

## CHAPTER 9

### NEGLIGENCE — GENERAL CONCEPTS

#### [Introductory Note](#)

#### A. NEGLIGENCE AND DUTY OF CARE

- [9:1](#) Elements of Liability — No Negligence of the Plaintiff
- [9:2](#) Negligent Infliction of Emotional Distress — Elements of Liability
- [9:3](#) Negligent Misrepresentation Causing Physical Harm — Elements of Liability
- [9:4](#) Negligent Misrepresentation Causing Financial Loss in a Business Transaction — Elements of Liability
- [9:5](#) Negligent Misrepresentation Causing Financial Loss in a Business Transaction — Unreasonable Reliance — Defined
- [9:6](#) Negligence — Defined (Including Assumption of the Risk and Comparative Negligence Cases)
- [9:7](#) Negligence — Defined — Inherently Dangerous Activities
- [9:8](#) Reasonable Care — Defined
- [9:9](#) Children — Standard of Care — Negligence (Including Comparative Negligence Cases)
- [9:10](#) Volunteer — Duty of Care
- [9:11](#) Sudden Emergency
- [9:12](#) Happening of Accident Not Presumptive Negligence
- [9:13](#) Looking But Failing to See as Negligence
- [9:14](#) Negligence Per Se — Violation of Statute or Ordinance
- [9:15](#) Conduct in Compliance with Statute or Ordinance and Justifiable Violation of Statute
- [9:16](#) Unknowing Violation of Statute or Ordinance
- [9:17](#) Res Ipsa Loquitur — Permissible Inference Arising from Rebuttable Presumption of Negligence

#### B. CAUSATION

#### [Special Note](#)

- [9:18](#) Cause When Only One Cause Is Alleged — Defined
- [9:19](#) Concurrent Causes (Excluding Designated Nonparty Fault Cases)
- [9:20](#) Cause — Concurrent Causes — Intervening Causes
- [9:21](#) Cause — Foreseeability Limitation

## C. COMPARATIVE NEGLIGENCE AND COMPARATIVE FAULT

### Special Note

- [9:22](#) Elements of Liability — Comparative Negligence
- [9:23](#) Affirmative Defense — Comparative Negligence of the Plaintiff
- [9:24](#) Affirmative Defense — Negligence or Fault of Designated Nonparty
- [9:25](#) Negligence of Parents Not Imputable to Children
- [9:26](#) Comparative Negligence of Plaintiff — Single Defendant — No Designated Nonparty Involved
- [9:26A](#) Special Verdict Questions — Mechanics for Submitting — Comparative Negligence of the Plaintiff — Single Defendant — No Designated Nonparty
- [9:26B](#) Special Verdict Forms — Comparative Negligence of the Plaintiff — No Counterclaim — Single Defendant — No Designated Nonparty — Forms A and B
- [9:26C](#) Special Verdict Questions — Mechanics for Submitting — Comparative Negligence of the Plaintiff — No Counterclaim — Single Defendant — No Designated Nonparty (Alternative to Instruction 9:26A)
- [9:26D](#) Special Verdict Forms — Comparative Negligence of the Plaintiff — No Counterclaim — Single Defendant — No Designated Nonparty — Forms A and B (Alternative to Instruction 9:26B)
- [9:27](#) Comparative Negligence of the Plaintiff — Multiple Defendants — No Designated Nonparty Involved
- [9:27A](#) Special Verdict Questions — Mechanics for Submitting — Comparative Negligence of the Plaintiff — Multiple Defendants — No Designated Nonparty
- [9:27B](#) Special Verdict Forms — Comparative Negligence of the Plaintiff — Multiple Defendants — No Designated Nonparty — Forms A and B
- [9:27C](#) Special Verdict Questions — Mechanics for Submitting — Comparative Negligence of the Plaintiff — Multiple Defendants — No Designated Nonparty (Alternative to Instruction 9:27A)
- [9:27D](#) Special Verdict Forms — Comparative Negligence of the Plaintiff — Multiple Defendants — No Designated Nonparty — Forms A and B (Alternative to Instruction 9:27B)
- [9:28](#) Comparative Negligence of Plaintiff — Single Defendant or Multiple Defendants — Designated Nonparty or Nonparties Involved
- [9:28A](#) Special Verdict Questions — Mechanics for Submitting — Comparative Negligence of the Plaintiff — Single Defendant or Multiple Defendants — Designated Nonparty or Nonparties Involved
- [9:28B](#) Special Verdict Forms — Comparative Negligence of the Plaintiff — Single Defendant or Multiple Defendants — Designated Nonparty or Nonparties Involved — Forms A and B

- [9:28C](#) Special Verdict Questions — Mechanics for Submitting — Comparative Negligence of the Plaintiff — Single Defendant or Multiple Defendants — Designated Nonparty or Nonparties Involved (Alternative to Instruction 9:28A)
- [9:28D](#) Special Verdict Forms — Comparative Negligence of the Plaintiff — Single Defendant or Multiple Defendants — Designated Nonparty or Nonparties Involved — Forms A and B (Alternative to Instruction 9:28B)
- [9:29](#) Elements — Multiple Defendants or One or More Defendants and One or More Designated Nonparties — No Negligence or Fault of Plaintiff
- [9:29A](#) Special Verdict Questions — Mechanics for Submitting — Multiple Defendants or One or More Defendants and One or More Designated Nonparties — No Negligence or Fault of Plaintiff
- [9:29B](#) Special Verdict Forms — Multiple Defendants or One or More Defendants and One or More Designated Nonparties — No Negligence or Fault of Plaintiff — Forms A and B

#### D. WILLFUL AND WANTON NEGLIGENCE

- [9:30](#) Willful and Wanton Conduct or Willful and Reckless Disregard — Defined

#### E. SUBJECTS ON WHICH NO SEPARATE INSTRUCTIONS HAVE BEEN PREPARED

- [9:31](#) Contributory Negligence, Contributory Negligence of (Spouse) (Parent) (Child), and Assumption of Risk

#### F. SUBJECTS ON WHICH NO SEPARATE INSTRUCTIONS SHOULD BE GIVEN

- [9:32](#) Rescue Doctrine, Unavoidable Accident, and Last Clear Chance

## Introductory Note

### Liability

1. To recover on a negligence claim, the plaintiff must establish the existence of a legal duty on the part of the defendant, a breach of that duty, causation, and damages. **United Blood Servs. v. Quintana**, 827 P.2d 509 (Colo. 1992); **Observatory Corp. v. Daly**, 780 P.2d 462 (Colo. 1989); **Perreira v. State**, 768 P.2d 1198 (Colo. 1989); **Leake v. Cain**, 720 P.2d 152 (Colo. 1986). Generally, a legal duty to use due care arises in response to a foreseeable and unreasonable risk of harm to others. **Quintana**, 827 P.2d at 519; **Lyons v. Nasby**, 770 P.2d 1250 (Colo. 1989).

2. In determining whether a person has a duty to act or refrain from acting to avoid injury to others, the nature of the inquiry is essentially whether recognizing a duty would comport with fairness under contemporary standards. **Peterson v. Halsted**, 829 P.2d 373 (Colo. 1992). To decide this, the court must consider several factors, including the feasibility and likelihood of injury and the possible extent of that injury, the magnitude of the burden placed on the defendant to guard against injury, and the consequences of placing that burden on the defendant. **Lyons**, 770 P.2d at 1254. Ultimately, whether a duty exists depends on considerations of policy. **Univ. of Denver v. Whitlock**, 744 P.2d 54 (Colo. 1987). These policy considerations militate more strongly against the imposition of a duty in cases involving an alleged negligent failure to act, i.e., a failure to take affirmative action to protect others from harm. *Id.* at 57. Generally, in nonfeasance, as opposed to misfeasance cases, a duty is recognized only if there is a “special relationship” between the parties or between the plaintiff and a third-party tortfeasor. *Id.* In nonfeasance cases, a duty has been recognized only in limited circumstances involving special relationships such as: (1) common carrier/passenger; (2) innkeeper/guest; (3) employer/employee; (4) landowner/invited guest; (5) parent/child; and (6) hospital/patient. *See N.M. v. Trujillo*, 2017 CO 79, ¶ 27, 397 P.3d 370; **Groh v. Westin Operator, LLC**, 2013 COA 39, ¶ 28, 352 P.3d 472, *aff’d*, 2015 CO 25, 347 P.3d 606; **English v. Griffith**, 99 P.3d 90 (Colo. App. 2004); **Lewis v. Emil Clayton Plumbing Co.**, 25 P.3d 1254 (Colo. App. 2000). For a discussion of the differing policy considerations in misfeasance and nonfeasance cases, see **Smit v. Anderson**, 72 P.3d 369 (Colo. App. 2002). *See also Groh*, 2013 COA 39, ¶¶ 27-30; **In re 2010 Denver Cty. Grand Jury**, 2012 COA 45, ¶¶ 25-31, 296 P.3d 168; **W. Innovations, Inc. v. Sonitrol Corp.**, 187 P.3d 1155 (Colo. App. 2008); **Montoya v. Connolly’s Towing, Inc.**, 216 P.3d 98 (Colo. App. 2008).

3. To prove that a defendant assumed a duty, the plaintiff must establish that: (1) the defendant undertook to render services that were reasonably calculated to prevent the type of harm that befell the plaintiff; and (2) either the defendant’s undertaking increased the plaintiff’s risk or the plaintiff relied on the defendant to perform those services. **P.W. v. Children’s Hosp. Colo.**, 2016 CO 6, ¶ 21, 364 P.3d 891 (applying the assumed duty doctrine to comparative negligence); **Cooper v. United States Ski Ass’n**, 32 P.3d 502 (Colo. App. 2000), *rev’d on other grounds*, 48 P.3d 1229 (Colo. 2002). *See also* Notes on Use to Instruction 9:10 (volunteer — duty of care).

4. The existence and scope of a legal duty are generally questions of law for the court to determine. **Peterson**, 829 P.2d at 379; **Imperial Distrib. Servs., Inc. v. Forrest**, 741 P.2d 1251 (Colo. 1987); **Metro. Gas Repair Serv., Inc. v. Kulik**, 621 P.2d 313 (Colo. 1980). However,

there may be rare cases where “the evidence presents a jury question on whether the injured party was a person within the foreseeable zone of danger created by defendant’s negligence and thus was owed a duty by defendant.” **Chutich v. Samuelson**, 33 Colo. App. 195, 201, 518 P.2d 1363, 1367 (1973), *aff’d in part, rev’d in part on other grounds*, 187 Colo. 155, 529 P.2d 631 (1974). Nevertheless, if the court concludes that injury to a person in plaintiff’s situation was foreseeable as a matter of law, it is reversible error to submit the issue of foreseeability to the jury. *Id.*; *see also* **Walcott v. Total Petroleum, Inc.**, 964 P.2d 609 (Colo. App. 1998) (risk that purchaser of gasoline would intentionally throw it on victim and set victim on fire was not reasonably foreseeable by operator of service station); **Scharrel v. Wal-Mart Stores, Inc.**, 949 P.2d 89 (Colo. App. 1997); **Cooley v. Paraho Dev. Corp.**, 851 P.2d 207 (Colo. App. 1992), *aff’d on other grounds sub nom. Gen. Elec. Co. v. Niemet*, 866 P.2d 1361 (Colo. 1994); **Sewell v. Pub. Serv. Co. of Colo.**, 832 P.2d 994 (Colo. App. 1991). In those cases where foreseeability is a factual question for the jury to determine, Instruction 9:21 should be used. *See generally* **P.W.**, 2016 CO 6, ¶ 24 n.7 (negligence cases address foreseeability twice, first as part of a duty inquiry, a legal issue, and second as the “touchstone of proximate cause,” a fact issue). Whether a party has assumed a duty not otherwise imposed by law is a mixed question of law and fact. **Pressey v. Children’s Hosp. Colo.** 2017 COA 28, ¶ 39.

5. For additional cases discussing the existence of a legal duty, see the Source and Authority to Instruction 9:1 under the subtopic “Existence and Scope of a Legal Duty.”

### **The Economic Loss Rule**

6. Generally, under Colorado law, in the absence of physical harm to a person or property, breach of a contractual duty does not give rise to a claim for negligence unless the facts supporting the negligence claim are different from the facts supporting the breach of contract claim. *See, e.g.*, **Grynberg v. Agri Tech, Inc.**, 10 P.3d 1267 (Colo. 2000) (distinguishing between tort and contract claims); **Town of Alma v. AZCO Constr., Inc.**, 10 P.3d 1256 (Colo. 2000) (under economic loss rule, no tort action for negligence where only damages are for economic loss); **Miller v. Bank of N.Y. Mellon**, 2016 COA 95, ¶¶ 17-36, 379 P.3d 342 (borrower’s tort claims against lender were barred by the economic loss rule, and neither (1) a consent judgment to which borrower was not a party nor (2) the lender-borrower relationship gave rise to an independent duty sufficient to avoid application of the rule); **Engeman Enters., LLC v. Tolin Mech. Sys. Co.**, 2013 COA 34, ¶ 9, 329 P.3d 364 (economic loss rule bars tort claims where there is no duty independent of contract); **Stan Clauson Assocs., Inc. v. Coleman Bros. Constr., LLC**, 2013 COA 7, ¶ 14, 297 P.3d 1042 (same); **Casey v. Colo. Higher Educ. Ins. Benefits All. Tr.**, 2012 COA 134, ¶ 22, 310 P.3d 196 (economic loss rule bars tort claims only as between contracting parties); **Former TCHR, LLC v. First Hand Mgmt. LLC**, 2012 COA 129, ¶ 33, 317 P.3d 1226 (fraud and misrepresentation claims were dependent on contract duties and were, thus, barred by economic loss rule); **Steward Software Co. v. Kopcho**, 275 P.3d 702 (Colo. App. 2010) (economic loss rule applied equally to torts based on an underlying contract whether written or oral), *rev’d on other grounds*, 266 P.3d 1085 (Colo. 2011); **Makoto USA, Inc. v. Russell**, 250 P.3d 625 (Colo. App. 2009) (theft and fraud claims were dependent on contract duties and were barred by economic loss rule); **U.S. Fire Ins. Co. v. Sonitrol Mgmt. Corp.**, 192 P.3d 543 (Colo. App. 2008) (contract established parties’ duties and economic loss rule precluded tort claim); **Cissell Mfg. Co. v. Park**, 36 P.3d 85 (Colo. App. 2001) (same); *see also* **BRW, Inc. v. Dufficy & Sons, Inc.**, 99 P.3d 66 (Colo. 2004) (economic loss rule barred negligence claims by subcontractor against project engineer for negligent design and inspection

of public works project); **A Good Time Rental, LLC v. First Am. Title Agency, Inc.**, 259 P.3d 534 (Colo. App. 2011) (economic loss rule barred claim that closing agent failed to exercise reasonable care in performing contract and claim that closing agent negligently misrepresented that it was performing obligation imposed by closing instructions); **Parr v. Triple L & J Corp.**, 107 P.3d 1104 (Colo. App. 2004) (economic loss rule generally bars only economic damages); **City of Westminster v. Centric-Jones Constructors**, 100 P.3d 472 (Colo. App. 2003); **Terrones v. Tapia**, 967 P.2d 216 (Colo. App. 1998) (no cause of action in tort for negligent breach of contractual duty); **Chellsen v. Pena**, 857 P.2d 472 (Colo. App. 1992) (no cause of action in tort for negligent breach of contractual duty resulting in purely economic damages); **Scott Co. of Cal. v. MK-Ferguson Co.**, 832 P.2d 1000 (Colo. App. 1991) (same), *overruled on other grounds by Lewis v. Lewis*, 189 P.3d 1134 (Colo. 2008); **Centennial Square, Ltd. v. Resolution Tr. Co.**, 815 P.2d 1002 (Colo. App. 1991); **Jardel Enters., Inc. v. Triconsultants, Inc.**, 770 P.2d 1301 (Colo. App. 1988) (applying economic loss rule which precludes recovery for negligence when duty breached is contractual and only economic losses are incurred). *But see Tanktech, Inc. v. First Interstate Bank*, 851 P.2d 174 (Colo. App. 1992) (if contract claim does not preclude negligence claim, relevant provisions of contract are admissible to establish appropriate standard of care to apply to alleged tortfeasor's conduct), *rev'd on other grounds*, 864 P.2d 116 (Colo. 1993). The economic loss rule may apply to an entity that did not exist at the time a duty was contractually created under the interrelated contracts doctrine if that entity is a party to a contract that is sufficiently interrelated with the duty-creating contract or is a third-party beneficiary of the interrelated contract. **S K Peightal Engineers, LTD v. Mid Valley Real Estate Sols. V, LLC**, 2015 CO 7, ¶ 16, 342 P.3d 868.

7. However, the economic loss rule does not apply where the defendant owes the plaintiff a duty of care independent of any contractual duty. **Van Rees v. Unleaded Software, Inc.**, 2016 CO 51, ¶ 15, 373 P.3d 603 (tort claims based on misrepresentations made before the formation of contracts, which allegedly induced plaintiff to enter into the contracts and therefore violated an independent duty in tort to refrain from such conduct, not barred by the economic loss rule); **A.C. Excavating v. Yacht Club II Homeowners Ass'n**, 114 P.3d 862 (Colo. 2005) (plaintiff homeowners association, third-party beneficiary of contract between general contractor and its subcontractors, not barred from enforcing negligence claims against defendant subcontractors, contracting parties, where law recognized duty of care that was independent of defendants' contractual duties); **Foster v. Bd. of Governors**, 2014 COA 18, ¶ 28, 342 P.3d 497 (economic loss rule does not bar recovery where bailee's duty to safely store stallion semen was separate from contractual duties); **Rhino Fund, LLLP v. Hutchins**, 215 P.3d 1186 (Colo. App. 2008) (economic loss rule did not bar claims based on independent tort duty to honor terms of escrow account and not to convert funds); **URS Grp., Inc. v. Tetra Tech FW, Inc.**, 181 P.3d 380 (Colo. App. 2008) (claim based on misrepresentations made before contract executed not barred by economic loss rule); **Andrews v. Picard**, 199 P.3d 6 (Colo. App. 2007) (economic loss rule not applicable where there is duty of care independent of any contractual duty); **Park Rise Homeowners Ass'n v. Res. Constr. Co.**, 155 P.3d 427 (Colo. App. 2006) (economic loss rule not a bar to homeowners' negligence claim against builder because builder owed homeowner independent duty to use due care in constructing home). Thus, a tort claim for negligence is "not limited by privity of contract"; instead, foreseeability determines its scope. **Forest City Stapleton Inc. v. Rogers**, 2017 CO 23, ¶ 13, 393 P.3d 487.

8. A claim for negligent misrepresentation is barred by the “economic loss rule” where the duty allegedly breached is contained in or arises out of the contract. **BRW**, 99 P.3d at 75 (economic loss rule barred negligent misrepresentation claim by subcontractor against project engineer for misrepresentations allegedly made during the performance of the engineer’s contract); **Top Rail Ranch Estates, LLC v. Walker**, 2014 COA 9, ¶ 40, 327 P.3d 321 (tort claim for negligent misrepresentation barred where no independent duties found to exist); **A Good Time Rental**, 259 P.3d at 541 (economic loss rule barred claims that closing agent negligently misrepresented that it was performing a duty imposed by the closing instructions). But when the alleged misrepresentation occurs before the parties entered into their contract, the economic loss rule does not bar the negligent misrepresentation claim. **Van Rees**, 2016 CO 51, ¶¶ 14-19 (economic loss rule does not bar negligent misrepresentation claim where an independent duty of care prohibits contracting party from making negligent misrepresentations in inducing contractual arrangement); **URS Grp.**, 181 P.3d at 391.

### **Damages**

9. No damage instructions have been prepared specifically for negligence cases because the instructions in Chapter 5, General Instructions Relating to Damages, and Chapter 6, Damages for Injuries to Persons or Property, are applicable to both negligence claims and to claims involving other kinds of tortious conduct. However, whenever punitive damages are claimed in a negligence case, Instruction 9:30 (defining willful and wanton conduct or willful and reckless disregard) should be used with Instruction 5:4 (exemplary or punitive damages).

10. For damage instructions and special verdict forms in actions against health care professionals or health care institutions, the instructions in subpart D of Part I of Chapter 15 should be used rather than the instructions in Part C of this chapter.

11. In actions for wrongful death, Instructions 10:3 and 10:4 should be used to instruct the jury on the applicable measure of damages.

## A. NEGLIGENCE AND DUTY OF CARE

### 9:1 ELEMENTS OF LIABILITY — NO NEGLIGENCE OF THE PLAINTIFF

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

1. The plaintiff had (injuries) (damages) (losses);
2. The defendant was negligent; and
3. The defendant's negligence was a cause of the plaintiff's (injuries) (damages) (losses).

If you find that any one or more of these (*number*) statements has not been proved, 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 paragraphs, the facts of which are not in dispute.
2. Use whichever parenthesized words are most appropriate and omit the last two paragraphs if the defendant has put no affirmative defense in issue or there is insufficient evidence to support any defense.

### Comparative Negligence

3. Whenever the defense of comparative negligence has been properly raised and, pursuant to section 13-21-111, C.R.S., the comparative negligence of the plaintiff must be determined, Instruction 9:22 must be used rather than this instruction, together with the other applicable comparative negligence instructions in Part C of this chapter.

### Comparative Fault

4. The instructions in Part C of this chapter should also be used in cases involving multiple defendants or designated nonparties where, under the pro rata liability statute, section



13-21-111.5, C.R.S., the comparative fault of the defendants or the comparative fault of defendant or defendants and one or more designated nonparties must be determined.

### **Related Instructions**

5. In product liability cases where a claim for negligence is asserted, the instructions in Part C of Chapter 14 should be used, rather than this instruction.

6. For negligence claims against attorneys involving an underlying case, i.e., a “case-within-a-case,” Instructions 15:19 and 15:20 should be used rather than this instruction.

7. 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.

8. In cases in which the plaintiff is claiming damages for fear of his own safety and for the consequential damages caused by that fright, as opposed to damages associated with physical injuries caused more directly by the alleged negligence of the defendant, Instruction 9:2 (negligent infliction of emotional distress) should be used rather than this instruction.

9. For the tort of negligent misrepresentation causing physical harm, see Instruction 9:3, and, for the tort of negligent misrepresentation causing financial loss in a business transaction, see Instruction 9:4.

10. Whenever this instruction is given, the appropriate instruction or instructions relating to causation must also be given, *see* Instructions 9:18 to 9:20, as well as other appropriate instructions defining the terms used in this instruction, e.g., Instruction 9:6 (defining negligence). Where the issue of foreseeability is presented as part of the causation analysis, Instruction 9:21 (foreseeability limitation) should be given.

11. This instruction should not be used when liability has been admitted, *see* Instruction 2:4, or when the court has directed a verdict as to liability, *see* Instruction 2:6.

12. Whenever the claim of negligence is against an owner or occupant of premises for failure to have properly maintained the premises or properly carried on an activity which caused injury to a person on the premises, the appropriate instruction in Chapter 12 should be used rather than this instruction. *See, e.g., Lombard v. Colo. Outdoor Educ. Ctr., Inc.*, 187 P.3d 565 (Colo. 2008); *Thornbury v. Allen*, 991 P.2d 335, 340 (Colo. App. 1999) (housekeeper injured when glass shelf fell on her foot while supervising cleaning of condominium could recover only from condominium owner under premises liability statute, § 13-21-115, C.R.S., and “not under any other theory of negligence, general, or otherwise”); *Casey v. Christie Lodge Owners Ass’n*, 923 P.2d 365 (Colo. App. 1996) (premises liability statute was applicable to claim for personal injuries against landowner resulting from dangerous condition of premises allegedly caused by landowner’s negligent hiring, supervision or retention of maintenance employee).

### **Description of Legal Duty**

13. As to the degree of specificity required in instructing the jury on the existence of a legal duty in a negligence action, see **Woolsey v. Holiday Health Clubs & Fitness Ctrs., Inc.**, 820 P.2d 1201 (Colo. App. 1991) (plaintiff not entitled to instruction that health club had legal duty to supervise whirlpool area and to warn about risks and hazards associated with use of whirlpool where more generalized instructions indicating that health club had legal duty to act reasonably towards its members was given).

### **Source and Authority**

1. This instruction is supported by **Bayly, Martin & Fay, Inc. v. Pete's Satire, Inc.**, 739 P.2d 239 (Colo. 1987); **Independent Lumber Co. v. Leatherwood**, 102 Colo. 460, 79 P.2d 1052 (1938); **Thompson v. Riveland**, 714 P.2d 1338 (Colo. App. 1986) (proof of compensable harm or damages is a necessary element of liability); and **Camacho v. Mennonite Board of Missions**, 703 P.2d 598 (Colo. App. 1985). Also in general support of this instruction, see the instructions approved in **Folck v. Haser**, 164 Colo. 11, 432 P.2d 245 (1967).

### **Existence and Scope of a Legal Duty**

2. This element is discussed in the "Liability" section of the Introductory Note to this chapter. Many additional Colorado Supreme Court cases discuss the existence and scope of a legal duty. See **N.M. v. Trujillo**, 2017 CO 79, ¶ 24, 397 P.3d 370 (dog owner did not have a special relationship with pedestrians walking by his house and did not owe a duty to prevent dogs from frightening pedestrians); **P.W. v. Children's Hosp. Colo.**, 2016 CO 6, ¶ 25, 364 P.3d 891 (when a hospital admits a person into its custody who it knows is "actively suicidal" and is admitted for the purpose of preventing self-harm, the hospital assumes a duty to use reasonable care in preventing the patient from engaging in self-harm); **Westin Operator, LLC v. Groh**, 2015 CO 25, ¶ 51, 347 P.3d 606 (hotels have a duty to evict patrons in a reasonable manner); **S K Peightal Eng'rs, LTD v. Mid Valley Real Estate Sols. V, LLC**, 2015 CO 7, ¶¶ 24-26, 342 P.3d 868 (construction professionals do not have independent tort duty to commercial property owner who acquired defective house through deed in lieu of foreclosure when construction contract documents define the relevant duties of the construction professionals and contractors); **Ryder v. Mitchell**, 54 P.3d 885 (Colo. 2002) (child therapist owed no duty to mother of children with respect to letter sent by therapist to the children's father and new therapist opining that mother was alienating children from father); **HealthONE v. Rodriguez ex rel. Rodriguez**, 50 P.3d 879 (Colo. 2002) (anesthesiologist owed duty of care to plaintiff with respect to drug inadvertently left on cart and subsequently given to plaintiff by another physician, even though there was no physician/patient relationship between anesthesiologist and plaintiff); **Martinez v. Lewis**, 969 P.2d 213 (Colo. 1998) (physician retained by insurer to conduct medical examination of insured owed no duty of care to insured to use reasonable care in preparing and making report to insurer regarding insured's medical condition); **Davenport v. Cmty. Corr. of the Pikes Peak Region, Inc.**, 962 P.2d 963 (Colo. 1998) (no duty of administrator of private halfway house to protect plaintiff from dangerous behavior of halfway-house resident); **Trailside Townhome Ass'n v. Acierno**, 880 P.2d 1197 (Colo. 1994) (duty of townhome association to townhome owners who make use of common areas in townhome complex); **Bath Excavating & Constr. Co. v. Wills**, 847 P.2d 1141 (Colo. 1993) (duty of excavation company to city employee injured while attempting to plug leak in water line severed by excavation company); **Greenberg v. Perkins**, 845 P.2d 530 (Colo. 1993) (duty of physician retained by defendant in personal injury

action to use due care in subjecting plaintiff to medical tests); **Mile Hi Concrete, Inc. v. Matz**, 842 P.2d 198 (Colo. 1992) (duty of concrete manufacturer to warn user of the dangers of continued exposure to wet concrete); **Connes v. Molalla Transp. Sys., Inc.**, 831 P.2d 1316 (Colo. 1992) (no duty of employer of long-haul truck driver with criminal record to woman sexually assaulted by driver); **Peterson v. Halsted**, 829 P.2d 373 (Colo. 1992) (no duty of father who co-signed loan on automobile purchased by emancipated daughter to victims of collision that resulted from daughter's driving automobile while intoxicated nearly three years after automobile was purchased); **Casebolt v. Cowan**, 829 P.2d 352 (Colo. 1992) (duty of employer under negligent entrustment theory to employee who was killed as a result of driving an automobile borrowed from employer when employee was intoxicated); **Observatory Corp. v. Daly**, 780 P.2d 462 (Colo. 1989) (duty of tavern owner to prevent injury to patrons); **Perreira v. State**, 768 P.2d 1198 (Colo. 1989) (duty of staff psychiatrist at mental health facility to victim assaulted by patient released by psychiatrist); **Bittle v. Brunetti**, 750 P.2d 49 (Colo. 1988) (no duty of commercial property owners to pedestrian injured on abutting public sidewalk); **Univ. of Denver v. Whitlock**, 744 P.2d 54 (Colo. 1987) (no duty on part of university to prevent student from being injured in trampoline accident at fraternity house); **Taco Bell, Inc. v. Lannon**, 744 P.2d 43 (Colo. 1987) (duty of fast food restaurant to protect patrons from criminal acts of unknown third parties).

3. The Colorado Court of Appeals has also discussed the scope and existence of a legal duty. *See Lopez v. Trujillo*, 2016 COA 53, ¶¶ 15-31, 399 P.3d 750 (homeowner who kept dog in a fenced yard did not owe duty to protect pedestrians on sidewalk adjacent from the yard from being frightened by homeowner's dog, analyzing cases from multiple jurisdictions), *aff'd sub nom. N.M. v. Trujillo*, 2017 CO 79, 397 P.3d 370; **Laughman v. Girtakovskis**, 2015 COA 143, ¶ 14, 374 P.3d 504 (co-participants in a martial arts sparring activity, an inherently dangerous sport, do not owe each other a duty of ordinary care that would support a negligence claim where the conduct at issue was within the realm of conduct anticipated in the sport); **Beasley v. Best Car Buys, LTD**, 2015 COA 145, ¶ 14, 363 P.3d 777 (car vendor has no duty to inquire into a buyer's driving history or to investigate the status of his license, particularly when that vendor has no reason to believe that the purchaser has dangerous driving habits); **Bedee v. Am. Med. Response of Colo.**, 2015 COA 128, ¶ 30, 361 P.3d 1083 (ambulance driver owes passenger ordinary duty of care, not heightened duty for activity involving increased risk of injury, where ambulance was traveling at normal speeds in a nonemergency situation and the passenger was wearing a seat belt); **Boulders at Escalante LLC v. Otten Johnson Robinson Neff & Ragonetti PC**, 2015 COA 85, ¶ 58 (law firm owed developer client a duty to render competent advice on insurance coverage issue); **In re Estate of Gattis**, 2013 COA 145, ¶ 17, 318 P.3d 549 (home sellers have independent duty to disclose latent but known defects to home buyers); **Collard v. Vista Paving Corp.**, 2012 COA 208, ¶ 61, 292 P.3d 1232 (When a road contractor finishes contracted work and then leaves the site in a dangerous condition as a result of that work, the contractor has an independent duty for a reasonable period of time either to eliminate the dangerous condition or warn of its existence; however, no such duty exists if the contractor has a good-faith reasonable belief that, after the contractor completed its work, another party would properly take the necessary measures to eliminate the danger or provide adequate warnings to foreseeable users.); **Draper v. DeFrenchi-Gordineer**, 282 P.3d 489 (Colo. App. 2011) (negligent entrustment); **J.C. v. Dungarvin Colo., LLC**, 252 P.3d 41 (Colo. App. 2010) (providers of services to the developmentally disabled owe no affirmative duty to third parties to

warn of dangerous tendencies unless the individual communicated a serious and credible threat against a specific person or a federal or state law or regulation imposes a duty of care under sections 13-21-117.5(4), (6), C.R.S.); **Barfield v. Hall Realty, Inc.**, 232 P.3d 286 (Colo. App. 2010) (“transaction broker” has no duty to investigate property and cannot be liable for negligent misrepresentation without actual knowledge); **Apodaca v. Allstate Ins. Co.**, 232 P.3d 253 (Colo. App. 2009) (insurance agent has no duty to insured beyond acting reasonably to procure the insurance requested by the insured or to notify the insured of the inability or failure to do so), *aff’d on other grounds*, 255 P.3d 1099 (Colo. 2011); **Hamon Contractors, Inc. v. Carter & Burgess, Inc.**, 229 P.3d 282 (Colo. App. 2009) (because the alleged tortious conduct was nonfeasance and no special relationship existed, contractor had no duty to inform project administrator of design flaws during bidding process); **W. Innovations, Inc. v. Sonitrol Corp.**, 187 P.3d 1155 (Colo. App. 2008) (no duty of security company to notify customer whose security alarm was not going off that security system of its neighbor, also a customer, was sounding an alarm); **Montoya v. Connolly’s Towing, Inc.**, 216 P.3d 98 (Colo. App. 2008) (duty of tow yard to disclose to non-employee towing a car it stored that its premises safety rules were not uniformly enforced); **Wark v. McClellan**, 68 P.3d 574 (Colo. App. 2003) (no duty of parents, who were passengers with their children in a car driven by another, to protect children by protesting driver’s actions or intervening in driver’s control of vehicle); **E. Meadows Co. v. Greeley Irrigation Co.**, 66 P.3d 214 (Colo. App. 2003) (discussing duty imposed by section 7-42-108, C.R.S., on ditch owners to maintain ditches to prevent water from escaping and injuring property of others); **Command Commc’ns, Inc. v. Fritz Cos.**, 36 P.3d 182 (Colo. App. 2001) (custom brokers had no duty continuously to research rulings on products similar to those imported by their customers); **Cooper v. United States Ski Ass’n**, 32 P.3d 502 (Colo. App. 2000) (ski company owed no duty to skier to supervise skiing instruction of ski club that used ski company facilities but was not associated with the ski company in any way), *rev’d on other grounds*, 48 P.3d 1229 (Colo. 2002); **Lewis v. Emil Clayton Plumbing Co.**, 25 P.3d 1254 (Colo. App. 2000) (plumbing contractor, hired to replace water heater, had no duty to inspect or warn occupants of home of danger posed by defective gas stove); **Weil v. First Nat’l Bank of Castle Rock**, 983 P.2d 812 (Colo. App. 1999) (bank had no duty to inquire into customer’s authority to open checking account under unregistered trade name); **Solano v. Goff**, 985 P.2d 53 (Colo. App. 1999) (county sheriff had no duty to protect murder victim from inmate who escaped from county jail); **Campbell v. Burt Toyota-Daihatsu, Inc.**, 983 P.2d 95 (Colo. App. 1998) (no duty of automobile repair shop to warn motorist of danger resulting from modification of seatbelt by motorist’s wife); **Snow v. Birt**, 968 P.2d 177 (Colo. App. 1998) (duty of grandparents to protect grandchild from being bitten by father’s dog); **Molosz v. Hohertz**, 957 P.2d 1049 (Colo. App. 1998) (no duty of landlords to protect neighbors from tenant’s harmful conduct even though landlords knew of tenant’s criminal record and violent propensities); **Bailey v. Huggins Diagnostic & Rehab. Ctr., Inc.**, 952 P.2d 768 (Colo. App. 1997) (dentist, who allegedly made false representations in book and on television program regarding effect of “dental amalgams” on health of dental patients, had no duty to plaintiff as member of general public); **Keith v. Valdez**, 934 P.2d 897 (Colo. App. 1997) (duty of employer of intoxicated motorist, who was driving employer’s van without employer’s permission, to driver of another vehicle involved in a collision with employer’s van); **Frisone v. Deane Auto. Ctr., Inc.**, 942 P.2d 1215 (Colo. App. 1996) (no duty of automotive center to buyer of used car where center serviced car for previous owner).

4. Earlier decisions by the Colorado Court of Appeals also include discussions of the scope and existence of a legal duty. *See* **Hall v. McBryde**, 919 P.2d 910 (Colo. App. 1996) (duty of parent to neighbor injured by child with parent's gun); **Glover v. Southard**, 894 P.2d 21 (Colo. App. 1994) (attorney who drafted will and trust owed no duty to intended beneficiaries of will and trust); **Jacque v. Pub. Serv. Co. of Colo.**, 890 P.2d 138 (Colo. App. 1994), (no duty of public utility company to passenger in car who was injured when car struck company's utility pole ten feet from paved portion of highway); **Cooley v. Paraho Dev. Corp.**, 851 P.2d 207 (Colo. App. 1992) (duty of lessee of housing development to tenants to maintain private roadway in safe condition), *aff'd on other grounds sub nom. Gen. Elec. Co. v. Niemet*, 866 P.2d 1361 (Colo. 1994); **Tolman v. CenCor Career Colls., Inc.**, 851 P.2d 203 (Colo. App. 1992) (no duty of private educational corporation to students with respect to quality of education, i.e., no educational malpractice), *aff'd on other grounds*, 868 P.2d 396 (Colo. 1994); **Auxier v. Auxier**, 843 P.2d 93 (Colo. App. 1992) (duty of construction company to provide reasonably safe workplace for nonemployee construction worker), *overruled on other grounds by Scott v. Matlack, Inc.*, 39 P.3d 1160 (Colo. 2002); **Sewell v. Pub. Serv. Co. of Colo.**, 832 P.2d 994 (Colo. App. 1991) (where, in wrongful death action against public utility, material issues of fact existed as to whether accident was reasonably foreseeable, the trial court erred in granting utility's motion for summary judgment on basis that utility owed no duty of care to airplane passenger who died when airplane crashed into utility's unmarked power lines); **Hines v. Denver & Rio Grande W. R.R.**, 829 P.2d 419 (Colo. App. 1991) (no duty of railroad to wife of victim killed by train properly to investigate accident); **Lego v. Schmidt**, 805 P.2d 1119 (Colo. App. 1990) (no duty of automobile passenger to pedestrian injured by automobile to warn driver of automobile of impending danger); **Broderick Inv. Co. v. Strand Nordstrom Stailey Parker, Inc.**, 794 P.2d 264 (Colo. App. 1990) (no duty of insurance agency under an "assumed" duty theory to notify third party of change in insured's liability coverage where insurance agency had previously furnished third party with a certificate verifying insured's liability coverage); **Halter v. Waco Scaffolding & Equip. Co.**, 797 P.2d 790 (Colo. App. 1990) (material issues of fact existed as to whether suppliers of scaffolding and wind clips had duty to warn users of dangers of wrapping scaffolding in protective plastic); **Wheatridge Lumber Co. v. Valley Water Dist.**, 790 P.2d 874 (Colo. App. 1989) (material issues of fact existed with respect to whether water district under an "assumed" duty theory had duty to lumber yard company damaged by fire to have water available at fire hydrant); **May Dep't Stores Co. v. Univ. Hills, Inc.**, 789 P.2d 434 (Colo. App. 1989) (no duty of department store under "assumed" duty theory to existing or future tenants for defects in construction of enclosed mall where department store's lease contained plan approval and consent clauses with respect to alterations in mall); **Felger v. Larimer Cty. Bd. of Cty. Comm'rs**, 776 P.2d 1169 (Colo. App. 1989) (duty of sheriff to protect person in custody from injury by third persons); **Allen v. Ramada Inn, Inc.**, 778 P.2d 291 (Colo. App. 1989) (duty of motel owner to protect guest from injury by third persons); **Hilberg v. F.W. Woolworth Co.**, 761 P.2d 236 (Colo. App. 1988) (no duty under negligent entrustment theory on part of either manufacturer or retailer of rifle to minor child who was accidentally shot by the minor child of the purchaser of the rifle), *overruled on other grounds by Casebolt v. Cowan*, 829 P.2d 352, 360 (Colo. 1992) (overruling **Hilberg** to the extent that it "suggest[s] that subsequent ability to control the user of the chattel or the manner in which the chattel is used represent[ ] an essential element of the negligent entrustment theory"); **Leppke v. Segura**, 632 P.2d 1057 (Colo. App. 1981) (duty of defendants who jump-started car of

intoxicated person to persons who were injured when involved in automobile collision with intoxicated person).

5. An employer may not recover damages for economic losses incurred as a result of physical injuries to an employee that were caused by the tortious conduct of a third party. **Gonzalez v. Yancey**, 939 P.2d 525 (Colo. App. 1997).

### **Negligent Hiring and Supervision**

6. Colorado recognizes the torts of negligent hiring and negligent supervision. *See* **Raleigh v. Performance Plumbing & Heating, Inc.**, 130 P.3d 1011 (Colo. 2006) (discussing liability for negligent hiring); **Keller v. Koca**, 111 P.3d 445 (Colo. 2005) (employer owed no duty to 12-year-old girl sexually assaulted by employee on business premises on day business was closed as risk was unforeseeable); **Moses v. Diocese of Colo.**, 863 P.2d 310 (Colo. 1993); **Semler v. Hellerstein**, 2016 COA 143, ¶¶ 42-45 (affirming dismissal of negligent supervision claim where plaintiff failed to allege tortious conduct of employee); **Settle v. Basinger**, 2013 COA 18, ¶ 29 (emergency room physician who treated plaintiff and ordered his transfer by air ambulance to another hospital owed no duty to supervise air ambulance nurses who attempted to intubate plaintiff during flight where physician had no reason to know that the nurses were likely to harm others); **Kahland v. Villarreal**, 155 P.3d 491 (Colo. App. 2006); **Winkler v. Rocky Mountain Conference of United Methodist Church**, 923 P.2d 152 (Colo. App. 1995); **DeBose v. Bear Valley Church of Christ**, 890 P.2d 214 (Colo. App. 1994), *rev'd on other grounds*, 928 P.2d 1315 (Colo. 1996); **Biel v. Alcott**, 876 P.2d 60 (Colo. App. 1993); *see also* **Loveland ex rel. Loveland v. St. Vrain Valley Sch. Dist. RE-1J**, 2012 COA 112, ¶¶ 29-33, 328 P.3d 228 (negligent supervision claim against school district on behalf of child injured on school playground apparatus barred by Colorado Governmental Immunity Act), *aff'd on other grounds sub nom. St. Vrain Valley Sch. Dist. RE-1J v. A.R.L.*, 2014 CO 33, 325 P.3d 1014; **Williams v. Cont'l Airlines, Inc.**, 943 P.2d 10 (Colo. App. 1996) (rejecting employee's tort claim against employer and supervisor for "negligent investigation" where employee accused of sexual assault by another employee sought to recover noneconomic damages for injury to reputation and for mental and emotional suffering).

7. Where a plaintiff seeks to recover against an employer for the negligence of an employee under both negligence and vicarious liability (e.g., respondeat superior) theories, the employer's acknowledgement of vicarious liability for the employee's negligence bars the plaintiff from recovering against the employer on a direct negligence claim, such as negligent hiring, supervision, retention, and entrustment. **Ferrer v. Okbamicael**, 2017 CO 14M, ¶¶ 19, 58, 390 P.3d 836 (adopting the rule announced in **McHaffie v. Bunch**, 891 S.W.2d 822 (Mo. 1995)). This rule does not apply when the plaintiff's injuries are not caused by the employee's negligence, such as when the employer's own negligence caused the injuries. *Id.* at ¶ 34.

### **Negligent Entrustment**

8. For a discussion of the doctrine of "negligent entrustment," see **Casebolt**, 829 P.2d at 355-62, where the court affirmed that the doctrine of negligent entrustment is part of the law of negligence in Colorado and ruled that under this doctrine, a wife whose husband died as a result of driving an automobile while intoxicated could bring a wrongful death action against her husband's employer who had loaned the automobile to the decedent. The court further ruled that evidence that the decedent's employer knew or had reason to know that the decedent was likely

to drive the automobile while intoxicated precluded the entry of summary judgment in favor of the employer. *Id.* at 362. In so ruling, the court overruled **Hilberg**, 761 P.2d at 238, and **Hasegawa v. Day**, 684 P.2d 936 (Colo. App. 1983), to the extent that these cases held that an essential element of negligent entrustment was that the entrustor had the ability to control the trustee or the trustee's use of the chattel supplied by the entrustor at the time the negligence of the trustee resulted in injury. The court also held that an trustee can recover for physical harm to himself or herself that results from a negligent entrustment, and that comparative negligence provides the appropriate framework for examining any negligence on the part of the trustee, including the negligence of a borrower of an automobile who drives the automobile while intoxicated. **Casebolt**, 829 P.2d at 360-61. Other Colorado cases discuss the doctrine of negligent entrustment. See **Ferrer**, 2017 CO 14M, ¶¶ 19, 58 (holding that where an employer acknowledges vicarious liability for its employee's negligence, a plaintiff's direct negligence claims against the employer — such as negligent entrustment — are barred); **Peterson**, 829 P.2d at 377; **Beasley**, 2015 COA 145, ¶¶ 8-28; **Draper**, 282 P.3d at 498-99; **Kahland**, 155 P.3d at 493; **Connes v. Molalla Transp. Sys., Inc.**, 817 P.2d 567 (Colo. App. 1991), *aff'd on other grounds*, 831 P.2d 1316 (Colo. 1992); **Lahey v. Benjou**, 759 P.2d 855 (Colo. App. 1988); **Hilberg**, 761 P.2d at 238-39; **Butcher v. Cordova**, 728 P.2d 388 (Colo. App. 1986); **Hasegawa**, 684 P.2d 936; see also **Mid-Century Ins. Co. v. Heritage Drug, Ltd.**, 3 P.3d 461 (Colo. App. 1999) (claim for negligent entrustment not based on vicarious liability); **Liebelt v. Bob Penkhus Volvo-Mazda, Inc.**, 961 P.2d 1147 (Colo. App. 1998) (automobile dealer did not negligently entrust vehicle to uninsured motorist); **Payberg v. Harris**, 931 P.2d 544 (Colo. App. 1996) (bailee cannot be held liable under negligent entrustment theory for returning bailed property to bailor).

### **Legislative Duty**

9. For a discussion as to when a negligence claim against a governmental entity can be predicated on a duty arising from a legislative enactment, see **State v. Moldovan**, 842 P.2d 220 (Colo. 1992); **Board of County Commissioners v. Moreland**, 764 P.2d 812 (Colo. 1988); **Jefferson County School District R-1 v. Justus**, 725 P.2d 767 (Colo. 1986); and **Easton v. 1738 Partnership**, 854 P.2d 1362 (Colo. App. 1993). See also § 24-10-106.5, C.R.S. (providing that the adoption of a policy or regulation to protect any person's health or safety shall not give rise to a duty of care on the part of a public entity or public employee where none otherwise existed); **Zapp v. Kukuris**, 847 P.2d 150 (Colo. App. 1992) (duty of police officers to victim struck by stolen car during high speed police chase).

### **Expert Testimony**

10. Generally, where the defendant is held to a standard of care beyond the common knowledge and experience of ordinary persons, expert testimony is required to prove breach of a legal duty. **Gerrity Oil & Gas Corp. v. Magness**, 946 P.2d 913 (Colo. 1997); see also **Dunn v. Am. Family Ins.**, 251 P.3d 1232 (Colo. App. 2010); **Hice v. Lott**, 223 P.3d 139 (Colo. App. 2009); **Calvaresi v. Nat'l Dev. Co.**, 772 P.2d 640 (Colo. App. 1988).

### **Construction and Improvements to Real Property**

11. In **Hildebrand v. New Vista Homes II, LLC**, 252 P.3d 1159 (Colo. App. 2010), the court held that a builder has a duty to use reasonable care and skill in constructing a home, and the failure to do so constitutes negligence. See also **Cosmopolitan Homes, Inc. v. Weller**, 663 P.2d 1041 (Colo. 1983) (a subsequent purchaser of a home foreseeably suffers personal injury as

a result of a builder's negligence and thus may state a claim for negligence against the builder). However, in **S K Peightal Engineers, LTD**, 2015 CO 7, ¶¶ 18-25, the court held that a commercial entity that acquires a home through a deed in lieu of foreclosure is not a "subsequent" purchaser or homeowner to whom an independent duty of care is owed under **Cosmopolitan Homes**, 663 P.2d at 1044-45.

12. For special pleading and other requirements and limitations in actions or arbitration proceedings against construction professionals "claiming damages, indemnity, or contribution in connection with alleged construction defects, resulting in property loss or damage," see sections 13-20-801 through 13-20-808, C.R.S. (Construction Defect Action Reform Act or "CDARA"). With respect to claims based on negligence, see section 13-20-804, relating to the effect of "substantial compliance with an applicable building code or industry standard." CDARA was originally enacted in 2001, but was amended in 2003 and 2007, with the amendments being applicable to actions filed on or after their effective dates. In May 2010, a new section addressing insurance coverage for construction defect claims was added. *See* § 13-20-808.

13. "An improvement to real property is commonly understood as '[a]n addition to real property, whether permanent or not; esp[ecially] one that increases its value or utility or that enhances its appearance.'" **Barron v. Kerr-McGee Rocky Mtn. Corp.**, 181 P.3d 348, 350 (Colo. App. 2007) (quoting Black's Law Dictionary 773 (8th ed. 2004), and discussing workers' compensation immunity for one contracting out work on "improvements"). Under particular facts involving a general contractor's claims against two subcontractors who had worked on the final building in a multi-phase project, an improvement may be a discrete component of an entire project, such as one of multiple residential buildings constructed in a project. **Shaw Constr., LLC v. United Builder Servs., Inc.**, 2012 COA 24, ¶ 38, 296 P.3d 145. The Committee takes no position regarding application of this case to a developer, builder, or other person responsible for the construction or development of a multi-family development as a whole.

14. A construction professional "can be liable for negligence if it fails to follow the recommendations of its independent contractors." **Hildebrand**, 252 P.3d at 1165.

15. A construction professional's employee may be personally liable for the construction professional's negligent conduct if that employee "approved of, directed, actively participated in, or cooperated in" the conduct. *Id.* at 1166; *accord* **Hoang v. Arbess**, 80 P.3d 863 (Colo. App. 2003).

16. Negligence claims arising out of construction defects are not limited by contractual privity. **Forest City Stapleton Inc. v. Rogers**, 2017 CO 23, ¶ 13, 393 P.3d 487. Rather, foreseeability of harm defines the scope of tort liability. *Id.*

### **Imputed Negligence**

17. The negligence or contributory negligence of a parent, as a parent, is not imputable to his or her children. **Pub. Serv. Co. of Colo. v. Petty**, 75 Colo. 454, 226 P. 297 (1924) (citing **Denver City Tramway Co. v. Brown**, 57 Colo. 484, 143 P. 364 (1914)); *see also* **Paris ex rel. Paris v. Dance**, 194 P.3d 404 (Colo. App. 2008); **Fletcher v. Porter**, 754 P.2d 788 (Colo. App. 1988). Similarly, in the absence of some other basis, such as master and servant, the contributory negligence of one parent or a spouse will not be imputed to the other parent so as to bar or reduce



whatever claim the other parent may have for injuries to the child. See **Phillips v. Denver City Tramway Co.**, 53 Colo. 458, 128 P. 460 (1912).

### Exculpatory Releases

18. Exculpatory releases executed by parents on behalf of minor children have been enforced in Colorado. Compare **Hamill v. Cheley Colo. Camps, Inc.**, 262 P.3d 945 (Colo. App. 2011) (enforcing release of minor's claims for negligence signed by mother because release adequately disclosed extent of potential injuries, was clear and unambiguous, and was fairly entered into by mother), with **Wycoff v. Grace Cmty. Church of Assemblies of God**, 251 P.3d 1260, 1264 (Colo. App. 2010) (declining to enforce release because decision was not voluntary and informed but noting that "parents have a fundamental right to make decisions on behalf of their children, including deciding whether the children should participate in risky activities" (citing § 13-22-107(1)(a)(I)-(V), C.R.S.)).

### Statutory Defenses

19. For the circumstances in which a person may not be entitled to recover damages sustained while engaged in the commission of, or during immediate flight from, an act constituting a felony, see section 13-80-119, C.R.S. (formerly section 13-80-129, C.R.S.); and **Molnar v. Law**, 776 P.2d 1156 (Colo. App. 1989). Other statutes create defenses to negligence claims or limit potential liability for negligence or the amount of recoverable damages. See, e.g., § 11-58-107, C.R.S. (issuer or public employee of issuer for information or omission in annual report concerning a nonrated public security); § 12-47-801, C.R.S. (sale, service, or provision of alcoholic beverages to an intoxicated person) (the constitutionality of the predecessor to former 12-47-801 was upheld in **Charlton v. Kimata**, 815 P.2d 946 (Colo. 1991), and the statute was interpreted in **Build It & They Will Drink, Inc. v. Strauch**, 253 P.3d 302 (Colo. 2011), and **Rojas v. Engineered Plastic Designs, Inc.**, 68 P.3d 591 (Colo. App. 2003)); § 13-21-108, C.R.S. (immunizing various providers of emergency assistance); § 13-21-108.1, C.R.S. (persons involved in providing emergency assistance using automated external defibrillators); § 13-21-108.2, C.R.S. (providers rendering emergency assistance to person injured while engaged in competitive sports); § 13-21-108.3, C.R.S. (architects, professional engineers, professional land surveyors, and building code officials rendering assistance during declared disaster emergency); § 13-21-108.5, C.R.S. (persons rendering assistance relating to discharges of hazardous materials); § 13-21-108.7, C.R.S. (persons rendering emergency assistance through the administration of an opiate antagonist); § 13-21-113(1), C.R.S. (suppliers donating food to nonprofit organizations for use of poor persons); § 13-21-113.3, C.R.S. (fire departments and other persons or entities donating equipment); § 13-21-115.5, C.R.S. (volunteers, including physicians, acting for a nonprofit organization or corporation or a hospital) ("Volunteer Services Act" was interpreted in **Rieger v. Wat Buddhawararam of Denver, Inc.**, 2013 COA 156, ¶¶ 14-37, 338 P.3d 404); § 13-21-115.6, C.R.S. (liability of school crossing guards limited to willful and wanton conduct when acting within official functions and duties); § 13-21-116(2)(b), C.R.S. (members of boards of directors of nonprofit corporations); § 13-21-116(2.5)(a), C.R.S. (volunteers assisting organizations for young persons); § 13-21-117, C.R.S. (liability of physicians, social workers, and other persons or institutions providing mental health care) (statute interpreted in **Marcellot v. Exempla, Inc.**, 2012 COA 200, ¶¶ 18-31, 317 P.3d 1275); § 13-21-117.5, C.R.S. (providers of service or support to persons with developmental disabilities) (statute interpreted in **McLaughlin v. Oxley**, 2012 COA 114, ¶¶ 11-18, 297 P.3d 1007); § 13-21-117.7, C.R.S. (limited immunity from liability of foster care provider for acts or omissions of

foster child in provider’s care); § 13-21-119, C.R.S. (participants engaged in equine and llama activities) (statute interpreted in **Clyncke v. Waneka**, 157 P.3d 1072 (Colo. 2007), and **Culver v. Samuels**, 37 P.3d 535 (Colo. App. 2001)); § 13-21-121 C.R.S. (persons engaged in providing agricultural recreational activities); § 14-10-128.1(7), C.R.S. (parenting time coordinator); § 18-1-704.5(1), (2), (4), C.R.S. (defense of use of physical force, including deadly physical force, against an intruder of a dwelling) (applicability in civil cases never decided); § 24-10-105, C.R.S. (public employees); § 24-10-106.5, C.R.S. (public officials adopting a policy or regulation or conducting an inspection); § 24-10-118(2), C.R.S. (public employees); § 24-33.5-1505, C.R.S. (public agencies or entities and persons engaged in “emergency planning, service, or response activities regarding a hazardous material release, threat of release, or act of terrorism”); § 37-87-104, C.R.S. (liability of one who owns, controls, or operates a water storage reservoir); § 37-87-115, C.R.S. (immunity of state engineer and staff); § 38-33.3-303(2)(b), C.R.S. (homeowners association executive board members and officers not appointed by declarant are not liable for acts or omissions undertaken as part of their duties, except for willful and wanton acts or omissions) (statute interpreted in **McShane v. Stirling Ranch Prop. Owners Ass’n**, 2015 COA 48, ¶ 18, *rev’d on other grounds*, 2017 CO 38, 393 P.3d 978); § 42-2-112(3), C.R.S. (physician or optometrist giving certain opinions concerning the competence of others to operate motor vehicles) (formerly § 42-2-110.5(3), C.R.S.); *see also* 42 U.S.C.A. §§ 14501-05 (volunteers for nonprofit organizations and governmental entities).

20. Notwithstanding the provisions of the comparative negligence statute, § 13-21-111, C.R.S., and the pro rata liability statute, § 13-21-111.5, C.R.S., the assumption of “inherent risks” by a spectator of a professional baseball game may be a complete defense against liability in an action for injuries by a spectator against an owner of a professional baseball team or stadium. *See* § 13-21-120, C.R.S.

21. For a discussion of the impact of the Colorado Ski Safety Act of 1979, §§ 33-44-101, *et seq.*, C.R.S., on the liability of ski area operators for injuries sustained in skiing accidents, see **Fleury v. IntraWest Winter Park Operations Corp.**, 2016 CO 41, ¶¶ 12-17, 372 P.3d 349; **Stamp v. Vail Corp.**, 172 P.3d 437 (Colo. 2007); **Graven v. Vail Associates, Inc.**, 909 P.2d 514 (Colo. 1995); **Anderson v. Vail Corp.**, 251 P.3d 1125 (Colo. App. 2010); **Ciocian v. Vail Corp.**, 251 P.3d 1130 (Colo. App. 2010); and **Cooper**, 32 P.3d at 509.

### **Immunities**

22. Of the immunities from liability for ordinary negligence accorded by various statutes, the broadest appears to be that accorded by section 13-21-116(2)(a), C.R.S., the “Good Samaritan” Act. Under that section, some limited immunity is now accorded to all good Samaritans when the person “performs a service or act of assistance, without compensation or expectation of compensation, for the benefit of another person, or adopts or enforces a policy or a regulation to protect another person’s health or safety.” In cases in which this statute may be applicable, this instruction and the definitional instructions accompanying it must be appropriately modified.

23. For cases discussing the common-law doctrine of official immunity that may relieve a public official from personal liability for negligence when making certain decisions, see **State v. Mason**, 724 P.2d 1289 (Colo. 1986) (absolute quasi-judicial immunity of parole board members); and **Leake v. Cain**, 720 P.2d 152 (Colo. 1986) (immunity of police officers when

making “discretionary” decisions). *See also* **Whitcomb v. City & Cty. of Denver**, 731 P.2d 749 (Colo. App. 1986). If a public official is not personally liable because of the doctrine of official immunity, then neither is the employing governmental entity. §§ 24-10-105 and 24-10-106(2) and (3), C.R.S.; **Ceja v. Lemire**, 154 P.3d 1064 (Colo. 2007); **Mason**, 724 P.2d at 1292; *see also* **Moreland**, 764 P.2d at 818 (Colo. 1988) (county not liable for alleged negligence of employee in not enforcing building code because “before a private civil liability remedy will be recognized for injuries resulting from a breach of obligations legislatively imposed on a governmental entity and unknown at common law, a clear expression of legislative intent must be found”).

24. For a discussion of the applicability and effect of the parental immunity doctrine, see **Terror Mining Co. v. Roter**, 866 P.2d 929 (Colo. 1994) (for willful and wanton misconduct exception to the parental immunity doctrine to apply, conduct must be purposeful and committed without regard to child’s safety). *See also* **Schlessinger v. Schlessinger**, 796 P.2d 1385 (Colo. 1990).

### **Fireman’s Rule**

25. For a discussion of the “fireman’s rule,” which provides that a firefighter or police officer may not recover in tort for injuries caused by the negligent conduct of others, see **Bath Excavating & Construction Co.**, 847 P.2d at 1143-47 (noting that fireman’s rule has not been expressly accepted or rejected in Colorado). *See also* **Banyai v. Arruda**, 799 P.2d 441 (Colo. App. 1990) (rejecting rule); **Rhea v. Green**, 29 Colo. App. 19, 476 P.2d 760 (1970) (rejecting rule by implication). *But see* **Lunt v. Post Printing & Publ’g Co.**, 48 Colo. 316, 110 P. 203 (1910) (classifying firefighter as a licensee and precluding recovery to the firefighter because landowner did not owe duty to licensee to warn of hidden dangers).

**9:2 NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS — ELEMENTS OF LIABILITY**

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

- 1. The defendant was negligent;**
- 2. The defendant’s negligence created an unreasonable risk of physical harm to the plaintiff;**
- 3. The defendant’s negligence caused the plaintiff to be put in fear for (his) (her) own safety and such fear was shown by physical consequences or long continued emotional disturbance, rather than only momentary fright, shock, or other similar and immediate emotional distress; and**
- 4. The plaintiff’s fear caused (him) (her) (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) 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 used when the plaintiff is claiming damages for fear of his or her own safety and for the consequential damages (physical and mental) caused by such fright, rather than damages resulting from an “impact” caused by the defendant’s negligence. When the plaintiff is claiming damages for intentional infliction of emotional distress by extreme and outrageous conduct, see Chapter 23, and for assault, see Part A of Chapter 20.

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

3. Use whichever parenthesized words are most appropriate and omit the last two paragraphs if the defendant has put no affirmative defense in issue or there is insufficient evidence to support any defense.

4. Whenever the defense of contributory negligence has been properly raised, the numbered paragraphs of this instruction should be substituted for the numbered paragraphs in Instruction 9:22 and that Instruction should then be used in accord with its Notes on Use.

5. Whenever this instruction is given, the appropriate instruction or instructions relating to causation must also be given, *see* Instructions 9:18 to 9:21, as well as other appropriate instructions defining the terms used in this instruction, e.g., Instruction 9:6 (defining “negligence”).

6. This instruction should not be used when liability has been admitted, *see* Instruction 2:4, or when the court has directed a verdict as to liability, *see* Instruction 2:6.

7. 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.

### Source and Authority

1. This instruction is supported by **Towns v. Anderson**, 195 Colo. 517, 579 P.2d 1163 (1978); **Wark v. McClellan**, 68 P.3d 574 (Colo. App. 2003) (to establish prima facie case of negligent infliction of emotional distress, plaintiff must first show that defendant was negligent); **Slovak v. Board of County Commissioners**, 697 P.2d 781 (Colo. App. 1984) (though physical impact is not required, to recover damages for negligent infliction of emotional distress, plaintiff must have been subjected to a risk of bodily harm from such negligence), *aff'd*, 723 P.2d 1309 (Colo. 1986); and **Mathews v. Lomas & Nettleton Co.**, 754 P.2d 791 (Colo. App. 1988) (proof of risk of bodily harm required). *See also* **Webster v. Boone**, 992 P.2d 1183 (Colo. App. 1999) (no recovery for emotional distress on negligence claim in the absence of fraud, malice or other willful and wanton conduct or the creation of an unreasonable risk of bodily harm); **Colwell v. Mentzer Invs., Inc.**, 973 P.2d 631 (Colo. App. 1998) (no recovery unless plaintiff subjected to unreasonable risk of bodily harm); **Scharrel v. Wal-Mart Stores, Inc.**, 949 P.2d 89 (Colo. App. 1997); **Card v. Blakeslee**, 937 P.2d 846 (Colo. App. 1996) (to recover on claim of negligent infliction of emotional distress, plaintiff must be subject to a direct threat of harm or an unreasonable risk of bodily injury); **Kimelman v. City of Colo. Springs**, 775 P.2d 51 (Colo. App. 1988) (no recovery for emotional distress caused by negligent handling of a dead body when plaintiff not personally subjected to a risk of physical harm). *But see* **Montoya v. Bebensee**, 761 P.2d 285 (Colo. App. 1988) (reversing the trial court’s dismissal of a claim for negligent infliction of emotional distress without discussing the requirement that the plaintiff have been subjected to a risk of physical harm).

2. A parent who is not personally subjected to an unreasonable risk of physical harm may not recover for emotional distress caused by witnessing the negligent infliction of physical harm on the parent’s child. **Millican v. Wolfe**, 701 P.2d 107 (Colo. App. 1985); *see also* **Hale v. Morris**, 725 P.2d 26 (Colo. App. 1986) (same, and, in addition, harm that child suffered did not occur in the parent’s presence).

3. 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 for negligent infliction of emotional distress. **Bigby v. Big 3 Supply Co.**, 937 P.2d 794 (Colo. App. 1996).

4. A claim of negligent infliction of emotional distress describes an independent tort injury suffered by the plaintiff directly; it is not derivative of a third person's personal injury claim. **Draper v. DeFrenchi-Gordineer**, 282 P.3d 489 (Colo. App. 2011) (husband suffering emotional distress after witnessing automobile accident in which wife was injured was able to maintain claim of negligent infliction of emotional distress against driver who caused the accident notwithstanding wife's settlement of her personal injury claim against driver).

**9:3 NEGLIGENT MISREPRESENTATION CAUSING PHYSICAL HARM —  
ELEMENTS OF LIABILITY**

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

- 1. The defendant negligently gave false information to the plaintiff;**
- 2. The plaintiff relied upon such information; and**
- 3. This reliance was a cause of physical harm to the (person) (property) of 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. This instruction should be used when the plaintiff is claiming damages for physical injury to the plaintiff's person or property caused by the plaintiff's or, with this instruction appropriately modified, a third person's reliance on information negligently provided by the defendant.

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

3. Use whichever parenthesized words are most appropriate and omit the last two paragraphs if the defendant has put no affirmative defense in issue or there is insufficient evidence to support any defense.

4. For the tort of negligent misrepresentation causing financial loss in a business transaction, see Instruction 9:4. Unlike that tort, the tort of negligent misrepresentation causing physical harm is not limited to persons whose business or profession is that of giving information dealing with the safety of others. Also, the defendant can be held liable for physical injuries caused by a negligent misrepresentation even though the false information was given on a purely

gratuitous basis. RESTATEMENT (SECOND) OF TORTS § 311 cmts. b–c (1965). Similarly, a defendant can be held liable under this instruction even though the plaintiff was not the person to whom the false information was communicated, nor was the person who was intended to rely on the information. *Id.* at cmt. f (incorporating by reference RESTATEMENT § 310 cmts. c–d). In these latter circumstances, this instruction must be appropriately modified.

5. The unreasonable reliance of the plaintiff on the misrepresentation of the defendant constitutes contributory negligence on which, because it is an affirmative defense, the defendant has the burdens of pleading and proof. Consequently, whenever the defense of contributory negligence has been properly raised in the form of unreasonable reliance or in any other form, the beginning unnumbered paragraph as well as the numbered paragraphs of this instruction should be substituted for the beginning unnumbered and numbered paragraphs in Instruction 9:22 and that Instruction should then be used in accord with its Notes on Use.

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

7. Whenever this instruction is given, the appropriate instruction or instructions relating to causation must also be given, *see* Instructions 9:18 to 9:21, as well as other appropriate instructions defining the terms used in this instruction, e.g., Instruction 9:6 (defining “negligence”).

8. This instruction should not be used when liability has been admitted, *see* Instruction 2:4, or when the court has directed a verdict as to liability, *see* Instruction 2:6.

### Source and Authority

1. This instruction is supported by **Bloskas v. Murray**, 646 P.2d 907 (Colo. 1982) (recognizing tort of negligent misrepresentation causing physical harm, as set out in RESTATEMENT (SECOND) OF TORTS § 311 (1965)); and **Greene v. Thomas**, 662 P.2d 491 (Colo. App. 1982) (insufficient evidence that any damages caused by reliance). *See also* Source and Authority to Instruction 9:1.

2. To recover on a claim for negligent misrepresentation, a plaintiff must show that the defendant owed the plaintiff a duty of care. **Bailey v. Huggins Diagnostic & Rehab. Ctr., Inc.**, 952 P.2d 768 (Colo. App. 1997) (dentist, who allegedly made false representations in book and on television program regarding effect of “dental amalgams” on health of dental patients, had no duty to plaintiff as member of general public).



**9:4 NEGLIGENT MISREPRESENTATION CAUSING FINANCIAL LOSS IN A BUSINESS TRANSACTION — ELEMENTS OF LIABILITY**

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

1. The defendant gave false information to the plaintiff;
2. The defendant gave such information to the plaintiff in the course of (the defendant's [business] [profession] [employment]) (a transaction in which the defendant had a financial interest);
3. The defendant gave the information to the plaintiff for the (guidance) (use) of the plaintiff in a business transaction;
4. The defendant was negligent in obtaining or communicating the information;
5. The defendant gave the information with the intent or knowing that (the plaintiff) (a limited group of persons of which the plaintiff was a member) would (act) (or) (decide not to act) in reliance on the information;
6. The plaintiff relied on the information supplied by the defendant; and
7. This reliance on the information supplied by the defendant caused 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 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. This instruction rather than Instruction 19:1 should be used when the plaintiff's claim is that, while the defendant may have had an honest belief in the truth of what the defendant represented, the defendant was negligent in arriving at such belief or was negligent in the manner

in which the defendant communicated it, thus creating a false impression of the true facts in the mind of the plaintiff. When the negligently given false information results in physical harm to the plaintiff's person or property, rather than causing a financial loss to the plaintiff in a business transaction, Instruction 9:3 should be used rather than this instruction. In several respects, the tort covered by this instruction is more akin to the tort of "fraud" or intentional deceit (Instruction 19:1) than it is to the tort of negligent misrepresentation resulting in physical harm (Instruction 9:3). *See* RESTATEMENT (SECOND) OF TORTS § 311 cmts. a–c (1965); RESTATEMENT (SECOND) OF TORTS § 552 cmt. a (1977).

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

3. Use whichever parenthesized words are most appropriate and omit the last two paragraphs if the defendant has put no affirmative defense in issue or there is insufficient evidence to support any defense.

4. In cases where the defendant did not give the information directly to the plaintiff, the first three numbered paragraphs of this instruction must be appropriately modified.

5. Whenever the defense of contributory negligence has been properly raised in the form of unreasonable reliance or in any other form, the beginning unnumbered paragraph as well as the numbered paragraphs of this instruction should be substituted for the beginning unnumbered and numbered paragraphs in Instruction 9:22 and that Instruction should then be used in accord with its Notes on Use. For the definition of the claimed negligence of the defendant, Instruction 9:6 should be used. For the definition of the claimed contributory negligence of the plaintiff, Instruction 9:5 should be used if that claimed negligence is in the form of unreasonable reliance. If the claimed contributory negligence is in any other form, Instruction 9:6 should be used to define the negligence of both parties.

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

7. This instruction, appropriately modified, may also be used in cases in which it is claimed the defendant was under a public duty to give information and did so negligently. RESTATEMENT (SECOND) OF TORTS § 552(3) (1977).

8. This instruction should not be used when liability has been admitted, *see* Instruction 2:4, or when the court has directed a verdict as to liability, *see* Instruction 2:6.

### **Source and Authority**

1. This instruction is supported by **First National Bank in Lamar v. Collins**, 44 Colo. App. 228, 616 P.2d 154 (1980) (adopting RESTATEMENT (SECOND) OF TORTS § 552 (1977)); **Robinson v. Poudre Valley Federal Credit Union**, 654 P.2d 861 (Colo. App. 1982); and **Fitzgerald v. Edelen**, 623 P.2d 418 (Colo. App. 1980). *See also* **Van Winkle v. Transamerica**

**Title Ins. Co.**, 697 P.2d 784 (Colo. App. 1984) (no liability for negligent failure to disclose in absence of duty to disclose); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §107, at 745-48 (5th ed. 1984); 2 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS § 7.6 (3rd ed. 2006). The decisions of the court of appeals in **Collins** and **Fitzgerald** were cited by analogy with approval by the supreme court in **Bloskas v. Murray**, 646 P.2d 907 (Colo. 1982). Later cases also provide support. See **Keller v. A.O. Smith Harvestore Prods., Inc.**, 819 P.2d 69 (Colo. 1991); **Hildebrand v. New Vista Homes II, LLC**, 252 P.3d 1159 (Colo. App. 2010) (affirming judgment on negligent misrepresentation claim against builder and its principal arising from misrepresentation that basement was suitable as a finished living space without a structural floor); **Mullen v. Allstate Ins. Co.**, 232 P.3d 168 (Colo. App. 2009) (affirming summary judgment on claim for negligent misrepresentation by omission because insurer was not obligated to provide information about other types of coverage); **Platt v. Aspenwood Condo. Ass'n, Inc.**, 214 P.3d 1060 (Colo. App. 2009) (allegations of misrepresentations of status of homeowners vote sufficient to withstand motion to dismiss); **Fluid Tech., Inc. v. CVJ Axles, Inc.**, 964 P.2d 614 (Colo. App. 1998) (allegation that information was provided in course of defendant's business was sufficient to withstand motion to dismiss); **Messler v. Phillips**, 867 P.2d 128 (Colo. App. 1993); **Burman v. Richmond Homes Ltd.**, 821 P.2d 913 (Colo. App. 1991); **Ebrahimi v. E.F. Hutton & Co.**, 794 P.2d 1015 (Colo. App. 1989) (distinguishing between the tort of negligent misrepresentation and tort of deceit).

2. A claim for negligent misrepresentation can be based only on misrepresentation of an existing fact. **Branscum v. Am. Cmty. Mut. Ins. Co.**, 984 P.2d 675, 680 (Colo. App. 1999) (claim for negligent misrepresentation "cannot be based solely on the nonperformance of a promise to do something at a future time" (citing **High Country Movin', Inc. v. U.S. W. Direct Co.**, 839 P.2d 469 (Colo. App. 1992))); see also **Colo. Pool Sys., Inc. v. Scottsdale Ins. Co.**, 2012 COA 178, ¶ 72, 317 P.3d 1262 (while expressions of opinion cannot support a negligent misrepresentation claim, liability for negligent misrepresentation may arise when a statement of opinion involves mixed statements of law and fact); **Colo. Coffee Bean, LLC v. Peaberry Coffee, Inc.**, 251 P.3d 9 (Colo. App. 2010); **Bedard v. Martin**, 100 P.3d 584 (Colo. App. 2004).

3. A claim for negligent misrepresentation can be based on false information that the defendant gave the plaintiff for use in a business transaction between the plaintiff and the defendant. See, e.g., **Keller**, 819 P.2d at 72 (contracting party's negligent misrepresentation of material facts prior to execution of agreement may provide basis for independent tort claim); **Collins**, 44 Colo. App. at 230, 616 P.2d at 155-56 (allegations that plaintiff relied on negligent misrepresentations of representative of defendant in entering into contract with the defendant stated claim for negligent misrepresentation in a business transaction).

### **Manufacturer's Liability**

4. For a discussion of a manufacturer's liability to a buyer for negligent misrepresentations made during the course of a sale of its product, see **Keller**, 819 P.2d at 72-74 (clause in integrated sales agreement that specifically disclaimed reliance on representations made prior to agreement's execution did not preclude finding that buyer relied on such representations). Accord **A.O. Smith Harvestore Prods., Inc. v. Kallsen**, 817 P.2d 1038 (Colo. 1991).

### Attorney Liability

5. For a discussion as to when an attorney may be liable to a non-client for negligent misrepresentation, see **Baker v. Wood, Ris & Hames, P.C.**, 2016 CO 5, ¶ 35, 364 P.3d 872 (attorney's liability to non-client is limited to narrow circumstances in which attorney committed fraud or a malicious or tortious act, including negligent misrepresentation). *See also* **Allen v. Steele**, 252 P.3d 476 (Colo. 2011) (attorney who negligently misrepresented statute of limitations to non-client was not liable because an initial consultation for a potential civil lawsuit is not a "business transaction," a necessary element of the claim); **Mehaffy, Rider, Windholz & Wilson v. Central Bank Denver, N.A.**, 892 P.2d 230 (Colo. 1995) (attorney who issues an opinion letter to client for purpose of inducing non-client to rely thereon in business transaction may be liable to non-client for negligent misrepresentation); **Zimmerman v. Dan Kamphausen Co.**, 971 P.2d 236 (Colo. App. 1998) (attorney owed duty to third party to whom he issued opinion letter); **First Interstate Bank of Denver, N.A. v. Berenbaum**, 872 P.2d 1297 (Colo. App. 1993).

### Information Given to Third Party

6. A defendant may be liable for negligent misrepresentation even though the defendant did not give the information directly to the plaintiff. It is sufficient if the defendant gave the information to a third person knowing that the third person intended to supply it to and use it to influence the plaintiff or a limited group of persons of which the plaintiff was a member. **Hildebrand**, 252 P.3d at 1168 ("direct communication of the information to the person acting in reliance upon it is not necessary" (quoting RESTATEMENT (SECOND) OF TORTS § 552 cmt. g (1977))); *see also* **Jimerson v. First Am. Title Ins. Co.**, 989 P.2d 258 (Colo. App. 1999) (recognizing rule, but holding that to impose liability on supplier of information, third-party's reliance on that information must have been justifiable); **DCB Constr. Co. v. Cent. City Dev. Co.**, 940 P.2d 958 (Colo. App. 1996) (privity not required as element of negligent misrepresentation claim), *aff'd on other grounds*, 965 P.2d 115 (Colo. 1998); **Galie v. RAM Assocs. Mgmt. Servs., Inc.**, 757 P.2d 176 (Colo. App. 1988) (privity between plaintiff and defendant not required); **Wolther v. Schaarschmidt**, 738 P.2d 25 (Colo. App. 1986) (same); *see generally* **Campbell v. Summit Plaza Assocs.**, 192 P.3d 465 (Colo. App. 2008) (reaffirming **Jimerson**, 989 P.2d 258, and holding that because title insurer owes no contractual obligation to a vendor of real property by virtue of the title commitment or title insurance policy issued to the buyer, vendor may not enforce obligations established by the title commitment and claim negligence in title insurer's performance).

### Reasonable Reliance

7. The unreasonable reliance of the plaintiff on the misrepresentation of the defendant constitutes contributory negligence for which, because it is an affirmative defense, the defendant has the burdens of pleading and proof. *See* RESTATEMENT (SECOND) OF TORTS § 552A (1977). In addition, the defense requires the application of an objective test. **Robinson**, 680 P.2d at 243. Thus, the defense applies even though the plaintiff's unreasonable reliance may otherwise have been "justifiable" in terms of what a person of comparable intelligence, education and experience to that of the plaintiff would have done. *Id.*; C.R.C.P. 8(c); RESTATEMENT § 552A.

8. Although unreasonable reliance may be considered a form of contributory or comparative negligence and treated as an affirmative defense, in a number of cases, the Colorado Court of Appeals has indicated that "justifiable" reliance is an element of a plaintiff's claim. *See*,

*e.g.*, **Colo. Pool Sys., Inc.**, 2012 COA 178, ¶¶ 59-63 (insured cannot justifiably rely on oral statement of insurance agent about insurance coverage if the insured has a copy of the policy and can see that the oral misrepresentation contradicts express, unambiguous terms of the policy, but case remanded for further proceedings because the policy term was ambiguous); **Colo. Coffee Bean, LLC**, 251 P.3d at 19 (reliance on franchisor’s general description of business model not justifiable in light of exculpatory clauses in transactional documents and the absence of any specific affirmative misrepresentation); **Sheffield Servs. Co. v. Trowbridge**, 211 P.3d 714 (Colo. App. 2009) (analyzing inquiry notice, the sophistication of the investor, and the parties’ relative access to the facts to determine whether reliance was justifiable), *overruled on other grounds* by **Weinstein v. Colborne Foodbotics, LLC**, 2013 CO 33, 302 P.3d 263; **Campbell v. Summit Plaza Assocs.**, 192 P.3d 465 (Colo. App. 2008); **Nelson v. Gas Research Inst.**, 121 P.3d 340 (Colo. App. 2005); **Balkind v. Telluride Mtn. Title Co.**, 8 P.3d 581 (Colo. App. 2000); **Branscum v. Am. Cmty. Mut. Ins.**, 984 P.2d 675 (Colo. App. 1999).

### **Damages**

9. Damages are an essential element of a claim for negligent misrepresentation causing financial loss in a business transaction. **W. Cities Broad., Inc. v. Schueller**, 849 P.2d 44 (Colo. 1993); **DC-10 Entm’t, LLC v. Manor Ins. Agency, Inc.**, 2013 COA 14, ¶ 7, 308 P.3d 1223.

10. The proper measure of damages for a negligent representation causing financial loss is the “out of pocket” rule rather than the “out of bargain” rule. **Ballow v. PHICO Ins. Co.**, 878 P.2d 672 (Colo. 1994); **W. Cities Broad., Inc.**, 849 P.2d at 49; **Harrison v. Smith**, 821 P.2d 832 (Colo. App. 1991); **Robinson**, 654 P.2d at 863 (citing with approval § 552B(1) of RESTATEMENT (SECOND) OF TORTS (1977)). A damage instruction based on section 552B(1) should therefore be given with this instruction rather than Instruction 19:17. *See also* RESTATEMENT § 552B(2) (specifically excluding from the recoverable damages “the benefit of the plaintiff’s contract with the defendant”).

**9:5 NEGLIGENT MISREPRESENTATION CAUSING FINANCIAL LOSS IN A BUSINESS TRANSACTION — UNREASONABLE RELIANCE — DEFINED**

**One is negligent in relying on information given by another when a reasonable person in the same or similar circumstances would not have so relied.**

**Notes on Use**

1. This instruction, rather than Instruction 9:6, should be used in conjunction with Instruction 9:4 for the definition of the plaintiff's negligence when the affirmative defense of contributory negligence in the form of unreasonable reliance on the part of the plaintiff has been properly raised. *See* Note 5 of the Notes on Use to Instruction 9:4.

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* **Bedard v. Martin**, 100 P.3d 584 (Colo. App. 2004); **Balkind v. Telluride Mtn. Title Co.**, 8 P.3d 581 (Colo. App. 2000); *see also* **M.D.C./Wood, Inc. v. Mortimer**, 866 P.2d 1380 (Colo. 1994). However, for a different test, see the cases and authorities cited in the Source and Authority to Instructions 19:8 to 19:10 (justifiable reliance).

**Source and Authority**

This instruction is supported by **Robinson v. Poudre Valley Federal Credit Union**, 654 P.2d 861 (Colo. App. 1982); and RESTATEMENT (SECOND) OF TORTS § 552A (1977).

**9:6 NEGLIGENCE — DEFINED (INCLUDING ASSUMPTION OF THE RISK AND COMPARATIVE NEGLIGENCE CASES)**

**Negligence means a failure to do an act which a reasonably careful person would do, or the doing of an act which a reasonably careful person would not do, under the same or similar circumstances to protect (oneself or) others from (bodily injury) (death) (property damage) (insert any other appropriate description, e.g., “financial loss”).**

**(Negligence may also mean assumption of risk. A person assumes the risk of injury or damage if the person voluntarily or unreasonably exposes [himself] [herself] to such injury or damage with knowledge or appreciation of the danger and risk involved.)**

**Notes on Use**

1. Use whichever parenthesized phrases in the first paragraph are appropriate. In particular, whenever the defense of contributory negligence has been raised and is being submitted to the jury under the appropriate comparative negligence instructions, *see* Instructions 9:22–9:26, the parenthesized words “oneself or” should be used.

2. In Colorado, assumption of risk is a form of contributory negligence. For this reason, a separate instruction on the defense of assumption of risk should not be given in a case governed by the comparative negligence statute, § 13-21-111, C.R.S. *See, e.g., Brown v. Kreuser*, 38 Colo. App. 554, 560 P.2d 105 (1977). “Instructions on [contributory negligence and on] determining [the] comparative negligence percentages of the plaintiff and [the] defendant [Instructions 9:22–9:27] sufficiently cover the conduct heretofore classed as assumption of risk in Colorado. . . .” *Id.* at 558, 560 P.2d at 108; *see also Loup-Miller v. Brauer & Assocs.–Rocky Mtn., Inc.*, 40 Colo. App. 67, 572 P.2d 845 (1977); *Stefanich v. Martinez*, 39 Colo. App. 500, 570 P.2d 554 (1977), *aff’d on other grounds*, 195 Colo. 341, 577 P.2d 1099 (1978). The parenthesized second paragraph of this instruction should be given only in comparative negligence cases governed by section 13-21-111, in which there is sufficient evidence to support it. *See, e.g., Laughman v. Girtakovskis*, 2015 COA 143, ¶ 25, 374 P.3d 504 (“the assumption of risk statute applies when the jury is required to apportion negligence”); *Vititoe v. Rocky Mountain Pavement Maint., Inc.*, 2015 COA 82, ¶¶ 70-75 (evidence that plaintiff motorcyclist voluntarily accelerated toward truck in front of him moments before colliding with rear end of truck supported instruction containing assumption of risk language); *Winkler v. Rocky Mtn. Conference of United Methodist Church*, 923 P.2d 152 (Colo. App. 1995) (insufficient evidence of assumption of risk or fault on part of plaintiff to warrant comparative negligence instruction); *Carter v. Lovelace*, 844 P.2d 1288 (Colo. App. 1992) (distinguishing assumption of risk as a form of contributory negligence and concluding that evidence was insufficient to support instruction on assumption of risk).

3. In a professional malpractice case, when the claimed contributory negligence of a plaintiff relates only to the plaintiff’s failure, as a patient or a client, to do what a reasonable patient or client would or would not do with regard to the services being rendered by defendant, Instruction 15:6 or Instruction 15:24, whichever is appropriate, should be used for the definition of contributory negligence rather than this instruction. When a hospital admits a person into its

custody who the hospital knows is actively suicidal, and when the admission is for the purpose of preventing that person's self-destructive behavior, the hospital assumes a duty to use reasonable care in preventing the patient from engaging in such behavior, and this duty subsumes any fault attributable to the plaintiff for harm suffered as a result of those self-destructive acts. In such circumstances, the defenses of comparative negligence or assumption of risk of the patient are inapplicable. *See P.W. v. Children's Hosp. Colo.*, 2016 CO 6, ¶ 25, 364 P.3d 891.

4. This instruction should not be used where the standard of care required of a person is greater than that normally required in a negligence case. *See, e.g.*, Instruction 9:7. For cases involving children, see Instruction 9:9.

5. In automobile accident cases, the failure to comply with the mandatory seat belt law is admissible to mitigate "pain and suffering" damages. See Instruction 5:3 as to the effect of an injured party's failure to wear a safety belt in an automobile accident case. However, an injured party's failure to have worn an available seat belt does not constitute negligence. **Fischer v. Moore**, 183 Colo. 392, 517 P.2d 458 (1973) (events occurring before the effective date of the Comparative Negligence Statute, § 13-21-111); **Churning v. Staples**, 628 P.2d 180 (Colo. App. 1981) (events occurring after the adoption of the Comparative Negligence Statute). Similarly, the failure to wear a helmet while riding a motorcycle does not constitute negligence. **Dare v. Sobule**, 674 P.2d 960 (Colo. 1984); **Lawrence v. Taylor**, 8 P.3d 607 (Colo. App. 2000). If the jury learns that a motorcyclist was not wearing a helmet, a limiting instruction may be required. **Vititoe**, 2015 COA 82, ¶ 19.

#### Source and Authority

1. This instruction is supported by **Lyons v. Nasby**, 770 P.2d 1250 (Colo. 1989); **Matt Skorey Packard Co. v. Canino**, 142 Colo. 411, 350 P.2d 1069 (1960); **Maercklein v. Smith**, 129 Colo. 72, 266 P.2d 1095 (1954); **Hogue v. Colo. & S. Ry.**, 110 Colo. 552, 136 P.2d 276 (1943); **Bedee v. Am. Med. Response of Colo.**, 2015 COA 128, ¶ 24, 361 P.3d 1083; **Vititoe**, 2015 COA 82, ¶¶ 61, 70; **Winkler v. Shaffer**, 2015 COA 63, ¶ 16, 356 P.3d 63; and **Lombard v. Colo. Outdoor Educ. Ctr., Inc.**, 266 P.3d 412 (Colo. App. 2011). *See also* RESTATEMENT (SECOND) OF TORTS §§ 282-84 (1965); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 32 (5th ed. 1984).

2. Contributory negligence has also been defined in similar terms by the Colorado courts in **Burr v. Green Brothers Sheet Metal, Inc.**, 159 Colo. 25, 409 P.2d 511 (1966); **King Soopers, Inc. v. Mitchell**, 140 Colo. 119, 342 P.2d 1006 (1959); **Peterson v. Kessler**, 135 Colo. 102, 308 P.2d 610 (1957); **Wilson v. Hill**, 103 Colo. 409, 86 P.2d 1084 (1939); **Colorado & S. Ry. v. Honaker**, 92 Colo. 239, 19 P.2d 759 (1933); **Blackman v. Rifkin**, 759 P.2d 54 (Colo. App. 1988); **Lannon v. Taco Bell, Inc.**, 708 P.2d 1370, 1372 (Colo. App. 1985) ("A party has a duty to refrain from acts or omissions to act which may contribute to the totality of acts which cause injury to him."), *aff'd on other grounds*, 744 P.2d 43 (Colo. 1987); and **Fay v. Kroblin Refrigerated Xpress, Inc.**, 644 P.2d 68 (Colo. App. 1981). *See also* RESTATEMENT (SECOND) OF TORTS § 464 (1965); PROSSER AND KEETON ON THE LAW OF TORTS, *supra*, at § 65.

3. The term comparative negligence has been defined as "a failure to do an act that a reasonably careful person would do, or the doing of an act that a reasonably careful person



would not do, under the same or similar circumstances, to protect oneself from bodily injury.” **Reid v. Berkowitz**, 2013 COA 110M, ¶ 54, 315 P.3d 185.

4. For the substantive definition of assumption of risk, as a form of contributory negligence, set out in the parenthesized second paragraph of this instruction, see section 13-21-111.7, C.R.S. *See also* **Harris v. The Ark**, 810 P.2d 226 (Colo. 1991) (statutory definition of assumption of risk as a form of contributory negligence not unconstitutionally vague or otherwise a violation of due process or of equal protection).

5. For a discussion of the distinction between negligent and intentional conduct, see **Wells Fargo Realty Advisors Funding, Inc. v. Uioli, Inc.**, 872 P.2d 1359 (Colo. App. 1994).

6. To the extent one or more forms of contributory negligence may be a partial defense to a product liability claim based on negligence, see section 13-21-406, C.R.S.

7. In a comparative negligence case, if the court directs a finding or verdict of negligence against one or more of the parties, the court must also instruct the jury as to the conduct on which such finding is based, as well as any other conduct the jury could reasonably find constituted negligence, in order to permit the jury to make a proper comparison of such negligence with any negligence of other parties the jury may find. **Ricklin v. Smith**, 670 P.2d 1239 (Colo. App. 1983).

8. Under the comparative negligence statute, a special instruction on momentary negligence or justifiable distraction is improper. **Rodriguez v. Morgan County R.E.A., Inc.**, 878 P.2d 77 (Colo. App. 1994).

9. When the parties to a negligence action are part of an industry that conforms to well-established safety practices or customs, those practices or customs may be considered by the jury as non-conclusive evidence of the standard of reasonable care that the defendant should have followed. **Scott v. Matlack, Inc.**, 39 P.3d 1160 (Colo. 2002) (admission of Occupational Safety and Health Act regulations as some, non-conclusive, evidence of the standard of care in the relevant industry). *See also* **Gerrity Oil & Gas Corp. v. Magness**, 946 P.2d 913 (Colo. 1997); **Yampa Valley Elec. Ass’n v. Telecky**, 862 P.2d 252 (Colo. 1993); **Bennett v. Greeley Gas Co.**, 969 P.2d 754 (Colo. App. 1998); **Miller v. Solaglas Cal., Inc.**, 870 P.2d 559 (Colo. App. 1993).

## 9:7 NEGLIGENCE — DEFINED — INHERENTLY DANGEROUS ACTIVITIES

**One carrying on an inherently dangerous activity such as the** (*insert an appropriate description, e.g., “transmission of electricity”*) **must exercise the highest possible degree of skill, care, caution, diligence, and foresight with regard to that activity, according to the best technical, mechanical, and scientific knowledge and methods which are practical and available at the time of the claimed conduct which caused the claimed injury. The failure to do so is negligence.**

### Notes on Use

1. This instruction should be used, rather than Instruction 9:6, to define “negligence,” when, because of the inherently dangerous nature of the activity, a higher standard of care is required than that required for most activities. **Fed. Ins. Co. v. Pub. Serv. Co.**, 194 Colo. 107, 570 P.2d 239 (1977) (applying the rule to the transmission of electricity); **accord City of Fountain v. Gast**, 904 P.2d 478 (Colo. 1995); **Yampa Valley Elec. Ass’n v. Telecky**, 862 P.2d 252 (Colo. 1993); **Bennett v. Greeley Gas Co.**, 969 P.2d 754 (Colo. App. 1998); **Mladjan v. Public Serv. Co. of Colo.**, 797 P.2d 1299 (Colo. App. 1990); *see also* **Blueflame Gas, Inc. v. Van Hoose**, 679 P.2d 579 (Colo. 1984) (by implication, sale and distribution of propane gas is an inherently dangerous activity, and requires the highest degree of care with respect to effective odorization of propane to detect leaks); **U.S. Fid. & Guar. Co. v. Salida Gas Serv. Co.**, 793 P.2d 602 (Colo. App. 1989) (supplying propane gas an inherently dangerous activity); **Hartford Fire Ins. Co. v. Pub. Serv. Co. of Colo.**, 676 P.2d 25 (Colo. App. 1983) (transmission of natural gas is not abnormally dangerous activity giving rise to strict liability, but court does not discuss whether such activity may be an “inherently dangerous” activity); **Kulik v. Pub. Serv. Co. of Colo.**, 43 Colo. App. 139, 605 P.2d 475 (1979) (even assuming transmission of natural gas is an “inherently dangerous” activity, loss caused by defective steam pressure safety release valve on gas-fired boiler is not, under this instruction, chargeable to the activity of transmitting natural gas), *aff’d on other grounds*, 621 P.2d 313 (Colo. 1980).

2. This instruction does not apply to “ultrahazardous” or “abnormally dangerous” activities to which a rule of strict liability is applicable. *See* **W. Stock Ctr., Inc. v. Sevit, Inc.**, 195 Colo. 372, 578 P.2d 1045 (1978).

3. The rule of this instruction applies only to those aspects of an activity which make it “inherently dangerous.”

4. The Colorado Court of Appeals has referred to “contact” sports generally and martial arts sparring contests specifically as “inherently dangerous” sporting activities. **Laughman v. Girtakovskis**, 2015 COA 143, ¶¶ 19-20, 374 P.3d 504. The use of the phrase “inherently dangerous” in cases involving contact sports should not be confused with the “inherently dangerous” or “ultrahazardous” activities doctrine that is the subject of this instruction.

## Source and Authority

1. This instruction is supported by **Federal Insurance Co.**, 194 Colo. at 111, 570 P.2d at 241-42; **Blankette v. Public Serv. Co. of Colorado**, 90 Colo. 456, 10 P.2d 327 (1932); **Denver Consolidated Electric Co. v. Lawrence**, 31 Colo. 301, 73 P. 39 (1903); and **Denver Consolidated Electric Co. v. Simpson**, 21 Colo. 371, 41 P. 499 (1895). *See also* **Smith v. Home Light & Power Co.**, 734 P.2d 1051 (Colo. 1987) (for purposes of strict liability in tort for a defective product, electricity is not a “product” that has been “sold” or put “in the stream of commerce,” at least not until it reaches the point where it has been made available for use by the consumer); **Kedar v. Pub. Serv. Co. of Colo.**, 709 P.2d 15 (Colo. App. 1985) (citing this instruction with approval).

2. It is for the court to determine whether a particular activity is “inherently dangerous” and consequently within the scope of this instruction. **Imperial Distribution Servs., Inc.**, 741 P.2d at 1254; **Pizza v. Wolf Creek Ski Dev. Corp.**, 711 P.2d 671 (Colo. 1985). *But see* **Huddleston v. Union Rural Elec. Ass’n**, 841 P.2d 282 (Colo. 1992) (whether transporting persons in single-engine plane over mountains was an “inherently dangerous” activity for purposes of imposing vicarious liability on employer of independent contractor was a factual question for jury to determine). For discussions of the factors to be considered in determining whether an activity is subject to the higher standard required by this instruction, see **Imperial Distribution Servs., Inc.**, 741 P.2d at 1255-56; **Minto v. Sprague**, 124 P.3d 881 (Colo. App. 2005); and **Mannhard v. Clear Creek Skiing Corp.**, 682 P.2d 64 (Colo. App. 1983). *See also* **W. Stock Ctr., Inc.**, 195 Colo. at 378-79, 578 P.2d at 1050; **Trinity Universal Ins. Co. v. Streza**, 8 P.3d 613 (Colo. App. 2000) (in negligence action arising out of explosion of propane heater, where alleged tortfeasor was not engaged in business of supplying propane gas, trial court did not err in refusing to instruct jury on elements of inherently dangerous activities); **Walcott v. Total Petroleum, Inc.**, 964 P.2d 609 (Colo. App. 1998) (dispensing gasoline at a service station not an ultrahazardous activity); **Melton v. Larrabee**, 832 P.2d 1069 (Colo. App. 1992) (installation of heat-tape around water pipe was not an “inherently dangerous” activity).

3. The duty of a ski lift operator to exercise the highest degree of care commensurate with lift’s practical operation was not preempted or abrogated by the enactment of either the Colorado Passenger Tramway Act, §§ 25-5-701 to -720, C.R.S., or the Colorado Ski Safety Act of 1979, §§ 33-44-101 to -114, C.R.S. **Bayer v. Crested Butte Mtn. Resort, Inc.**, 960 P.2d 70 (Colo. 1998).

4. Ambulance driver owes passenger ordinary duty of care, not the duty to exercise the highest degree of care, when the ambulance is traveling at normal speeds in a nonemergency situation, and the passenger was wearing a seat belt. **Bedee v. Am. Med. Response of Colo.**, 2015 COA 128, ¶ 30, 361 P.3d 1083.

**9:8 REASONABLE CARE — DEFINED**

**Reasonable care is that degree of care which a reasonably careful person would use under the same or similar circumstances.**

**Notes on Use**

This instruction should be used when “reasonable care” is used in another instruction and needs further definition.

**Source and Authority**

This instruction is supported by **Blankette v. Public Service Co. of Colorado**, 90 Colo. 456, 10 P.2d 327 (1932) (dictum). *See* **Bedee v. Am. Med. Response of Colo.**, 2015 COA 128, ¶ 24, 361 P.3d 1083; **Winkler v. Shaffer**, 2015 COA 63, ¶ 16, 356 P.3d 1020; *see also* **Richardson v. El Paso Consol. Gold Mining Co.**, 51 Colo. 440, 118 P. 982 (1911); RESTATEMENT (SECOND) OF TORTS § 283 (1965); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 31 (5th ed. 1984).

**9:9 CHILDREN — STANDARD OF CARE — NEGLIGENCE (INCLUDING COMPARATIVE NEGLIGENCE CASES)**

**(A child under the age of seven at the time of an occurrence is incapable of negligence.)**

**A child (seven years of age or older at the time of an occurrence) is under a duty to use that degree of care which children of similar age, experience and intelligence would ordinarily use under the same or similar circumstances to protect (themselves) (others) from (bodily injury) (death) (property damage).**

**Notes on Use**

1. When there is no dispute that the child was under seven years, only the first parenthesized paragraph should be used. When there is no dispute that the child was over the age of seven, only the second paragraph should be used, deleting the first parenthetical phrase referring to age. Where there is a dispute as to whether the child was under or over the age of seven, both paragraphs should be used. The other parenthetical words should be used as are appropriate to the issues in dispute and the evidence in the case. The alternative “others” or “themselves” is to be used depending on whether the minor party is alleged to have been negligent or contributorily negligent. If the minor party is alleged to have been both, then the instruction should read “themselves and others.”

2. While a child under the age of seven is incapable, as a matter of law, of being contributorily negligent, *see* **Benallo v. Bare**, 162 Colo. 22, 427 P.2d 323 (1967), and **Fletcher v. Porter**, 754 P.2d 788 (Colo. App. 1988), a child seven years of age or more is capable of being negligent under this instruction. **LeCoq v. Klemme**, 28 Colo. App. 590, 476 P.2d 280 (1970). Also, although a child may be negligent or contributorily negligent under the common-law standard of care stated in this instruction, a child under the age of ten, because he cannot be found guilty of criminal conduct under the provisions of section 18-1-801, C.R.S., may not be found negligent or contributorily negligent under the doctrine of negligence per se (Instruction 9:14). **Calkins v. Albi**, 163 Colo. 370, 431 P.2d 17 (1967).

3. The usual standard of care required of children as set out in this instruction does not apply to a minor operating a motor vehicle. *See* Instruction 11:5 (duty of care of minor operating motor vehicle).

**Source and Authority**

This instruction is supported by **Roberts v. Fisher**, 169 Colo. 288, 455 P.2d 871 (1969) (age); **Krause v. Watson Brothers Transportation Co.**, 119 Colo. 73, 200 P.2d 387 (1948) (age); **Lakeside Park Co. v. Wein**, 111 Colo. 322, 141 P.2d 171 (1943) (age and intelligence); **Simkins v. Dowis**, 100 Colo. 355, 67 P.2d 627 (1937) (age and intelligence); **Colorado Utilities Corp. v. Casady**, 89 Colo. 156, 300 P. 601 (1931) (age); RESTATEMENT (SECOND) OF TORTS §§ 283A, 464 (1965); and W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 32, at 179-82 (5th ed. 1984).

## 9:10 VOLUNTEER — DUTY OF CARE

**One who voluntarily assumes the care of an (injured) (ill) person is under a duty to act as a reasonably careful person would under the same or similar circumstances.**

### Notes on Use

1. Use whichever parenthesized word is more appropriate.
2. In appropriate cases this instruction may be modified to state the general rule concerning the duty of a volunteer who assumes a duty of affirmative action. *See Leppke v. Segura*, 632 P.2d 1057 (Colo. App. 1981) (one who does an affirmative act has a duty to use due care to avoid creating, as a result of such act, an unreasonable risk of foreseeable damage or injury to foreseeable persons (adopting RESTATEMENT (SECOND) OF TORTS § 302 cmt. a (1965) (citing § 320))).
3. This instruction either should not be given, or, if given, should be appropriately modified in cases in which a statutory immunity from liability for ordinary negligence may be applicable. *See, e.g.*, § 13-21-116(2), C.R.S. (acts or omissions of gratuitous volunteers); § 13-21-108, C.R.S. (“Good Samaritan” statute); § 13-21-114, C.R.S. (immunity of persons and organizations engaged in mine rescue or recovery work).

### Source and Authority

This instruction is supported by RESTATEMENT (SECOND) OF TORTS §§ 324, 324A (1965). *See also St. Luke’s Hospital v. Indus. Comm’n*, 142 Colo. 28, 349 P.2d 995 (1960) (dictum).

## 9:11 SUDDEN EMERGENCY

### Instruction Deleted

#### Note

In **Bedor v. Johnson**, 2013 CO 4, ¶ 2, 292 P.3d 924, the Colorado Supreme Court held that trial courts should no longer give the sudden emergency instruction in negligence cases because the instruction's potential to mislead the jury greatly outweighs its minimal utility.

## 9:12 HAPPENING OF ACCIDENT NOT PRESUMPTIVE NEGLIGENCE

**The occurrence of an accident does not raise any presumption of negligence on the part of either the plaintiff or the defendant.**

### Notes on Use

1. This instruction should not be given in cases where the happening of an accident does give rise to a presumption of negligence, e.g., rear-end collision cases (Instruction 11:12) and res ipsa loquitur cases (Instruction 9:17). **Gambrell v. Ravin**, 764 P.2d 362 (Colo. App. 1988), *aff'd*, 788 P.2d 817 (Colo. 1990); **Kitto v. Gilbert**, 39 Colo. App. 374, 570 P.2d 544 (1977). *See also* **Pizza v. Wolf Creek Ski Dev. Corp.**, 711 P.2d 671 (Colo. 1985) (instruction should not be given where it would conflict with a contrary presumption created by statute).

### Source and Authority

1. This instruction is supported by **Kendrick v. Pippin**, 252 P.3d 1052 (Colo. 2011); **Pence v. Chaudet**, 163 Colo. 104, 428 P.2d 705 (1967); **City of Aurora v. Weeks**, 152 Colo. 509, 384 P.2d 90 (1963); **National Construction Co. v. Holt**, 137 Colo. 208, 322 P.2d 1046 (1958); and **Perry Lumber Co. v. Ruybal**, 133 Colo. 502, 297 P.2d 531 (1956). *See also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 39, at 242 (5th ed. 1984).

2. “While it is true, that ‘proof of the happening of an accident, or the incurrance of an injury alone raises no inference of negligence,’ it is equally true that negligence may be established by the facts and circumstances surrounding an accident.” **Remley v. Newton**, 147 Colo. 401, 405, 364 P.2d 581, 583 (1961); *accord* **Alhilo v. Kliem**, 2016 COA 142, ¶ 42.



## 9:13 LOOKING BUT FAILING TO SEE AS NEGLIGENCE

**To look in such a manner as to fail to see what must have been plainly visible is to look without a reasonable degree of care and is of no more effect than not to have looked at all.**

### Notes on Use

1. This instruction may be given in cases of contributory negligence as well as negligence.

2. The giving of Instruction 11:1 (duty to maintain lookout) is not necessarily precluded by the giving of this instruction. **Horton v. Mondragon**, 705 P.2d 977 (Colo. App. 1984).

3. This instruction should not be given unless “the alleged negligence involved the failure to see something which was plainly visible, and the allegedly negligent actor [claims or admits] he did not see it.” **Zavorka v. Union Pac. R.R.**, 690 P.2d 1285, 1289 (Colo. App. 1984); *accord* **Regents of the Univ. of Colo. v. Harbert Constr. Co.**, 51 P.3d 1037 (Colo. App. 2001). This instruction must be appropriately modified if there is conflicting evidence as to whether the thing to be observed was plainly visible. **Brady v. Burlington N. R.R.**, 752 P.2d 592 (Colo. App. 1988); *see also* **Pizza v. Wolf Creek Ski Dev. Corp.**, 711 P.2d 671 (Colo. 1985) (error to give this instruction where the thing to be avoided was not obvious); **Martinez v. W.R. Grace Co.**, 782 P.2d 827 (Colo. App. 1989) (error to give this instruction when there is a dispute as to whether the hazard was “plainly” visible).

### Source and Authority

This instruction is supported by **Clark v. Bunnell**, 172 Colo. 32, 470 P.2d 42 (1970); **Folck v. Haser**, 164 Colo. 11, 432 P.2d 245 (1967); **Behr v. McCoy**, 138 Colo. 137, 330 P.2d 535 (1958) (citing several earlier cases); **Union Pacific Railroad v. Cogburn**, 136 Colo. 184, 315 P.2d 209 (1957) (involving contributory negligence); and **Fabling v. Jones**, 108 Colo. 144, 114 P.2d 1100 (1941). *See also* RESTATEMENT (SECOND) OF TORTS § 289 (1965).

## 9:14 NEGLIGENCE PER SE — VIOLATION OF STATUTE OR ORDINANCE

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

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

A violation of (this) (these) (statute[s]) (ordinance[s]) constitutes negligence.

If you find such a violation, you may only consider it if you also find that it was a cause of the claimed (injuries) (damages) (losses).

### Notes on Use

1. Use whichever parenthesized words are appropriate. See **Easton v. 1738 P'ship**, 854 P.2d 1362 (Colo. App. 1993).

2. One or more appropriate instructions on cause should also be given with this instruction. See Part D of this chapter.

3. This instruction should not be given unless (1) one of the purposes of the statute or ordinance was to protect against the type of injuries or losses the plaintiff sustained, and (2) the plaintiff was a member of the group of persons the statute or ordinance was intended to protect. See **Scott v. Matlack, Inc.**, 39 P.3d 1160 (Colo. 2002); **Davenport v. Cmty. Corr. of the Pikes Peak Region, Inc.**, 962 P.2d 963 (Colo. 1998); **Lyons v. Nasby**, 770 P.2d 1250, 1257 (Colo. 1989); **Dickinson v. Lincoln Bldg. Corp.**, 2015 COA 170M, ¶ 54, 378 P.3d 797 (building code section applicable to design and construction of exit doors was not enacted to protect against injuries potentially incurred when attempting to open a locked exit door); **Lawson v. Stow**, 2014 COA 26, ¶¶ 43, 47, 327 P.3d 340 (the false reporting statute, § 18-8-111(1)(b), C.R.S., cannot serve as the basis for negligence per se claim); **Smit v. Anderson**, 72 P.3d 369 (Colo. App. 2002) (building code not designed to protect person injured while assisting owner in building house); **Trinity Universal Ins. Co. v. Streza**, 8 P.3d 613 (Colo. App. 2000) (fuel products statute not applicable to incidental use of propane heater by contractor); **Liebelt v. Bob Penkhus Volvo-Mazda, Inc.**, 961 P.2d 1147 (Colo. App. 1998) (automobile dealer was not negligent per se by violating "dealer plate law"); **Jacque v. Pub. Serv. Co. of Colo.**, 890 P.2d 138 (Colo. App. 1994); **Martin v. Minnard**, 862 P.2d 1014 (Colo. App. 1993); **Deacon v. Am. Plant Food Corp.**, 782 P.2d 861 (Colo. App. 1989), *rev'd on other grounds sub nom. Stone's Farm Supply, Inc. v. Deacon*, 805 P.2d 1109 (Colo. 1991); **Comfort v. Rocky Mtn. Consultants, Inc.**, 773 P.2d 615 (Colo. App. 1989); **Russo v. Birrenkott**, 770 P.2d 1335 (Colo. App. 1988); *see also* **Leake v. Cain**, 720 P.2d 152 (Colo. 1986); **Dunbar v. Olivieri**, 97 Colo. 381, 50 P.2d 64 (1935), *overruled on other grounds by* **Mile High Fence Co. v. Radovich**, 175 Colo. 537, 489 P.2d 308 (1971); **Crespin v. Largo Corp.**, 698 P.2d 826 (Colo. App. 1984), *aff'd*, 727 P.2d 1098 (Colo. 1986); **Bartley v. Floyd**, 695 P.2d 781 (Colo. App. 1984), *aff'd*, 727 P.2d 1109 (Colo. 1986) (plaintiff within class of persons intended to be protected); **Aetna Cas. & Surety Co. v. Crissy Fowler Lumber Co.**, 687 P.2d 514 (Colo. App. 1984); **Phillips v. Monarch**

**Recreation Corp.**, 668 P.2d 982 (Colo. App. 1983); **Iverson v. Solsbery**, 641 P.2d 314 (Colo. App. 1982); **Hamilton v. Gravinsky**, 28 Colo. App. 408, 474 P.2d 185 (1970), *aff'd*, 174 Colo. 206, 483 P.2d 385 (1971); RESTATEMENT (SECOND) OF TORTS § 286 (1965); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 36, at 222-27 (5th ed. 1984).

4. This instruction does not apply when the ordinance or statute is construed as only imposing an obligation for the benefit of the public at large, rather than for individuals, as members of the public. **Bittle v. Brunetti**, 712 P.2d 1112, 1113 (Colo. App. 1985) (ordinance requiring abutting landowner to remove snow from a public walk “is penal only and cannot serve as a basis of civil liability for one injured on the walk”), *aff'd*, 750 P.2d 49 (Colo. 1988) (unless legislative body expressly makes property owners civilly liable for a violation, intended purpose will be understood to benefit primarily the municipality); *accord* **Foster v. Redd**, 128 P.3d 316 (Colo. App. 2005); *see also* **Dunlap v. Colo. Springs Cablevision, Inc.**, 799 P.2d 416 (Colo. App. 1990) (if the exclusive purpose of a legislative enactment is to secure rights or privileges to the public at large, not citizens in their individual capacity, no basis exists for a claim of negligence per se), *rev'd on other grounds*, 829 P.2d 1286 (Colo. 1992).

5. Nor should this instruction be given unless there is sufficient evidence that the conduct was in violation of the relevant statute or ordinance as construed by the court, and that such violation was a proximate cause of the damages being claimed. **Orth v. Bauer**, 163 Colo. 136, 429 P.2d 279 (1967); **Parrish v. Smith**, 102 Colo. 250, 78 P.2d 629 (1938); *see* **Beasley v. Best Car Buys, LTD**, 2015 COA 145, ¶ 32, 363 P.3d 777; **Harless v. Geyer**, 849 P.2d 904 (Colo. App. 1992); **Kepley v. Kim**, 843 P.2d 133 (Colo. App. 1992); **Comfort v. Rocky Mtn. Consultants, Inc.**, 773 P.2d 615 (Colo. App. 1989) (proof of violation required); **Hilberg v. F.W. Woolworth Co.**, 761 P.2d 236 (Colo. App. 1988), *overruled on other grounds by* **Casebolt v. Cowan**, 829 P.2d 352 (Colo. 1992); **Sanchez v. Staats**, 34 Colo. App. 243, 526 P.2d 672 (1974), *aff'd*, 189 Colo. 228, 539 P.2d 1233 (1975); *see also* **Lego v. Schmidt**, 805 P.2d 1119 (Colo. App. 1990) (no evidence that defendants, who were passengers in vehicle which struck pedestrian, violated ordinance or statute or that “their use of vehicle was a proximate cause of pedestrian’s injuries”).

6. If necessary, the court should give additional instructions defining the terms used in the statute or ordinance.

7. Because a child under the age of ten cannot be found guilty of criminal conduct under the provisions of section 18-1-801, C.R.S., this instruction is not applicable to such children. **Calkins v. Albi**, 163 Colo. 370, 431 P.2d 17 (1967).

#### Source and Authority

1. This instruction is supported by **Largo Corp. v. Crespin**, 727 P.2d 1098 (Colo. 1986); **Palmer v. A.H. Robins Co., Inc.**, 684 P.2d 187 (Colo. 1984) (statute); **Kirk v. Himes**, 170 Colo. 378, 461 P.2d 444 (1969) (statute); **Reed v. Barlow**, 153 Colo. 451, 386 P.2d 979 (1963) (ordinance violation involving contributory negligence of plaintiff); **Lambotte v. Payton**, 147 Colo. 207, 363 P.2d 167 (1961); **La Garde v. Aeverman**, 144 Colo. 465, 356 P.2d 971 (1960); **Ankeny v. Talbot**, 126 Colo. 313, 250 P.2d 1019 (1952); **Barsch v. Hammond**, 110 Colo. 441, 135 P.2d 519 (1943) (statute); and **Hertz Driv-Ur-Self Sys., Inc. v. Hendrickson**, 109 Colo. 1,

121 P.2d 483 (1942) (statute). *See also* **City & County of Denver v. DeLong**, 190 Colo. 219, 545 P.2d 154 (1976); **Nutting v. N. Energy, Inc.**, 874 P.2d 482 (Colo. App. 1994); **Schneider v. Midtown Motor Co.**, 854 P.2d 1322 (Colo. App. 1992) (trial court erred in granting summary judgment for automobile dealer where material issues of fact remained on issue of whether violation of statute prohibiting automobile owner from allowing unlicensed driver to drive constituted negligence per se).

2. The doctrine of negligence per se does not apply unless the statute or ordinance prescribes or proscribes specific conduct. **Sego v. Mains**, 41 Colo. App. 1, 578 P.2d 1069 (1978). It does not apply, for example, to a statutorily authorized discretionary act. **Bauer v. Sw. Denver Mental Health Ctr., Inc.**, 701 P.2d 114 (Colo. App. 1985). Neither does the doctrine apply when the defendant was unaware he or she was engaged in the conduct that constituted the violation. **Singleton v. Collins**, 40 Colo. App. 340, 574 P.2d 882 (1978). In situations in which a statute or ordinance does not contain an absolute prohibition of the conduct in question, but instead uses language implying that a violation of the statute or ordinance must be based upon volitional conduct, it may be appropriate to modify this instruction to include additional language requiring the jury to consider whether the alleged violation was undertaken with the level of negligence, knowledge, or intent required by the statute or ordinance. **Novak v. Craven**, 195 P.3d 1115 (Colo. App. 2008).

3. If a statutory standard of care is a codification of common-law negligence, the negligence per se instruction has no practical effect when given alongside a common-law negligence instruction. In such cases, the court need not give both a common-law negligence instruction and a negligence per se instruction. **Winkler v. Shaffer**, 2015 COA 63, ¶ 18, 356 P.3d 1020; **Silva v. Wilcox**, 223 P.3d 127 (Colo. App. 2009); *see* **Fishman v. Kotts**, 179 P.3d 232 (Colo. App. 2007); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 14 cmt. e (2005).

4. In cases subject to the Colorado Premises Liability Act, § 13-21-115, C.R.S., a plaintiff may not assert a claim of negligence per se against a landowner to recover for damages caused on the premises. The premises liability statute establishes a comprehensive and exclusive legislative scheme for premises liability claims. However, certain statutes or ordinances may be relevant to establish the standard of reasonable care, and violation of that statute or ordinance may be evidence of a failure to exercise reasonable care for purposes of establishing a premises liability claim. **Lombard v. Colo. Outdoor Educ. Ctr., Inc.**, 187 P.3d 565 (Colo. 2008).

5. In addition to state statutes and municipal ordinances, this instruction, appropriately modified, also may be applicable to violations of applicable federal regulations. *Compare* **Hageman v. TSI, Inc.**, 786 P.2d 452 (Colo. App. 1989), *with* **Scott v. Matlack, Inc.**, 39 P.3d 1160 (Colo. 2002) (violation of regulatory standards issued pursuant to the Occupational Safety and Health Act, 29 U.S.C. §§ 651 to -678, does not constitute negligence per se but admission of regulations are some, albeit non-conclusive, evidence of the standard of care in the relevant industry), and **Canape v. Petersen**, 897 P.2d 762 (Colo. 1995) (same).

6. For a discussion of the possible impact of the Colorado Governmental Immunity Act on the application of the negligence per se doctrine, see **State v. Moldovan**, 842 P.2d 220 (Colo. 1992).

7. Generally, to determine if a private tort remedy is available to a person alleging that a defendant has violated a statutory duty, a court must consider three factors: (1) whether the plaintiff is within the class of persons intended to be benefitted by the legislative enactment; (2) whether the General Assembly intended to create, albeit implicitly, a private right of action; and (3) whether an implied civil remedy would be consistent with the legislative scheme. **Allstate Ins. Co. v. Parfrey**, 830 P.2d 905 (Colo. 1992); **Grizzell v. Hartman Enters., Inc.**, 68 P.3d 551 (Colo. App. 2003) (no private tort remedy available to parent of child injured as a result of a violation of the Youth Employment Opportunity Act, § 8-12-101 to -117, C.R.S.); *see also* **Gerrity Oil & Gas Corp. v. Magness**, 946 P.2d 913 (Colo. 1997) (when statutory language indicates that legislature considered but chose not to include private remedy for damages, such remedy will not be inferred).

8. A violation of either the Colorado Passenger Tramway Act, §§ 25-5-701 to -720, C.R.S., or the Colorado Ski Safety and Liability Act, §§ 33-44-101 to -114, C.R.S., constitutes negligence per se. **Bayer v. Crested Butte Mtn. Resort, Inc.**, 960 P.2d 70 (Colo. 1998).

9. For a discussion regarding the difference between strict liability in tort and negligence per se, see **Lui v. Barnhart**, 987 P.2d 942 (Colo. App. 1999) (in action by motorist who collided with horse, mere fact that horse was out of corral did not establish, as a matter of law, that owner had violated ordinance requiring that such animals be confined, or that owner was negligent per se).

## **9:15 CONDUCT IN COMPLIANCE WITH STATUTE OR ORDINANCE AND JUSTIFIABLE VIOLATION OF STATUTE**

**Even if (statutes) (ordinances) govern the actions of persons, such persons must use reasonable care under the particular circumstances and conditions prevailing.**

**A person violating a (statute) (ordinance) may justifiably do so if compliance with the (statute) (ordinance) would have created a greater risk of danger or injury to him or herself or others.**

### **Notes on Use**

1. Use whichever parenthesized words are appropriate.
2. The first paragraph may be used alone as a separate instruction in appropriate cases where it is claimed that because of a party's compliance with a statute, that party was not negligent.
3. The second paragraph of this instruction should be given after Instruction 9:14, but only if there is sufficient evidence on which justification might be found under the rule stated in this instruction. For the statutory justifications applicable in criminal cases, some or all of which may be applicable in civil cases under the second paragraph of this instruction, see sections 18-1-701 to -709, C.R.S. In such cases, the second paragraph should be appropriately modified. A violation because of lack of knowledge as to the existence of the statute or ordinance is not justifiable. *See* Instruction 9:16; *see also* **People v. Brandyberry**, 812 P.2d 674 (Colo. App. 1990) (to be entitled to choice of evils defense as defined by section 18-1-702, C.R.S., actor's criminal conduct must be necessary because of sudden and unforeseen emergence of situation requiring actor's immediate action to prevent occurrence of imminently impending injury).

### **Source and Authority**

1. The rule stated in the first paragraph is supported by **Oliver v. Weaver**, 72 Colo. 540, 212 P. 978 (1923) (compliance not conclusive evidence of no negligence). *See also* RESTATEMENT (SECOND) OF TORTS § 288C (1965); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 36, at 233 (5th ed. 1984).
2. The rule stated in the second paragraph is supported by **Crosby v. Canino**, 84 Colo. 225, 268 P. 1021 (1928). *See also* **La Garde v. Aeverman**, 144 Colo. 465, 356 P.2d 971 (1960); **Larson v. Long**, 74 Colo. 152, 219 P. 1066 (1923); RESTATEMENT (SECOND) OF TORTS § 288A; PROSSER AND KEETON ON THE LAW OF TORTS, *supra*, § 36, at 227-29.

## **9:16 UNKNOWNING VIOLATION OF STATUTE OR ORDINANCE**

**It is not a defense to a claimed act of negligence that a person was unaware that his or her conduct constituted a violation of a (statute) (ordinance).**

### **Notes on Use**

1. Use whichever parenthesized words are appropriate.
2. This instruction does not apply and should not be given in a case where the person allegedly violating the statute was unaware and reasonably could not be aware of the fact that he or she was engaging in the conduct which constituted the violation, for example, a person whose tail lights on the car the person was driving suddenly went out while the person was driving on a highway at night. *See also Singleton v. Collins*, 40 Colo. App. 340, 574 P.2d 882 (1978) (landlady not held liable under the doctrine of negligence per se when unaware condition on the premises, created by builder, was in violation of ordinance, and governmental inspection had indicated building was in compliance).
3. This instruction is intended only to cover the situation where the person was aware he or she was engaging in the conduct, but was unaware of a statute or ordinance making such conduct unlawful.
4. In appropriate cases, this instruction should be given with Instruction 9:14 (violation of statute or ordinance).
5. For exceptions to the rule stated in this instruction, see section 18-1-504(2), C.R.S.

### **Source and Authority**

This instruction is supported by section 18-1-504(2), and RESTATEMENT (SECOND) OF TORTS § 290 cmt. o (1965).

## 9:17 RES IPSA LOQUITUR — PERMISSIBLE INFERENCE ARISING FROM REBUTTABLE PRESUMPTION OF NEGLIGENCE

In deciding whether or not the defendant, (*name*), was negligent, you may, but are not required to, draw an inference that the defendant was negligent if you find that:

1. The plaintiff, (*name*), had (injuries) (damages) (losses) caused by the (*insert appropriate description of instrumentality*); and

2. Such (injuries) (damages) (losses) would not have occurred unless someone was negligent in (*insert one or more appropriate descriptions, e.g., “using,” “handling,” “operating,” “manufacturing,” “repairing,” “maintaining,” etc.*) the (*insert appropriate description of instrumentality*); and

3. At the time and in the way such negligence probably occurred, it was more likely that the negligence of the defendant (or someone for whom the defendant was legally responsible), rather than the negligence of anyone else, caused the plaintiff’s (injuries) (damages) (losses).

If you draw this inference, you may consider it along with all the other evidence in the case in deciding whether or not the defendant was negligent.

### Notes on Use

1. To demonstrate the applicability of res ipsa loquitur, a plaintiff must introduce evidence that, when viewed in the light most favorable to the plaintiff, establishes each of three elements by a preponderance of the evidence: (1) the event is of the kind that ordinarily does not occur in the absence of negligence; (2) responsible causes other than the defendant’s negligence are sufficiently eliminated; and (3) the presumed negligence is within the scope of the defendant’s duty to the plaintiff. **Chapman v. Harner**, 2014 CO 78, ¶ 5, 339 P.3d 519; **Kendrick v. Pippin**, 252 P.3d 1052 (Colo. 2011).

2. Formerly, when the trial court determined that res ipsa loquitur applied, the jury was instructed to consider the presumption of negligence together with all other evidence in the case in deciding whether or not the defendant was negligent. In **Chapman**, 2014 CO 78, ¶¶ 25-26, however, the Supreme Court held that, under Rule 301, the res ipsa loquitur doctrine shifts only the burden of going forward with evidence to rebut the presumed fact of negligence. The doctrine does not shift the burden of proof, which remains on the plaintiff throughout the case.

3. If the plaintiff presents sufficient evidence for a jury to find in favor of the plaintiff on the elements of res ipsa loquitur, then the burden shifts to the defendant to produce legally sufficient evidence rebutting the presumption. **Chapman**, 2014 CO 78, ¶ 25. If the defendant fails to produce legally sufficient evidence rebutting the presumption, **Chapman** does not state the procedure to be followed. **Krueger v. Ary**, 205 P.3d 1150 (Colo. 2009), addressing the rebuttable presumption of undue influence in will contests, sets forth in detail the general procedure for applying a rebuttable presumption. Although **Krueger** was distinguished in



**Chapman**, 2014 CO 78, ¶ 15, on the effect of applying *res ipsa loquitur*, **Krueger** nonetheless may provide guidance about the procedure when the defendant fails to rebut the presumption of negligence created by *res ipsa loquitur*. **Krueger** states that “if the opponent does not meet her burden [of going forward], the presumption establishes the presumed facts as a matter of law.” 205 P.3d at 1156. In that event, see Instruction 2:6 (instructing jury on remaining issues where trial court has directed a verdict on negligence against the defendant).

4. If the defendant meets the burden of going forward by producing sufficient evidence to rebut the presumption of negligence, then “the presumption is destroyed and only a permissible inference of negligence remains. The jury may consider this inference alongside the other evidence in determining whether the plaintiff satisfied his burden to prove that the defendant was negligent, but it is not required to do so, and the trial court has discretion to determine whether or not to instruct the jury on the remaining permissible inference.” **Chapman**, 2014 CO 78, ¶ 25. If the court decides to instruct on the remaining permissible inference, this instruction, rather than Instruction 3:5 (permissible inference arising from rebuttable presumption), should be used. However, the supreme court “disfavor[s] instructions emphasizing specific evidence.” **Krueger**, 205 P.3d at 1157. “A trial court does not abuse its discretion in failing to instruct the jury on a permissible inference unless the omission caused substantial prejudice to the requesting party.” *Id.* When the permissible inference arises, an instruction should be given if “justified by strong underlying policy considerations.” *Id.*

5. As an example of policy considerations that would support giving a permissible inference instruction, the court in **Krueger** cited the presumption that evidence destroyed by a civil litigant would have been unfavorable to the destroying party. *Id.* “A trial court may give this permissible inference instruction as long as it furthers two underlying rationales.” *Id.* “The instruction should be both punitive and remedial; it should deter the parties from destroying evidence, and restore the prejudiced party to the position she would have been in had the evidence not been destroyed.” *Id.*

6. This instruction should not be given if the circumstances of the case “do not suggest or indicate superior knowledge or opportunity for explanation on the part of the party charged or if the plaintiff . . . has equal or superior means of information.” **Shutt v. Kaufman’s, Inc.**, 165 Colo. 175, 179-80, 438 P.2d 501, 503 (1968) (quoting **Yellow Cab Co. v. Hodgson**, 91 Colo. 365, 373, 14 P.2d 1081, 1084 (1932)).

7. If the doctrine of *res ipsa loquitur* applies, it is reversible error for the court to instruct the jury that the mere happening of an accident does not give rise to a presumption of negligence (Instruction 9:12). **Trione v. Mike Wallen Standard, Inc.**, 902 P.2d 454 (Colo. App. 1995); *see also* **Kitto v. Gilbert**, 39 Colo. App. 374, 570 P.2d 544 (1977).

8. The doctrine of *res ipsa loquitur* may apply in cases involving more than one defendant and in cases where the defendant may not have had “exclusive” control in a literal sense. **Branco E. Co. v. Leffler**, 173 Colo. 428, 482 P.2d 364 (1971); *see also* **Ochoa v. Vered**, 212 P.3d 963 (Colo. App. 2009); **Auxier v. Auxier**, 843 P.2d 93 (Colo. App. 1992), *overruled on other grounds by* **Scott v. Matlack, Inc.**, 39 P.3d 1160 (Colo. 2002). On the question of what constitutes sufficient proof on the issue of “exclusive” control, compare **Leffler**, 482 P.2d 364, with **Hilzer v. MacDonald**, 169 Colo. 230, 454 P.2d 928 (1969); *see also* **Holmes v. Gamble**,

655 P.2d 405 (Colo. 1982) (evidence insufficient to eliminate other possible responsible causes, including plaintiff's own conduct and conduct of third persons); **Lui v. Barnhart**, 987 P.2d 942 (Colo. App. 1999) (in action by motorist who collided with horse, mere fact that horse was out of corral did not support instruction on *res ipsa loquitur* since horse's presence on road could be explained by actions of unknown third parties); **Nutting v. N. Energy, Inc.**, 874 P.2d 482 (Colo. App. 1994); **Martin v. Minnard**, 862 P.2d 1014 (Colo. App. 1993); **Berrey v. White Wing Servs., Inc.**, 44 Colo. App. 506, 619 P.2d 82 (1980) (sufficient evidence of "exclusive" control). Also, in cases involving alleged medical malpractice, compare **Spoor v. Serota**, 852 P.2d 1292 (Colo. App. 1992), **Mudd v. Dorr**, 40 Colo. App. 74, 574 P.2d 97 (1977), and **Kitto**, 39 Colo. App. 374, 570 P.2d 544, with **Adams v. Leidholt**, 195 Colo. 450, 579 P.2d 618 (1978), *aff'd on other grounds*, 195 Colo. 450, 579 P.2d 618 (1978). *See also* **Holmes**, 655 P.2d at 409 (*res ipsa loquitur* instruction not warranted because it was "equally likely" that there was another cause for plaintiff's injury); **Freedman v. Kaiser Found. Health Plan of Colo.**, 849 P.2d 811 (Colo. App. 1992) (instruction on *res ipsa loquitur* not warranted where evidence did not sufficiently eliminate other possible causes of plaintiffs' damages and indicated that plaintiffs' damages might have been caused by negligence of third party not named as a defendant); **Miller v. Van Newkirk**, 628 P.2d 143 (Colo. App. 1980) (insufficient evidence that "accident" would not ordinarily have happened in the absence of negligence).

9. In order to rely on the doctrine, it is not necessary for the plaintiff's proof to eliminate all possibilities other than the negligence of the defendant which might explain the accident and his injuries. **Adams**, 38 Colo. App. at 470, 563 P.2d at 20; *see also* **Montgomery Elevator Co. v. Gordon**, 619 P.2d 66 (Colo. 1980); **Manzi v. Montgomery Elevator Co.**, 865 P.2d 902 (Colo. App. 1993) (evidence sufficient to invoke doctrine against manufacturer of escalator where injuries occurred as a result of plaintiff's shoe being caught in escalator mechanism); **Hartford Fire Ins. Co. v. Pub. Serv. Co. of Colo.**, 676 P.2d 25 (Colo. App. 1983). Moreover, once the plaintiff has established a *prima facie* case that the accident would not have happened but for the negligence of someone and that such negligence might have been that of the defendant, the presentation of conflicting evidence concerning other explanations as to how the accident might have been caused, or by whom, does not deprive the plaintiff of the right to have the case submitted to the jury on the theory of *res ipsa loquitur*. **Hartford Fire Ins. Co.**, 676 P.2d at 29.

10. In cases governed by the comparative negligence statute, it is not necessary in all cases for the plaintiff to prove a lack of contributory negligence on his or her part in order to rely on the doctrine of *res ipsa loquitur* as a means of establishing the defendant's negligence. That would appear to be necessary only where the plaintiff has had some "control" over the instrumentality at the time of the probable negligence and consequently might have been the only person whose negligence caused his or her injuries. Such is not the case, however, where the doctrine would be sufficient alone to establish negligence on the part of anyone having "exclusive control of the instrumentality" at the time of the probable negligence, and any negligence of the plaintiff, even though it may have contributed to the plaintiff's injuries, for example, by enhancing them, was causally independent of whatever events may have caused the instrumentality to bring about the accident. **Gordon**, 619 P.2d at 70; *see also* **Tracy v. Graf**, 37 Colo. App. 323, 550 P.2d 886 (1976), *rev'd on other grounds*, 194 Colo. 1, 568 P.2d 467 (1977).

11. The plaintiff need only disprove any possible contributory negligence on his or her part if the plaintiff had some control over the instrumentality at the time the instrumentality caused the accident, and the plaintiff's control was such that, if exercised negligently, it could have been the negligence inferable from the accident rather than that of the defendant. While other independent contributory negligence of the plaintiff may be established by the defendant to bar or reduce the plaintiff's damages under the comparative negligence statute, evidence of that negligence will not preclude the plaintiff's use of the doctrine of *res ipsa loquitur*, if otherwise applicable, to establish negligence on the part of the defendant. **Gordon**, 619 P.2d at 70; *see Spoor*, 852 P.2d at 1295.

12. To rely on the doctrine, it is not necessary in all cases to establish that a specific instrumentality caused the injuries. It is sufficient if all reasonable causes were within the control of the defendant and the injuries would probably not have occurred in the absence of negligence. **Zimmer v. Celebrities, Inc.**, 44 Colo. App. 515, 615 P.2d 76 (1980).

13. “[A]llegations of specific negligence in a complaint do not preclude a plaintiff from relying on the doctrine.” **Hartford Fire Ins. Co.**, 676 P.2d at 27. In addition, “an attempt to prove [a specific act of] negligence does not negate the applicability of [the doctrine] so long as the evidence of [such] specific negligence does not conclusively establish the facts surrounding the accident.” *Id.*; *see also Zimmer*, 44 Colo. App. at 518, 615 P.2d at 79. However, in a medical malpractice claim the doctrine does not apply if the evidence establishes that a “specific act of negligence was the only likely cause for the harm.” **Kitto**, 39 Colo. App. at 380, 570 P.2d at 548; *accord Shelton v. Penrose-St. Francis Healthcare Sys.*, 968 P.2d 132 (Colo. App. 1998), *rev'd on other grounds*, 984 P.2d 623 (Colo. 1999).

14. Whether there is sufficient evidence for a reasonable jury to find the requirements of the doctrine have been established, and therefore whether this instruction should be given, is a question of law for the court. **Miller**, 628 P.2d at 146; **Zimmer**, 44 Colo. App. at 517, 615 P.2d at 78. In determining the sufficiency of the evidence, the court should not weigh the evidence nor apply a preponderance of the evidence test, but rather should apply the standard directed verdict test to each of the elements of the doctrine. **Holmes**, 655 P.2d at 409.

15. In a medical malpractice action, the doctrine of *res ipsa loquitur* does not apply if expert testimony is required to establish that the defendant caused the injury and that the injury would not have occurred in the absence of negligence. **Williams v. Boyle**, 72 P.3d 392 (Colo. App. 2003).

### Source and Authority

This instruction is supported by **Chapman**, 2014 CO 78, ¶¶ 25-26; **Kendrick**, 252 P.3d at 1061; and **Ravin v. Gambrell**, 788 P.2d 817 (Colo. 1990). **Home Public Market v. Newrock**, 111 Colo. 428, 142 P.2d 272 (1943), supports the first part of the instruction as to the elements required for *res ipsa loquitur*. *See Bloxsom v. San Luis Valley Crop Care, Inc.*, 198 Colo. 113, 596 P.2d 1189 (1979); **Leffler**, 173 Colo. at 435-36, 482 P.2d at 367-68; **Hamilton v. Smith**, 163 Colo. 88, 428 P.2d 706 (1967); **Zimmerman v. Franzen**, 121 Colo. 574, 220 P.2d 344 (1950); **Minto v. Sprague**, 124 P.3d 881 (Colo. App. 2005); **Canape v. Peterson**, 878 P.2d 83 (Colo. App. 1994), *aff'd on other grounds*, 897 P.2d 762 (Colo. 1995); **U.S. Fid. & Guar.**

**Co. v. Salida Gas Serv. Co.**, 793 P.2d 602 (Colo. App. 1989); **Mudd**, 40 Colo. App. at 77, 574 P.2d at 100; **Kitto**, 39 Colo. App. at 379-80, 570 P.2d 548; **Majors v. J.C. Penney Co., Inc.**, 31 Colo. App. 568, 506 P.2d 399 (1972) (error to instruct on res ipsa loquitur where accident was one that could have occurred in the absence of any negligence on the defendant's part and, further, could have been caused by plaintiff's voluntary act, negligence or otherwise); **Oil Bldg. Corp. v. Hermann**, 29 Colo. App. 564, 488 P.2d 1126 (1971); **Smith v. Curran**, 28 Colo. App. 358, 472 P.2d 769 (1970); *see also* **Krueger**, 205 P.3d 1154-56 (procedure for applying rebuttable presumption of undue influence in will contest).

## **B. CAUSATION**

### **Special Note**

The Committee has intentionally eliminated the use of the word “proximate” when instructing the jury on causation issues because the concept of proximate cause is adequately included in the instructions in this Part B and because the word “proximate” tends to be confusing to the jury.

## 9:18 CAUSE WHEN ONLY ONE CAUSE IS ALLEGED — DEFINED

The word “cause” as used in these instructions means an act or failure to act which in natural and probable sequence produced the claimed injury. It is a cause without which the claimed injury would not have happened.

### Notes on Use

1. Depending on the evidence in the particular case, when concurrent or succeeding causes are involved, additional instructions should be given with, or in lieu of, this instruction. See Instructions 9:19 and 9:20.

2. This instruction is not necessary and should not be given when Instruction 9:20 (intervening causes) is given. **Reaves v. Horton**, 33 Colo. App. 186, 518 P.2d 1380 (1973), *aff'd in part, rev'd in part on other grounds*, 186 Colo. 149, 526 P.2d 304 (1974).

3. This instruction applies a “but for” causation test, which cannot be satisfied based solely on evidence that the defendant’s conduct substantially increased the risk to the plaintiff. **Reigel v. SavaSeniorCare L.L.C.**, 292 P.3d 977 (Colo. App. 2011) (disapproving instruction that stated, “If you find that [defendant’s] negligence increased the risk of [plaintiff’s] death or deprived [plaintiff] of some significant chance to avoid death, you may also find that [defendant’s] negligence was a cause of [plaintiff’s] death,” and declining to follow **Sharp v. Kaiser Foundation Health Plan of Colorado**, 710 P.2d 1153 (Colo. App. 1985), *aff'd*, 741 P.2d 714 (Colo. 1987)).

### Source and Authority

1. This instruction is supported by **Kaiser Foundation Health Plan of Colorado v. Sharp**, 741 P.2d 714 (Colo. 1987); **Hook v. Lakeside Park Co.**, 142 Colo. 277, 351 P.2d 261 (1960); **Stout v. Denver Park & Amusement Co.**, 87 Colo. 294, 287 P. 650 (1930); **Colorado Springs & Interurban Railway v. Allen**, 55 Colo. 391, 135 P. 790 (1913); **Smith v. State Compensation Insurance Fund**, 749 P.2d 462 (Colo. App. 1987); and **Colorado Coal & Iron Co. v. Lamb**, 6 Colo. App. 255, 40 P. 251 (1895). See also **Reigel**, 292 P.3d at 988 (approving Instruction 9:18 language as a correct statement of Colorado law); RESTATEMENT (SECOND) OF TORTS §§ 431-33 (1965).

2. As to the sufficiency of evidence on the issue of cause, see **Gibbons v. Ludlow**, 2013 CO 49, ¶ 2, 304 P.3d 239 (evidence insufficient to establish cause of economic damages beyond mere possibility or speculation); **Lyons v. Nasby**, 770 P.2d 1250 (Colo. 1989) (evidence of proximate cause sufficient); **Kaiser Foundation Health Plan**, 741 P.2d at 719 (cause need not be proved with absolute certainty, nor need defendant’s conduct be proved the only cause); **Bayly, Martin & Fay, Inc. v. Pete’s Satire, Inc.**, 739 P.2d 239 (Colo. 1987) (proof of cause when insurance agent negligently fails to obtain requested insurance coverage); and **Reigel**, 292 P.3d at 988 (plaintiff must establish causation beyond mere possibility or speculation). For the general test for determining the sufficiency of evidence, see **Gossard v. Watson**, 122 Colo. 271, 221 P.2d 353 (1950).

**9:19 CONCURRENT CAUSES (EXCLUDING DESIGNATED NONPARTY FAULT CASES)**

**More than one person may be responsible for causing (injuries) (damages) (losses). If you find that the defendant, (*name*), was negligent and that (his) (her) negligence caused (injury) (damage) (loss) to the plaintiff, it is not a defense that some third person's negligence might also have been a cause of the (injuries) (damages) (losses).**

**Notes on Use**

1. Use whichever parenthesized words are appropriate.
2. This instruction should be given when there might be a basis for contending that a third person, not a party to the action, was in whole or in part responsible for causing the plaintiff's losses.
3. It should not, however, be used in cases in which the negligence or fault of a designated nonparty has been properly put in issue under section 13-21-111.5(2) and (3)(b), C.R.S., as a cause, in whole or part, of the plaintiff's claimed damages. Instead, Instruction 9:20 (intervening causes) should be used.

**Source and Authority**

This instruction is supported by **Colorado Mortgage & Investment Co. v. Giacomini**, 55 Colo. 540, 136 P. 1039 (1913); **Carlock v. Denver & Rio Grande Railroad**, 55 Colo. 146, 133 P. 1103 (1913); and **Colorado Mortgage & Investment Co. v. Rees**, 21 Colo. 435, 42 P. 42 (1895). *See also* RESTATEMENT (SECOND) OF TORTS § 439 (1965); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 268 (5th ed. 1984).

## 9:20 CAUSE — CONCURRENT CAUSES — INTERVENING CAUSES

The word “cause” as used in these instructions means an act or failure to act that in natural and probable sequence produced the claimed injury. It is a cause without which the claimed injury would not have happened.

If more than one act or failure to act contributed to the claimed injury, then each act or failure to act may have been a cause of the injury. A cause does not have to be the only cause or the last or nearest cause. It is enough if the act or failure to act joins in a natural and probable way with some other act or failure to act to cause some or all of the claimed injury.

(One’s conduct is not a cause of another’s injuries, however, if, in order to bring about such injuries, it was necessary that his or her conduct combine or join with an intervening cause that also contributed to cause the injuries. An intervening cause is a cause that would not have been reasonably foreseen by a reasonably careful person under the same or similar circumstances.)

### Notes on Use

1. This instruction should be used when there is sufficient evidence that the defendant’s negligence was a proximate cause even though such negligence may not have been the most immediate cause and, to bring about the plaintiff’s losses, such negligence had to operate in conjunction with other causes.

2. When another concurrent actual cause may not have been sufficiently foreseeable so that it might constitute an intervening cause, thereby relieving the defendant of liability, the last parenthesized paragraph of this instruction setting forth the doctrine of intervening cause must be given. **Jones v. Caterpillar Tractor Co.**, 701 P.2d 84 (Colo. App. 1984); *see also* **Albo v. Shamrock Oil & Gas Corp.**, 160 Colo. 144, 415 P.2d 536 (1966); **Estate of Newton v. McNew**, 698 P.2d 835, 837 (Colo. App. 1984) (holding that “[a]n intervening cause relieves a defendant of liability for negligence only if the intervening cause is not reasonably foreseeable,” and concluding that the intentional intervening acts of third persons were sufficiently foreseeable); RESTATEMENT (SECOND) OF TORTS §§ 440-53 (1965); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 44 (5th ed. 1984). The fact that a third person’s concurrent act was intentionally tortious or criminal does not necessarily render that act an intervening cause. It is sufficient “if that act [was] reasonably and generally foreseeable.” **Ekberg v. Greene**, 196 Colo. 494, 497, 588 P.2d 375, 377 (1978); *see also* **Taco Bell, Inc. v. Lannon**, 744 P.2d 43 (Colo. 1987); **Largo Corp. v. Crespin**, 727 P.2d 1098 (Colo. 1986); **Sewell v. Pub. Serv. Co. of Colo.**, 832 P.2d 994 (Colo. App. 1991); Source and Authority to Instruction 9:27 (comparative negligence of the plaintiff with multiple defendants).

3. When a case is submitted to the jury on more than one theory of negligence and on the basis of the evidence the last parenthetical paragraph of this instruction would be appropriate as to one or more of the theories of negligence but not to all, the paragraph must be modified to make clear to the jury the theory or theories to which the rule stated in the paragraph may be



applicable and the theory or theories to which it would not. **Kerby v. Flamingo Club, Inc.**, 35 Colo. App. 127, 532 P.2d 975 (1974).

4. In civil actions in which the negligence or fault of a designated nonparty has been properly put in issue under sections 13-21-111.5(2) and (3)(b), C.R.S., as a cause, in whole or in part, of the plaintiff's claimed damages, this instruction should be used rather than Instruction 9:19. In addition, in those cases, Instruction 9:24 (negligence or fault of designated nonparty) should also be given.

### Source and Authority

1. This instruction is supported by the authorities cited in Source and Authority to Instruction 9:19. Additional cases support the second paragraph of this instruction. *See* **Moore v. Standard Paint & Glass Co.**, 145 Colo. 151, 358 P.2d 33 (1960) (acts of others and act of God concurring with defendant's negligence); **Barlow v. N. Sterling Irrigation Dist.**, 85 Colo. 488, 277 P. 469 (1929) (concurring act of God); **Ryan Gulch Reservoir Co. v. Swartz**, 83 Colo. 225, 263 P. 728 (1928) (same); **Bradley v. Guess**, 797 P.2d 749 (Colo. App. 1989), *rev'd on other grounds sub nom. Seaward Constr. Co. v. Bradley*, 817 P.2d 971 (Colo. 1991).

2. ““An intervening act of a human being . . . which is a normal response to the stimulus of a situation created by [the actor's] negligent conduct, is not a superseding cause of harm to another which the actor's conduct is a substantial factor in bringing about.”” **Calkins v. Albi**, 163 Colo. 370, 377, 431 P.2d 17, 20 (1967) (quoting RESTATEMENT (SECOND) OF TORTS § 443 (1965)); *see also* **Webb v. Dessert Seed Co.**, 718 P.2d 1057 (Colo. 1986) (the precise manner in which the injuries were caused need not have been foreseeable).

3. Cases supporting the third parenthesized paragraph include **Farmers Mutual Insurance Co. v. Chief Industries, Inc.**, 170 P.3d 832 (Colo. App. 2007) (defendant who seeks to assert defense of intervening cause must request optional instruction language from the third parenthesized paragraph or the issue of intervening cause is deemed to be waived); and **Smith v. State Compensation Insurance Fund**, 749 P.2d 462 (Colo. App. 1987) (subsequent motorcycle accident an independent, intervening cause because not a foreseeable consequence of the defendant's claimed negligence).

4. In **Webb**, 718 P.2d at 1063-64, the court adopted the test that is set forth in the RESTATEMENT (SECOND) OF TORTS § 442B (1965), for determining the existence of an intervening cause. *Accord* **Groh v. Westin Operator, LLC**, 2013 COA 39, 352 P.3d 472, ¶ 49, *aff'd*, 2015 CO 25, 347 P.3d 606; **Scharrel v. Wal-Mart Stores, Inc.**, 949 P.2d 89 (Colo. App. 1997); **Voight v. Colo. Mtn. Club**, 819 P.2d 1088 (Colo. App. 1991). Intervening cause principles apply in situations in which the defendant's negligence is alleged to have caused the plaintiff's decedent to commit suicide. In such cases, the test set forth in the RESTATEMENT (SECOND) OF TORTS § 455 (1965), is relevant in determining causation. **Moore v. W. Forge Corp.**, 192 P.3d 427 (Colo. App. 2007).

5. As to the sufficiency of evidence on the issue of cause, *see* **Kaiser Foundation Health Plan of Colorado v. Sharp**, 741 P.2d 714 (Colo. 1987) (cause need not be proved with absolute

certainty, nor need defendant's conduct be proved the only cause). *See also* **Gossard v. Watson**, 122 Colo. 271, 221 P.2d 353 (1950).

## 9:21 CAUSE — FORESEEABILITY LIMITATION

**The negligence, if any, of the defendant, (*name*), is not a cause of any (injuries) (damages) (losses) to the plaintiff, (*name*), unless injury to a person in the plaintiff's situation was a reasonably foreseeable result of that negligence. The specific injury need not have been foreseeable. It is enough if a reasonably careful person, under the same or similar circumstances, would have anticipated that injury to a person in the plaintiff's situation might result from the defendant's conduct.**

### Notes on Use

1. This instruction is not applicable to unique or extensive unforeseeable injuries the plaintiff may have sustained because of some physical or mental peculiarity of the plaintiff, as long as some physical impact with the plaintiff was foreseeable. For example, a negligent driver who collides with another's car cannot avoid liability for all the other person's damages even though, because of personal peculiarities, the plaintiff's injuries or damages may be greatly in excess of what a reasonable person might expect a typical plaintiff to sustain. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 43, at 291-92 (5th ed. 1984); *see also* Instruction 6:7 ("thin skull" doctrine).

2. This instruction should be used "only when the evidence presents a jury question on whether the injured party was a person within the foreseeable zone of danger created by defendant's negligence and thus was owed a duty by defendant." **Chutich v. Samuelson**, 33 Colo. App. 195, 201, 518 P.2d 1363, 1367 (1973), *aff'd in part, rev'd in part on other grounds*, 187 Colo. 155, 529 P.2d 631 (1974); *see also* **Walcott v. Total Petroleum, Inc.**, 964 P.2d 609 (Colo. App. 1998) (risk that purchaser of gasoline would intentionally throw it on victim and set victim on fire was not reasonably foreseeable by operator of service station); **Scharrel v. Wal-Mart Stores, Inc.**, 949 P.2d 89 (Colo. App. 1997); **Cooley v. Paraho Dev. Corp.**, 851 P.2d 207 (Colo. App. 1992), *aff'd on other grounds sub nom. Gen. Elec. Co. v. Niemet*, 866 P.2d 1361 (Colo. 1994); **Sewell v. Pub. Serv. Co. of Colo.**, 832 P.2d 994 (Colo. App. 1991).

### Source and Authority

1. This instruction is supported by **Aikens v. George W. Clayton Trust Commission**, 132 Colo. 374, 288 P.2d 349 (1955) (defendants could not reasonably foresee the accident); **Stout v. Denver Park & Amusement Co.**, 87 Colo. 294, 287 P. 650 (1930) (intervening cause could not reasonably have been anticipated); and **Town of Lyons v. Watt**, 43 Colo. 238, 95 P. 949 (1908) (same). *See also* **Webb v. Dessert Seed Co.**, 718 P.2d 1057 (Colo. 1986) (the precise manner in which the injuries were caused need not have been foreseeable); **Smith v. State Comp. Ins. Fund**, 749 P.2d 462 (Colo. App. 1987) (subsequent motorcycle accident not foreseeable); **Wesley v. United Servs. Auto. Ass'n**, 694 P.2d 855 (Colo. App. 1984) (quoting this instruction with approval).

2. The fact that it may not have been foreseeable that an injury to the plaintiff as a particular individual person might result from the defendant's conduct does not necessarily absolve the defendant from liability. It is sufficient if the plaintiff was within a group of

foreseeable persons who might have been endangered by the defendant's conduct. **Moore v. Standard Paint & Glass Co.**, 145 Colo. 151, 358 P.2d 33 (1960) (by implication); **Estate of Newton v. McNew**, 698 P.2d 835 (Colo. App. 1984); **Bartley v. Floyd**, 695 P.2d 781 (Colo. App. 1984), *aff'd on other grounds*, 727 P.2d 1109 (Colo. 1986).

3. Foreseeability in the context of determining proximate cause involves policy considerations as to whether a defendant's responsibility should extend to the results in question. **Keller v. Koca**, 111 P.3d 445 (Colo. 2005) (employer owed no duty to twelve-year-old sexually assaulted by employee on business premises on day that business was closed as risk was unforeseeable); *see also* **Build It & They Will Drink, Inc. v. Strauch**, 253 P.3d 302 (Colo. 2011) (under dram shop liability statute, injury need not be foreseeable by vendor who serves obviously intoxicated person, and vendor could be liable when the intoxicated patron stabbed another one-and-a-half blocks from nightclub); **Lyons v. Nasby**, 770 P.2d 1250 (Colo. 1989); **Largo Corp. v. Crespin**, 727 P.2d 1098 (Colo. 1986).

4. For cases discussing foreseeability in the context of determining whether a duty of care exists, see the Introductory Note to Chapter 9 and the Source and Authority to Instruction 9:1, under the subtopic "Existence and Scope of a Legal Duty." "A negligence claim requires two distinct and separate foreseeability analyses. First, foreseeability is an integral element of duty. Second, foreseeability is the touchstone of proximate cause. The former is a question of law for the court; the latter is a question of fact for the jury at trial." **P.W. v. Children's Hosp. Colo.**, 2016 CO 6, ¶ 24 n.7, 364 P.3d 891 (quoting **Westin Operator, LLC v. Groh**, 2015 CO 25, ¶ 33 n.5, 347 P.3d 606).

## C. COMPARATIVE NEGLIGENCE AND COMPARATIVE FAULT

### Special Note

1. The comparative negligence statute, section 13-21-111(2), C.R.S., could be construed to require that in all cases where the issue of plaintiff's comparative negligence is submitted to the jury for its determination, "the jury shall return a special verdict which shall state: (a) The amount of damages which would have been recoverable if there had been no contributory negligence; and (b) The degree of negligence of each party, expressed as a percentage." Under this interpretation, the statute would require that the jury determine the amount of plaintiff's damages in cases where the plaintiff is denied any recovery because the jury determines either (1) that the defendant was not negligent or (2) that the plaintiff's negligence is equal to or greater than that of the defendant. However, since subsection (2) of section 13-21-111 only applies to ". . . any action to which subsection (1) of this section applies . . ." and subsection (1) of the statute applies only to actions in which the plaintiff's "negligence was not as great as the negligence of the person against whom recovery is sought. . .," the statute can also be construed to require a determination of damages only in those cases where the negligence of the plaintiff is "not as great as the negligence" of the defendant. In drafting the special verdict forms set forth in this Part C, the Committee has not endorsed either of these interpretations of the statute.

2. In cases where the comparative negligence or fault of the plaintiff is in issue, Instruction 9:26, 9:27, or 9:28 should be used in conjunction with the accompanying special verdict forms. The special verdict forms set forth in 9:26A and B, 9:27A and B, and 9:28A and B require the jury to determine the amount of plaintiff's damages, regardless of whether the jury also determines that the negligence of the plaintiff was equal to or greater than that of the defendant or defendants. On the other hand, special verdict forms 9:26C and D, 9:27C and D, and 9:28C and D require the jury to determine the amount of plaintiff's damages only when the jury has determined that the negligence of the plaintiff was less than the negligence of the defendant or defendants. Neither set of special verdict forms require the jury to determine the amount of plaintiff's damages in cases where the jury has determined that there was no negligence on the part of the defendant or defendants. *See Dickinson v. Lincoln Bldg. Corp.*, 2015 COA 170M, ¶ 27 (A plaintiff's comparative negligence and another's pro rata liability are substantive defenses that function only to decrease the defendant's percentage of liability; comparative fault defenses are applicable only when there is first substantiated evidence that both parties are at fault.).

3. In cases involving multiple claims, Instruction 4:20 (model unified verdict form) may be used in lieu of or in conjunction with the special verdict forms in this chapter. However, under section 13-21-111.5(5), C.R.S., the trial court is required to "instruct the jury on the effect of its finding as to the degree or percentage of negligence or fault as between the plaintiff or plaintiffs and the defendant or defendants." Therefore, regardless of which special verdict form is used, in negligence actions, where the comparative negligence or fault of the plaintiff is in issue, the jury must be instructed in accordance with either Instruction 9:26, 9:27, or 9:28.

## 9:22 ELEMENTS OF LIABILITY — COMPARATIVE NEGLIGENCE

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

1. The plaintiff had (injuries) (damages) (losses);
2. The defendant was negligent; and
3. The defendant's negligence was a cause of the plaintiff's (injuries) (damages) (losses).

If you find that any one or more of these (*number*) statements has not been proved, then your foreperson shall complete only Special Verdict Form A, and all jurors shall sign it.

On the other hand, if you find that all of these (*number*) statements have been proved, then your foreperson shall complete only Special Verdict Form B and he or she and all jurors shall sign it.

### Notes on Use

1. Omit any numbered paragraphs, the facts of which are not in dispute.
2. Whenever this instruction is given, Instruction 9:23 and Instruction 9:26, 9:27, or 9:28, together with the corresponding special verdict forms, must also be given.
3. The comparative negligence statute, § 13-21-111, C.R.S., applies “in any action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property” in which the comparative negligence of the plaintiff has been raised as a defense and there is evidence that would support a finding that both the plaintiff and the defendant were negligent and that such negligence caused the plaintiff's injuries. **DeBose v. Bear Valley Church of Christ**, 890 P.2d 214 (Colo. App. 1994), *rev'd on other grounds*, 928 P.2d 1315 (Colo. 1996); *see also Reid v. Berkowitz*, 2013 COA 110M, ¶ 52, 315 P.3d 185. When such evidence is lacking, comparative negligence instructions should not be given. **Kildahl v. Tagge**, 942 P.2d 1283 (Colo. App. 1997); **Morgan v. Bd. of Water Works of Pueblo**, 837 P.2d 300 (Colo. App. 1992); **Powell v. City of Ouray**, 32 Colo. App. 44, 507 P.2d 1101 (1973).
4. In a comparative negligence case, if the court directs a finding or verdict of negligence against one or more of the parties, the court must also instruct the jury as to the conduct on which the finding is based as well as any other conduct the jury could reasonably find constituted negligence, in order to permit the jury to make a proper comparison of such negligence with any negligence of other parties the jury may find. **Ricklin v. Smith**, 670 P.2d 1239 (Colo. App. 1983). Also in such cases, the applicable “mechanics for submitting” instruction and special verdict forms, *see* Instructions 9:26A-9:28D, must be appropriately modified.

5. To the extent one or more forms of contributory negligence may be a partial defense to a product liability claim based on negligence, the “comparative fault” statute applies rather than the comparative negligence statute. § 13-21-406(4), C.R.S.

6. Comparative negligence is a defense to willful and wanton negligence. **White v. Hansen**, 837 P.2d 1229 (Colo. 1992); **G.E.C. Minerals, Inc. v. Harrison W. Corp.**, 781 P.2d 115 (Colo. App. 1989). It is not, however, a defense to an intentional tort. **Carman v. Heber**, 43 Colo. App. 5, 601 P.2d 646 (1979); *see also* **Finnigan v. Sandoval**, 43 Colo. App. 219, 600 P.2d 123 (1979).

7. Generally, when there is evidence of negligence on the part of both the plaintiff and the defendant, the jury is responsible for deciding their comparative negligence. **Gordon v. Benson**, 925 P.2d 775 (Colo. 1996) (trial court must instruct on comparative negligence when evidence would support finding that both parties were at fault); **Holmes v. Gamble**, 655 P.2d 405 (Colo. 1982); **Reid**, 2013 COA 110M, ¶ 57 (comparative negligence instruction required where plaintiff, a veteran construction worker, worked on a dimly lit construction site, fell over debris, broke through stair railing, and landed three stories below, stating that “[a] plaintiff must be cognizant of the physical conditions and surroundings present when he or she acts or fails to act”); **Wark v. McClellan**, 68 P.3d 574 (Colo. App. 2003) (comparative negligence instruction proper where plaintiffs and their children were injured in accident while passengers in an automobile driven by someone that plaintiffs knew or should have known was intoxicated, however, comparative negligence instruction based on theory that plaintiffs should have interfered with driver was not warranted); **Carlson v. Ferris**, 58 P.3d 1055 (Colo. App. 2002) (failure to fully use safety belt system not a proper consideration in determining comparative negligence), *aff’d on other grounds*, 85 P.3d 504 (Colo. 2003), and *overruled on other grounds* by **Trattler v. Citron**, 182 P.3d 674 (Colo. 2008); **Sheron v. Lutheran Med. Ctr.**, 18 P.3d 796 (Colo. App. 2000) (patient who committed suicide after being discharged from hospital could be found comparatively negligent in wrongful death action against health care providers); **Bennett v. Greeley Gas Co.**, 969 P.2d 754 (Colo. App. 1998) (trial court erred in not submitting issue of comparative negligence to jury); **Voight v. Colo. Mtn. Club**, 819 P.2d 1088 (Colo. App. 1991) (trial court erred in setting aside jury verdict and determining as a matter of law that plaintiff was as negligent as defendant). *But see* **Huntoon v. TCI Cablevision of Colo., Inc.**, 969 P.2d 681 (Colo. 1998) (trial court acted properly in refusing to submit issue of comparative negligence to jury).

8. “[A] plaintiff’s comparative fault should not be reduced based on the number of defendants liable for damages.” **Ferrer v. Okbamicael**, 2017 CO 14M, ¶ 38, 390 P.3d 836, 846-47. For example, “[i]n a motor vehicle accident, comparative fault as it applies to the plaintiff should end with the parties to the accident. A plaintiff’s comparative negligence remains the same, regardless of whether the remaining fault can be allocated in part to the employer based on negligent entrustment.” *Id.* (alteration in original) (quoting **Gant v. L.U. Transp., Inc.**, 770 N.E.2d 1155, 1159 (Ill. App. Ct. 2002)). “Thus, if a plaintiff is fifty percent at fault in an accident, her comparative negligence should not be diminished simply because the portion of fault for which she is not responsible may be attributed to two defendants instead of one.” *Id.*

9. An employer who acknowledges vicarious liability for an employee’s negligence is strictly liable for the employee’s negligence “regardless of the ‘percentage of fault’ as between

the party whose negligence directly caused the injury and the one whose liability for negligence is derivative.” **Ferrer**, 2017 CO 14M, ¶ 37, 390 P.3d at 846 (citation omitted). The employer is “responsible for *all* the fault attributed to the negligent employee, but *only* the fault attributed to the negligent employee as compared to the other parties to the accident.” *Id.* (citation omitted).

10. If a hospital admits a person into its custody who the hospital knows is actively suicidal for the purpose of preventing that person’s self-destructive behavior, the hospital assumes a duty to use reasonable care in preventing the patient from engaging in self-harm, and the patient is not comparatively negligent for engaging in self-harm. **P.W. v. Children’s Hosp. Colo.**, 2016 CO 6, ¶ 25, 364 P.3d 891. A defendant may not raise a defense of comparative negligence as a matter of law if, under the circumstances, the plaintiff “did all he was legally required to do,” and had no duty to do more. **Ringsby Truck Lines, Inc. v. Bradfield**, 193 Colo. 151, 154, 563 P.2d 939, 942 (1977).

11. Punitive damages are not subject to reduction on the basis of assigned fault under comparative negligence and pro rata liability statutes. **Lira v. Davis**, 832 P.2d 240 (Colo. 1992).

12. In cases under the Federal Employers Liability Act, 45 U.S.C.A. §§ 51 to -60, a special verdict dealing with comparative negligence is not required by statute or necessity, though a special verdict or interrogatories accompanying a general verdict may be used. If used, the forms should be specifically prepared to conform to the applicable federal law. **Felder v. Union Pac. R.R.**, 660 P.2d 911 (Colo. App. 1982).

13. Notwithstanding the provisions of the comparative negligence statute, § 13-21-111, and the proportionate liability statute, § 13-21-111.5, C.R.S., the assumption of inherent risks by a spectator of a professional baseball game may be a complete defense against liability in an action for injuries by a spectator against an owner of a professional baseball team or stadium. *See* § 13-21-120, C.R.S. Whenever, in light of the evidence in the case, this complete defense might be applicable, an instruction based on the provisions of section 13-21-120 should be given if supported by sufficient evidence. And, if the defense of comparative negligence might be applicable to a claim of negligence not covered by this complete defense, then the instruction covering this defense and the instructions covering the defense of comparative negligence must be worded so as to avoid confusing the jury.

14. To be effective as a defense, any negligence on the plaintiff’s part must have been a proximate cause of his injuries or losses. **Roberts v. Fisher**, 169 Colo. 288, 455 P.2d 871 (1969); **Matt Skorey Packard Co. v. Canino**, 142 Colo. 411, 350 P.2d 1069 (1960).

15. The principles of comparative negligence apply as a defense to a claim for damages under the Drug Dealer Liability Act, §§ 13-21-801 to -813, C.R.S., from a defendant who made illegal drugs available to an illegal user when the use of such drugs caused damages to the plaintiff. *See* § 13-21-806(1), C.R.S. Under section 13-21-806(2), however, that defense must be established by clear and convincing evidence. In such cases, this instruction and related comparative negligence instructions, appropriately modified as necessary, may be used.

16. A defendant who is negligent per se is not precluded from raising comparative negligence as a defense. **Lyons v. Nasby**, 770 P. 2d 1250 (Colo. 1989); *accord* **McCall v.**



**Meyers**, 94 P.3d 1271 (Colo. App. 2004) (section 42-4-808, C.R.S., which directs motor vehicle drivers to stop and take necessary precautions to avoid accidents with disabled pedestrians, did not eliminate comparative negligence as a defense in negligence action by injured pedestrian against driver of motor vehicle).

#### **Source and Authority**

This instruction is supported by section 13-21-111 and on the authorities cited above.

**9:23 AFFIRMATIVE DEFENSE — COMPARATIVE NEGLIGENCE OF THE PLAINTIFF**

**The affirmative defense of the comparative negligence of the plaintiff, (*name*), is proved if you find all of the following:**

- 1. The plaintiff was negligent; and**
- 2. The negligence of the plaintiff was a cause of the plaintiff's own claimed (injuries) (damages) (losses).**

**Notes on Use**

1. See Notes on Use to Instruction 9:22.
2. Contributory or comparative negligence is an affirmative defense. C.R.C.P. 8(c); **Stevens v. Strauss**, 147 Colo. 547, 364 P.2d 382 (1961) (citing earlier cases); **Dickinson v. Lincoln Bldg. Corp.**, 2015 COA 170M, ¶ 25, 378 P.3d 797.

**Source and Authority**

This instruction is supported by the authorities cited in the Notes on Use to Instruction 9:22.

**9:24 AFFIRMATIVE DEFENSE — NEGLIGENCE OR FAULT OF DESIGNATED NONPARTY**

**The affirmative defense of the (negligence) (or) (fault) of the nonparty, (insert name or other appropriate description), is proved if you find all of the following:**

**1. (insert name or other appropriate description of the nonparty) was (negligent) (or) (at fault); and**

**2. The (negligence) (or) (fault) of (insert name or other appropriate description of the nonparty) was a cause of the plaintiff's claimed (injuries) (damages) (losses).**

**Notes on Use**

1. This instruction must be given whenever Instruction 9:28 or Instruction 9:29 is given and either instruction includes references to a nonparty properly identified or designated under section 13-21-111.5(3)(b), C.R.S. The negligence or fault of a nonparty cannot be considered unless the nonparty has been properly designated by the defendant in a pleading that complies with the requirements of section 13-21-111.5(3). **Thompson v. Colorado & E. R.R.**, 852 P.2d 1328 (Colo. App. 1993). Nonparties need not have been engaged in the same kind of tortious conduct as the defendant in order to be properly designated. **Moody v. A.G. Edwards & Sons, Inc.**, 847 P.2d 215 (Colo. App. 1992). Generally, a person or entity designated under section 13-21-111.5, must have owed a duty recognized by law to the injured party. **Miller v. Byrne**, 916 P.2d 566 (Colo. App. 1995).

2. If a defendant properly identifies a nonparty under section 13-21-111.5(3)(b), and the plaintiff does not bring that nonparty into the lawsuit, the defendant bears the burden of proving the nonparty's negligence and causation. The defendant's failure to give proper statutory notice of the nonparty does not preclude a defendant, however, from contending at trial that the defendant was not negligent or that the plaintiff's damages were not caused, actually or proximately, by the defendant's negligence. **Redden v. SCI Colo. Funeral Servs., Inc.**, 38 P.3d 75 (Colo. 2001). But in these circumstances the name or other identification of any nonparty whose conduct may be involved will not appear on the verdict form for an allocation of negligence or fault, and this instruction should not be given. *See Thompson*, 852 P.2d at 1330.

3. Whenever this instruction is given, numbered paragraph 2 of Instruction 3:1 (defining preponderance of evidence) must be retained in that instruction when it is given.

4. Use whichever parenthesized words are appropriate. When the parenthesized word "fault" is used, another instruction defining what that term means in the context of the case must be given.

5. Even when a defendant is vicariously liable for the acts or omissions of another defendant or designated nonparty at fault under the nondelegable-duty doctrine, the jury should be instructed to determine the respective shares of fault of the vicariously liable defendant and any other defendants and/or nonparties at fault. However, in entering judgment, the court should

aggregate the fault of the vicariously liable defendant and any other defendants and/or nonparties at fault for whom the defendant is vicariously liable. **Reid v. Berkowitz**, 2013 COA 110M, ¶ 39, 315 P.3d 185; *see also* **Kidwell v. K-Mart Corp.**, 942 P.2d 1280 (Colo. App. 1996) (while property owner was entitled to designate independent maintenance contractor as nonparty at fault, because of property owner’s nondelegable duty of care, plaintiff would be entitled to instruction on remand that negligence of contractor must be imputed to property owner). In Colorado, liability may be imputed under various legal theories, including respondeat superior, *see* Chapter 8 (Liability Based on Agency and Respondeat Superior), the inherently dangerous activity doctrine, *see* **Huddleston v. Union Rural Elec. Ass’n**, 841 P.2d 282 (Colo. 1992); Instruction 9:7 (inherently dangerous activities), and the nondelegable or independent duty doctrine, *see* **Springer v. City & Cty. of Denver**, 13 P.3d 794 (Colo. 2000).

6. A defendant is not entitled to a nonparty at fault instruction identifying a nonparty who, if brought into the action, would be liable only vicariously for the negligence or fault of another. **Just In Case Bus. Lighthouse, LLC v. Murray**, 2013 COA 112M, *rev’d in part on other grounds*, 2016 CO 47M, 374 P.3d 443; *see also* **Ochoa v. Vered**, 212 P.3d 963 (Colo. App. 2009) (physician, to whom liability for a surgical nurse’s negligence was imputed under the “captain of the ship” doctrine, is not a joint tortfeasor and cannot apportion some of the plaintiff’s damages to the nurse).

#### **Source and Authority**

This instruction is supported by section 13-21-111.5(1), (2), and (3)(b). *See also* **Union Pac. R.R. v. Martin**, 209 P.3d 185, 189 n.3 (Colo. 2009).

## 9:25 NEGLIGENCE OF PARENTS NOT IMPUTABLE TO CHILDREN

**The negligence, if any, of a parent, as a parent, cannot be charged to his or her child.**

### Notes on Use

This instruction does not apply and should not be given or should not be given without being appropriately modified when there is sufficient evidence of another relationship on the basis of which the parent's negligence may be imputable to the child, for example, joint venture. *See* Instructions in Chapter 8 and in Chapter 11, Part C.

### Source and Authority

1. This instruction is supported by **Public Service Co. of Colorado v. Petty**, 75 Colo. 454, 226 P. 297 (1924) (citing **Denver City Tramway Co. v. Brown**, 57 Colo. 484, 143 P. 364 (1914)). *See also* **Francis v. Dahl**, 107 P.3d 1171 (Colo. App. 2005); **Fletcher v. Porter**, 754 P.2d 788 (Colo. App. 1988).

2. However, the fact that a parent's negligence cannot be imputed to his or her child does not preclude a defendant from designating a child-plaintiff's parent as a nonparty at fault under section 13-21-111.5, C.R.S. **Paris ex rel. Paris v. Dance**, 194 P.3d 404 (Colo. App. 2008) (defendant may designate minor plaintiff's parent as nonparty at fault notwithstanding parental immunity).

**9:26 COMPARATIVE NEGLIGENCE OF PLAINTIFF — SINGLE DEFENDANT — NO DESIGNATED NONPARTY INVOLVED**

**If you find the plaintiff, (*name*), was damaged and that the plaintiff's damages were caused by both the negligence of the plaintiff, (*name*), and the defendant, (*name*), then you must determine to what extent the negligent conduct of each contributed to the damages of the plaintiff, expressed as a percentage of 100 percent.**

**If you find that both the plaintiff and the defendant were negligent and that the negligence of the plaintiff was equal to or greater than the negligence of the defendant, then the plaintiff will not be allowed to recover.**

**On the other hand, if you find that both the plaintiff and the defendant were negligent and that the negligence of the defendant was greater than the negligence of the plaintiff, then the plaintiff will be allowed to recover.**

**If the plaintiff is allowed to recover, the total damages you award will be reduced by the Court by the percentage of the plaintiff's negligence.**

**Notes on Use**

1. See Notes on Use to Instruction 9:22 and Special Note to Part C of this Chapter 9.
2. In cases involving a single defendant and no counterclaim, this instruction should be preceded by Instruction 9:22 and given in conjunction with either Instructions 9:26A and B or Instructions 9:26C and D. *See* Special Note to Part C of this Chapter 9. If there is a counterclaim, a separate set of similar instructions, with plaintiff and defendant reversed, should be given.
3. In actions involving multiple defendants but not involving a designated nonparty, Instructions 9:27 and either 9:27A and B or 9:27C and D should be used in conjunction with Instruction 9:22, appropriately modified. In actions involving either a single defendant or multiple defendants and one or more nonparties of whom notice has been properly given under section 13-21-111.5, C.R.S., Instruction 9:28, in conjunction with Instructions 9:28A and B or Instructions 9:28C and D and Instruction 9:22, appropriately modified, should be used rather than this instruction.
4. Section 13-21-111.5(5) requires the trial court to “instruct the jury on the effect of its finding as to the degree or percentage of negligence or fault as between the plaintiff or plaintiffs and the defendant or defendants. However, the jury shall not be informed as to the effect of its finding as the allocation of fault among two or more defendants. . . .” Under an earlier version of this statute, it was reversible error for the trial court to not instruct the jury on the effect of its finding as to the relative negligence of the parties, even though no such instruction was requested by counsel. **Appelgren v. Agri Chem, Inc.**, 39 Colo. App. 158, 562 P.2d 766 (1977).
5. In any case in which (a) there is more than one plaintiff, or (b) a cross-claim is also being litigated, or (c) any negligence on the plaintiff's part could only be found by the jury to have been a proximate cause of part of his or her damages, the otherwise applicable comparative

negligence instructions must be appropriately modified. In particular, where there are two or more plaintiffs and (1) there is sufficient evidence for a reasonable jury to find contributory negligence on the part of one plaintiff, but not the other, and (2) there is no basis for imputing such possible contributory negligence of the one plaintiff to the other, this instruction, as well as the appropriate special verdict instructions, must be modified to make it clear to the jury that they are to consider (and compare if they find it to exist) only the possible negligence of the plaintiff whose conduct constitutes sufficient evidence of contributory negligence.

6. Only the negligence of those who have been made parties or those properly designated as nonparties should be compared; the negligence of a tortfeasor who has not been made a party or properly designated as a nonparty should not be included. *See, e.g., Nat'l Farmers Union Prop. & Cas. Co. v. Frackelton*, 662 P.2d 1056 (Colo. 1983); *Thompson v. Colo. & E. R.R.*, 852 P.2d 1328 (Colo. App. 1993) (negligence of nonparty cannot be considered unless nonparty is properly designated in pleading that complies with section 13-21-111.5(3)).

#### **Source and Authority**

This instruction is supported by sections 13-21-111 and 13-21-111.5.

**9:26A SPECIAL VERDICT QUESTIONS — MECHANICS FOR SUBMITTING —  
COMPARATIVE NEGLIGENCE OF THE PLAINTIFF — SINGLE  
DEFENDANT — NO DESIGNATED NONPARTY**

**You are instructed to answer the following questions. You must all agree on your answers to each question for which an answer is required.**

- 1. Did the plaintiff, (*name*), have (injuries) (damages) (losses)?**
- 2. Was the defendant, (*name*), negligent?**
- 3. Was the defendant's negligence, if any, a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff?**

**If your answer to any one or more of the above three questions is “no,” then your foreperson shall complete only Special Verdict Form A and all jurors shall sign it.**

**On the other hand, if your answer to all three questions is “yes,” then you shall answer these questions as well as the following questions on Special Verdict Form B and all jurors shall sign it.**

- 4. Was the plaintiff, (*name*), negligent?**
- 5. Was the plaintiff's negligence, if any, a cause of (his) (her) own claimed (injuries) (damages) (losses)?**
- 6. State your answers to the following questions relating to the plaintiff's damages that were caused by the negligence of the defendant, whether the damages were also caused by the negligence, if any, of the plaintiff (or anyone else).**

**a. What is the total amount of plaintiff's damages, if any, for noneconomic losses or injuries (, excluding any damages for [physical impairment] [or] [disfigurement])? Noneconomic losses or injuries are those losses or injuries described in numbered paragraph 1 of Instruction (*insert number of the applicable Instruction on damages*). You should answer “0” if you determine there were none.**

**b. What is the total amount of plaintiff's damages, if any, for economic losses (, excluding any damages for [physical impairment] [or] [disfigurement])? Economic losses are those losses described in numbered paragraph 2 of Instruction (*insert number of applicable Instruction on damages*). You should answer “0” if you determine there were none.**

**(c. What is the total amount of plaintiff's damages, if any, for [physical impairment] [or] [disfigurement]? You should answer “0” if you determine there were none.)**

**If your answer to all five questions 1, 2, 3, 4, and 5 is “yes,” then you shall also answer the following question 7 on Special Verdict Form B.**



**7. Taking as 100 percent the combined negligence of the defendant and the plaintiff that caused the plaintiff's (injuries) (damages) (losses), what percentage of the negligence was the defendant's and what percentage was the plaintiff's?**

#### **Notes on Use**

1. Instructions 6:1 (personal injuries) and 9:22 should be used with this instruction. The Notes on Use to Instructions 4:4 (verdict form), 6:1, and 9:22 are applicable to this instruction, along with the Special Note to Part C of this Chapter 9.

2. The parenthesized language in the first sentences of paragraphs 6a, 6b, and 6c of this instruction should only be given if there is sufficient evidence from which it can be inferred with a reasonable degree of probability that physical impairment or disfigurement has been sustained.

3. Omit the parenthesized clause in numbered question 6 unless some evidence of negligent conduct on the part of a person other than the plaintiff or the defendant has been brought into the case.

4. Whenever this instruction is given, the two verdict forms set out in Instruction 9:26B must also be used.

5. Insert any other questions which may be necessary to resolve properly any other claims of the plaintiff or affirmative defenses of the defendant.

6. If, in a district court case, the parties have stipulated to a verdict or finding by some stated majority pursuant to C.R.C.P. 48, this instruction should be modified accordingly.

#### **Source and Authority**

This instruction is supported by the authorities cited in the Notes on Use to Instruction 9:22.

**9:26B SPECIAL VERDICT FORMS — COMPARATIVE NEGLIGENCE OF THE PLAINTIFF — NO COUNTERCLAIM — SINGLE DEFENDANT — NO DESIGNATED NONPARTY — FORMS A AND B**

**Form A:**

**IN THE \_\_\_\_\_ COURT IN AND FOR THE  
COUNTY OF \_\_\_\_\_, STATE OF COLORADO**

**Civil Action No. \_\_\_\_\_**

_____ )	
<b>Plaintiff,</b> )	
)	
<b>v.</b> )	<b>SPECIAL VERDICT</b>
)	<b>FORM A</b>
_____ )	
<b>Defendant.</b> )	

**DO NOT ANSWER THIS SPECIAL VERDICT FORM A IF YOUR FOREPERSON HAS COMPLETED AND ALL JURORS HAVE SIGNED SPECIAL VERDICT FORM B.**

**We, the jury, present our Answers to Questions submitted by the Court, to which we have all agreed:**

**1. Did the plaintiff, (*name*), have (injuries) (damages) (losses)? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**2. Was the defendant, (*name*), negligent? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**3. Was the defendant's negligence, if any, a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**We, the jury, having answered one or more of the above three questions "no," find the issues for the defendant, (*name*).**

Signatures of all jurors:

	<b>Foreperson</b>

**Form B:**

IN THE \_\_\_\_\_ COURT IN AND FOR THE  
COUNTY OF \_\_\_\_\_, STATE OF COLORADO

Civil Action No. \_\_\_\_\_

	)	
<b>Plaintiff,</b>	)	
	)	
v.	)	<b>SPECIAL VERDICT</b>
	)	<b>FORM B</b>
	)	
<b>Defendant.</b>	)	

**DO NOT ANSWER THIS SPECIAL VERDICT FORM B IF YOUR FOREPERSON HAS COMPLETED AND ALL JURORS HAVE SIGNED SPECIAL VERDICT FORM A.**

**We, the jury, present our Answers to Questions submitted by the Court, to which we have all agreed:**

**1. Did the plaintiff, (*name*), have (injuries) (damages) (losses)? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**2. Was the defendant, (*name*), negligent? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**3. Was the defendant's negligence, if any, a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**4. Was the plaintiff, (name), negligent? (Yes or No)**

**ANSWER:** \_\_\_\_\_

**5. Was the plaintiff's negligence, if any, a cause of (his) (her) own claimed (injuries) (damages) (losses)? (Yes or No)**

**ANSWER:** \_\_\_\_\_

**6. State your answers to the following questions relating to the plaintiff's damages that were caused by the negligence of the defendant, whether the damages were also caused by the negligence, if any, of the plaintiff (or anyone else).**

**a. What is the total amount of plaintiff's damages, if any, for noneconomic losses or injuries (, excluding any damages for [physical impairment] [or] [disfigurement])? Noneconomic losses or injuries are those losses or injuries described in numbered paragraph 1 of Instruction (insert number of the applicable Instruction on damages). You should answer "0" if you determine there were none.**

**ANSWER:** \_\_\_\_\_

**b. What is the total amount of plaintiff's damages, if any, for economic losses (, excluding any damages for [physical impairment] [or] [disfigurement])? Economic losses are those losses described in numbered paragraph 2 of Instruction (insert number of applicable Instruction on damages). You should answer "0" if you determine there were none.**

**ANSWER:** \_\_\_\_\_

**(c. What is the total amount of plaintiff's damages, if any, for [physical impairment] [or] [disfigurement]? You should answer "0" if you determine there were none.)**

**ANSWER:** \_\_\_\_\_

**Answer the following question 7 only if your answer to all five questions 1, 2, 3, 4, and 5 is "yes."**

**7. Taking as 100 percent the combined negligence of the defendant and the plaintiff that caused the plaintiff's (injuries) (damages) (losses), what percentage of the negligence was the defendant's and what percentage was the plaintiff's?**

**ANSWER:**

**Percentage charged to defendant, (name):** \_\_\_\_\_%

**Percentage charged to plaintiff, (name):** \_\_\_\_\_%

**MUST TOTAL: 100%**

**Signatures of all jurors:**

_____	_____
_____	<b>Foreperson</b>
_____	_____

**Notes on Use**

1. See Notes on Use to Instruction 9:26A and Special Note to Part C of this Chapter 9.

**Source and Authority**

This instruction is supported by the authorities cited in the Notes on Use to Instruction 9:22.

**9:26C SPECIAL VERDICT QUESTIONS — MECHANICS FOR SUBMITTING — COMPARATIVE NEGLIGENCE OF THE PLAINTIFF — NO COUNTERCLAIM — SINGLE DEFENDANT — NO DESIGNATED NONPARTY (ALTERNATIVE TO INSTRUCTION 9:26A)**

**You are instructed to answer the following questions. You must all agree on your answers to each question for which an answer is required.**

**1. Did the plaintiff, (*name*), have (injuries) (damages) (losses)?**

**2. Was the defendant, (*name*), negligent?**

**3. Was the defendant's negligence, if any, a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff?**

**If your answer to any one or more of the above three questions is "no," then your foreperson shall complete only Special Verdict Form A and all jurors shall sign it.**

**On the other hand, if your answer to all three questions is "yes," then you shall answer these questions as well as the following questions on Special Verdict Form B and all jurors shall sign it.**

**4. Was the plaintiff, (*name*), negligent?**

**5. Was the plaintiff's negligence, if any, a cause of (his) (her) own claimed (injuries) (damages) (losses)?**

**If your answer to all five questions 1, 2, 3, 4, and 5 is "yes," then you shall also answer the following question 6 on Special Verdict Form B. Otherwise skip question 6 and go on to question 7.**

**6. Taking as 100 percent the combined negligence of the defendant and the plaintiff that caused the plaintiff's (injuries) (damages) (losses), what percentage of the negligence was the defendant's and what percentage was the plaintiff's?**

**If you determine that the negligence of the plaintiff was equal to or greater than the negligence of the defendant, i.e., 50% or more, then skip question 7.**

**7. State your answers to the following questions relating to the plaintiff's damages that were caused by the negligence of the defendant, whether the damages were also caused by the negligence, if any, of the plaintiff (or anyone else).**

**a. What is the total amount of plaintiff's damages, if any, for noneconomic losses or injuries (, excluding any damages for [physical impairment] [or] [disfigurement])? Noneconomic losses or injuries are those losses or injuries described in numbered paragraph 1 of Instruction (*insert number of the applicable Instruction on damages*). You should answer "0" if you determine there were none.**

**b. What is the total amount of plaintiff’s damages, if any, for economic losses (, excluding any damages for [physical impairment] [or] [disfigurement])? Economic losses are those losses described in numbered paragraph 2 of Instruction (*insert number of applicable Instruction on damages*). You should answer “0” if you determine there were none.**

**(c. What is the total amount of plaintiff’s damages, if any, for [physical impairment] [or] [disfigurement]? You should answer “0” if you determine there were none.)**

#### **Notes on Use**

See the Notes on Use to Instructions 9:26 and 9:26A, and the Special Note to Part C of this Chapter 9.

#### **Source and Authority**

This instruction is supported by the authorities cited in the Notes on Use to Instruction 9:26.

**9:26D SPECIAL VERDICT FORMS — COMPARATIVE NEGLIGENCE OF THE PLAINTIFF — NO COUNTERCLAIM — SINGLE DEFENDANT — NO DESIGNATED NONPARTY — FORMS A AND B (ALTERNATIVE TO INSTRUCTION 9:26B)**

**Form A:**

**IN THE \_\_\_\_\_ COURT IN AND FOR THE  
COUNTY OF \_\_\_\_\_, STATE OF COLORADO**

**Civil Action No. \_\_\_\_\_**

_____ )	
Plaintiff, )	
)	
v. )	<b>SPECIAL VERDICT</b>
)	<b>FORM A</b>
_____ )	
Defendant. )	

**DO NOT ANSWER THIS SPECIAL VERDICT FORM A IF YOUR FOREPERSON HAS COMPLETED AND ALL JURORS HAVE SIGNED SPECIAL VERDICT FORM B.**

**We, the jury, present our Answers to Questions submitted by the Court, to which we have all agreed:**

**1. Did the plaintiff, (*name*), have (injuries) (damages) (losses)? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**2. Was the defendant, (*name*), negligent? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**3. Was the defendant's negligence, if any, a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**We, the jury, having answered one or more of the above three questions "no," find the issues for the defendant, (*name*).**

**Signatures of all jurors:**



\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
**Foreperson**  
\_\_\_\_\_

**Form B:**

**IN THE \_\_\_\_\_ COURT IN AND FOR THE  
COUNTY OF \_\_\_\_\_, STATE OF COLORADO**

**Civil Action No. \_\_\_\_\_**

\_\_\_\_\_)  
**Plaintiff,** )  
 )  
 )  
 v. ) **SPECIAL VERDICT**  
 ) **FORM B**  
 )  
\_\_\_\_\_)  
**Defendant.** )

**DO NOT ANSWER THIS SPECIAL VERDICT FORM B IF YOUR FOREPERSON HAS COMPLETED AND ALL JURORS HAVE SIGNED SPECIAL VERDICT FORM A.**

**We, the jury, present our Answers to Questions submitted by the Court, to which we have all agreed:**

**1. Did the plaintiff, (*name*), have (injuries) (damages) (losses)? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**2. Was the defendant, (*name*), negligent? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**3. Was the defendant's negligence, if any, a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**4. Was the plaintiff, (*name*), negligent? (Yes or No)**

ANSWER: \_\_\_\_\_

**5. Was the plaintiff's negligence, if any, a cause of (his) (her) own claimed (injuries) (damages) (losses)? (Yes or No)**

ANSWER: \_\_\_\_\_

Answer the following question 6 only if your answer to all five questions 1, 2, 3, 4, and 5 is "yes." Otherwise, skip question 6 and go on to question 7.

**6. Taking as 100 percent the combined negligence of the defendant and the plaintiff that caused the plaintiff's (injuries) (damages) (losses), what percentage of the negligence was the defendant's and what percentage was the plaintiff's?**

ANSWER:

Percentage charged to defendant, (*name*): \_\_\_\_\_%

Percentage charged to plaintiff, (*name*): \_\_\_\_\_%

**MUST TOTAL: 100%**

Answer the following question 7 only if you have determined that the negligence of the plaintiff was less than that of the defendant, i.e., under 50%.

**7. State your answers to the following questions relating to the plaintiff's damages that were caused by the negligence of the defendant, whether the damages were also caused by the negligence, if any, of the plaintiff (or anyone else).**

**a. What is the total amount of plaintiff's damages, if any, for noneconomic losses or injuries (, excluding any damages for [physical impairment] [or] [disfigurement])? Noneconomic losses or injuries are those losses or injuries described in numbered paragraph 1 of Instruction (*insert number of the applicable Instruction on damages*). You should answer "0" if you determine there were none.**

ANSWER: \_\_\_\_\_

**b. What is the total amount of plaintiff's damages, if any, for economic losses (, excluding any damages for [physical impairment] [or] [disfigurement])? Economic losses are those losses described in numbered paragraph 2 of Instruction (*insert number of applicable Instruction on damages*). You should answer "0" if you determine there were none.**

ANSWER: \_\_\_\_\_

**(c. What is the total amount of plaintiff’s damages, if any, for [physical impairment] [or] [disfigurement]? You should answer “0” if you determine there were none.)**

**ANSWER:** \_\_\_\_\_

**Signatures of all jurors:**

_____	_____
	<b>Foreperson</b>
_____	_____
_____	_____

**Notes on Use**

See the Notes on Use to Instructions 9:26 and 9:26A, and the Special Note to Part C of this Chapter 9.

**Source and Authority**

This instruction is supported by the authorities cited in the Notes on Use to Instruction 9:26.

**9:27 COMPARATIVE NEGLIGENCE OF THE PLAINTIFF — MULTIPLE DEFENDANTS — NO DESIGNATED NONPARTY INVOLVED**

If you find the plaintiff, (*name*), was damaged and that the plaintiff's damages were caused by the negligence of the plaintiff and one or more of the defendants, (*names*), or that the plaintiff's damages were caused by more than one of the defendants, then you must determine to what extent the negligent conduct of each contributed to the damages of the plaintiff, expressed as a percentage of 100 percent.

If you find that the plaintiff and one or more of the defendants were negligent and that the negligence of the plaintiff was equal to or greater than the combined negligence of all the defendants, then the plaintiff will not be allowed to recover.

If you find that the plaintiff and one or more of the defendants were negligent and that the negligence of any one defendant or the combined negligence of more than one of the defendants was greater than the negligence of the plaintiff, then the plaintiff will be allowed to recover as against each of the defendants found negligent.

If the plaintiff is allowed to recover, the total damages you award will be reduced by the Court by the percentage of the plaintiff's negligence.

**Notes on Use**

The Notes on Use to Instructions 9:22 and 9:23 are generally applicable to this instruction. *See also* Special Note to Part C of this Chapter 9.

**Source and Authority**

1. This instruction is supported by **Mountain Mobile Mix, Inc. v. Gifford**, 660 P.2d 883 (Colo. 1983) (negligence of multiple defendants is to be combined and compared with negligence of plaintiff); and sections 13-21-111 and 13-21-111.5, C.R.S.

2. As to the rights of joint tortfeasors, as between themselves, see the Uniform Contribution Among Tortfeasors Act, §§ 13-50.5-101 to -106, C.R.S. *See also* **Graber v. Westaway**, 809 P.2d 1126 (Colo. App. 1991) (a party held liable for damages in prior tort litigation is not precluded from bringing action for contribution against joint tortfeasor who was not joined or designated in prior action).

**9:27A SPECIAL VERDICT QUESTIONS — MECHANICS FOR SUBMITTING —  
COMPARATIVE NEGLIGENCE OF THE PLAINTIFF — MULTIPLE  
DEFENDANTS — NO DESIGNATED NONPARTY**

**You are instructed to answer the following questions. You must all agree on your answers to each question for which an answer is required:**

- 1. Did the plaintiff, (*name*), have (injuries) (damages) (losses)?**
- 2. Was the defendant, (*name of first defendant*), negligent?**
- 3. Was the negligence, if any, of the defendant, (*name of first defendant*), a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff?**
- 4. Was the defendant, (*name of second defendant*), negligent?**
- 5. Was the negligence, if any, of the defendant, (*name of second defendant*), a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff?**

**If you find that the plaintiff, (*name*), did not have (injuries) (damages) (losses), or if you find that none of the defendants was negligent or that no defendant's negligence was a cause of any of the plaintiff's claimed (injuries) (damages) (losses), then your foreperson shall complete only Special Verdict Form A and all jurors shall sign it.**

**On the other hand, if you find that the plaintiff did have (injuries) (damages) (losses) and you further find that one or more of the defendants was negligent and that such negligence was a cause of any of the plaintiff's (injuries) (damages) (losses), then on Special Verdict Form B you shall answer questions 1 through 5 as well as the following questions, and your foreperson shall complete only Special Verdict Form B, and all jurors shall sign it.**

- 6. Was the plaintiff, (*name*), negligent?**
- 7. Was the negligence, if any, of the plaintiff a cause of (his) (her) own claimed (injuries) (damages) (losses)?**
- 8. State your answers to the following questions relating to the plaintiff's damages that were caused by the negligence of any one or more of the defendants, whether the damages were also caused by the negligence, if any, of the plaintiff (or anyone else).**
  - a. What is the total amount of the plaintiff's damages, if any, for noneconomic losses or injuries (, excluding any damages for [physical impairment] [or] [disfigurement])? Noneconomic losses or injuries are those losses or injuries described in numbered paragraph 1 of Instruction (*insert number of the applicable Instruction on damages*). You should answer "0" if you determine there were none.**
  - b. What is the total amount of the plaintiff's damages, if any, for economic losses (, excluding any damages for [physical impairment] [or] [disfigurement])? Economic**

**losses are those losses described in numbered paragraph 2 of Instruction** *(insert number of applicable Instruction on damages)*. **You should answer “0” if you determine there were none.**

**(c. What is the total amount of the plaintiff’s damages, if any, for [physical impairment] [or] [disfigurement]? You should answer “0” if you determine there were none.)**

**9. Taking as 100 percent the combined negligence of all parties you find were negligent and whose negligence was a cause of any of the plaintiff’s (injuries) (damages) (losses), what percentage of negligence, if any, was that of the defendant, *(name of first defendant)*, of the defendant, *(name of second defendant)*, and of the plaintiff, *(name)*?**

**You must enter the figure of zero, “0,” for any party you decide was not negligent or whose negligence you decide was not a cause of any of the plaintiff’s (injuries) (damages) (losses).**

### **Notes on Use**

1. Instruction 6:1 (personal injuries) should be used with this instruction. The Notes on Use to Instructions 4:4 (verdict form), 6:1, 9:22, and 9:23 are applicable to this instruction, along with Special Note to Part C of this Chapter 9.

2. Whenever this instruction is given, the verdict forms in Instruction 9:27B must also be given.

3. Omit the parenthesized clause in numbered question 8 unless some evidence of negligent conduct on the part of a person other than the plaintiff or the defendants has been brought into the case.

4. If a claim of liability against one defendant is based only upon that defendant’s vicarious liability for the negligence of another (e.g., an employer-employee relationship), this instruction must be appropriately modified.

5. Insert any other questions that may be necessary to resolve properly any other claims of the plaintiff or affirmative defenses of any of the defendants.

6. If, in a district court case, the parties have stipulated to a verdict or finding by some stated majority, pursuant to C.R.C.P. 48, this instruction should be modified accordingly.

### **Source and Authority**

This instruction is supported by the authorities cited in the Notes on Use to Instruction 9:22.

**9:27B SPECIAL VERDICT FORMS — COMPARATIVE NEGLIGENCE OF THE PLAINTIFF — MULTIPLE DEFENDANTS — NO DESIGNATED NONPARTY — FORMS A AND B**

**Form A:**

**IN THE \_\_\_\_\_ COURT IN AND FOR THE COUNTY OF \_\_\_\_\_, STATE OF COLORADO**

**Civil Action No. \_\_\_\_\_**

_____ )	
<b>Plaintiff,</b> )	
)	
<b>v.</b> )	<b>SPECIAL VERDICT</b>
)	<b>FORM A</b>
_____ )	
<b>Defendant.</b> )	

**DO NOT ANSWER THIS SPECIAL VERDICT FORM A IF YOUR FOREPERSON HAS COMPLETED SPECIAL VERDICT FORM B AND ALL JURORS HAVE SIGNED IT.**

**We, the jury, present our Answers to Questions submitted by the Court, to which we have all agreed:**

**1. Did the plaintiff, (*name*), have (injuries) (damages) (losses)? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**2. Was the defendant, (*name of first defendant*), negligent? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**3. Was the negligence, if any, of the defendant, (*name of first defendant*), a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**4. Was the defendant, (*name of second defendant*), negligent? (Yes or No)**

**ANSWER: \_\_\_\_\_**

5. Was the negligence, if any, of the defendant, *(name of second defendant)*, a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff? (Yes or No)

ANSWER: \_\_\_\_\_

We, the jury, find for the defendants and award no damages to the plaintiff, *(name)*.

Signatures of all jurors:

_____	_____
	<b>Foreperson</b>
_____	_____
_____	_____

**Form B:**

IN THE \_\_\_\_\_ COURT IN AND FOR THE  
COUNTY OF \_\_\_\_\_, STATE OF COLORADO

Civil Action No. \_\_\_\_\_

_____ )	
Plaintiff, )	
)	
v. )	SPECIAL VERDICT
)	FORM B
_____ )	
Defendant. )	

**DO NOT ANSWER THIS SPECIAL VERDICT FORM B IF YOUR FOREPERSON HAS COMPLETED SPECIAL VERDICT FORM A AND ALL JURORS HAVE SIGNED IT.**

We, the jury, present our Answers to Questions submitted by the Court, to which we have all agreed:

1. Did the plaintiff, *(name)*, have (injuries) (damages) (losses)? (Yes or No)

ANSWER: \_\_\_\_\_

2. Was the defendant, *(name of first defendant)*, negligent? (Yes or No)



ANSWER: \_\_\_\_\_

**3. Was the negligence, if any, of the defendant, (*name of first defendant*), a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff? (Yes or No)**

ANSWER: \_\_\_\_\_

**4. Was the defendant, (*name of second defendant*), negligent? (Yes or No)**

ANSWER: \_\_\_\_\_

**5. Was the negligence, if any, of the defendant, (*name of second defendant*), a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff? (Yes or No)**

ANSWER: \_\_\_\_\_

**If you find that the plaintiff did have (injuries) (damages) (losses) and you further find that one or more of the defendants was negligent and that such negligence was a cause of any of the plaintiff's (injuries) (damages) (losses), then answer the following questions:**

**6. Was the plaintiff, (*name*), negligent? (Yes or No)**

ANSWER: \_\_\_\_\_

**7. Was the negligence, if any, of the plaintiff a cause of (his) (her) own claimed (injuries) (damages) (losses)? (Yes or No)**

ANSWER: \_\_\_\_\_

**8. State your answers to the following questions relating to the plaintiff's damages that were caused by the negligence of one or more of the defendants, whether the damages were also caused by the negligence, if any, of the plaintiff (or anyone else).**

**a. What is the total amount of the plaintiff's damages, if any, for noneconomic losses or injuries (, excluding any damages for [physical impairment] [or] [disfigurement])? Noneconomic losses or injuries are those losses or injuries described in numbered paragraph 1 of Instruction (*insert number of the applicable Instruction on damages*). You should answer "0" if you determine there were none.**

ANSWER: \$ \_\_\_\_\_

**b. What is the total amount of the plaintiff's damages, if any, for economic losses (, excluding any damages for [physical impairment] [or] [disfigurement])? Economic losses are those losses described in numbered paragraph 2 of Instruction (*insert***

*number of applicable Instruction on damages*). You should answer “0” if you determine there were none.

ANSWER: \$ \_\_\_\_\_

(c. What is the total amount of the plaintiff’s damages, if any, for [physical impairment] [or] [disfigurement]? You should answer “0” if you determine there were none.)

ANSWER: \$ \_\_\_\_\_

**9. Taking as 100 percent the combined negligence of all parties you find were negligent and whose negligence was a cause of any of the plaintiff’s (injuries) (damages) (losses), what percentage of negligence, if any, was that of the defendant, (*name of first defendant*), of the defendant, (*name of second defendant*), and of the plaintiff, (*name*)? Enter the figure of zero, “0,” for any party you decide was not negligent or whose negligence you decide was not a cause of any of the plaintiff’s (injuries) (damages) (losses).**

ANSWER:

Percentage charged to (*name of first defendant*): \_\_\_\_\_%

Percentage charged to (*name of second defendant*): \_\_\_\_\_%

Percentage charged to plaintiff, (*name*): \_\_\_\_\_%

**MUST TOTAL: 100%**

**Signatures of all jurors:**

_____	_____
	<b>Foreperson</b>
_____	_____
_____	_____

**Notes on Use**

See the Notes on Use to Instruction 9:27A and the Special Note to Part C of this Chapter 9.

**Source and Authority**

This instruction is supported by the authorities cited in the Notes on Use to Instruction 9:22.

**9:27C SPECIAL VERDICT QUESTIONS — MECHANICS FOR SUBMITTING —  
COMPARATIVE NEGLIGENCE OF THE PLAINTIFF — MULTIPLE  
DEFENDANTS — NO DESIGNATED NONPARTY (ALTERNATIVE TO  
INSTRUCTION 9:27A)**

You are instructed to answer the following questions. You must all agree on your answers to each question for which an answer is required:

- 1. Did the plaintiff, (*name*), have (injuries) (damages) (losses)?**
- 2. Was the defendant, (*name of first defendant*), negligent?**
- 3. Was the negligence, if any, of the defendant, (*name of first defendant*), a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff?**
- 4. Was the defendant, (*name of second defendant*), negligent?**
- 5. Was the negligence, if any, of the defendant, (*name of second defendant*), a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff?**

If you find that the plaintiff, (*name*), did not have (injuries) (damages) (losses), or if you find that none of the defendants was negligent or that no defendant's negligence was a cause of any of the plaintiff's claimed (injuries) (damages) (losses), then your foreperson shall complete only Special Verdict Form A and all jurors shall sign it.

On the other hand, if you find that the plaintiff did have (injuries) (damages) (losses) and you further find that one or more of the defendants was negligent and that such negligence was a cause of any of the plaintiff's (injuries) (damages) (losses), then on Special Verdict Form B you shall answer questions 1 through 5 as well as the following questions, and your foreperson shall complete only Special Verdict Form B, and all jurors shall sign it.

- 6. Was the plaintiff, (*name*), negligent?**
- 7. Was the negligence, if any, of the plaintiff a cause of (his) (her) own claimed (injuries) (damages) (losses)?**
- 8. Taking as 100 percent the combined negligence of all parties you find were negligent and whose negligence was a cause of any of the plaintiff's (injuries) (damages) (losses), what percentage of negligence, if any, was that of the defendant, (*name of first defendant*), of the defendant, (*name of second defendant*), and of the plaintiff, (*name*)?**

You must enter the figure of zero, "0," for any party you decide was not negligent or whose negligence you decide was not a cause of any of the plaintiff's (injuries) (damages) (losses).

If you determine that the negligence of the plaintiff was equal to or greater than the combined negligence of the defendants, i.e., 50% or more, then skip question 9.

**9. State your answers to the following questions relating to the plaintiff's damages that were caused by the negligence of one or more of the defendants, whether the damages were also caused by the negligence, if any, of the plaintiff (or anyone else).**

**a. What is the total amount of plaintiff's damages, if any, for noneconomic losses or injuries (, excluding any damages for [physical impairment] [or] [disfigurement])? Noneconomic losses or injuries are those losses or injuries described in numbered paragraph 1 of Instruction (insert number of the applicable Instruction on damages). You should answer "0" if you determine there were none.**

**b. What is the total amount of plaintiff's damages, if any, for economic losses (, excluding any damages for [physical impairment] [or] [disfigurement])? Economic losses are those losses described in numbered paragraph 2 of Instruction (insert number of applicable Instruction on damages). You should answer "0" if you determine there were none.**

**(c. What is the total amount of plaintiff's damages, if any, for [physical impairment] [or] [disfigurement]? You should answer "0" if you determine there were none.)**

#### **Notes on Use**

1. Instruction 6:1 (personal injuries) should be used with this instruction. The Notes on Use to Instructions 4:4 (verdict form), 6:1, 9:22, and 9:23 are also applicable to this instruction. *See also* Special Note to Part C of this Chapter.

2. Whenever this instruction is given, the verdict forms in Instruction 9:27D must also be given.

3. Omit the parenthesized clause in numbered question 9 unless some evidence of negligent conduct on the part of a person other than the plaintiff or the defendants has been brought into the case.

4. If a claim of liability against one defendant is based only upon that defendant's vicarious liability for the negligence of another (e.g., an employer-employee relationship), this instruction must be appropriately modified.

5. Insert any other questions that may be necessary to resolve properly any other claims of the plaintiff or affirmative defenses of any of the defendants.

6. If, in a district court case, the parties have stipulated to a verdict or finding by some stated majority pursuant to C.R.C.P. 48, this instruction should be modified accordingly.

#### **Source and Authority**

This instruction is supported by the authorities cited in the Notes on Use to Instruction 9:22.

**9:27D SPECIAL VERDICT FORMS — COMPARATIVE NEGLIGENCE OF THE PLAINTIFF — MULTIPLE DEFENDANTS — NO DESIGNATED NONPARTY — FORMS A AND B (ALTERNATIVE TO INSTRUCTION 9:27B)**

**Form A:**

**IN THE \_\_\_\_\_ COURT IN AND FOR THE COUNTY OF \_\_\_\_\_, STATE OF COLORADO**

**Civil Action No. \_\_\_\_\_**

_____ )	
<b>Plaintiff,</b> )	
)	
<b>v.</b> )	<b>SPECIAL VERDICT</b>
)	<b>FORM A</b>
_____ )	
<b>Defendant.</b> )	

**DO NOT ANSWER THIS SPECIAL VERDICT FORM A IF YOUR FOREPERSON HAS COMPLETED SPECIAL VERDICT FORM B AND ALL JURORS HAVE SIGNED IT.**

**We, the jury, present our Answers to Questions submitted by the Court, to which we have all agreed:**

**1. Did the plaintiff, (*name*), have (injuries) (damages) (losses)? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**2. Was the defendant, (*name of first defendant*), negligent? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**3. Was the negligence, if any, of the defendant, (*name of first defendant*), a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**4. Was the defendant, (*name of second defendant*), negligent? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**5. Was the negligence, if any, of the defendant, (*name of second defendant*), a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff? (Yes or No)**

ANSWER: \_\_\_\_\_

We, the jury, find for the defendants and award no damages to the plaintiff, *(name)*.

Signatures of all jurors:

_____	_____
	<b>Foreperson</b>
_____	_____
_____	_____

**Form B:**

IN THE \_\_\_\_\_ COURT IN AND FOR THE  
COUNTY OF \_\_\_\_\_, STATE OF COLORADO

Civil Action No. \_\_\_\_\_

_____ )	
Plaintiff, )	
)	
v. )	<b>SPECIAL VERDICT</b>
)	<b>FORM B</b>
_____ )	
Defendant. )	

**DO NOT ANSWER THIS SPECIAL VERDICT FORM B IF YOUR FOREPERSON HAS COMPLETED SPECIAL VERDICT FORM A AND ALL JURORS HAVE SIGNED IT.**

We, the jury, present our Answers to Questions submitted by the Court, to which we have all agreed:

**1. Did the plaintiff, *(name)*, have (injuries) (damages) (losses)? (Yes or No)**

ANSWER: \_\_\_\_\_

**2. Was the defendant, *(name of first defendant)*, negligent? (Yes or No)**

ANSWER: \_\_\_\_\_

**3. Was the negligence, if any, of the defendant, (*name of first defendant*), a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**4. Was the defendant, (*name of second defendant*), negligent? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**5. Was the negligence, if any, of the defendant, (*name of second defendant*), a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**If you find that the plaintiff did have (injuries) (damages) (losses) and you further find that one or more of the defendants was negligent and that such negligence was a cause of any of the plaintiff's (injuries) (damages) (losses), then answer the following questions:**

**6. Was the plaintiff, (*name*), negligent? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**7. Was the negligence, if any, of the plaintiff a cause of (his) (her) own claimed (injuries) (damages) (losses)? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**8. Taking as 100 percent the combined negligence of all parties you find were negligent and whose negligence was a cause of any of the plaintiff's (injuries) (damages) (losses), what percentage of negligence, if any, was that of the defendant, (*name of first defendant*), of the defendant, (*name of second defendant*), and of the plaintiff, (*name*)?**

**Enter the figure of zero, "0," for any party you decide was not negligent or whose negligence you decide was not a cause of any of the plaintiff's (injuries) (damages) (losses).**

**ANSWER:**

**Percentage charged to (*name of first defendant*): \_\_\_\_\_%**

**Percentage charged to (*name of second defendant*): \_\_\_\_\_%**

**Percentage charged to plaintiff, (*name*): \_\_\_\_\_%**

**MUST TOTAL: 100%**

If you determine that the negligence of the plaintiff was equal to or greater than the combined negligence of the defendants, i.e., 50% or more, then skip question 9.

9. State your answers to the following questions relating to the plaintiff's damages that were caused by the negligence of one or more of the defendants, whether the damages were also caused by the negligence, if any, of the plaintiff (or anyone else).

a. What is the total amount of the plaintiff's damages, if any, for noneconomic losses or injuries (, excluding any damages for [physical impairment] [or] [disfigurement])? Noneconomic losses or injuries are those losses or injuries described in numbered paragraph 1 of Instruction (*insert number of the applicable Instruction on damages*). You should answer "0" if you determine there were none.

ANSWER: \$ \_\_\_\_\_

b. What is the total amount of the plaintiff's damages, if any, for economic losses (, excluding any damages for [physical impairment] [or] [disfigurement])? Economic losses are those losses described in numbered paragraph 2 of Instruction (*insert number of applicable Instruction on damages*). You should answer "0" if you determine there were none.

ANSWER: \$ \_\_\_\_\_

(c. What is the total amount of the plaintiff's damages, if any, for [physical impairment] [or] [disfigurement]? You should answer "0" if you determine there were none.)

ANSWER: \$ \_\_\_\_\_

Signatures of all jurors:

_____	_____
_____	<b>Foreperson</b>
_____	_____

#### Notes on Use

9. See the Notes on Use to Instruction 9:27A and the Special Note to Part C of this Chapter



## **Source and Authority**

This instruction is supported by the authorities cited in the Notes on Use to Instruction 9:22.

**9:28 COMPARATIVE NEGLIGENCE OF PLAINTIFF — SINGLE DEFENDANT OR MULTIPLE DEFENDANTS — DESIGNATED NONPARTY OR NONPARTIES INVOLVED**

**If you find the plaintiff, *(name)*, was damaged and that the plaintiff’s damages were caused by the negligence of the plaintiff and (one or more of the defendants, *[names]*, and *[insert name or other appropriate description of designated nonparty]*) (the defendant, *[name]*, and *[insert name or other appropriate description of designated nonparty]*) (one or more of the defendants, *[names]*, and *[insert names or other appropriate description of designated nonparties]*) (the defendant, *[name]*, and *[insert names or other appropriate description of designated nonparties]*) or that the plaintiff’s damages were caused by more than one of the defendants, then you must determine to what extent the negligent conduct of each contributed to the damages of the plaintiff, expressed as a percentage of 100 percent.**

**If you find that the plaintiff and (one or more of the defendants, *[names]*, and *[insert name or other appropriate description of designated nonparty]*) (the defendant, *[name]*, and *[insert name or other appropriate description of designated nonparty]*) (one or more of the defendants, *[names]*, and *[insert names or other appropriate description of designated nonparties]*) (the defendant, *[name]*, and *[insert names or other appropriate description of designated nonparties]*) were negligent and that the negligence of the plaintiff was equal to or greater than the combined negligence of (the defendant) (all the defendants) and (the designated nonparty) (all of the designated nonparties), then the plaintiff will not be allowed to recover.**

**On the other hand, if you find that the negligence of the plaintiff was less than the combined negligence of (the defendant) (all the defendants) and (the designated nonparty) (all of the designated nonparties), then the plaintiff will be allowed to recover.**

**If the plaintiff is allowed to recover, the total damages you award will be reduced by the Court by the percentage of the plaintiff’s negligence and by the percentage of the negligence of the designated (nonparty) (nonparties).**

**Notes on Use**

1. The Notes on Use to Instructions 9:22, 9:23, and 9:24 are generally applicable to this instruction. *See also* Special Note to Part C of this Chapter 9. Use whichever parenthesized and bracketed phrases are applicable.

2. This instruction along with Instructions 9:28A and B or Instructions 9:28C and D and Instruction 9:22, appropriately modified, should be used in actions, in which there is a single defendant or multiple defendants and notice of one or more designated nonparties has been properly given under section 13-21-111.5(3)(b), C.R.S. In such actions, under section 13-21-111.5(2), the “jury shall return a special verdict, or, in the absence of a jury, the court shall make special findings determining the percentage of negligence or fault attributable to each of the parties and any persons not parties to the action of whom notice has been given pursuant to paragraph (b) of subsection (3) . . . to whom some negligence or fault is found . . . .”

3. For the instructions dealing with cases involving the claimed negligence or fault of a designated nonparty, but not involving any negligence or fault of the plaintiff, see Instructions 9:29 and 9:29A and B.

4. When otherwise applicable, this instruction should be given with Instruction 15:18 (elements of liability for attorneys).

5. Where a settlement is reached with one or more parties, the damages awarded are reduced by the percentage of fault attributed to the settling designated nonparties. **Smith v. Zufelt**, 880 P.2d 1178 (Colo. 1994); **Kidwell v. K-Mart Corp.**, 942 P.2d 1280 (Colo. App. 1996) (even though negligence of independent contractor, who settled prior to trial, was imputable to defendant, independent contractor was properly designated as nonparty at fault).

6. Section 13-21-111.5(1) limits the scope of the pro rata liability statute to only “those actions ‘brought as a result of a death or an injury to person or property.’” **Broderick v. McElroy & McCoy, Inc.**, 961 P.2d 504, 507 (Colo. App. 1997).

7. Even when a defendant is vicariously liable for the acts or omissions of another defendant or designated nonparty at fault under the nondelegable-duty doctrine, the jury should be instructed to determine the respective shares of fault of the vicariously liable defendant and any other defendants and/or nonparties at fault. However, in entering judgment, the court should aggregate the fault of the vicariously liable defendant and any other defendants and/or nonparties at fault for whom the defendant is vicariously liable. **Reid v. Berkowitz**, 2013 COA 110M, ¶ 39, 315 P.3d 185; *see also* **Kidwell**, 942 P.2d at 1283 (while property owner was entitled to designate independent maintenance contractor as nonparty at fault, because of property owner’s nondelegable duty of care, plaintiff would be entitled to instruction on remand that negligence of contractor must be imputed to property owner). In Colorado, vicarious liability may be imputed under various legal theories, including respondeat superior, *see* Chapter 8 (Liability Based on Agency and Respondeat Superior), the inherently dangerous activity doctrine, *see* **Huddleston v. Union Rural Elec. Ass’n**, 841 P.2d 282 (Colo. 1992) and Instruction 9:7 (inherently dangerous activities), and the nondelegable or independent duty doctrine, *see* **Springer v. City & County of Denver**, 13 P.3d 794 (Colo. 2000).

8. A defendant is not entitled to a nonparty at fault instruction identifying a nonparty who, if brought into the action, would be liable only vicariously for the negligence or fault of another. **Just In Case Bus. Lighthouse, LLC v. Murray**, 2013 COA 112M, *rev’d in part on other grounds*, 2016 CO 47M, 374 P.3d 443; *see also* **Ochoa v. Vered**, 212 P.3d 963 (Colo. App. 2009) (physician, to whom liability for a surgical nurse’s negligence was imputed under the “captain of the ship” doctrine, is not a joint tortfeasor and cannot apportion some of the plaintiff’s damages to the nurse).

### Source and Authority

1. This instruction is supported by section 13-21-111.5(5), and the authorities cited in the Notes on Use above.

2. Under Colorado's pro rata liability statute, § 13-21-111.5, C.R.S., unidentified or unknown persons may be designated as nonparties. **Pedge v. R.M. Holdings, Inc.**, 75 P.3d 1126 (Colo. App. 2002). Also, persons who commit intentional torts can be designated as nonparties. **Slack v. Farmers Ins. Exch.**, 5 P.3d 280 (Colo. 2000); **Pedge**, 75 P.3d at 1128.

3. The negligence or fault of a nonparty cannot be considered unless the nonparty has been properly designated by the defendant in a pleading that complies with the requirements of section 13-21-111.5(3). **B.G.'s, Inc. v. Gross**, 23 P.3d 691 (Colo. 2001); **Pedge**, 75 P.3d at 1128; **Thompson v. Colo. & E. R.R.**, 852 P.2d 1328 (Colo. App. 1993). Nonparties need not have engaged in the same kind of tortious conduct as the defendant in order to be properly designated. **Moody v. A.G. Edwards & Sons, Inc.**, 847 P.2d 215 (Colo. App. 1992). However, generally, a person or entity designated under section 13-21-111.5 must have owed a duty recognized by law to the injured party. **Miller v. Byrne**, 916 P.2d 566 (Colo. App. 1995); *see also* **Fried v. Leong**, 946 P.2d 487 (Colo. App. 1997) (when plaintiff seeks damages for aggravation of a preexisting condition, liability cannot be prorated among nonparties whose conduct merely created that preexisting condition nor can liability be prorated among nonparties who breached no duty to the plaintiff, even though their conduct contributed to aggravation of preexisting condition). And liability may be apportioned between a defendant and a designated nonparty only if admissible evidence has been presented showing that the nonparty contributed to plaintiff's injuries. **Barton v. Adams Rental, Inc.**, 938 P.2d 532 (Colo. 1997).

4. The negligence of multiple defendants or designated nonparties is to be combined and compared with the negligence of the plaintiff. Damages are recoverable by the plaintiff from the defendants found liable unless the negligence attributable to the plaintiff is 50% or greater. **Mountain Mobile Mix, Inc. v. Gifford**, 660 P.2d 883 (Colo. 1983). As to the liability of individual defendants, however, in contrast to prior case law and statutes, under section 13-21-111.5(1), "no defendant shall be liable for an amount greater than that represented by the degree or percentage of the negligence . . . attributable to such defendant that produced the claimed injury, death, damage or loss," whether such negligence was greater or lesser, on an individual comparative basis, than the plaintiff's, another defendant's, or that of a designated nonparty. *See* **Inland/Riggle Oil Co. v. Painter**, 925 P.2d 1083 (Colo. 1996) (where plaintiff's negligence was less than the combined negligence of all of the defendants and designated nonparties, a defendant whose negligence was less than that of plaintiff was, nevertheless, liable for its pro rata share of the damages awarded).

**9:28A SPECIAL VERDICT QUESTIONS — MECHANICS FOR SUBMITTING —  
COMPARATIVE NEGLIGENCE OF THE PLAINTIFF — SINGLE  
DEFENDANT OR MULTIPLE DEFENDANTS — DESIGNATED NONPARTY  
OR NONPARTIES INVOLVED**

You are instructed to answer the following questions. You must all agree on your answers to each question for which an answer is required:

**1. Did the plaintiff, *(name)*, have (injuries) (damages) (losses)?**

**2. Was the defendant, *(name of first or only defendant)*, negligent?**

**3. Was the negligence, if any, of the defendant, *(name of first or only defendant)*, a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff?**

**(4. Was the defendant, *(name of second defendant)*, negligent?)**

**(5. Was the negligence, if any, of the defendant, *[name of second defendant]*, a cause of the [injuries] [damages] [losses] claimed by the plaintiff?)**

If you find that the plaintiff, *(name)*, did not have (injuries) (damages) (losses), or if you find that (the defendant was not) (none of the defendants was) negligent or that no negligence (of the defendant) (of any of the defendants) was a cause of any of the plaintiff's claimed (injuries) (damages) (losses), then your foreperson shall complete only Special Verdict Form A and he or she and all jurors will sign it.

On the other hand, if you find that the plaintiff did have (injuries) (damages) (losses) and you further find that (the defendant) (one or more of the defendants) was negligent and that such negligence was a cause of any of the plaintiff's (injuries) (damages) (losses), then on Special Verdict Form B you shall answer the following questions, and your foreperson shall complete only Special Verdict Form B, and all jurors shall sign it.

**6. Was *(name or other appropriate description of first or only designated nonparty)* negligent?**

**7. Was the negligence, if any, of *(name or other appropriate description of first or only designated nonparty)* a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff?**

**8. Was *(name or other appropriate description of second designated nonparty)* negligent?**

**9. Was the negligence, if any, of *(name or other appropriate description of second designated nonparty)* a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff?**

**10. Was the plaintiff, *(name)*, negligent?**

**11. Was the negligence, if any, of the plaintiff a cause of (his) (her) own claimed (injuries) (damages) (losses)?**

**12. State your answers to the questions as they appear on Special Verdict Form B relating to the plaintiff's damages that were caused by the negligence, if any, of the parties to this lawsuit and the negligence, if any, of the (nonparty) (nonparties), (name or names or other appropriate description).**

**13. Taking as 100 percent the combined negligence of all parties and (any nonparty) you find were negligent and whose negligence was a cause of any of the plaintiff's (injuries) (damages) (losses), what percentage of negligence, if any, was that of the defendant, (name of first or only defendant), (of the defendant, [name of second defendant]), of the (nonparty) (nonparties), (name or names or other appropriate description), and of the plaintiff, (name)?**

**You must enter the figure of zero, "0," for any party or nonparty you decide was not negligent or whose negligence you decide was not a cause of any of the plaintiff's claimed (injuries) (damages) (losses).**

#### **Notes on Use**

1. This instruction is for use in cases, in which (a) there is one defendant and one or more designated nonparties of whom notice has been properly given under section 13-21-111.5(3)(b), C.R.S., or (b) there are two or more defendants and one or more designated nonparties of whom proper notice has been given.

2. Use whichever parenthesized and bracketed words and phrases are appropriate, and modify the instruction appropriately if proper notice has been given of more than one nonparty.

3. Instruction 6:1 (personal injuries) should be used with this instruction. The Notes on Use to Instructions 4:4 (verdict form), 6:1, 9:22, 9:23, and 9:24 are generally applicable to this instruction, along with the Special Note to Part C of this Chapter 9.

4. This instruction must be used with Instruction 9:28B.

5. If a claim of liability against a defendant is based only upon that defendant's vicarious liability for the negligence of another (e.g., an employer-employee relationship), this instruction must be appropriately modified.

6. Insert any other questions that may be necessary to resolve properly any other claims of the plaintiff or affirmative defenses of any of the defendants.

7. If, in a district court case, the parties have stipulated to a verdict or finding by some stated majority pursuant to C.R.C.P. 48, this instruction should be modified accordingly.

### **Source and Authority**

This instruction is supported by the authorities cited in the Notes on Use to Instruction 9:22, and the Notes on Use to Instruction 9:24. The provisions relating to the determination of percentages of negligence of parties and nonparties is based on section 13-21-111.5(2).

**9:28B SPECIAL VERDICT FORMS — COMPARATIVE NEGLIGENCE OF THE PLAINTIFF — SINGLE DEFENDANT OR MULTIPLE DEFENDANTS — DESIGNATED NONPARTY OR NONPARTIES INVOLVED — FORMS A AND B**

**Form A:**

**IN THE \_\_\_\_\_ COURT IN AND FOR  
THE COUNTY OF \_\_\_\_\_, STATE OF COLORADO**

**Civil Action No. \_\_\_\_\_**

_____ )	
Plaintiff, )	
)	
v. )	<b>SPECIAL VERDICT</b>
)	<b>FORM A</b>
_____ )	
Defendant. )	

**DO NOT ANSWER THIS SPECIAL VERDICT FORM A IF YOUR FOREPERSON HAS COMPLETED SPECIAL VERDICT FORM B AND ALL JURORS HAVE SIGNED IT.**

**We, the jury, present our Answers to Questions submitted by the Court, to which we have all agreed:**

**1. Did the plaintiff, (*name*), have (injuries) (damages) (losses)? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**2. Was the defendant, (*name of first or only defendant*), negligent? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**3. Was the negligence, if any, of the defendant, (*name of first or only defendant*), a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**(4. Was the defendant, [*name of second defendant*], negligent? [Yes or No]**

**ANSWER: \_\_\_\_\_)**



(5. Was the negligence, if any, of the defendant, [name of second defendant], a cause of any of the [injuries] [damages] [losses] claimed by the plaintiff? [Yes or No]

ANSWER: \_\_\_\_\_)

We, the jury, find for the defendant(s) and award no damages to the plaintiff, (name).

Signatures of all jurors:

_____	_____
	Foreperson
_____	_____
_____	_____

**Form B:**

IN THE \_\_\_\_\_ COURT IN AND FOR THE  
COUNTY OF \_\_\_\_\_, STATE OF COLORADO

Civil Action No. \_\_\_\_\_

_____ )	
Plaintiff, )	
)	
v. )	SPECIAL VERDICT
)	FORM B
_____ )	
Defendant. )	

**DO NOT ANSWER THIS SPECIAL VERDICT FORM B IF YOUR FOREPERSON HAS COMPLETED SPECIAL VERDICT FORM A AND ALL JURORS HAVE SIGNED IT.**

We, the jury, present our Answers to Questions submitted by the Court, to which we have all agreed:

1. Did the plaintiff, (name), have (injuries) (damages) (losses)? (Yes or No)

ANSWER: \_\_\_\_\_

**2. Was the defendant, (*name of first or only defendant*), negligent? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**3. Was the negligence, if any, of the defendant, (*name of first or only defendant*), a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**(4. Was the defendant, [*name of second defendant*], negligent? [Yes or No]**

**ANSWER: \_\_\_\_\_)**

**(5. Was the negligence, if any, of the defendant, [*name of second defendant*], a cause of any of the [injuries] [damages] [losses] claimed by the plaintiff? [Yes or No]**

**ANSWER: \_\_\_\_\_)**

**If you find that the plaintiff did have (injuries) (damages) (losses), and you further find that (the defendant) (one or more of the defendants) was negligent and that such negligence was a cause of any of the plaintiff's (injuries) (damages) (losses), then answer the following questions:**

**6. Was (*name or other appropriate description of first or only designated nonparty*) negligent? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**7. Was the negligence, if any, of (*name or other appropriate description of first or only designated nonparty*) a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**(8. Was [*name or other appropriate description of second designated nonparty*] negligent? [Yes or No]**

**ANSWER: \_\_\_\_\_)**

**(9. Was the negligence, if any, of [*name or other appropriate description of second designated nonparty*] a cause of any of the [injuries]) [damages] [losses] claimed by the plaintiff? [Yes or No]**

**ANSWER: \_\_\_\_\_)**

**10. Was the plaintiff, (*name*), negligent? (Yes or No)**

ANSWER: \_\_\_\_\_

**11. Was the negligence, if any, of the plaintiff a cause of (his) (her) own claimed (injuries) (damages) (losses)? (Yes or No)**

ANSWER: \_\_\_\_\_

**12. State your answers to the following questions relating to the plaintiff's damages that were caused by the negligence, if any, of the parties to this lawsuit and the negligence, if any of the (nonparty) (nonparties), (name or names or other appropriate description):**

**a. What is the total amount of the plaintiff's damages, if any, for noneconomic losses or injuries (, excluding any damages for [physical impairment] [or] [disfigurement])? Noneconomic losses or injuries are those losses or injuries described in numbered paragraph 1 of Instruction (insert number of the applicable Instruction on damages). You should answer "0" if you determine there were none.**

ANSWER: \$\_\_\_\_\_

**b. What is the total amount of the plaintiff's damages, if any, for economic losses (, excluding any damages for [physical impairment] [or] [disfigurement])? Economic losses are those losses described in numbered paragraph 2 of Instruction (insert number of applicable Instruction on damages). You should answer "0" if you determine there were none.**

ANSWER: \$\_\_\_\_\_

**(c. What is the total amount of the plaintiff's damages, if any, for [physical impairment] [or] [disfigurement]? You should answer "0" if you determine there were none.)**

ANSWER: \$\_\_\_\_\_

**13. Taking as 100 percent the combined negligence of all parties and (any nonparty) you find were negligent and whose negligence was a cause of any of the plaintiff's (injuries) (damages) (losses), what percentage of negligence, if any, was that of the defendant, (name of first or only defendant), (of the defendant, [name of second defendant]), (of the nonparty, [name or other appropriate description of first or only nonparty]), (of the nonparty, [name or other appropriate description of second nonparty]) and of the plaintiff, (name)? Enter the figure zero, "0," for any party or nonparty you decide was not negligent or whose negligence you decide was not a cause of any of the plaintiff's claimed (injuries) (damages) (losses).**

ANSWER:

**Percentage charged to (name of first or only defendant):** \_\_\_\_\_%

**Percentage charged to (name of second defendant):** \_\_\_\_\_%

**Percentage charged to (name of first or only nonparty):** \_\_\_\_\_%

**Percentage charged to (name of second nonparty):** \_\_\_\_\_%

**Percentage charged to plaintiff, (name):** \_\_\_\_\_%

**MUST TOTAL: 100%**

**Signatures of all jurors:**

_____	_____
	<b>Foreperson</b>
_____	_____
_____	_____

**Notes on Use**

9. See the Notes on Use to Instruction 9:28A and the Special Note to Part C of this Chapter

**Source and Authority**

This instruction is supported by sections 13-21-111, 13-21-111.5, and 13-21-102.5, C.R.S.

**9:28C SPECIAL VERDICT QUESTIONS — MECHANICS FOR SUBMITTING — COMPARATIVE NEGLIGENCE OF THE PLAINTIFF — SINGLE DEFENDANT OR MULTIPLE DEFENDANTS — DESIGNATED NONPARTY OR NONPARTIES INVOLVED (ALTERNATIVE TO INSTRUCTION 9:28A)**

You are instructed to answer the following questions. You must all agree on your answers to each question for which an answer is required:

**1. Did the plaintiff, *(name)*, have (injuries) (damages) (losses)?**

**2. Was the defendant, *(name of first or only defendant)*, negligent?**

**3. Was the negligence, if any, of the defendant, *(name of first or only defendant)*, a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff?**

**(4. Was the defendant, *[name of second defendant]*, negligent?)**

**(5. Was the negligence, if any, of the defendant, *[name of second defendant]*, a cause of the [injuries] [damages] [losses] claimed by the plaintiff?)**

If you find that the plaintiff, *(name)*, did not have (injuries) (damages) (losses), or if you find that (the defendant was not) (none of the defendants was) negligent or that no negligence (of the defendant) (of any of the defendants) was a cause of any of the plaintiff's claimed (injuries) (damages) (losses), then your foreperson shall complete only Special Verdict Form A and he or she and all jurors will sign it.

On the other hand, if you find that the plaintiff did have (injuries) (damages) (losses) and you further find that (the defendant) (one or more of the defendants) was negligent and that such negligence was a cause of any of the plaintiff's (injuries) (damages) (losses), then on Special Verdict Form B you shall answer the following questions, and your foreperson shall complete only Special Verdict Form B, and all jurors shall sign it.

**6. Was *(name or other appropriate description of first or only designated nonparty)* negligent?**

**7. Was the negligence, if any, of *(name or other appropriate description of first or only designated nonparty)* a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff?**

**8. Was *(name or other appropriate description of second designated nonparty)* negligent?**

**9. Was the negligence, if any, of *(name or other appropriate description of second designated nonparty)* a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff?**

**10. Was the plaintiff, *(name)*, negligent?**

**11. Was the negligence, if any, of the plaintiff a cause of (his) (her) own claimed (injuries) (damages) (losses)?**

**12. Taking as 100 percent the combined negligence of all parties and (any nonparty) you find were negligent and whose negligence was a cause of any of the plaintiff's (injuries) (damages) (losses), what percentage of negligence, if any, was that of the defendant, (*name of first or only defendant*), (of the defendant, [*name of second defendant*]), of the (nonparty) (nonparties), (*name or names or other appropriate description*), and of the plaintiff, (*name*)?**

**You must enter the figure of zero, "0," for any party or nonparty you decide was not negligent or whose negligence you decide was not a cause of any of the plaintiff's claimed (injuries) (damages) (losses).**

**If you determine that the negligence of the plaintiff was equal to or greater than the combined negligence of the (defendant) (defendants) and the (nonparty) (nonparties), i.e., 50% or more, then skip question 13.**

**13. State your answers to the questions as they appear on Special Verdict Form B relating to the plaintiff's damages that were caused by the negligence, if any, of the parties to this lawsuit and the negligence, if any, of the (nonparty) (nonparties), (*name or names or other appropriate description*).**

#### **Notes on Use**

See the Notes on Use to Instruction 9:28A, and the Special Note to Part C of this Chapter 9.

#### **Source and Authority**

This instruction is supported by the authorities cited in the Source and Authority to Instruction 9:28A.

**9:28D SPECIAL VERDICT FORMS — COMPARATIVE NEGLIGENCE OF THE PLAINTIFF — SINGLE DEFENDANT OR MULTIPLE DEFENDANTS — DESIGNATED NONPARTY OR NONPARTIES INVOLVED — FORMS A AND B (ALTERNATIVE TO INSTRUCTION 9:28B)**

**Form A:**

**IN THE \_\_\_\_\_ COURT IN AND FOR THE COUNTY OF \_\_\_\_\_, STATE OF COLORADO**

**Civil Action No. \_\_\_\_\_**

_____ )	
Plaintiff, )	
)	
v. )	<b>SPECIAL VERDICT</b>
)	<b>FORM A</b>
_____ )	
Defendant. )	

**DO NOT ANSWER THIS SPECIAL VERDICT FORM A IF YOUR FOREPERSON HAS COMPLETED SPECIAL VERDICT FORM B AND ALL JURORS HAVE SIGNED IT.**

**We, the jury, present our Answers to Questions submitted by the Court, to which we have all agreed:**

**1. Did the plaintiff, (*name*), have (injuries) (damages) (losses)? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**2. Was the defendant, (*name of first or only defendant*), negligent? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**3. Was the negligence, if any, of the defendant, (*name of first or only defendant*), a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**(4. Was the defendant, [*name of second defendant*], negligent? [Yes or No]**

**ANSWER: \_\_\_\_\_)**





**2. Was the defendant, (*name of first or only defendant*), negligent? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**3. Was the negligence, if any, of the defendant, (*name of first or only defendant*), a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**(4. Was the defendant, [*name of second defendant*], negligent? [Yes or No]**

**ANSWER: \_\_\_\_\_)**

**(5. Was the negligence, if any, of the defendant, [*name of second defendant*], a cause of any of the [injuries] [damages] [losses] claimed by the plaintiff? [Yes or No]**

**ANSWER: \_\_\_\_\_)**

**If you find that the plaintiff did have (injuries) (damages) (losses), and you further find that (the defendant) (one or more of the defendants) was negligent and that such negligence was a cause of any of the plaintiff's (injuries) (damages) (losses), then answer the following questions:**

**6. Was (*name or other appropriate description of first or only designated nonparty*) negligent? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**7. Was the negligence, if any, of (*name or other appropriate description of first or only designated nonparty*) a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**(8. Was [*name or other appropriate description of second designated nonparty*] negligent? [Yes or No]**

**ANSWER: \_\_\_\_\_)**

**(9. Was the negligence, if any, of [*name or other appropriate description of second designated nonparty*] a cause of any of the [injuries] [damages] [losses] claimed by the plaintiff? [Yes or No]**

**ANSWER: \_\_\_\_\_)**

**10. Was the plaintiff, (*name*), negligent? (Yes or No)**

ANSWER: \_\_\_\_\_

**11. Was the negligence, if any, of the plaintiff a cause of (his) (her) own claimed (injuries) (damages) (losses)? (Yes or No)**

ANSWER: \_\_\_\_\_

**12. Taking as 100 percent the combined negligence of all parties and (any nonparty) you find were negligent and whose negligence was a cause of any of the plaintiff's (injuries) (damages) (losses), what percentage of negligence, if any, was that of the defendant, (*name of first or only defendant*), (of the defendant, [*name of second defendant*],) (of the nonparty, [*name or other appropriate description of first or only nonparty*]), (of the nonparty, [*name or other appropriate description of second nonparty*]) and of the plaintiff, (*name*)? Enter the figure zero, "0," for any party or nonparty you decide was not negligent or whose negligence you decide was not a cause of any of the plaintiff's claimed (injuries) (damages) (losses).**

ANSWER:

Percentage charged to (*name of first or only defendant*): \_\_\_\_\_%

Percentage charged to (*name of second defendant*): \_\_\_\_\_%

Percentage charged to (*name of first or only nonparty*): \_\_\_\_\_%

Percentage charged to (*name of first or only nonparty*): \_\_\_\_\_%

Percentage charged to plaintiff, (*name*): \_\_\_\_\_%

**MUST TOTAL: 100%**

**If you determine that the negligence of the plaintiff was equal to or greater than the combined negligence of the (defendant) (defendants) and the (nonparty) (nonparties), i.e., 50% or more, then skip question 13.**

**13. State your answers to the following questions relating to the plaintiff's damages that were caused by the negligence, if any, of the parties to this lawsuit and the negligence, if any of the (nonparty) (nonparties), (*name or names or other appropriate description*):**

**a. What is the total amount of the plaintiff's damages, if any, for noneconomic losses or injuries (, excluding any damages for [physical impairment] [or] [disfigurement])? Noneconomic losses or injuries are those losses or injuries described in numbered paragraph 1 of Instruction (*insert number of the applicable Instruction on damages*). You should answer "0" if you determine there were none.**

ANSWER: \$ \_\_\_\_\_

**b. What is the total amount of the plaintiff’s damages, if any, for economic losses (, excluding any damages for [physical impairment] [or] [disfigurement])? Economic losses are those losses described in numbered paragraph 2 of Instruction (insert number of applicable Instruction on damages). You should answer “0” if you determine there were none.**

ANSWER: \$ \_\_\_\_\_

**(c. What is the total amount of the plaintiff’s damages, if any, for [physical impairment] [or] [disfigurement]? You should answer “0” if you determine there were none.**

ANSWER: \$ \_\_\_\_\_)

**Signatures of all jurors:**

_____	_____
_____	<b>Foreperson</b>
_____	_____

**Notes on Use**

9. See the Notes on Use to Instruction 9:28A, and the Special Note to Part C of this Chapter

**Source and Authority**

This instruction is supported by the authorities cited in the Source and Authority to Instruction 9:28A.

**9:29 ELEMENTS — MULTIPLE DEFENDANTS OR ONE OR MORE DEFENDANTS AND ONE OR MORE DESIGNATED NONPARTIES — NO NEGLIGENCE OR FAULT OF PLAINTIFF**

**If you find that the plaintiff, (*name*), had (injuries) (damages) (losses) and that the plaintiff’s damages were caused by the (negligence) (or) (fault) of (*insert appropriate following phrase*):)**

**(two or more of the defendants, [*names*],)**

**(one or more of the defendants, [*names*], and that of the nonparty, [*name or other appropriate description*],)**

**(the defendant, [*name*], and that of the nonparty, [*name or other appropriate description*],)**

**then you must determine to what extent the (negligence) (or) (fault) of each contributed to the damages of the plaintiff, expressed as a percentage of 100 percent.**

**Notes on Use**

1. This instruction, based on section 13-21-111.5, C.R.S., applies only in civil actions, “brought as a result of a death or an injury to person or property,” in which there is no, or insufficient, evidence of the plaintiff’s contributory negligence or fault, but there is sufficient evidence that the plaintiff’s damages were caused, in whole or in part, by the negligence or fault of (1) two or more defendants, (2) one defendant and one or more designated nonparties of whom notice has been properly given under section 13-21-111.5(3)(b), or (3) two or more defendants and one or more designated nonparties of whom proper notice has been given. If there is sufficient evidence of negligence or fault on the plaintiff’s part, Instruction 9:22 appropriately modified, if necessary, to cover any relevant form of fault other than, or in addition to, negligence, should be used rather than this instruction.

2. Use whichever parenthesized words are appropriate. When the parenthesized word “fault” is used, another instruction defining what that term means in the context of the case must be given.

3. Whenever this instruction is given, Instructions 9:29A and B must also be given, as well as Instruction 9:24 if proper notice of a nonparty has been given under section 13-21-111.5(3)(b).

4. If notice has been properly given of more than one designated nonparty, this instruction and its accompanying “mechanics for submitting” and “special verdict forms” instructions, *see* Instructions 9:29A and B, must be appropriately modified.

5. This instruction, as well as its accompanying Instructions 9:29A and B, must be appropriately modified if there is sufficient evidence that two or more persons consciously conspired and deliberately pursued “a common plan or design to commit a tortious act,” in which

case they are to be held jointly liable. § 13-21-111.5(4). Absent a showing of concerted action, however, the trier of fact must apportion negligence or fault between tortfeasors. **Messler v. Phillips**, 867 P.2d 128 (Colo. App. 1993).

6. Similarly, this instruction and Instructions 9:29A and B must be appropriately modified if a claim of liability of any defendant or designated nonparty is based on vicarious liability alone or in conjunction with another claim based on personal liability.

7. The negligence or fault of a nonparty cannot be considered unless the nonparty has been properly designated by the defendant in a pleading that complies with the requirements of section 13-21-111.5(3). **Redden v. SCI Colo. Funeral Servs., Inc.**, 38 P.3d 75 (Colo. 2001); **Thompson v. Colorado & E. R.R.**, 852 P.2d 1328 (Colo. App. 1993). Nonparties need not have engaged in the same kind of tortious conduct as the defendant in order to be properly designated. **Moody v. A.G. Edwards & Sons, Inc.**, 847 P.2d 215 (Colo. App. 1992). However, it is not proper to designate a nonparty where the moving defendant fails to establish a prima facie case that the nonparty owed and breached a legal duty to the plaintiff. **Stone v. Satriana**, 41 P.3d 705 (Colo. 2002); **Redden**, 38 P.3d at 81. Immunity from suit does not preclude the nonparty from being designated under section 13-21-111.5. **Paris ex rel. Paris v. Dance**, 194 P.3d 404 (Colo. App. 2008) (defendant may designate minor plaintiff's parent as nonparty at fault notwithstanding parental immunity).

8. Section 13-21-111.5(1), limits the scope of the pro rata liability statute to only “those actions ‘brought as a result of a death or an injury to person or property.’” **Broderick v. McElroy & McCoy, Inc.**, 961 P.2d 504, 507 (Colo. App. 1997) (trial court not required to instruct on pro rata liability in action by vendors against brokers for breach of contract and breach of fiduciary duty). Section 13-21-111.5 is limited to tort claims and therefore does not apply to contract-based claims. **Core-Mark Midcontinent, Inc. v. Sonitrol Corp.**, 2012 COA 120, ¶ 47, 300 P.3d 963.

9. Even when a defendant is vicariously liable for the acts or omissions of another defendant or designated nonparty at fault under the nondelegable-duty doctrine, the jury should be instructed to determine the respective shares of fault of the vicariously liable defendant and any other defendants and/or nonparties at fault. However, in entering judgment, the court should aggregate the fault of the vicariously liable defendant and any other defendants and/or nonparties at fault for whom the defendant is vicariously liable. **Reid v. Berkowitz**, 2013 COA 110M, ¶ 39, 315 P.3d 185; *see also* **Kidwell v. K-Mart Corp.**, 942 P.2d 1280 (Colo. App. 1996) (while property owner was entitled to designate independent maintenance contractor as nonparty at fault, because of property owner's nondelegable duty of care, plaintiff would be entitled to instruction on remand that negligence of contractor must be imputed to property owner). In Colorado, vicarious liability may be imputed under various legal theories, including respondeat superior, *see* Chapter 8 (Liability Based on Agency and Respondeat Superior), the inherently dangerous activity doctrine, *see* **Huddleston v. Union Rural Elec. Ass'n**, 841 P.2d 282 (Colo. 1992), and Instruction 9:7 (inherently dangerous activities), and the nondelegable or independent duty doctrine, *see* **Springer v. City & Cty. of Denver**, 13 P.3d 794 (Colo. 2000).

10. A defendant is not entitled to a nonparty at fault instruction identifying a nonparty who, if brought into the action, would be liable only vicariously for the negligence or fault of

another. **Just In Case Bus. Lighthouse, LLC v. Murray**, 2013 COA 112M, 383 P.3d 1, *rev'd in part on other grounds*, 2016 CO 47M, 374 P.3d 443; *see also* **Ochoa v. Vered**, 212 P.3d 963 (Colo. App. 2009) (physician, to whom liability for a surgical nurse's negligence was imputed under the "captain of the ship" doctrine, is not a joint tortfeasor and cannot apportion some of the plaintiff's damages to the nurse).

### Source and Authority

This instruction is supported by section 13-21-111.5, which states that, "(1) . . . no defendant shall be liable for an amount greater than that represented by the degree or percentage of the negligence or fault attributable to such defendant that produced the claimed injury, death, damage, or loss . . . [,] (2) [t]he jury shall return a special verdict . . . determining the percentage of negligence or fault attributable to each of the parties and any persons not parties to the action of whom notice has been given pursuant to paragraph (b) of subsection (3) . . . to whom some negligence or fault is found and determining the total amount of damages sustained by each claimant." *See, e.g., Bohrer v. DeHart*, 961 P.2d 472 (Colo. 1998) (error for trial court not to instruct on pro rata liability of defendants, but error was harmless where court instructed jury to divide total damages between culpable defendants in proportional amounts and jury followed court's instructions).

**9:29A SPECIAL VERDICT QUESTIONS — MECHANICS FOR SUBMITTING —  
MULTIPLE DEFENDANTS OR ONE OR MORE DEFENDANTS AND ONE OR  
MORE DESIGNATED NONPARTIES — NO NEGLIGENCE OR FAULT OF  
PLAINTIFF**

You are instructed to answer the following questions. You must all agree on your answers to each question for which an answer is required:

1. Did the plaintiff, *(name)*, have (injuries) (damages) (losses)?
2. Was the defendant, *(name of first or only defendant)*, (negligent) (or) (at fault)?
3. Was the (negligence) (or) (fault), if any, of the defendant, *(name of first or only defendant)*, a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff?
- (4. Was the defendant, *[name of second defendant]*, [negligent] [or] [at fault]?)
- (5. Was the [negligence] [or] [fault], if any, of the defendant, *[name of second defendant]*, a cause of any of the [injuries] [damages] [losses] claimed by the plaintiff?)

If you find that the plaintiff, *(name)*, did not have (injuries) (damages) (losses), or if you find that (the defendant was not) (none of the defendants was) (negligent) (or) (at fault) or that no (negligence) (or) (fault) (of the defendant) (of any of the defendants) was a cause of any of the plaintiff's claimed (injuries) (damages) (losses), then your foreperson shall complete only Special Verdict Form A and all jurors shall sign it.

On the other hand, if you find that the plaintiff did have (injuries) (damages) (losses) and you further find that (the defendant) (one or more of the defendants) was (negligent) (or) (at fault) and that such (negligence) (or) (fault) was a cause of any of the plaintiff's (injuries) (damages) (losses), then on Special Verdict Form B you shall answer the following questions, and your foreperson shall complete only Special Verdict Form B, and all jurors shall sign it.

6. Was *(name or other appropriate description of designated nonparty)* (negligent) (or) (at fault)?

7. Was the (negligence) (or) (fault), if any, of *(name or other appropriate description of designated nonparty)* a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff?

8. State your answers to the questions as they appear on Special Verdict Form B relating to the plaintiff's damages that were caused by the (negligence) (or) (fault) of the (defendant) (one or more of the defendants) and the (negligence) (or) (fault), if any, of the nonparty, *(name or other appropriate description)*.

9. Taking as 100 percent the combined (negligence) (or) (fault) of the (defendant) (defendants) and (any nonparty) you find were (negligent) (or) (at fault) and whose (negligence) (or) (fault) was a cause of any of the plaintiff's (injuries) (damages) (losses),

**what percentage of (negligence) (or) (fault), if any, was that of the defendant, (*name of first or only defendant*), (of the defendant, [*name of second defendant*],) and of the nonparty, (*name or other appropriate description*)?**

**You must enter the figure of zero, “0,” for the nonparty (and any defendant) you decide was not (negligent) (or) (at fault) or whose (negligence) (or) (fault) you decide was not a cause of any of the plaintiff’s (injuries) (damages) (losses).**

### **Notes on Use**

1. Instruction 6:1 (personal injuries) should be used with this instruction. The Notes on Use to Instructions 4:4 (verdict form), 6:1, and 9:24 are also applicable to this instruction.

2. Whenever this instruction is given, the two verdict forms set out in Instruction 9:28B must also be given.

3. If the case involves only multiple defendants and no designated nonparties, this instruction and Instruction 9:29B must be appropriately modified.

4. Insert any other questions that may be necessary to resolve properly any other claims or affirmative defenses.

5. If, in a district court case, the parties have stipulated to a verdict or finding by some stated majority pursuant to C.R.C.P. 48, this instruction should be modified accordingly.

### **Source and Authority**

This instruction is supported by the authorities cited in the Notes on Use and Source and Authority to Instructions 9:24 and 9:29.



**9:29B SPECIAL VERDICT FORMS — MULTIPLE DEFENDANTS OR ONE OR MORE DEFENDANTS AND ONE OR MORE DESIGNATED NONPARTIES — NO NEGLIGENCE OR FAULT OF PLAINTIFF — FORMS A AND B**

**Form A:**

**IN THE \_\_\_\_\_ COURT IN AND FOR THE  
COUNTY OF \_\_\_\_\_, STATE OF COLORADO**

**Civil Action No. \_\_\_\_\_**

_____ )	
<b>Plaintiff,</b> )	
)	
<b>v.</b> )	<b>SPECIAL VERDICT</b>
)	<b>FORM A</b>
_____ )	
<b>Defendant.</b> )	

**DO NOT ANSWER THIS SPECIAL VERDICT FORM A IF YOUR FOREPERSON HAS COMPLETED SPECIAL VERDICT FORM B AND ALL JURORS HAVE SIGNED IT.**

**We, the jury, present our Answers to Questions submitted by the Court, to which we have all agreed:**

**1. Did the plaintiff, (*name*), have (injuries) (damages) (losses)? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**2. Was the defendant, (*name of first or only defendant*), (negligent) (or) (at fault)? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**3. Was the (negligence) (or) (fault), if any, of the defendant, (*name of first or only defendant*), a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**(4. Was the defendant, [*name of second defendant*], [negligent] [or] [at fault]? [Yes or No]**

ANSWER: \_\_\_\_\_)

(5. Was the [negligence] [or] [fault], if any, of the defendant, [name of second defendant], a cause of any of the [injuries] [damages] [losses] claimed by the plaintiff? [Yes or No]

ANSWER: \_\_\_\_\_)

We, the jury, find for the defendant(s) and award no damages to the plaintiff, (name).

Signatures of all jurors:

_____	_____
	Foreperson
_____	_____
_____	_____

**Form B:**

IN THE \_\_\_\_\_ COURT IN AND FOR THE  
COUNTY OF \_\_\_\_\_, STATE OF COLORADO

Civil Action No. \_\_\_\_\_

_____ )	
Plaintiff, )	
)	
v. )	SPECIAL VERDICT
)	FORM B
)	
_____ )	
Defendant. )	

**DO NOT ANSWER THIS SPECIAL VERDICT FORM B IF YOUR FOREPERSON HAS COMPLETED SPECIAL VERDICT FORM A AND ALL JURORS HAVE SIGNED IT.**

We, the jury, present our Answers to Questions submitted by the Court, to which we have all agreed:

1. Did the plaintiff, (name), have (injuries) (damages) (losses)? (Yes or No)

ANSWER: \_\_\_\_\_

**2. Was the defendant, (name of first or only defendant), (negligent) (or) (at fault)? (Yes or No)**

ANSWER: \_\_\_\_\_

**3. Was the (negligence) (or) (fault), if any, of the defendant, (name of first or only defendant), a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff? (Yes or No)**

ANSWER: \_\_\_\_\_

**(4. Was the defendant, [name of second defendant], [negligent] [or] [at fault]? [Yes or No]**

ANSWER: \_\_\_\_\_)

**(5. Was the [negligence] [or] [fault], if any, of the defendant, [name of second defendant], a cause of any of the [injuries] [damages] [losses] claimed by the plaintiff? [Yes or No]**

ANSWER: \_\_\_\_\_)

**If you find that the plaintiff did have (injuries) (damages) (losses), and you further find that (the defendant) (one or more of the defendants) was (negligent) (or) (at fault) and that such (negligence) (or) (fault) was a cause of any of the plaintiff's (injuries) (damages) (losses), then answer the following questions:**

**6. Was (name or other appropriate description of designated nonparty) (negligent) (or) (at fault)? (Yes or No)**

ANSWER: \_\_\_\_\_

**7. Was the (negligence) (or) (fault), if any, of (name or other appropriate description of designated nonparty) a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff? (Yes or No)**

ANSWER: \_\_\_\_\_

**8. State your answers to the following questions relating to the plaintiff's damages that were caused by the (negligence) (or) (fault), if any, of the (defendant) (one or more of the defendants) and the (negligence) (or) (fault), if any, of the nonparty, (name or other appropriate description):**

a. What is the total amount of the plaintiff's damages, if any, for noneconomic losses or injuries (, excluding any damages for [physical impairment] [or] [disfigurement])? Noneconomic losses or injuries are those losses or injuries described in numbered paragraph 1 of Instruction (*insert number of the applicable Instruction on damages*). You should answer "0" if you determine there were none.

ANSWER: \$ \_\_\_\_\_

b. What is the total amount of the plaintiff's damages, if any, for economic losses (, excluding any damages for [physical impairment] [or] [disfigurement])? Economic losses are those losses described in numbered paragraph 2 of Instruction (*insert number of applicable Instruction on damages*). You should answer "0" if you determine there were none.

ANSWER: \$ \_\_\_\_\_

(c. What is the total amount of the plaintiff's damages, if any, for [physical impairment] [or] [disfigurement]? You should answer "0" if you determine there were none.)

ANSWER: \$ \_\_\_\_\_

9. Taking as 100 percent the combined (negligence) (or) (fault) of the (defendant) (defendants) and nonparty you find were (negligent) (or) (at fault) and whose (negligence) (or) (fault) was a cause of any of the plaintiff's (injuries) (damages) (losses), what percentage of (negligence) (or) (fault), if any, was that of the defendant, (*name of first or only defendant*), (of the defendant, [*name of second defendant*],) and of the nonparty, (*name or other appropriate description*)? Enter the figure zero, "0," for the nonparty (and any defendant you decide was not (negligent) (or) (at fault) or whose (negligence) (or) (fault) you decide was not a cause of any of the plaintiff's (injuries) (damages) (losses).

ANSWER:

Percentage charged to (*name of first or only defendant*): \_\_\_\_\_%

Percentage charged to (*name of second defendant*): \_\_\_\_\_%

Percentage charged to (*name of nonparty*): \_\_\_\_\_%

**MUST TOTAL: 100%**

Signatures of all jurors:

\_\_\_\_\_  
Foreperson



**Notes on Use**

See Notes on Use to Instructions 9:24 and 9:29.

**Source and Authority**

This instruction is supported by the authorities cited in the Notes on Use and Source and Authority to Instructions 9:24 and 9:29.

## D. WILLFUL AND WANTON NEGLIGENCE

### 9:30 WILLFUL AND WANTON CONDUCT OR WILLFUL AND RECKLESS DISREGARD — DEFINED

**(“Willful and wanton conduct”) (“Wanton and reckless disregard of the rights and feelings of others”) means an act or omission purposefully committed by a person who must have realized that the conduct was dangerous, and which conduct was done heedlessly and recklessly, either without regard to the consequences, or without regard to the rights and safety of others, particularly the plaintiff.**

#### Notes on Use

1. This instruction, using whichever parenthesized words are appropriate, should be used with Instruction 5:4 (exemplary or punitive damages).

2. When necessary, this instruction may also be used, with appropriate modifications, to define such phrases as “willful and wanton negligence,” “willful and reckless negligence,” etc.

#### Source and Authority

1. This instruction is supported by section 13-21-102(1)(b), C.R.S., which appears to be a codification of the three basic ideas common to “willful,” “wanton,” or “reckless” conduct that run through the cases: (1) the conduct must have created a higher-than-normal risk of harm; (2) the defendant must have been aware of the risk (i.e., acted purposefully); and (3) the defendant must have acted “heedlessly” (i.e., without justification) in disregard of the rights of others. *See also Tri-Aspen Constr. Co. v. Johnson*, 714 P.2d 484 (Colo. 1986) (to justify award of punitive damages, act complained of must have been performed with such a wanton and reckless disregard of plaintiff’s rights as to evidence a “wrongful motive”); *Palmer v. A.H. Robins Co., Inc.*, 684 P.2d 187 (Colo. 1984) (purposely performed with an awareness of the risk); *Core-Mark Midcontinent, Inc. v. Sonitrol Corp.*, 2012 COA 120, ¶¶ 18-19, 300 P.3d 963 (discussing willful and wanton conduct under tort and contract law); *U.S. Fire Ins. Co. v. Sonitrol Mgmt. Corp.*, 192 P.3d 543, 549 (Colo. App. 2008) (evidence of burglar alarm monitoring company’s failures to respond to multiple automated alarm notifications of a burglary in progress was sufficient to support jury finding of “purposeful conduct committed recklessly with conscious disregard for the rights and safety of others”); *Forman v. Brown*, 944 P.2d 559, 564 (Colo. App. 1996) (“purposeful conduct committed recklessly that exhibits an intent consciously to disregard the safety of others”); *Miller v. Solaglas Cal., Inc.*, 870 P.2d 559 (Colo. App. 1993) (declining to apply a “knew or should have known” standard); *Messler v. Phillips*, 867 P.2d 128 (Colo. App. 1993); *see also Terror Mining Co. v. Roter*, 866 P.2d 929 (Colo. 1994); *Foster v. Redding*, 97 Colo. 4, 45 P.2d 940 (1935) (no material difference between phrase “willful and wanton” as used in guest statute (now repealed) and phrase “wanton and reckless” as used in exemplary damages statute); *Clark v. Small*, 80 Colo. 227, 250 P. 385 (1926) (punitive damages); *Jacobs v. Commonwealth Highland Theatres, Inc.*, 738 P.2d 6 (Colo. App. 1986) (punitive damages).

2. By way of analogy, section 18-1-501(8), C.R.S., defines “recklessly” in the criminal law using these same three basic ideas. “A person acts recklessly when he consciously disregards a substantial and unjustifiable risk that a result will occur . . . .” One acts “willfully” under the Colorado Criminal Code “when he is aware that his conduct is practically certain to cause the result.” § 18-1-501(6).

3. For cases decided under the former guest statute, see **Coffman v. Seifert**, 175 Colo. 224, 486 P.2d 422 (1971); **Brown v. Spain**, 171 Colo. 205, 466 P.2d 462 (1970); **Steeves v. Smiley**, 144 Colo. 5, 354 P.2d 1011 (1960) (consciously choosing a dangerous course of action with knowledge of facts that a reasonable person would recognize creates a strong probability of injury to others); **Hodges v. Ladd**, 143 Colo. 143, 352 P.2d 660 (1960) (intentionally disregarding symptoms of sleepiness); **Coffman v. Godsoe**, 142 Colo. 575, 351 P.2d 808 (1960) (citing and discussing several earlier cases); **Burrell v. Anderson**, 133 Colo. 386, 295 P.2d 1039 (1956) (negligence resulting from a passive mind is not willful and wanton negligence); **Graham v. Shilling**, 133 Colo. 5, 291 P.2d 396 (1955); **Pettingell v. Moede**, 129 Colo. 484, 271 P.2d 1038 (1954); and **Helgoth v. Foxhoven**, 125 Colo. 446, 244 P.2d 886 (1952) (citing several earlier cases).

4. Willful and wanton negligence may consist of either an act or an omission. **Millington v. Hiedloff**, 96 Colo. 581, 45 P.2d 937 (1935).

5. Comparative negligence is a defense to willful and wanton negligence. **White v. Hansen**, 837 P.2d 1229 (Colo. 1992); **G.E.C. Minerals, Inc. v. Harrison W. Corp.**, 781 P.2d 115 (Colo. App. 1989).

## E. SUBJECTS ON WHICH NO SEPARATE INSTRUCTIONS HAVE BEEN PREPARED

### 9:31 CONTRIBUTORY NEGLIGENCE, CONTRIBUTORY NEGLIGENCE OF (SPOUSE) (PARENT) (CHILD), AND ASSUMPTION OF RISK

No separate instructions on these subjects have been prepared.

#### Notes

1. The definition of “negligence” set forth in Instruction 9:6 is also applicable to define “contributory negligence,” and therefore, no separate instruction defining “contributory negligence” has been prepared.

2. Under the comparative negligence statute, § 13-21-111, C.R.S., although contributory negligence is a defense to a negligence claim, it may not be a complete defense, and therefore, in cases where contributory negligence is raised as a defense, use the applicable comparative negligence instructions in Part C of this chapter.

3. The contributory negligence of one spouse in causing injuries to the other spouse is a defense to the former’s claim for loss of consortium. *W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS* § 125, at 938 (5th ed. 1984). In such cases, use the applicable comparative negligence instructions, appropriately modified, in Part C of this chapter, together with Instructions 6:5 and 6:6 (loss of consortium), also appropriately modified.

4. While the negligence of a parent in proximately causing injuries to his or her child is a defense to that parent’s claim for loss of services, expenses, etc., *PROSSER AND KEETON ON THE LAW OF TORTS, supra*, § 125, at 938, it is not necessarily a complete bar under section 13-21-111. Therefore, in such cases, use the applicable comparative negligence instructions (Instructions 9:22-9:29), appropriately modified.

5. Even though the contributory negligence of a parent may bar or reduce the parent’s claim, such negligence will not be imputed to the child so as to bar or reduce the child’s claim. *See* Instruction 9:25. Similarly, in the absence of some other basis, such as master and servant, the contributory negligence of one parent or a spouse will not be imputed to the other parent so as to bar or reduce whatever claim the other parent may have for injuries to the child. *See Phillips v. Denver City Tramway Co.*, 53 Colo. 458, 128 P. 460 (1912).

6. In cases where the contributory negligence of a child has been raised as a defense, use Instruction 9:9, together with the applicable comparative negligence instructions in Part C of this chapter.

7. In Colorado, assumption of risk is a form of contributory negligence. *Wark v. McClellan*, 68 P.3d 574 (Colo. App. 2003) (instructions on assumption of risk as a form of contributory negligence may be given with instructions on comparative negligence where facts support such instructions). For this reason, a separate instruction on the defense of assumption of risk should not be given in a case governed by the comparative negligence statute, § 13-21-111. *See, e.g., Brown v. Kreuser*, 38 Colo. App. 554, 558, 560 P.2d 105, 108 (1977) (Instructions on



contributory negligence, see, e.g., Instruction 9:6, and on determining the “comparative negligence percentages of the plaintiff and the defendant [Instructions 9:22-9:29] sufficiently cover the conduct heretofore classed as assumption of risk in Colorado . . . .”); *see also* **Loup-Miller v. Brauer & Assocs. Rocky Mtn., Inc.**, 40 Colo. App. 67, 572 P.2d 845 (1977); **Stefanich v. Martinez**, 39 Colo. App. 500, 570 P.2d 554 (1977), *aff’d on other grounds*, 195 Colo. 341, 577 P.2d 1099 (1978). In actions in which the statutory definition of assumption of risk under section 13-21-111.7, C.R.S., may be applicable when comparing negligence under the comparative negligence statute, § 13-21-111, Instruction 9:6 should be used.

8. Under section 13-21-120, C.R.S., the assumption of “inherent risks” by a spectator of a professional baseball game may be a complete defense against liability in an action by a spectator against an owner of a professional baseball team or stadium. Whenever, in light of the evidence in the case, this complete defense of assumption of risk might be applicable, an instruction based on the provisions of section 13-21-120, should be given if supported by sufficient evidence.

## F. SUBJECTS ON WHICH NO SEPARATE INSTRUCTIONS SHOULD BE GIVEN

### 9:32 RESCUE DOCTRINE, UNAVOIDABLE ACCIDENT, AND LAST CLEAR CHANCE

**No separate instructions on these subjects should be given.**

#### Notes

1. The usual instructions given in a negligence case, particularly those relating to causation, *see* Instructions 9:18-9:21, will normally cover adequately the cases in which the plaintiff is claiming damages for injuries incurred while rescuing or attempting to rescue another who was endangered or injured as a result of the claimed negligence of the defendant. For a discussion of the “Rescue Doctrine,” *see* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 44, at 307-09 (5th ed. 1984), and RESTATEMENT (SECOND) OF TORTS § 294 (1965).

2. In **Lewis v. Buckskin Joe’s, Inc.**, 156 Colo. 46, 396 P.2d 933 (1964), overruling several earlier cases, the court held it was error to give an unavoidable accident instruction in a negligence case.

3. The doctrine of last clear chance is logically subsumed under a comparative negligence statute such as Colorado’s. PROSSER AND KEETON ON THE LAW OF TORTS, *supra*, § 67, at 477. *See also* J. PALMER & S. FLANAGAN, COMPARATIVE NEGLIGENCE MANUAL § 1.230 (rev. ed. 1986); 4 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS § 22.14 (3d ed. 1986). Therefore, the applicable comparative negligence instructions (Instructions 9:22-9:29), based on section 13-21-111, C.R.S., should be used rather than an instruction on last clear chance.