of causing severe emotional distress in another person, or knowing that his or her conduct is certain or substantially certain to have that result.

A person whose conduct causes severe emotional distress in another person has acted recklessly if, at the time, that person knew, or, because of other facts known to him or her, reasonably should have known that there was a substantial probability that his or her conduct would cause severe emotional distress in another person.

Notes on Use

1. When Instruction 23:1 is given, this instruction must also be given if the issue of intent is in dispute.

2. If there is no evidence to support one of the paragraphs, that paragraph should not be given.

Source and Authority

1. This instruction is supported by **Culpepper v. Pearl Street Building, Inc.**, 877 P.2d 877 (Colo. 1994); and **Zalnis v. Thoroughbred Datsun Car Co.**, 645 P.2d 292 (Colo. App. 1982) (citing RESTATEMENT (SECOND) OF TORTS § 46 (1965)).

2. This instruction was cited with approval in **Culpepper**, 877 P.2d at 882-83.

23:4 SEVERE EMOTIONAL DISTRESS — DEFINED

Severe emotional distress consists of highly unpleasant mental reactions, such as (nervous shock, fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, or worry) and is so extreme that no person of ordinary sensibilities could be expected to tolerate and endure it. The duration and intensity of emotional distress are factors to be considered in determining its severity.

(If a person is more susceptible to a certain kind of emotional distress than a person of ordinary sensibilities and that fact is known to another person who recklessly or intentionally causes that emotional distress, then the emotional distress is severe if it is more than a person of the same or similar susceptibility would reasonably be expected to endure under the same or similar circumstances.)

Notes on Use

1. This instruction is to be given whenever Instruction 23:1 is given.

2. In the first paragraph, use only those descriptive words in the parentheses that are appropriate to the evidence in the case.

3. Omit the second parenthesized paragraph, unless there is evidence that would support the jury finding that the plaintiff was peculiarly susceptible and the defendant had knowledge of that fact.

4. When the third paragraph of Instruction 23:2 is given the second paragraph of this instruction should be given as well.

Source and Authority

1. This instruction is supported by RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1965). *See also* **Espinosa v. Sheridan United Tire**, 655 P.2d 424 (Colo. App. 1982) (suggesting that RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1965) is part of Colorado's common law); **DeCicco v. Trinidad Area Health Ass'n**, 40 Colo. App. 63, 573 P.2d 559 (1977) (grief is significant factor in outrageous conduct action).

2. The second paragraph is supported by **Zalnis v. Thoroughbred Datsun Car Co**., 645 P.2d 292 (Colo. App. 1982).

3. Severe emotional distress does not require an accompanying physical injury. **Rugg v. McCarty**, 173 Colo. 170, 476 P.2d 753 (1970).

23:5 EXERCISING LEGAL RIGHTS IN PERMISSIBLE MANNER

The defendant, *(name)***, claims that (he) (she) (it) was exercising (his) (her) (its) legal rights in** *(insert appropriate description, e.g., evicting the plaintiff, arresting the plaintiff, attempting collection of a debt, etc.)***. If the defendant was exercising (his) (her) (its) legal rights in a manner that would not otherwise constitute extreme and outrageous conduct, your verdict must be for the defendant.**

Notes on Use

1. Comment g to the RESTATEMENT (SECOND) OF TORTS § 46 (1965) states in part: "The actor is never liable . . . where he has done no more than to insist upon his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress." A "permissible way," however, is one that does not give rise to the tort of intentional infliction of emotional distress by extreme and outrageous conduct. The purpose of this instruction, therefore, is to make it clear to the jury, when necessary, that (1) the fact that the defendant was exercising a legal right does not excuse the defendant's conduct if it was otherwise tortious, but (2) when the defendant was exercising a legal right, the burden of proof remains on the plaintiff to prove the defendant's conduct was "extreme and outrageous."

2. Because this burden remains on the plaintiff, the rule stated in this instruction does not set out an affirmative defense; rather, it is a cautionary instruction to explain to the jury what relevance they should give, if any, to the fact that the defendant was "exercising a legal right."

3. The instruction, therefore, should only be given when there is evidence that the defendant was in fact exercising legal rights. If it is uncontroverted that the defendant's conduct also violated some provision of the law, criminal or civil, or constituted a breach of contract, violation of a lease, etc., the instruction should not be used.

Source and Authority

This instruction is supported by the RESTATEMENT (SECOND) OF TORTS § 46 cmt. g (1965). *See also* **Montgomery Ward & Co. v. Andrews**, 736 P.2d 40 (Colo. App. 1987) (recognizing and citing rule set out in instruction but holding it inapplicable because condition set out in second sentence of instruction not met).

23:6 ACTUAL DAMAGES

Plaintiff, *(name)***, has the burden of proving, by a preponderance of the evidence, the nature and extent of (his) (her) damages. If you find in favor of the plaintiff, you must determine the total dollar amount of plaintiff's damages, if any, that were caused by the extreme and outrageous conduct 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. Any noneconomic losses or injuries plaintiff has had to the present time or that plaintiff will probably have in the future, including: physical and mental pain and suffering, inconvenience, emotional stress, fear, anxiety, embarrassment, humiliation, public disgrace, indignity, impairment of the quality of life, and *(insert any other recoverable noneconomic losses for which there is sufficient evidence)***. (In considering damages in this category, you shall not consider damages for [physical impairment] [or] [disfigurement], because these damages, if any, are to be considered in a separate category.)**

2. Any economic losses plaintiff has had to the present time or will probably have in the future, including: loss of earnings or income; ability to earn money in the future; (reasonable and necessary) medical, hospital and other expenses, and *(insert any other recoverable economic losses for which there is sufficient evidence)***. (In considering damages in this category, you shall not consider damages for [physical impairment] [or] [disfigurement], since these damages, if any, are to be considered in a separate category.)**

(3. Any [physical impairment] [or] [disfigurement]. In considering damages in this category, you shall not include damages again for losses or injuries already determined in either numbered paragraph 1 or 2 above.)

Notes on Use

1. Only those numbered, parenthesized words or phrases as are appropriate in the case should be given.

2. The amount of damages sought should not be stated in this instruction or in the statement of the case. **Rodrigue v. Hausman**, 33 Colo. App. 305, 519 P.2d 1216 (1974).

3. Where appropriate, "fault" of nonparties must be considered. *See* **Slack v. Farmers Ins. Exch.**, 5 P.3d 280 (Colo. 2000) (section 13-15-111.5, C.R.S., requires the pro rata distribution of civil liability among intentional and negligent tortfeasors who jointly cause indivisible injuries).

Source and Authority

1. This instruction is supported by **Palmer v. Diaz**, 214 P.3d 546 (Colo. App. 2009); and **Meiter v. Cavanaugh**, 40 Colo. App. 454, 580 P.2d 399 (1978).

2. The sentimental and emotional value of property may be considered in awarding damages in claims for the intentional or reckless infliction of emotional distress, such as a claim for outrageous conduct. **Chryar v. Wolf**, 21 P.3d 428 (Colo. App. 2000).

3. In the context of a publication that is found to constitute outrageous conduct, the jury may consider a retraction when calculating damages. The jury should consider whether the retraction was full and complete, the timing and placement of the retraction, whether defendants admitted a mistake, whether defendants apologized, the audience the retraction reached, and the effect the retraction had on lessening the harm to the plaintiff. **Lee v. Colo. Times, Inc.**, 222 P.3d 957 (Colo. App. 2009).