

CHAPTER 26

BREACH OF FIDUCIARY DUTY

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26:1 ELEMENTS OF LIABILITY

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

- 1. The defendant was acting as a fiduciary of the plaintiff with respect to *(insert appropriate description of the subject matter, e.g., “sale of plaintiff’s house”)*;**
- 2. The defendant breached a fiduciary duty to the plaintiff;**
- 3. The plaintiff had (injuries) (damages) (losses); and**
- 4. The defendant’s breach of fiduciary duty was a cause of the plaintiff’s (injuries) (damages) (losses).**

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

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

If you find that (this affirmative defense has) (any one or more of these affirmative defenses have not) 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 Notes on Use to Instruction 4:20.
3. When the court directs a verdict as to the existence of a fiduciary relationship and the subject matter of such a relationship, this instruction should be modified according to Note on Use 5 of this instruction. See **Paine, Webber, Jackson & Curtis, Inc. v. Adams**, 718 P.2d 508 (Colo. 1986).
4. Although the second element requires that the defendant breach a fiduciary duty owed to the plaintiff, the Colorado Court of Appeals in **Taylor v. Taylor**, 2016 COA 100, concluded that a plaintiff may maintain a breach of fiduciary duty claim where the fiduciary duty is owed to a third party so long as the plaintiff can establish standing. See **Taylor**, ¶¶ 14-25 (holding that

settlor's children had standing to bring action against trustee for breach of fiduciary duty even though trustee's fiduciary duty was owed to the settlor and not to the children). *But cf. Baker v. Wood, Ris & Hames, P.C.*, 2016 CO 5, ¶¶ 20-35, 364 P.3d 872 (declining to extend liability of a testator's attorney to non-client beneficiaries, except where the attorney has committed fraud or a malicious or tortious act, including negligent misrepresentation). Accordingly, where the court has concluded that a plaintiff has standing to pursue a breach of fiduciary duty claim in circumstances in which the fiduciary duty was owed to a third party, this element of the instruction should be modified accordingly.

5. If there is a dispute as to whether the defendant was acting as a fiduciary of the plaintiff, Instruction 26:2 or 26:3 should be given with this instruction together with any additional instructions that may be required, e.g., Instruction 8:1, defining "agent" and "principal." If there is no such dispute, the first numbered paragraph should be omitted, the jury should be instructed that a fiduciary relationship existed between the parties, and only the first sentence of Instruction 26:2 should be given in order to define the fiduciary relationship.

6. Appropriate instructions defining other terms used in this instruction must also be given, e.g., an instruction or instructions relating to causation. *See* Instructions 9:18 to 9:21.

7. Use whichever parenthesized words are appropriate.

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

9. 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.

10. If plaintiff is alleging the existence of a fiduciary duty arising out of a confidential relationship, Instructions 26:3 and 26:4 should be given with this instruction.

Source and Authority

1. This instruction is supported by **Rupert v. Clayton Brokerage Co.**, 737 P.2d 1106 (Colo. 1987); **Paine, Webber, Jackson & Curtis, Inc. v. Adams**, 718 P.2d 508 (Colo. 1986); **Kunz v. Warren**, 725 P.2d 794 (Colo. App. 1986); **Brunner v. Horton**, 702 P.2d 283 (Colo. App. 1985); **Mahoney Marketing Corp. v. Sentry Builders, Inc.**, 697 P.2d 1139 (Colo. App. 1985). *See also* **Accident & Injury Med. Specialists, P.C. v. Mintz**, 2012 CO 50, 279 P.3d 658; **Destefano v. Grabrian**, 763 P.2d 275, 284, 289 (Colo. 1988); **Bithell v. Western Care Corp.**, 762 P.2d 708 (Colo. App.), *cert. denied* (1988); RESTATEMENT (SECOND) OF TORTS § 874 (1979).

2. This instruction does not apply to claims for relief that are equitable rather than legal. *Compare* **Kaitz v. District Court**, 650 P.2d 553 (Colo. 1982), *with* **Paine, Webber, Jackson & Curtis, Inc. v. Adams**, 718 P.2d 508 (Colo. 1986). *See also* **Mahoney Mktg. Corp. v. Sentry**

Builders, Inc., 697 P.2d 1139, 1140 (Colo. App. 1985) (“[a]lthough fiduciary obligations are equitable in nature, the remedies [for breach] are generally at law.”).

3. Because an action for damages for breach of a duty not to disclose confidential information lies in tort, and is legal rather than equitable, it will support a claim for punitive damages. **Rubenstein v. South Denver Nat’l Bank**, 762 P.2d 755 (Colo. App. 1988), *cert. denied* (1989). *See also* **Virdanco, Inc. v. MTS Int’l**, 820 P.2d 352 (Colo. App. 1991) (where primary purpose of action for breach of fiduciary duty was to recover compensatory damages, action was primarily legal and, therefore, punitive damages were recoverable, even though plaintiff also sought equitable remedy of accounting).

4. For a discussion of the elements necessary to establish the tort of aiding and abetting a breach of a fiduciary duty, see **Nelson v. Elway**, 971 P.2d 245 (Colo. App. 1998), *cert. denied* (1999), and **Holmes v. Young**, 885 P.2d 305 (Colo. App.), *cert. denied* (1994).

5. Where the same operative facts support claims for both legal malpractice and breach of fiduciary duty, the latter claim should be dismissed as duplicative. **Moguls of Aspen, Inc. v. Faegre & Benson**, 956 P.2d 618 (Colo. App. 1997). On the other hand, where the facts and duties underlying claims for breach of a fiduciary duty and negligence are not the same, it is proper to submit both claims to the jury. **Boyd v. Garvert**, 9 P.3d 1161 (Colo. App.), *cert. denied* (2000). Expert testimony is necessary to support causation in a breach of fiduciary case arising out of an attorney-client relationship. **Allen v. Martin**, 203 P.3d 546 (Colo. App. 2008), *cert. denied* (2009).

6. Where a breach of fiduciary duty claim is based on a misuse of property held in trust, a plaintiff need only show a transfer to or use of trust property by the fiduciary to raise a rebuttable presumption of a breach of fiduciary duty and establish a prima facie case. The fiduciary must then introduce some evidence to show that the transaction was fair and reasonable. If such evidence is introduced, the trier of fact must then determine, based on all the evidence, whether the plaintiff has proven her claim of breach of fiduciary duty by a preponderance of the evidence. *See* **Estate of Heyn**, 47 P.3d 724 (Colo. App. 2002); *see also* **In re Estate of Foiles**, 2014 COA 104, ¶¶ 15, 45 (trial court erred in failing to recognize prima facie case of breach of fiduciary duty where trustee transferred trust property to himself).

7. In the absence of a trust provision allowing ratification by a co-trustee of otherwise invalid actions, only the consent of all beneficiaries who have proper capacity and are fully informed of the facts can ratify an action taken in violation of a trust agreement. Accordingly, the trial court erred in ruling that beneficiary’s breach of fiduciary duty claim against one trustee was precluded by ratification of the suspect transaction by the co-trustee. **In re Estate of Foiles**, 2014 COA 104.

8. Colorado recognizes a claim of breach of a duty of loyalty arising out of an employer-employee relationship. **Jet Courier Servs., Inc. v. Mulei**, 771 P.2d 486 (Colo. 1989) (employee with a high level of authority in the employer’s organization is an agent, has a duty to act solely for his principal’s benefit, and violates that duty by setting up his business by soliciting customers and urging co-workers to leave with him before terminating employment). The court declined to call the duty a fiduciary duty or delineate the exact scope of an employee’s duty. *See*

also **Graphic Directions, Inc. v. Bush**, 862 P.2d 1020 (Colo. App.), *cert. denied* (1993) (designating the employment relationship a fiduciary one based on the high level of the employee's authority, and duty to employer breached by pretermination solicitation of customers); **Koontz v. Rosener**, 787 P.2d 192 (Colo. App. 1989) (employee exceeded bounds of permissible preparation to compete and improperly competed by shortlisting or discouraging real estate offerings and soliciting co-workers to quit); **Lucht's Concrete Pumping, Inc. v. Horner**, 224 P.3d 355 (Colo. App. 2009), *rev'd on other grounds*, 255 P.3d 1058 (Colo. 2011) (when employee's authority made him an agent of the employer, the relationship was a fiduciary relationship).

9. A fiduciary has the duty to disclose only material information. Therefore, a breach of fiduciary duty by non-disclosure requires that the undisclosed information be material. **Moye White LLP v. Beren**, 2013 COA 89, 320 P.3d 373, *cert. denied* (2014) (holding that attorney's arrest record and medical issues were not material because any risk of an adverse impact to legal representation of plaintiff based on such information was speculative).

26:2 FIDUCIARY RELATIONSHIP — DEFINED

A fiduciary relationship exists whenever one person is entrusted to act for the benefit of or in the interests of another and has the legal (power) (authority) to do so.

If you find that the defendant, (name), was acting as (a) (an) (insert appropriate description, e.g., “attorney,” “partner,” “joint venturer,” “agent,” etc.) of the plaintiff, (name), with respect to (insert appropriate description of subject matter, e.g., “sale of plaintiff’s house”), then you are instructed that the defendant was acting as a fiduciary of the plaintiff, (name), with respect to (insert appropriate description of subject matter).

Notes on Use

1. When, based on undisputed facts, the court determines as a matter of law that the defendant was acting as a fiduciary for the plaintiff with respect to the subject matter of the suit, the jury should be instructed that the court has determined that a fiduciary relationship existed between the parties, and define that fiduciary relationship by using the first sentence of this instruction. However, when the alleged relationship between the parties, if proven, would establish the existence of a fiduciary relationship as a matter of law, but the facts giving rise to such a relationship are in dispute, then the second paragraph of this instruction should also be given. Depending on the nature of the fiduciary relationship alleged and the particular facts in dispute, this instruction may have to be appropriately modified.

2. If plaintiff is claiming that the fiduciary duty arose out of a confidential relationship and there is sufficient evidence to support that claim, then Instruction 26:3, rather than this instruction, should be used.

Source and Authority

1. This instruction is supported by RESTATEMENT (THIRD) OF TRUSTS § 2 cmt. b (2003); **McKinney v. Christmas**, 143 Colo. 361, 353 P.2d 373 (1960) (real estate agent); **Midwest Mutual v. Heald**, 106 Colo. 552, 108 P.2d 535 (1940) (attorney); **Mountain States Beet Growers’ Marketing Ass’n v. Monroe**, 84 Colo. 300, 269 P. 886 (1928) (trustee). *See also* **Lucas v. Abbott**, 198 Colo. 477, 601 P.2d 1376 (1979) (recognizing the fiduciary relationship between joint venturers); **Howard v. Hester**, 139 Colo. 255, 338 P.2d 106 (1959) (attorney and real estate agent); **Hart v. Colorado Real Estate Commission**, 702 P.2d 763 (Colo. App. 1985) (agent as a fiduciary); **Brunner v. Horton**, 702 P.2d 283 (Colo. App. 1985) (same).

2. A prerequisite to finding a fiduciary duty is the existence of a fiduciary relationship. **Moses v. Diocese of Colo.**, 863 P.2d 310 (Colo. 1993) (record supported jury’s determination that fiduciary relationship existed between bishop and parishioner where there was evidence that bishop occupied superior position over parishioner, was able to exert substantial influence over parishioner, and assumed a duty to act in the best interests of the parishioner).

3. Fiduciary duties arise only as to matters within the scope of the fiduciary relationship. *See* **Mintz v. Accident & Injury Med. Specialists, PC**, 284 P.3d 62, 68 (Colo. App. 2010),

aff'd, 2012 CO 50, 279 P.3d 658 (explaining that a “fiduciary relationship exists between two persons when one of them has a duty to act for or to give advice for the benefit of another on matters within the relationship’s scope”); *see also Semler v. Hellerstein*, 2016 COA 143, ¶¶ 35-40 (recognizing that board members of a homeowners’ association owe fiduciary duties to both the association and its members, but affirming dismissal of breach of fiduciary duty claim against association treasurer because treasurer was not bound by his fiduciary duties when acting wholly outside the scope of his board position) (*cert. granted* March 20, 2017); RESTATEMENT (THIRD) OF TRUSTS § 2 cmt. b (2003).

4. For a definition of a “fiduciary,” *see Taylor v. Taylor*, 2016 COA 100, ¶ 13 n.1, 381 P.3d 428, 431 (“A fiduciary is required to act with good faith and loyalty, unaffected by personal motives.”); and *Tepley v. Public Employees Retirement Ass’n*, 955 P.2d 573 (Colo. App. 1997), *cert. denied* (1998) (fiduciary is a person having a duty, created by his undertaking, to act primarily for the benefit of another in matters connected with the undertaking). *See also Application for Water Rights of Town of Minturn*, 2015 CO 61, ¶ 11, 359 P.3d 29, 31 (recognizing that the “relationship between a trustee and a beneficiary is fiduciary in nature” and explaining that a “fiduciary relationship involves a duty on the part of the fiduciary to act for the benefit of the other party as to matters within the scope of the relationship” (quoting 1 A. WAKEMEN SCOTT, ET AL., SCOTT AND ASCHER ON TRUSTS § 2.1.5, at 37 (5th ed. 2006))). A “fiduciary” may also be defined by statute. *See, e.g.*, § 15-1-103(2), C.R.S., defining “fiduciary” under the Uniform Fiduciaries law.

5. In a principal/agent relationship, the principal is not a fiduciary of the agent, and any duties owed by a principal to an agent are not fiduciary duties. *MDM Group Assocs., Inc. v. CX Reinsurance Co.*, 165 P.3d 882 (Colo. App.), *cert. dismiss’d* (2007). However, if an employee has sufficient authority to be deemed the agent of an employer, the employee owes the employer a duty of loyalty. *Jet Courier Serv., Inc. v. Mulei*, 771 P.2d 486 (Colo. 1989); *Lucht’s Concrete Pumping, Inc. v. Horner*, 224 P.3d 355 (Colo. App. 2009), *rev’d on other grounds*, 255 P.3d 1058 (Colo. 2011) (employee violated duty of loyalty to employer by setting up new business while still employed); *Graphic Directions, Inc. v. Bush*, 862 P.2d 1020 (Colo. App.), *cert. denied* (1993) (designating the employment relationship a fiduciary one based on the high level of the employee’s authority, and duty to employer breached by pretermination solicitation of customers).

6. Corporate agents may in some circumstances have a fiduciary relationship with third parties. *See Alexander v. Anstine*, 152 P.3d 497 (Colo. 2007) (directors and officers of insolvent corporation have limited fiduciary duty not to favor their own interests over those of creditors). *But see Weinstein v. Colborne Foodbiotics, LLC*, 2013 CO 33, 302 P.3d 263 (holding that a creditor of an insolvent LLC could not assert a claim for breach of fiduciary duty against managers of the LLC because the LLC Act expressly provides that managers are not liable for debts of the LLC, and the Act extends no fiduciary duty to creditors).

7. Parties to a joint venture have a fiduciary relationship. *Lucas*, 198 Colo. at 481, 601 P.2d at 1379.

8. For other cases in which the existence of a fiduciary relationship was an issue, *see Baker v. Wood, Ris & Hames, P.C.*, 2016 CO 5, ¶¶ 20-35, 364 P.3d 872, 879 (reiterating that

Colorado follows a rule of “strict privity” in limiting the fiduciary duty owed by attorneys to their clients only and not third parties and holding that “an attorney’s liability to a non-client is limited to the narrow set of circumstances in which the attorney has committed fraud or a malicious or tortious act, including negligent misrepresentation”); **Trujillo v. Colorado Division of Insurance**, 2014 CO 17, ¶ 20 & n.14, 320 P.3d 1208 (although insurance producers owe fiduciary duties to insured and insurers under plain language of section 10-2-704(1)(a), C.R.S., bail bondsmen did not violate this fiduciary duty with respect to his client because she was not an “insured” within the meaning of the statute); **Accident & Injury Specialists, P.C. v. Mintz**, 2012 CO 50, ¶ 19, 279 P.3d 658 (attorney did not owe fiduciary duties to third party medical providers who were owed money by attorney’s clients out of insurance settlement proceeds placed into attorney’s COLTAF account); **Brodeur v. American Home Assurance Co.**, 169 P.3d 139 (Colo. 2007) (workers’ compensation insurer owes no fiduciary duty to insured); **Destefano v. Grabrian**, 763 P.2d 275 (Colo. 1988) (priest acting as marriage counselor had fiduciary relationship to both husband and wife with respect to their marital relationship); **Paine, Webber, Jackson & Curtis, Inc. v. Adams**, 718 P.2d 508 (Colo. 1986) (stockbroker who had practical control over customer’s account had fiduciary duty to customer with respect to handling account); **Semler**, 2016 COA 143, ¶¶ 35-40 (recognizing that board members of a homeowners’ association owe fiduciary duties to both the association and its members, but affirming dismissal of breach of fiduciary duty claim against association treasurer because treasurer was not bound by his fiduciary duties when acting wholly outside the scope of his board position); **Gessler v. Grossman**, 2015 COA 62, ¶¶ 18-20 (holding that the public trust statute, § 24-18-103, C.R.S., is not merely hortatory, but sets forth a specific standard of conduct by imposing a fiduciary duty on public officials) (*cert. granted* June 20, 2016); **LaFond v. Sweeney**, 2012 COA 27, 345 P.3d 932, ¶¶ 38-42 (members of LLC law firm owed one another fiduciary duties and such duties continued subsequent to dissolution of the LLC but before the winding up of the LLC was completed), *aff’d*, 2015 CO 3, 343 P.3d 939; **Ludlow v. Gibbons**, 310 P.3d 130 (Colo. App. 2011) (section 12-61-803(2), C.R.S., provides that the exclusive method for a real estate broker to assume fiduciary duties to a party to a real estate transaction is through a written agreement), *rev’d on other grounds*, 2013 CO 49, 304 P.3d 239; **A Good Time Rental, LLC v. First American Title Agency, Inc.**, 259 P.3d 534 (Colo. App. 2011) (any fiduciary-type relationship between a closing agent and its client does not trump the economic loss rule); **Barfield v. Hall Realty, Inc.**, 232 P.3d 286 (Colo. App. 2010) (real estate transaction broker does not have a fiduciary relationship with either party to a real estate transaction); **Olson v. State Farm Mutual Automobile Insurance, Co.**, 174 P.3d 849 (Colo. App. 2007) (no quasi-fiduciary duty between insurer and insured requiring insurer to inform insured of statute of limitations on claim for UM benefits); **Premier Farm Credit, PCA v. W-Cattle, LLC**, 155 P.3d 504 (Colo. App. 2006) (absent special circumstances, relationship between lending institution and customer is not a fiduciary relationship but merely one of creditor and debtor); **Equitex, Inc. v. Ungar**, 60 P.3d 746 (Colo. App. 2002) (attorney’s longstanding relationship with corporation and its president did not give rise to fiduciary duties on part of corporation or its president where they had not assumed any responsibility to represent attorney’s interests and attorney had not been induced to place trust or confidence in corporation or its president); **Turkey Creek, LLC v. Rosania**, 953 P.2d 1306 (Colo. App. 1998) (no fiduciary relationship existed between tenants in common absent evidence that one party reposed special confidence in the other); **Vikell Investors Pacific, Inc. v. Kip Hampden, Ltd.**, 946 P.2d 589 (Colo. App. 1997) (no fiduciary relationship between owner of apartment buildings and engineer who worked on project to stabilize buildings);

Winkler v. Rocky Mountain Conference of United Methodist Church, 923 P.2d 152 (Colo. App. 1995) (pastor who counseled parishioner on personal matters had fiduciary relationship with parishioner); **Johnston v. CIGNA Corp.**, 916 P.2d 643 (Colo. App. 1996) (generally, investment advisor owes fiduciary duty to customers); **Emenyonu v. State Farm Fire & Casualty Co.**, 885 P.2d 320 (Colo. App. 1994) (contractual relationship between insurer and its insured does not give rise to fiduciary relationship with respect to first-party disputes); **Wells Fargo Realty Advisors Funding, Inc. v. Uioli, Inc.**, 872 P.2d 1359 (Colo. App. 1994) (no fiduciary relationship between borrower and lender where borrower did not repose special trust in lender or relax care and vigilance that borrower would ordinarily have exercised); **Bock v. Brody**, 870 P.2d 530 (Colo. App. 1993) (evidence of close business and personal relationship, without more, is insufficient to establish fiduciary relationship), *aff'd in part, rev'd in part on other grounds*, 897 P.2d 769 (Colo. 1995); **Jarnagin v. Busby, Inc.**, 867 P.2d 63 (Colo. App. 1993) (no fiduciary relationship between parties where there was no evidence that plaintiff reasonably reposed trust and confidence in defendant); **Graphic Directions, Inc. v. Bush**, 862 P.2d 1020 (Colo. App. 1993) (art director of graphics business owed fiduciary duty to employer); **Nicholson v. Ash**, 800 P.2d 1352 (Colo. App. 1990) (evidence was insufficient to establish fiduciary relationship where no confidential relationship existed between parties prior to date of business transaction that gave rise to claim); **First National Bank of Meeker v. Theos**, 794 P.2d 1055 (Colo. App. 1990) (trial court erred in failing to instruct jury that to establish fiduciary relationship between bank and borrower, borrower had to show that he justifiably reposed a special trust or confidence in bank to act in borrower's best interest, that bank either invited, ostensibly accepted or acquiesced in such trust, and that bank assumed duty to act in borrower's interest with respect to subject matter of trust); **Rubenstein v. South Denver National Bank**, 762 P.2d 755 (Colo. App. 1988) (trial court erred in entering summary judgment dismissing plaintiff's claim against bank for breach of fiduciary duty since there were controverted issues of material fact regarding the existence of fiduciary relationship); **Dolton v. Capitol Federal Savings & Loan Ass'n**, 642 P.2d 21 (Colo. App. 1981) (same); and **Breeden v. Dailey**, 40 Colo. App. 70, 574 P.2d 508 (1977) (where employment agreement gave defendant the power to make financial commitments in unlimited amounts on plaintiff's behalf and without prior approval, fiduciary relationship existed between the parties as a matter of law). *See also* **Circle T Corp. v. Deerfield**, 166 Colo. 238, 444 P.2d 404 (1968); **Alexander Co. v. Packard**, 754 P.2d 780 (Colo. App. 1988); **Meyer v. Schwartz**, 638 P.2d 821 (Colo. App. 1981).

26:3 FIDUCIARY RELATIONSHIP ARISING OUT OF A CONFIDENTIAL RELATIONSHIP

For the plaintiff, (*name*), to recover from the defendant, (*name*), on (his) (her) (its) claim of breach of a fiduciary duty arising from a confidential relationship, you must find that all the following have been proved by a preponderance of the evidence:

- 1. The plaintiff had a confidential relationship with the defendant;**
- 2. [The plaintiff justifiably placed trust and confidence in the defendant], [The defendant invited, accepted or appeared to accept, or acquiesced in the plaintiff's trust and confidence];**
- 3. The defendant assumed a duty to represent the plaintiff's interest in the subject of the transaction;**
- 4. The duty that arose by reason of the confidential relationship between the plaintiff and the defendant applied to (*insert appropriate description of subject matter of the suit*); and**
- 5. The defendant violated that duty, causing damage 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 of more of the 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. This instruction should be given with Instruction 26:4.
2. In paragraph 2 of the instruction, use all alternate phrases that apply.
3. When, based on undisputed facts, the court determines as a matter of law that the defendant was acting as a fiduciary for the plaintiff with respect to the subject matter of the suit, the jury should be instructed that the court has determined that a fiduciary relationship existed between the parties, and the first sentence of Instruction 26:2, rather than this instruction should

be used. Also, Instruction 26:2 should be used, rather than this instruction, when the claimed fiduciary duty is based on a relationship that is recognized, as a matter of law, as being a fiduciary relationship, such as exists between agent and principal, partners, joint venturers, attorney and client, etc. See generally Chapter 7 of these instructions.

4. In all cases involving a fiduciary relationship arising out of a confidential relationship, the elements of this instruction must be proven by the plaintiff. However, because fiduciary relationships have been found to arise in diverse situations, the court may need to consider the adequacy of this instruction in light of the particular facts of the case, and this instruction may need to be appropriately modified or supplemented to better reflect the law applicable to specific factual situations.

Source and Authority

1. This instruction is supported by **First Nat'l Bank v. Theos**, 794 P.2d 1055 (Colo. App. 1990); *see also* **Jarnagin v. Busby, Inc.**, 867 P.2d 63 (Colo. App. 1993).

2. A fiduciary duty may arise out of a confidential relationship. **Rubenstein v. South Denver Nat'l Bank**, 762 P.2d 755 (Colo. App. 1988); **Dolton v. Capitol Fed. Sav. & Loan Ass'n**, 642 P.2d 21 (Colo. App. 1981). However, the existence of a confidential relationship, without more, is insufficient to establish a fiduciary duty. **Bock v. Brody**, 870 P.2d 530 (Colo. App. 1993), *aff'd in part, rev'd in part on other grounds*, 897 P.2d 769 (Colo. 1995); **First Nat'l Bank v. Theos**, 794 P.2d 1055 (Colo. App. 1990). Moreover, under Colorado law, there is no separate tort for breach of a confidential relationship. **Bock**, 870 P.2d 530; **Todd Holding Co., Inc. v. Super Valu Stores, Inc.**, 874 P.2d 402 (Colo. App. 1993); *see also* **Smith v. TCI Commc'ns, Inc.**, 981 P.2d 690 (Colo. App. 1999) (recognizing that confidential relationship may give rise to fiduciary duty, but holding that no such duty existed where confidential relationship did not exist prior to transaction giving rise to claim).

3. A fiduciary duty has been found where one party occupied a superior position over the other and, thus, was in a position to influence or affect the interests of the other. **Moses v. Diocese of Colo.**, 863 P.2d 310 (Colo. 1993), *cert. denied*, 511 U.S. 1137 (1994); *see also* **In the Interest of Delluomo v. Cedarblade**, 2014 COA 43, ¶ 27, 328 P.3d 291, 296 (“A trustee’s duty springs from the underlying legal agreement to manage property and is bounded by the scope of that relationship; in contrast, the duty of a confidential relation arises from superiority and influence, is borne by the individual, is not expressly agreed upon, and involves property only incidentally.”). A fiduciary duty has been found where one person has practical control over the affairs of another. **Paine, Webber, Jackson & Curtis, Inc. v. Adams**, 718 P.2d 508 (Colo. 1986). A fiduciary duty may arise from a business or confidential relationship that compels or induces one party to relax the care and vigilance one would ordinarily exercise in dealing with a stranger. **Dolton v. Capitol Fed. Sav. & Loan Ass'n**, 642 P.2d 21 (Colo. App. 1981). A fiduciary relationship can arise out of a relationship of blood, business, friendship, or other association. **Moses**, 863 P.2d 310.

26:4 CONFIDENTIAL RELATIONSHIP — DEFINED

A confidential relationship exists between parties to a transaction if the parties' relationship is such that one is induced to relax the care and vigilance one ordinarily would exercise in dealing with a stranger.

Notes on Use

1. When instructing a jury on the definition of a confidential relationship in a will contest, Instruction 34:18 should be used, rather than this instruction.

2. The existence of a confidential relationship is not sufficient in and of itself to establish a breach of fiduciary duty. **First Nat'l Bank v. Theos**, 794 P.2d 1055 (Colo. App.), *cert. denied* (1990). Accordingly, this instruction should be given with Instruction 26:3.

Source and Authority

1. This instruction is supported by **Jarnagin v. Busby, Inc.**, 867 P.2d 63 (Colo. App. 1993); *see also* **Turkey Creek, LLC v. Rosania**, 953 P.2d 1306 (Colo. App. 1998); **Vikell Investors Pacific, Inc. v. Kip Hampden, Ltd.**, 946 P.2d 589 (Colo. App. 1997); **Nicholson v. Ash**, 800 P.2d 1352 (Colo. App. 1990); **Dolton v. Capital Fed. Sav. & Loan Ass'n**, 642 P.2d 21 (Colo. App. 1981); *accord* **United Fire & Casualty Co. v. Nissan Motor Corp.**, 164 Colo. 42, 433 P.2d 769 (1967) (concluding that no fiduciary relationship existed between plaintiff and defendant in the absence of any showing of a relationship “which might have impelled or induced” plaintiff “to relax the care and vigilance it would and should have ordinarily exercised in dealing with a stranger”).

2. **First Nat'l Bank v. Theos**, 794 P.2d 1055 (Colo. App.), *cert. denied* (1990) states that a confidential relationship may also arise if: (1) one party has taken steps to induce another to believe that it can safely rely on the first party's judgment or advice (citing RESTATEMENT (SECOND) OF CONTRACTS § 161d comment f (1982)); or (2) one person has gained the confidence of the other and purports to act or advise with the other's interest in mind (citing RESTATEMENT (SECOND) OF TRUSTS § 2 comment b (1959)); *see also* **In re Marriage of Page**, 794 P.2d 1055 (1990) (following *Theos*).

3. A confidential relationship may arise from a multitude of different circumstances. **Nicholson v. Ash**, 800 P.2d 1352 (Colo. App. 1990); *see also* **Lewis v. Lewis**, 180 P.3d 1134 (Colo. 2008) (discussing the nature of a confidential relationship in the context of a claim for unjust enrichment and stating that a confidential relationship may serve as an indication of fiduciary status).

26:5 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 breach of fiduciary duty by the defendant(s), (*name[s]*), (and the [*insert appropriate description, e.g., "negligence"*], if any, of any designated nonparties).

In determining such damages, you shall consider the following:

1. Any noneconomic losses or injuries which plaintiff has had or will probably have in the future, including: [*insert any recoverable noneconomic losses for which there is sufficient evidence*]; and

2. Any economic losses which plaintiff has had or will probably have in the future, including:

(a. Anything of value or any profit the defendant, [*name*], received as a result of the breach of fiduciary duty);

(b. Any loss of the plaintiff's property or assets caused by the breach of the fiduciary duty);

(c. Any loss of [profits] [or] [income] which plaintiff could reasonably have expected to earn had the fiduciary duty not been breached);

(d. Any [loss] [damage] which plaintiff has had as a result of a third person making a claim against (him) (her) because of the breach of fiduciary duty); and

(e. [*insert any other recoverable economic losses for which there is sufficient evidence*]).

Notes on Use

1. The amount of damages prayed for 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).

2. This instruction should be used in conjunction with Instruction 26:1.

3. Only those parenthesized numbered paragraphs and lettered subparagraphs should be given as are appropriate in light of the evidence in the case.

Source and Authority

1. This instruction and its lettered subparagraphs are supported by the following authorities:

Subparagraph a: **Paine, Webber, Jackson & Curtis, Inc. v. Adams**, 718 P.2d 508, 511 (Colo. 1986); **McKinney v. Christmas**, 143 Colo. 361, 353 P.2d 373 (1960); **Lestoque v. M. R. Mansfield Realty, Inc.**, 36 Colo. App. 32, 536 P.2d 1146 (1975); RESTATEMENT (SECOND) OF AGENCY §§ 403 and 404 (1958).

Subparagraph b: **Rupert v. Clayton Brokerage Co.**, 737 P.2d 1106 (Colo. 1987); **Murphy v. Central Bank & Trust Co.**, 699 P.2d 13 (Colo. App. 1985); RESTATEMENT (SECOND) OF AGENCY § 402 (1958).

Subparagraph c: **Paine, Webber, Jackson & Curtis, Inc. v. Adams**, 718 P.2d 508 (Colo. 1986).

Subparagraph d: **Elijah v. Fender**, 674 P.2d 946 (Colo. 1984); **Pete's Satire, Inc. v. Commercial Union Ins. Co.**, 698 P.2d 1388 (Colo. App. 1985), *aff'd on other grounds*, 739 P.2d 239 (Colo. 1987).

Subparagraph e: **White v. Brock**, 41 Colo. App. 156, 584 P.2d 1224 (1978); RESTATEMENT (SECOND) OF AGENCY § 401 (1958).

2. For other cases supporting one or more of the lettered subparagraphs in numbered paragraph 2, see **Buder v. Sartore**, 774 P.2d 1383 (Colo. 1989) (supports lettered subparagraphs a, b, and c); **Life Care Centers of America, Inc. v. East Hampden Associates Limited Partnership**, 903 P.2d 1180 (Colo. App.), *cert. denied* (Colo. 1995), *cert. denied*, 516 U.S. 1158 (1996) (loss of future profits); **Graphic Directions, Inc. v. Bush**, 862 P.2d 1020 (Colo. App.), *cert. denied* (1993) (evidence insufficient to sustain award of damages for lost profits).

3. For other cases discussing damages for breach of a fiduciary duty, see **Genova v. Longs Peak Emergency Physicians, P.C.**, 72 P.3d 454 (Colo. App. 2003) (where the only kind of economic damages that plaintiff could have sustained as a result of defendants' breach of fiduciary duty were damages for loss of future earnings, trial court did not err in refusing to instruct on damages for loss of assets or property); **T-A-L-L, Inc. v. Moore & Co.**, 765 P.2d 1039 (Colo. App. 1988), *aff'd in part and rev'd in part on other grounds*, 792 P.2d 794 (Colo. 1990) (seller entitled to return, on theory of unjust enrichment, of commission paid real estate broker who had breached duty of loyalty); **Collie v. Becknell**, 762 P.2d 727 (Colo. App. 1988), *cert. denied* (1988).

4. When otherwise appropriate to the evidence in the case, punitive damages may also be recoverable in a case based on a claim for relief for breach of a fiduciary duty. **Mahoney Mktg. Corp. v. Sentry Builders, Inc.**, 697 P.2d 1139 (Colo. App. 1985); **White v. Brock**, 41 Colo. App. 156, 584 P.2d 1224 (1978). *But see* **Kaitz v. District Court**, 650 P.2d 553, 556 (Colo. 1982) (punitive damages not recoverable when plaintiff's claim is equitable rather than legal).

5. Attorney fees may be recovered as an exception to the "American Rule" only in breach of trust actions or breach of fiduciary duty actions that are closely analogous to breach of trust actions. *See* **In the Interest of Delluomo v. Cedarblade**, 2014 COA 43, 328 P.3d 291; *see also* **Taylor v. Taylor**, 2016 COA 100, ¶¶ 32-35 (holding that an award of attorney fees to settlor's children against trustee was proper under breach of trust exception to American Rule in

accordance with **Delluomo** where jury determined that defendant had breached a fiduciary duty to settlor, the defendant was a trustee, and trustee and his siblings stood to personally gain from his breach of fiduciary duty).

6. Comparative negligence is not available as a defense to an intentional tort claim. **Carman v. Heber**, 43 Colo. App. 5, 601 P.2d 646 (1979). *See also* **Winkler v. Rocky Mountain Conference of the United Methodist Church**, 923 P.2d 152 (Colo. App. 1995) (holding that trial court did not err in failing to instruct the jury on comparative negligence with respect to plaintiff's claim for breach of fiduciary duty because even assuming that comparative negligence principles may apply to a claim for breach of fiduciary duty there was no evidence which would support a finding that plaintiff was at fault or had knowledge of the danger to which she was exposed, consented to that danger, and assumed the risk); **Van Schaack v. Van Schaack Holdings, Ltd.**, 856 P.2d 15 (Colo. App. 1992) (holding that trial court did not err in refusing to instruct the jury on comparative negligence in conjunction with plaintiff's breach of fiduciary duty claim because plaintiff's actions could not have affected the jury's determination as to whether defendants had breached their fiduciary duty to her as a shareholder).

7. When a fiduciary duty arises from a contract, the economic loss rule applies, such that a breach of a fiduciary duty cannot serve as the basis of a tort claim seeking additional compensation for an alleged failure to perform a contractual obligation. **Casey v. Colorado Higher Educ. Ins. Benefits Alliance Trust**, 2012 COA 134, 2012 WL 3517612; **A Good Time Rental, LLC v. First Am. Title Agency, Inc.**, 259 P.3d 534 (Colo. App. 2011).

8. The general rule is that an employee is not entitled to any compensation for services performed during a period in which he engaged in activities constituting a breach of his duty of loyalty, even though part of those services may have been properly performed. The employee is, however, entitled to compensation for services properly performed during periods in which no such breach occurred. **Koontz v. Rosener**, 787 P.2d 192 (Colo. App. 1989).