

**CHAPTER 14**  
**PRODUCT LIABILITY**

[Introductory Note](#)

**A. STRICT PRODUCT LIABILITY**

- [14:1](#) Elements of Liability
- [14:2](#) Manufacturer — Defined
- [14:3](#) Defective, Unreasonably Dangerous — Defined
- [14:4](#) Warnings and Instructions
- [14:5](#) Presumptions — Noncompliance with Governmental Standards
- [14:5A](#) Presumptions — Compliance with Governmental Standards
- [14:5B](#) Presumptions — Ten-Year Use of Product
- [14:6](#) State-of-the-Art
- [14:7](#) Damage Alone Not Proof Product Was Defective or Unreasonably Dangerous

**B. PRODUCT LIABILITY FOR BREACH OF WARRANTY**

- [14:8](#) Breach of Express Warranty Under U.C.C. — Elements of Liability
- [14:9](#) Express Warranty — Defined
- [14:10](#) Breach of Implied Warranty of Merchantability — Elements of Liability
- [14:11](#) Implied Warranty of Merchantability — Defined
- [14:12](#) Implied Warranty of Wholesomeness of Food — Defined
- [14:13](#) Breach of Implied Warranty of Fitness for a Particular Purpose — Elements of Liability
- [14:14](#) Implied Warranty of Fitness for a Particular Purpose — Defined
- [14:15](#) Notice of Breach of Warranty — What Constitutes
- [14:16](#) Implied Warranties — Creation and Exclusion or Modification

**C. PRODUCT LIABILITY FOR NEGLIGENCE**

- [14:17](#) Manufacturer's Liability Based on Negligence — Elements of Liability
- [14:18](#) Manufacturer's Duty as to Parts Obtained from Other Sources
- [14:19](#) Manufacturer's/Seller's Duty to Warn
- [14:20](#) Liability for Injury from Food or Beverage in Sealed Container — Elements of Liability
- [14:21](#) Prima Facie Negligence Liability for Injury from Food or Beverage in Sealed Container (Res Ipsa Loquitur)

## D. STRICT PRODUCT LIABILITY FOR MISREPRESENTATION

- [14:22](#) Elements of Liability
- [14:23](#) Misrepresentation of Material Fact — Defined
- [14:24](#) Reasonable Reliance — Defined

## E. AFFIRMATIVE DEFENSES AND DEFENSE CONSIDERATIONS

- [14:25](#) Affirmative Defense — Unreasonable, Knowing Use of Defective Product or Product Not in Compliance with Warranty
- [14:26](#) Affirmative Defense — Risk of an Unavoidably Unsafe Product
- [14:27](#) Affirmative Defense — Misuse of Product
- [14:28](#) Affirmative Defense — Comparative Fault Based on Unreasonable, Knowing Use of Product Involving Negligently Created Risk, Product Not in Compliance with Warranty, or Defective or Misrepresented Product
- [14:29](#) Affirmative Defense — Comparative Fault Based on Negligence
- [14:30](#) Comparative Fault — Elements and Effect — No Counterclaim — Single Defendant
- [14:30A](#) Special Verdict — Mechanics for Submitting — No Counterclaim — Single Defendant
- [14:30B](#) Special Verdict Forms — No Counterclaim — Single Defendant — Forms A, B, and C
- [14:31](#) Comparative Fault — Elements and Effect — No Counterclaim — Multiple Defendants
- [14:31A](#) Special Verdict — Mechanics for Submitting — No Counterclaim — Multiple Defendants
- [14:31B](#) Special Verdict Forms — No Counterclaim — Multiple Defendants — Forms A, B, and C
- [14:32](#) Comparative Fault — Elements and Effect — No Counterclaim — Single Defendant — Designated Nonparty or Nonparties Involved
- [14:32A](#) Special Verdict — Mechanics for Submitting — No Counterclaim — Single Defendant — Designated Nonparty or Nonparties Involved
- [14:32B](#) Special Verdict Forms — No Counterclaim — Single Defendant — Designated Nonparty or Nonparties Involved — Forms A, B, and C
- [14:33](#) Comparative Fault — Elements and Effect — Multiple Defendants — Designated Nonparty or Nonparties Involved
- [14:33A](#) Special Verdict — Mechanics for Submitting — No Counterclaim — Multiple Defendants — Designated Nonparty or Nonparties Involved
- [14:33B](#) Special Verdict Forms — No Counterclaim — Multiple Defendants — Designated Nonparty or Nonparties Involved — Forms A, B, and C

## Introductory Note

1. As the law of product liability has developed in Colorado, claims are available for strict product liability for defective products (Instructions 14:1 to 14:7), for product misrepresentation (Instructions 14:22 to 14:24), for breach of warranty (Instructions 14:8 to 14:16), and for negligence (Instructions 14:17 to 14:21). The defenses to those claims are set forth in Instructions 14:25 to 14:29, and the remaining instructions set out the verdict carrying instructions and verdict forms (Instructions 14:30 to 14:33B).

2. The law of strict product liability was first endorsed in Colorado in the 1970s. *See Hiigel v. Gen. Motors Corp.*, 190 Colo. 57, 544 P.2d 983 (1975); **Bradford v. Bendix-Westinghouse Auto. Air Brake Co.**, 33 Colo. App. 99, 517 P.2d 406 (1973). Before claims for strict liability were recognized, actions against product manufacturers and sellers proceeded under the tort theory of negligence and the contract theory of warranty. *See, e.g., Am. Furniture Co. v. Veazie*, 131 Colo. 340, 281 P.2d 803 (1955). Until 1971, negligence claims could be completely barred by a plaintiff's contributory negligence, *see* § 13-21-111, C.R.S. (adopting comparative negligence), while claims for breach of warranty required privity of contract between the injured person and the defendant. *See White v. Rose*, 241 F.2d 94 (10th Cir. 1957) (imposing privity requirement under Colorado law); **Senter v. B.F. Goodrich Co.**, 127 F. Supp. 705 (D. Colo. 1954) (same); *see also H.B. Bolas Enters., Inc. v. Zarlengo*, 156 Colo. 530, 400 P.2d 447 (1965) (privity required in action for breach of implied warranty of merchantability against builder/vendor of newly constructed building). Lack of notice within a reasonable time was also a defense to a plaintiff's right to recover based on breach of warranty. **Am. Furniture Co.**, 131 Colo. at 344, 281 P.2d at 805; *see* § 4-2-607(3)(a), C.R.S. The adoption of the Uniform Commercial Code (UCC) in 1965, §§ 4-1-101 to 4-11-102, C.R.S., eased the restrictions imposed by contract law's privity requirement, *see* §§ 4-2-313, cmt. 2 & 4-2-318, C.R.S., but timely notice was and remains a condition precedent to recovery. § 4-2-607(3)(a), C.R.S.; *see* Instruction 14:15 (notice of breach of warranty).

3. In 1965, the American Law Institute created a new cause of action, advancing a more liberal theory of recovery in product liability actions. RESTATEMENT (SECOND) OF TORTS § 402A (1965). This tort theory of strict product liability was formally adopted by the Colorado Court of Appeals in 1973, *see Bradford*, 33 Colo. App. at 107, 517 P.2d at 411, and two years later by the Colorado Supreme Court. *See Hiigel*, 190 Colo. at 63, 544 P.2d at 987. Under this theory of strict liability, the plaintiff's comparative negligence was not a defense to either strict liability claims, *see Uptain v. Huntington Lab, Inc.*, 723 P.2d 1322 (Colo. 1987), or to those for breach of warranty. **Zertuche v. Montgomery Ward & Co.**, 706 P.2d 424 (Colo. App. 1985). Because strict liability was not based on fault, simple negligence was viewed as insufficient to constitute a defense. **Jackson v. Harsco Corp.**, 673 P.2d 363 (Colo. 1983). Also, privity was not a restriction to the imposition of liability, as the Colorado courts invoked the doctrine of strict liability as to bystanders as well as product buyers, *see Bradford*, 33 Colo. App. at 108, 517 P.2d at 411-12 (allowing non-buyer, non-consumer plaintiff to recover). The instruction endorsed by the supreme court has adopted the same language as is found in the UCC, to permit recovery by any person "who may reasonably be expected to use, consume, or be affected" by the product. § 4-2-318, C.R.S.; Instruction 14:1 (elements of liability), ¶ 8. Finally, plaintiffs were also allowed to proceed against anyone in the chain of distribution, from the manufacturer

to the retail seller. **Prutch v. Ford Motor Co.**, 618 P.2d 657 (Colo. 1980); RESTATEMENT § 402A.

4. In 1977, the General Assembly enacted the Product Liability Act. *See* §§ 13-21-401 to -406, C.R.S. The Act, *inter alia*, defined “manufacturer,” § 13-21-401(1), C.R.S.; *see* Instruction 14:2; Notes on Use to Instruction 14:1, and generally allowed a plaintiff to sue only a “manufacturer” for strict liability rather than every seller in the chain of distribution. § 13-21-402, C.R.S.; *see* Instructions 14:1 & 14:2 and their Notes on Use. The Act also included presumptions and rules of evidence that offer some additional protection to manufacturers. §§ 13-21-403, -404, C.R.S.; *see* Instructions 14:5, 14:5A, 14:5B, & 14:6.

5. The limitation in section 13-21-402(1), was broadened by the legislature in 2003, when the provision was amended to preclude any product liability action, regardless of the theory, against a product seller unless that seller is also the manufacturer of the product or component part that is the subject of the action. *See Carter v. Brighton Ford, Inc.*, 251 P.3d 1179 (Colo. App. 2010). Presumably, that “qualified immunity” for sellers and distributors will continue to be an affirmative statutory defense that will be considered waived unless it is raised in the defendant’s responsive pleading or answer. **Stone’s Farm Supply, Inc. v. Deacon**, 805 P.2d 1109 (Colo. 1991).

6. In 1981, the Colorado Legislature added a comparative fault provision to the Product Liability Act that applies in any product liability action, as defined in section 13-21-401(2). *See Miller v. Solaglas Cal., Inc.*, 870 P.2d 559 (Colo. App. 1993); **States v. R.D. Werner Co.**, 799 P.2d 427 (Colo. App. 1990). The comparative negligence statute, § 13-21-111, does not apply in any “product liability action,” including those based on negligence. *See* § 13-21-406(4), C.R.S. Under section 13-21-406(1), comparative fault is an affirmative defense that, while it does not bar relief, will reduce a plaintiff’s recoverable damages. Initially, those cases that applied the statute seemed reluctant to reduce a plaintiff’s recovery by any degree of negligence. *See Armentrout v. FMC Corp.*, 842 P.2d 175 (Colo. 1992); **States**, 799 P.2d at 430. However, more recent cases have applied the comparative fault provision to require reduction of a plaintiff’s recovery by any comparative fault, including negligence. **Miller**, 870 P.2d 565-66; *see* Instruction 14:29 (comparative fault based on negligence). *See also Huffman v. Caterpillar Tractor Co.*, 908 F.2d 1470 (10th Cir. 1990) (applying Colorado law); *accord Montag v. Honda Motor Co.*, 75 F.3d 1414 (10th Cir. 1996). Whenever comparative fault is a submitted issue, the jury must return special verdicts. § 13-21-406(2); *see* Instructions 14:30 to 14:33.

7. In 2003, the Legislature codified “product misuse” in section 13-21-402.5, C.R.S. This statute applies to all product liability claims regardless of the theory. The statute provides that a product liability claim may not be commenced or maintained if, at the time the injury, death, or property damage occurred, the product was being used in a manner or for a purpose other than that which was intended and which could not reasonably have been expected, and such misuse was a cause of the injury, death, or property damage. *Id.* This statute may present an issue as to whether the Legislature intended to eliminate the affirmative defense of misuse and instead require that the plaintiff prove, as an element of liability, that misuse was not a cause of the plaintiff’s injuries, damages, or losses. The Committee takes no position on this issue. However, counsel and the trial court should be aware of this issue when the evidence is sufficient to warrant instructing the jury on the issue of misuse. *See* Instruction 14:27.

8. Current Colorado case law holds that whether or not the product is defective, the plaintiff cannot recover and the manufacturer or seller is not liable if the plaintiff's own misuse, rather than a product defect, is the cause of plaintiff's injuries, damages, or losses. **Kysor Indus. Corp. v. Frazier**, 642 P.2d 908 (Colo. 1982) (plaintiff cannot rely on RESTATEMENT § 402A to recover when his own misuse causes the injury); **Shultz v. Linden-Alimak, Inc.**, 734 P.2d 146 (Colo. App. 1986) (where user with full knowledge of dangers inherent in his own misuse of a product creates a dangerous condition in the product that injures him, there is no factual basis for submitting case to the jury).

9. Several Colorado cases have discussed misuse as a causation concept. *See, e.g.*, **Uptain**, 723 P.2d at 1325 (misuse is a question of causation and a manufacturer is not liable if an unforeseeable misuse of the product caused the injuries); **White v. Caterpillar, Inc.**, 867 P.2d 100 (Colo. App. 1993) (misuse is a causation concept which excuses the seller of a defective product from liability where misuse and not a defect caused the injury).

10. In **American Safety Equipment Corp. v. Winkler**, 640 P.2d 216 (1982), the Colorado Supreme Court approved adoption of section 402B of the RESTATEMENT (SECOND) OF TORTS. *See* Instructions 14:22 to 14:24. Section 402B allows recovery under a theory of strict liability for a seller's misrepresentation of a product, but there is no requirement that the product be defective or unreasonably dangerous. Although strict liability for misrepresentation remains a viable claim, no cases other than **American Safety Equipment** have been reported in the Colorado appellate courts. If a plaintiff is claiming damages for negligent misrepresentation during the course of the sale of a product under section 552 of the RESTATEMENT (SECOND) OF TORTS (1965), then the appropriate instructions will be found in Chapter 9. *See* Instruction 9:4; **Keller v. A.O. Smith Harvestore Prods., Inc.**, 819 P.2d 69 (Colo. 1991).

11. Any product liability action may include alternative claims for strict liability, negligence, and breach of warranty, with separate claims or with the possibility of separate claims for breach of express warranty (Instruction 14:8), breach of implied warranty of merchantability (Instruction 14:10), and breach of implied warranty of fitness for a particular purpose (Instruction 14:13). If a plaintiff is claiming the same damages for the same injuries under more than one claim for relief, then Instruction 6:14 must also be given.

12. Under section 13-22-104(2), C.R.S., an action for breach of warranty or in tort for sale of a defective product is precluded against those involved in blood transfusions or transplantations of human organs. Liability must be based on "negligence or willful misconduct." *See* **United Blood Servs. v. Quintana**, 827 P.2d 509 (Colo. 1992). Prior to the enactment of the statute, the supreme court had held that providing a blood transfusion by a hospital was not a sale for purposes of strict liability in tort or contract, **St. Luke's Hosp. v. Schmaltz**, 188 Colo. 353, 534 P.2d 781 (1975), but the selling of blood to a hospital by a blood bank was. **Belle Bonfils Mem'l Blood Bank v. Hansen**, 195 Colo. 529, 579 P.2d 1158 (1978).

13. For modifications in the instructions that may be required in any product liability action for damages against "the manufacturer, distributor, importer, or seller of firearms or ammunition alleging a defect in the design or manufacture of a firearm or ammunition," see sections 13-21-501 to -505, C.R.S. *See also* **Hilberg v. F.W. Woolworth Co.**, 761 P.2d 236 (Colo. App. 1988) (holding that prior to statute, a .22-caliber rifle, as such, was not defective

under “consumer expectations” or “risk-benefit” test), *overruled on other grounds by Casebolt v. Cowan*, 829 P.2d 352 (Colo. 1992).

14. Two federal statutes that may be relevant in certain product liability cases are the Consumer Product Warranties Act (Magnuson-Moss Act), 15 U.S.C. §§ 2301-2312 (2012), and the Consumer Product Safety Act, 15 U.S.C. §§ 2051-2089 (2012).

## A. STRICT PRODUCT LIABILITY

### 14:1 ELEMENTS OF LIABILITY

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

**1. The defendant was a manufacturer of the *(description of product or component part of product)*;**

**2. The defendant was engaged in the business of selling such *(description of product or component part)* for resale, use or consumption;**

**3. The defendant sold the *(description of product or component part)*;**

**4. The *(description of product or component part)* was defective and, because of the defect, the *(description of product or component part)* was unreasonably dangerous (to a person) (or) (to the property of a person) who might reasonably be expected to use, consume, or be affected by the *(description of product or component part)*;**

**5. The *(description of product or component part)* was defective at the time it was sold by the defendant or left **(his) (her) (its)** control;**

**6. The *(description of product or component part)* was expected to reach the user or consumer without substantial change in the condition in which it was sold;**

**7. The *(description of product or component part)* did reach the user or consumer without substantial change in the condition in which it was sold;**

**8. The plaintiff was a person who would reasonably be expected to use, consume or be affected by the *(description of product or component part)*;**

**9. The plaintiff had **(injuries) (damages) (losses)**; and**

**10. The defect in the *(description of product or component part)* 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 (on this claim) 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. **Koehn v. R.D. Werner Co.**, 809 P.2d 1045, 1050 (Colo. App. 1990) (“[A]n elemental instruction should not be so cast as to require proof of elements that are admitted or uncontroverted.”).

2. Use whichever parenthesized words are most appropriate and omit the last two paragraphs if no affirmative defense has been raised or there is insufficient evidence to support any defense.

3. Although mitigation of damages is an affirmative defense, *see* Instruction 5:2, only rarely, if ever, will it be a complete defense. For this reason, mitigation should not be identified as an affirmative defense in the concluding paragraphs of this instruction. Instead, if supported by sufficient evidence, Instruction 5:2 should be given along with the actual damages instruction appropriate to the claim and the evidence in the case. *See Miller v. Solaglas Cal., Inc.*, 870 P.2d 559 (Colo. App. 1993) (seat-belt defense, § 42-4-237(7), C.R.S., applies in product liability action only to mitigate pain and suffering damages and may not be used in support of a comparative fault defense).

4. When the affirmative defense of comparative fault applies, this instruction must be appropriately modified and should be given in conjunction with the appropriate comparative fault instructions. *See* Instructions 14:28 to 14:33. If, in addition to comparative fault, an affirmative defense has been properly put in issue that would bar the plaintiff’s entire claim — for example, release — additional questions covering that defense must be included in the comparative fault instructions and special verdict forms given in the case.

5. Under section 13-21-402(1), C.R.S., “[n]o product liability action shall be commenced or maintained against any seller of a product unless said seller is also the manufacturer of said product or . . . the part thereof giving rise to the product liability action.” However, as defined in section 13-21-401(1), C.R.S., the term “manufacturer” includes other sellers who are not manufacturers in the usual sense. *See also Carter v. Brighton Ford, Inc.*, 251 P.3d 1179 (Colo. App. 2010); **Miller**, 870 P.2d at 563-64 (quoting statute).

6. Section 13-21-401(1) provides as follows:

“Manufacturer” means a person or entity who designs, assembles, fabricates, produces, constructs, or otherwise prepares a product or a component part of a product prior to the sale of the product to a user or consumer. The term includes any seller who has actual knowledge of a defect in a product or a seller of a product who creates and furnishes a



manufacturer with specifications relevant to the alleged defect for producing the product or who otherwise exercises some significant control over all or a portion of the manufacturing process or who alters or modifies a product in any significant manner after the product comes into his possession and before it is sold to the ultimate user or consumer. The term also includes any seller of a product who is owned in whole or significant part by the manufacturer or who owns, in whole or significant part, the manufacturer. A seller not otherwise a manufacturer shall not be deemed to be a manufacturer merely because he places or has placed a private label on a product if he did not otherwise specify how the product shall be produced or control, in some significant manner, the manufacturing process of the product and the seller discloses who the actual manufacturer is.

7. In addition, under section 13-21-402(2):

If jurisdiction cannot be obtained over a particular manufacturer of a product or a part of a product alleged to be defective, then that manufacturer's principal distributor or seller over whom jurisdiction can be obtained shall be deemed, for the purposes of this section, the manufacturer of the product.

8. Based on these statutes and the evidence in the case, an appropriate instruction defining "manufacturer" must be given with this instruction, or this instruction must be modified to include appropriate language from these statutes defining a "manufacturer." *See Stone's Farm Supply, Inc. v. Deacon*, 805 P.2d 1109, 1113-14 (Colo. 1991) (qualified immunity for sellers and distributors under section 13-21-402 is affirmative statutory defense that must be raised in defendant's responsive pleading or answer, or it is waived); *Miller*, 870 P.2d at 564 (approving instruction defining "manufacturer" as "a person or entity who designs, assembles, fabricates, produces, constructs or otherwise prepares a product or a component of a product prior to the sale of the product to a user or consumer. The term also includes any seller who alters or modifies a product in any significant manner after the product comes into [the seller's] possession and before it is sold to the ultimate user or consumer"); *see also Halter v. Waco Scaffolding & Equip. Co.*, 797 P.2d 790 (Colo. App. 1990) (distributor not deemed "manufacturer" under section 13-21-402(2), on basis of plaintiff's inability to learn name and address of manufacturer until after statute of limitations had run). *But see Carter*, 251 P.3d at 1182-83 (where plaintiff essentially seeks damages only concerning the product itself, because the product is not as warranted, that is a contract claim and not a "product liability action").

9. A product liability action may be available against a "manufacturer" who leases, rather than sells, a defective product. *See* § 13-21-401(3) (definition of "seller"). In such a case this instruction must be appropriately modified.

10. Other appropriate instructions defining the terms and phrases used in this instruction, for example, Instruction 14:3, defining "defective" and "unreasonably dangerous," and the applicable instructions relating to causation from Chapter 9 must also be given with this instruction. *See Armentrout v. FMC Corp.*, 842 P.2d 175 (Colo. 1992) (in design defect case, jury should be specifically instructed regarding the meaning of "defective"). Such other instructions in this Part A as are appropriate to the evidence in the case should be given as well.

11. This instruction, with appropriate modifications, may be used if a defendant is claiming that a nonparty manufacturer or a seller that may be deemed to be a “manufacturer” is strictly liable for all or part of the plaintiff’s claimed damages. The modified instruction should reflect that the defendant designating the nonparty, and not the plaintiff, has the burden of proving the elements of such a claim. **Barton**, 938 P.2d at 537.

12. In some cases, for example products sold in bulk, the plaintiff’s evidence concerning whether the product was defective at the time it left the defendant’s control will be sufficient, even though the product may have passed through the hands of others, if the evidence shows (a) the product was defective at the time the plaintiff purchased it or it proved to be defective within a reasonable time after it was purchased, and (b) the defect, if it was to occur at all, was of the kind that was likely to occur prior to the plaintiff’s purchase and as part of the manufacturing or distribution processes. **Blueflame Gas, Inc. v. Van Hoose**, 679 P.2d 579 (Colo. 1984); **Prutch v. Ford Motor Co.**, 618 P.2d 657 (Colo. 1980); *see also* **Thirsk v. Ethicon, Inc.**, 687 P.2d 1315, 1317 (Colo. App. 1983) (“[I]f . . . the defendant presents any evidence that the product was not defective when it left the defendant’s control, the jury must be instructed that the defendant cannot be held liable if the defendant has proved, by a preponderance of the evidence, that the product was not defective when it left the defendant’s control.”). In such cases, this instruction must be appropriately modified (particularly numbered paragraph 5, as well, possibly, as numbered paragraphs 6 and 7), and other instructions based on these rules should be given, as may be necessary.

13. For purposes of imposing 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 a consumer. **Smith v. Home Light & Power Co.**, 734 P.2d 1051 (Colo. 1987). For possible liability in negligence in the distribution or transmission of electricity, see Instruction 9:7 (inherently dangerous activities).

### Source and Authority

1. This instruction is supported by the Colorado statutes set out above and on RESTATEMENT (SECOND) OF TORTS § 402A (1965), as adopted and elaborated by the Colorado Supreme Court in both **Hiigel v. General Motors Corp.**, 190 Colo. 57, 544 P.2d 983 (1975), and **Union Supply Co. v. Pust**, 196 Colo. 162, 583 P.2d 276 (1978). *See also* **Barton v. Adams Rental, Inc.**, 938 P.2d 532 (Colo. 1997) (specifically supporting elements in numbered paragraphs 1, 2, 3, and 6); **Armentrout**, 842 P.2d at 186 (specifically supporting numbered paragraph 4); **Simon v. Coppola**, 876 P.2d 10 (Colo. App. 1993) (citing instruction and discussing principle in paragraph 7); **Bond v. E.I. Du Pont De Nemours & Co.**, 868 P.2d 1114 (Colo. App. 1993) (citing **Union Supply Co.** in context of elements for prima facie case against manufacturer of component parts or supplier of raw materials); **Shaw v. General Motors Corp.**, 727 P.2d 387 (Colo. App. 1986) (specifically supporting numbered paragraph 5); **Union Ins. Co. v. RCA Corp.**, 724 P.2d 80 (Colo. App. 1986) (sufficiency of circumstantial evidence to support finding of defect); **Littlejohn v. Stanley Structures, Inc.**, 688 P.2d 1130 (Colo. App. 1984) (citing this instruction); **Larson v. Clark Equip. Co.**, 33 Colo. App. 277, 518 P.2d 308 (1974) (warranty provisions of U.C.C. do not preclude judicial adoption of strict liability in tort under RESTATEMENT § 402A); **Bradford v. Bendix-Westinghouse Auto. Air Brake Co.**, 33 Colo. App. 99, 517 P.2d 406 (1973).

2. An action for strict liability in tort may be maintained by one who “foreseeably may be injured along the path of delivery” of a defective product. **Frazier v. Kysor Indus. Corp.**, 43 Colo. App. 287, 292, 607 P.2d 1296, 1301 (1979), *rev’d on other grounds*, 642 P.2d 908 (Colo. 1982).

3. A defendant may not rely on an exculpatory agreement purporting to release a manufacturer from a claim for strict product liability for personal injury because such releases are against public policy. **Boles v. Sun Ergoline, Inc.**, 223 P.3d 724 (Colo. 2010).

4. The doctrine of strict liability in tort may be used to recover damages for physical injury to the product itself caused by the defect, in addition to damages for physical injuries caused to persons or to other property by the defect. However, commercial or business losses attributable directly to the defect are not recoverable under the doctrine. **Hiigel**, 190 Colo. at 65, 544 P.2d at 989; **Aetna Cas. & Sur. Co. v. Crissy Fowler Lumber Co.**, 687 P.2d 514 (Colo. App. 1984). *But see Carter*, 251 P.3d at 1187 (noting that **Hiigel** must be read now in light of **Town of Alma v. AZCO Construction, Inc.**, 10 P.3d 1256 (Colo. 2000), and that “product liability actions” are actions in tort that seek recovery for injury and collateral damage caused by defective products).

5. As to the applicability of the doctrine to manufacturers of component parts that prove to be defective, see **Union Supply Co.**, 196 Colo. at 170-71, 583 P.2d at 281-82; **Hiigel**, 190 Colo. at 65, 544 P.2d at 989; **Vista Resorts, Inc. v. Goodyear Tire & Rubber Co.**, 117 P.3d 60 (Colo. App. 2004); **White v. Caterpillar, Inc.**, 867 P.2d 100 (Colo. App. 1993); and **Bond**, 868 P.2d at 1118-19. *See also Miller*, 870 P.2d at 565 (component parts could constitute “product” that seller had prepared for sale to consumer); **Shaw**, 727 P.2d at 389.

6. As to the potential liability of a successor corporation, see **Ruiz v. ExCello Corp.**, 653 P.2d 415, 417 (Colo. App. 1982) (nothing in legislative history of Product Liability Act, §§ 13-21-401 to -406, C.R.S., “indicates a legislative intent to abrogate the corporate rule of successor liability as applied to [the successor of] a manufacturer”). *See also Johnston v. Amsted Indus., Inc.*, 830 P.2d 1141 (Colo. App. 1992) (rejecting “product line” and “continuity of enterprise” exceptions to traditional rule of nonliability of successor corporations in products liability action).

## 14:2 MANUFACTURER — DEFINED

**“Manufacturer” means:**

**(1. A person or entity who designs, assembles, makes, produces, constructs or otherwise prepares [a product] [or] [a component part of a product] prior to the sale of the product to a user or consumer;)**

**(2. A seller who has knowledge of a defect in a product;)**

**(3. A seller who creates and furnishes a manufacturer with specifications for a product that are related to the alleged defect [whether or not the seller placed a private label on the product];)**

**(4. A seller who exercises some significant control over all or a portion of the manufacturing process or who alters or modifies a product in any significant manner after the product comes into [his] [her] [its] possession and before it is sold to the ultimate user or consumer [whether or not the seller placed a private label on the product];)**

**(5. A seller who placed a private label on the product and did not disclose who the actual manufacturer is).**

### Notes on Use

1. This instruction is to be given whenever there is a factual dispute that prevents the trial court from determining as a matter of law that a defendant or a designated nonparty is a “manufacturer,” as that term is defined in section 13-21-401(1), C.R.S. This instruction must be given whenever numbered paragraph 1 to Instruction 14:1 (elements of liability) is given.

2. Use whichever parenthesized paragraphs are most appropriate and omit any words or phrases that are undisputed or that do not apply to the facts at issue. Another definition of “manufacturer” set out in section 13-21-401(1) has been omitted from this instruction because it will seldom involve a factual dispute and should be decided by the court as a matter of law. That omitted language states that a manufacturer “also includes any seller of a product who is owned in whole or in significant part by the manufacturer or who owns, in whole or significant part, the manufacturer.” Also, under section 13-21-402(2), C.R.S., “[i]f jurisdiction cannot be obtained over a particular manufacturer . . . that manufacturer’s principal distributor or seller over whom jurisdiction can be obtained shall be deemed . . . the manufacturer of the product.”

### Source and Authority

1. This instruction is supported by section 13-21-401(1), and **Miller v. Solaglas California, Inc.**, 870 P.2d 559 (Colo. App. 1993) (approving instruction that conformed to a portion of the definition set forth in statute).

2. It is important to determine whether a defendant is a “manufacturer,” as that term is defined in § 13-21-401(1), because only a manufacturer can be held liable in a product liability action. § 13-21-402(1).

### 14:3 DEFECTIVE, UNREASONABLY DANGEROUS — DEFINED

(A product is unreasonably dangerous because of a defect in its manufacture if it creates a risk of harm to persons or property that would not ordinarily be expected.)

(A product is unreasonably dangerous because of a defect in its design if it creates a risk of harm to persons or property that is not outweighed by the benefits to be achieved from such design.)

(A product is defective in its design, even if it is manufactured and performs exactly as intended, if any aspect of its design makes the product unreasonably dangerous.)

#### Notes on Use

1. Use whichever parenthesized sentences are appropriate in light of the evidence in the case.

2. This instruction should be used whenever a claimed defect involves a matter relating to the manufacture or design of the product, as opposed to a claimed defect that relates only to the adequacy of warnings or instructions dealing with the use of the product. When the claimed defect relates only to the adequacy of warnings or instructions as to its use, Instruction 14:4 should be used rather than this instruction. When there is a claimed defect relating to manufacture or design as well as a claimed defect relating to warnings or instructions, both this instruction and Instruction 14:4 should be given. The first paragraph of this instruction should be used only if the case involves an alleged manufacturing defect. The second and third paragraphs of this instruction should be used only if the case involves an alleged design defect. *See Armentrout v. FMC Corp.*, 842 P.2d 175 (Colo. 1992).

3. The “risk-benefit test,” and not the “consumer expectation test,” is the proper test to use in assessing “whether a product is unreasonably dangerous due to a design defect where the dangerousness of the design is ‘defined primarily by technical, scientific information.’” **Walker v. Ford Motor Co.**, 2017 CO 102, ¶ 2, 406 P.3d 845, 847 (quoting **Ortho Pharm. Corp. v. Heath**, 722 P.2d 410, 415 (Colo. 1986), *overruled on other grounds by Armentrout*, 842 P.2d at 183). In so holding, the supreme court implicitly disagreed with **Biosera, Inc. v. Forma Scientific, Inc.**, 941 P.2d 284 (Colo. App. 1996), *aff’d on other grounds*, 960 P.2d 108 (Colo. 1998), concluding that the “risk-benefit” test and the “consumer expectation” test are not mutually exclusive, and, therefore, in an appropriate case, there is no error in giving the jury an instruction that reflects both of these tests.

4. The “risk-benefit” test in the second paragraph must also be given in any case involving a prescription drug when the drug is claimed to be unsafe because of its design, though it was produced “in precisely the manner intended.” **Ortho Pharm. Corp.**, 722 P.2d at 415; *see also Barton v. Adams Rental, Inc.*, 938 P.2d 532, 537 & n.7 (Colo. 1997) (also citing seven factors identified in **Ortho** and noting that the existence of a “feasible design alternative” may be another factor in the analysis). As to when the “risk-benefit” test may be appropriate in cases involving other products, compare **Ortho** with **Camacho v. Honda Motor Co.**, 741 P.2d 1240

(Colo. 1987), and **White v. Caterpillar, Inc.**, 867 P.2d 100, 105 (Colo. App. 1993) (risk-benefit test “has been applied in cases involving products that are complex and largely beyond the knowledge and experience of the ordinary consumer”). As to the factors that are relevant under the “risk-benefit” test and, therefore, appropriate for determining the relevance of evidence and argument of counsel, see **Armentrout**, 842 P.2d at 184 and n.10 (citing **Ortho**, 722 P.2d at 414, and listing additional factors that may be considered). The court noted that the existence of a feasible design alternative is a factor in the “risk-benefit” analysis, but “not always necessary” to establish a design defect claim. **Armentrout**, 842 P.2d at 185 n.11. *See also* **Fibreboard Corp. v. Fenton**, 845 P.2d 1168 (Colo. 1993) (“risk-benefit” test requires flexibility in deciding which factors should apply to facts of case).

5. If more appropriate to the evidence in the case, substitute any one or more of the following for the word “manufacture”: construction, installation, preparation, assembly, testing, or packaging. If appropriate, a more suitable word may be substituted for “design,” such as, “formulation.” For other possible language, see section 13-21-401(2), C.R.S.

### Source and Authority

1. See Source and Authority to Instruction 14:1, in particular, RESTATEMENT (SECOND) OF TORTS § 402A cmts. g, h, i, and k (1965).

2. The first sentence is supported by **Hiigel v. General Motors Corp.**, 34 Colo. App. 145, 525 P.2d 1198 (1974), *rev'd on other grounds*, 190 Colo. 57, 544 P.2d 983 (1975); and **Littlejohn v. Stanley Structures, Inc.**, 688 P.2d 1130 (Colo. App. 1984) (citing previous version of this instruction).

3. For strict liability in tort, the product must be defective and the defect must render the product unreasonably dangerous. *See* **Barton v. Adams Rental, Inc.**, 938 P.2d 532 (Colo. 1997); **Armentrout**, 842 P.2d at 183; **White**, 867 P.2d at 105 (recognizing both “consumer expectation” and “risk-benefit” tests); **Potthoff v. Alms**, 41 Colo. App. 51, 583 P.2d 309 (1978); *see also* **Hilberg v. F.W. Woolworth Co.**, 761 P.2d 236 (Colo. App. 1988) (.22-caliber rifle, as such, not defective under “consumer expectations” or “risk-benefit” test), *overruled on other grounds by* **Casebolt v. Cowan**, 829 P.2d 352 (Colo. 1992).

4. A product, including one used as a component part, may be defective and unreasonably dangerous because of its design. *See* **Walker**, 2017 CO 102, ¶ 2; **Armentrout**, 842 P.2d at 187; **Union Supply Co. v. Pust**, 196 Colo. 162, 583 P.2d 276 (1978); **White**, 867 P.2d at 105; **Bond v. E.I. Du Pont De Nemours & Co.**, 868 P.2d 1114 (Colo. App. 1993); **Shaw v. General Motors Corp.**, 727 P.2d 387 (Colo. App. 1986).

5. Liability may be imposed for additional injuries caused by a design defect even though the defect did not cause the initial accident, such as, the “second-collision” or “crashworthiness” case. *See* **Camacho v. Honda Motor Co.**, 741 P.2d 1240 (Colo. 1987) (applying concept to motorcycles); **Roberts v. May**, 41 Colo. App. 82, 583 P.2d 305 (1978).

6. A product may be defective in design and unreasonably dangerous if it fails to meet the “ordinary consumer expectation” test or the “risk-benefit” test. *See* **Armentrout**, 842 P.2d at

183; **Camacho**, 741 P.2d at 1247-48; **Ortho Pharm. Corp.**, 722 P.2d at 413-14. Also, it may be defective and unreasonably dangerous even though the risk of harm is open and obvious. **Armentrout**, 842 P.2d at 181 (citing **Camacho** and **Union Supply Co.**); **White**, 867 P.2d at 107. *But cf.* **Kern v. General Motors Corp.**, 724 P.2d 1365 (Colo. App. 1986) (failure to equip passenger car with “passive restraint” system did not render vehicle defective and unreasonably dangerous); **Davis v. Caterpillar Tractor Co.**, 719 P.2d 324, 326-27 (Colo. App. 1986) (product not “unreasonably dangerous” when “consumer deliberately chooses to purchase that which he, as a reasonable consumer, should have expected was not as safe as other products on the market”).



## 14:4 WARNINGS AND INSTRUCTIONS

**(A product is) (A product not otherwise defective in its manufacture or design becomes) defective and unreasonably dangerous if adequate (warnings) (or) (instructions for use) are not provided. To be adequate, the (warnings) (or) (instructions for use) must inform the ordinary user of any specific risk of harm that may be involved in (any intended or reasonably expected use) (or) (any failure to properly follow instructions when using the product for any intended or reasonably expected use).**

**However, if a specific risk of harm would be apparent to an ordinary (buyer) (user) (consumer) from the product itself, (a warning of) (or) (instructions concerning) that specific risk of harm (is) (are) not required.**

### Notes on Use

1. This instruction should be given whenever a claimed defect involves the lack or adequacy of warnings or instructions for the use of the product. The first parenthetical clause in the first sentence should be used when the only defect claimed in the product is the inadequacy of warnings or instructions. The second parenthetical clause should be used when the claimed defect also involves, or another claimed defect involves, manufacture or design. *See* Note 1 of Notes on Use to Instruction 14:3.

2. Use whichever other parenthesized words are appropriate. In certain cases, this instruction may need to be modified to clarify that the adequacy of warnings or instructions is to be tested in terms of the persons or groups of persons to whom the warnings and instructions are normally expected to be addressed. For example, warnings and instructions dealing with risks involved with the installation or use of medical devices or the side effects of prescription drugs will normally be addressed to physicians and pharmacists, rather than to the ultimate consumer. *See, e.g., O'Connell v. Biomet, Inc.*, 250 P.3d 1278 (Colo. App. 2010); *Peterson v. Parke Davis & Co.*, 705 P.2d 1001 (Colo. App. 1985); *Hamilton v. Hardy*, 37 Colo. App. 375, 549 P.2d 1099 (1976), *overruled on other grounds by State Bd. of Med. Exam'rs v. McCroskey*, 880 P.2d 1188 (Colo. 1994).

3. Even though a risk may be “open and obvious,” a product may nonetheless be defective for lack of an adequate warning, for example, that an option is available for use with, or as part of, the product that would make it safer. *Armentrout v. FMC Corp.*, 842 P.2d 175 (Colo. 1992) (if a danger is open and obvious, there is no duty to warn unless there is a substantial likelihood that proposed warning would have prevented injury to ordinary user); *Camacho v. Honda Motor Co.*, 741 P.2d 1240 (Colo. 1987) (citing *Union Supply Co. v. Pust*, 196 Colo. 162, 583 P.2d 276 (1978)); *see also White v. Caterpillar, Inc.*, 867 P.2d 100 (Colo. App. 1993) (citing instruction and following *Armentrout*). In these cases, appropriate modifications may be required in the second paragraph of this instruction. *Armentrout*, 842 P.2d at 181.

4. In appropriate cases, Instruction 14:6 regarding “state-of-the-art” products should also be given with this instruction. See **Barton v. Adams Rental, Inc.**, 938 P.2d 532 (Colo. 1997); **Fibreboard Corp. v. Fenton**, 845 P.2d 1168 (Colo. 1993).

### Source and Authority

This instruction is supported by section 13-21-401(2), C.R.S.; **Barton**, 938 P.2d at 537; **Fibreboard Corp.**, 845 P.2d at 1173-74; **Armentrout**, 842 P.2d at 180-81; **Anderson v. M.W. Kellogg Co.**, 766 P.2d 637 (Colo. 1988); **Uptain v. Huntington Lab, Inc.**, 723 P.2d 1322 (Colo. 1986) (adequacy of warning of risk arising from unintended, but foreseeable, use of unavoidably unsafe product); **Anderson v. Heron Engineering Co.**, 198 Colo. 391, 604 P.2d 674 (1979) (concerning adequacy of warnings and instructions to maintenance personnel); **Union Supply Co.**, 196 Colo. at 173, 583 P.2d at 283; **Hiigel v. General Motors Corp.**, 190 Colo. 57, 64, 544 P.2d 983, 988 (1975) (“[T]he duty to warn may not be satisfied by directions which merely tell how to use the product, but say nothing about the inherent and specific dangers if directions are not followed.”); **Vista Resorts, Inc. v. Goodyear Tire & Rubber Co.**, 117 P.3d 60 (Colo. App. 2004) (component-part manufacturer was not entitled to jury instruction that it had no duty to foresee or warn of all dangers that may result from use of final product); **White**, 867 P.2d at 105 (supporting second paragraph and following **Armentrout**); **Davis v. Caterpillar Tractor Co.**, 719 P.2d 324 (Colo. App. 1985) (supporting second paragraph); **Downing v. Overhead Door Corp.**, 707 P.2d 1027 (Colo. App. 1985) (product may be defective because of failure to provide adequate installation instructions for its safe use); **Bailey v. Montgomery Ward & Co.**, 690 P.2d 1280, 1282 (Colo. App. 1984) (“failure to warn through adequate directions or instructions may itself constitute a product defect”); **Martinez v. Atlas Bolt & Screw Co.**, 636 P.2d 1287 (Colo. App. 1981); **Frazier v. Kysor Industrial Corp.**, 43 Colo. App. 287, 607 P.2d 1296 (1979) (in case involving adequacy of instructions for moving heavy equipment, product not defective when plaintiff’s injuries were caused by dangerous condition created solely by plaintiff’s own mishandling or misuse rather than by lack or inadequacy of warnings or instructions), *rev’d on other grounds*, 642 P.2d 908 (Colo. 1982), **Potthoff v. Alms**, 41 Colo. App. 51, 583 P.2d 309 (1978); and **Bookout v. Victor Comptometer Corp.**, 40 Colo. App. 417, 576 P.2d 197 (1978). See also **Campbell v. Burt Toyota-Daihatsu, Inc.**, 983 P.2d 95 (Colo. App. 1998) (where warning is given, it is assumed it will be read and heeded, citing RESTATEMENT (SECOND) OF TORTS § 402A cmt. j (1965)); RESTATEMENT § 402A cmt. j.

## 14:5 PRESUMPTIONS — NONCOMPLIANCE WITH GOVERNMENTAL STANDARDS

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

**In this case, if you find that at the time** (*name of defendant if a “manufacturer”*) (*name of “manufacturer” if other than defendant*) **sold** (*description of product*), **(1) the product did not comply with any applicable code, standard, or regulation of the United States or the State of Colorado or any of their agencies, and (2) that the lack of compliance was a cause of the plaintiff’s claimed (injuries) (damages) (losses), then the law presumes that (the** [*description of product*] **was defective) (the** [*name of defendant*] **was negligent) (the** [*description of product*] **did not comply with any warranty of** [*insert description*]).

**You must consider this presumption together with all the other evidence in the case in deciding whether (the** [*description of product*] **was defective) (the** [*name of defendant*] **was negligent) (the** [*description of product*] **complied with any warranty of** [*insert description*]).

### Notes on Use

1. When otherwise applicable, this instruction should be used rather than Instruction 3:5 (permissible inference arising from rebuttable presumption).

2. Use whichever bracketed or parenthesized portions of this instruction are appropriate in light of plaintiff’s theory or theories of relief and the evidence in the case.

3. This instruction must be given if the court determines by a preponderance of the evidence that the evidence has established the necessary facts giving rise to the presumption. § 13-21-403(4), C.R.S.; *see Downing v. Overhead Door Corp.*, 707 P.2d 1027 (Colo. App. 1985); *see also Patterson v. Magna Am. Corp.*, 754 P.2d 1385 (Colo. App. 1988). *But see Mile Hi Concrete, Inc. v. Matz*, 842 P.2d 198 (Colo. 1992). In *Mile Hi Concrete*, the supreme court held that the presumption in section 13-21-403(3), was rebuttable; that is, when a plaintiff introduces evidence to counter the presumption, it is error to instruct the jury concerning the presumption. However, section 13-21-403 was amended in 2003, and now requires a court to inform the jury of the presumptions stated in section 13-21-403 when facts giving rise to the presumption have been established. *See* § 13-21-403(4). This amendment effectively overrules *Mile Hi Concrete* as it relates to jury instructions based on the statutory presumptions in section 13-21-403. Nonetheless, since the presumption relates to compliance or noncompliance with any code, standard, or regulation, the instruction should be given only when that code, standard, or regulation specifically relates to the claimed defect. If the code, standard, or regulation is of a general nature and does not deal with the specific nature of the claimed defect, this instruction should not be given.

4. If there is sufficient evidence of the basic facts on which the presumption stated in this instruction is based, then this instruction is applicable in any case where damages for injury,

death, or property damage are claimed to have been the result of breach of warranty, strict liability in tort, or the manufacturer's or seller's negligence. § 13-21-403(1); *see also* § 13-21-401(2), C.R.S. (defining "product liability action"). This instruction does not apply to warranty claims where the plaintiff is seeking contract (i.e., commercial) damages, rather than damages for physical injuries to persons or property caused by the breach.

5. Regarding the Product Liability Act's presumptions of nondefectiveness, see Instructions 14:5A (compliance with governmental standards) and 14:5B (first sale of product ten years or more before claimed injury).

6. If there is a dispute as to whether the defendant was a "manufacturer," or, if not the defendant, whether the person claimed to be the "manufacturer" was a manufacturer within the meaning of section 13-21-401(1), or section 13-21-402(2), C.R.S. (quoted in Notes on Use to Instruction 14:1), then an appropriate instruction based on the relevant portions of those statutes must be given.

7. Evidence of noncompliance may be given in the form of an opinion of a qualified expert and is sufficient to warrant the giving of this instruction. *See Uptain v. Huntington Lab, Inc.*, 685 P.2d 218 (Colo. App. 1984), *aff'd on other grounds*, 723 P.2d 1322 (Colo. 1986).

#### **Source and Authority**

This instruction is supported by section 13-21-403(2), C.R.S.

## 14:5A PRESUMPTIONS — COMPLIANCE WITH GOVERNMENTAL STANDARDS

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

**In this case, if you find that at the time** *(name of defendant if a “manufacturer”) (name of “manufacturer” if other than defendant)* **sold** *(description of product)*, **(1) the product complied with any applicable code(s), standard(s) or regulation(s) of the United States or the State of Colorado or any of their agencies, then the law presumes that (the** *[description of product]* **was not defective) (the** *[name of defendant]* **was not negligent) (the** *[description of product]* **did not fail to comply with any warranty of** *[insert description]***).**

**You must consider this presumption together with all the other evidence in the case in deciding whether (the** *[description of product]* **was defective) (the** *[name of defendant]* **was negligent) (the** *[description of product]* **complied with any warranty of** *[insert description]***).**

### Notes on Use

1. Except for the last Note on Use, the Notes on Use to Instruction 14:5 are also applicable to this instruction.

2. Evidence of compliance may be given in the form of an opinion of a qualified expert and is sufficient to warrant the giving of this instruction. **Uptain v. Huntington Lab, Inc.**, 685 P.2d 218 (Colo. App. 1984), *aff’d on other grounds*, 723 P.2d 1322 (Colo. 1986).

### Source and Authority

This instruction is supported by section 13-21-403(1), C.R.S.

## 14:5B PRESUMPTIONS — TEN-YEAR USE OF PRODUCT

“Presumptions” are legal rules based on experience or public policy. They are established in the law to assist the jury in determining the truth.

**In this case, if you find that the (*description of product*) was sold for the first time for use or consumption ten or more years before any claimed (injuries) (damages) (losses) were incurred by the plaintiff, then the law presumes that (the [*description of product*] [was not defective]) (the [*name of defendant*] was not negligent) (the [*description of product*] was in compliance with any warranty of [*insert description*]) (and) (all warnings and instructions were proper and adequate).**

**You must consider this presumption together with all the other evidence in the case in deciding whether (the [*description of product*] was defective) (the [*name of defendant*] was negligent) (the [*description of product*] complied with any warranty of [*insert description*]).**

### Notes on Use

1. Except for the last Note on Use, the Notes on Use to Instruction 14:5 are also applicable to this instruction.

2. There is a split of authority in the court of appeals as to whether the ten-year period runs from the time when the specific product involved in the case was first sold, **Downing v. Overhead Door Corp.**, 707 P.2d 1027 (Colo. App. 1985), or from the time when the product line of the particular design that includes the product involved in the case was first sold to the public. **Patterson v. Magna Am. Corp.**, 754 P.2d 1385 (Colo. App. 1988). Depending on the evidence in the case and which interpretation the court determines to be more appropriate, this instruction may need to be appropriately modified.

### Source and Authority

This instruction is supported by section 13-21-403(3), C.R.S.

## 14:6 STATE-OF-THE-ART

**A product is not defective and unreasonably dangerous if a particular risk was not known or knowable by the manufacturer in light of the generally recognized and prevailing scientific and technical knowledge available at the time of manufacture and distribution.**

### Notes on Use

This instruction should be given in appropriate cases in strict liability if the plaintiff is claiming damages as a result of a failure to warn. *See* **Barton v. Adams Rental, Inc.**, 938 P.2d 532 (Colo. 1997); **Fibreboard Corp. v. Fenton**, 845 P.2d 1168 (Colo. 1993).

### Source and Authority

This instruction is supported by **Fibreboard**, 845 P.2d at 1175.

**14:7 DAMAGE ALONE NOT PROOF PRODUCT WAS DEFECTIVE OR UNREASONABLY DANGEROUS**

**The fact that (the plaintiff may have been injured) (the plaintiff's property may have been damaged), without more, does not establish that the product was defective or unreasonably dangerous.**

**Notes on Use**

Use whichever parenthesized clause is appropriate, in light of the evidence in the case.

**Source and Authority**

This instruction is supported by **Kysor Indus. Corp. v. Frazier**, 642 P.2d 908 (Colo. 1982); **Shultz v. Linden-Alimak, Inc.**, 734 P.2d 146 (Colo. App. 1986); **Kern v. General Motors Corp.**, 724 P.2d 1365 (Colo. App. 1986); and **Davis v. Caterpillar Tractor Co.**, 719 P.2d 324 (Colo. App. 1985). *See also* Source and Authority to Instruction 14:1.



## B. PRODUCT LIABILITY FOR BREACH OF WARRANTY

### 14:8 BREACH OF EXPRESS WARRANTY UNDER U.C.C. — ELEMENTS OF LIABILITY

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

1. The defendant sold the *(insert description of article)*;
2. The defendant expressly warranted the *(description of article)* to *(insert express warranty claimed by the plaintiff)*;
3. The plaintiff is a person who was reasonably expected to use, consume or be affected by the *(description of article)*;
4. The *(description of article)* was not as warranted;
5. This breach of warranty caused the plaintiff **(injuries) (damages) (losses)**; and
6. Within a reasonable time after the plaintiff discovered or should have discovered the alleged breach of warranty, the plaintiff notified the defendant of such breach.

If you find that any one or more of these *(number)* statements has not been proved, then your verdict (on this claim) 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 plaintiffs 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 no affirmative defense has been raised or there is insufficient evidence to support any defense.

3. Although mitigation of damages is an affirmative defense, *see* Instruction 5:2, only rarely, if ever, will it be a complete defense. For this reason, mitigation should not be identified as an affirmative defense in the concluding paragraphs of this instruction. Instead, if supported by sufficient evidence, Instruction 5:2 should be given along with the actual damages instruction appropriate to the claim and the evidence in the case. *See Miller v. Solaglas Cal., Inc.*, 870 P.2d 559 (Colo. App. 1993) (the seat-belt defense, § 42-4-237(7), C.R.S., applies in product liability action only to mitigate noneconomic damages and may not be used in support of a comparative-fault defense).

4. When the affirmative defense of comparative fault applies, this instruction must be appropriately modified and should be given in conjunction with the appropriate comparative fault instructions. *See* Instructions 14:28 to 14:33. If, in addition to comparative fault, an affirmative defense has been properly put in issue that would bar the plaintiff's entire claim — for example, release — additional questions covering that defense must be included in the comparative fault instructions and special verdict forms given in the case.

5. Other appropriate instructions defining the terms and phrases used in this instruction, for example, Instruction 14:15, explaining what constitutes a reasonable time for the purpose of giving notice, must also be given with this instruction. In particular, the appropriate instruction or instructions relating to causation must be given. *See* Chapter 9.

6. This instruction has been prepared primarily for use in cases in which the plaintiff, as a remote user or consumer, is claiming tort-like damages for personal injuries or property damage under the provisions of section 4-2-318, C.R.S. (quoted in the following paragraph), and section 4-2-715(2)(b), C.R.S. (allowing recovery for personal injuries and property damage proximately caused by a breach of warranty). *Cf. Carter v. Brighton Ford, Inc.*, 251 P.3d 1179 (Colo. App. 2010) (where plaintiff essentially seeks damages only concerning the product itself, because the product is not as warranted, that is a contract claim and not a “product liability action”). However, with appropriate modifications, this instruction may be used where the plaintiff, as a buyer, is claiming contract or tort-like damages for a breach of warranty against his or her immediate seller. The most significant difference between the claims of two such plaintiffs would appear to be whether the plaintiff must prove actual damages or injuries as a necessary element of the cause of action. When the plaintiff is suing under section 4-2-318, as a remote user or consumer, for example, as a third-party beneficiary, the language of that section appears to make the proof of actual damages a necessary element of the cause of action. On the other hand, if the plaintiff is suing as the immediate contracting party, such as a buyer suing his or her seller, then whether the plaintiff is claiming contract damages or tort-like damages for physical injuries or property damage, the action is clearly one in contract, and the usual contract rule would appear to be applicable: if the plaintiff fails to prove actual damages, the plaintiff should be entitled to recover, although recovery is limited to nominal damages. *See* 67A Am. Jur. 2d *Sales* § 1125 (2014). In such cases, the element of liability relating to the plaintiff being an expected user or consumer should be omitted, the phrase “to the plaintiff” should be added to the first numbered paragraph, and the element of liability relating to proof of physical injuries or damages should be omitted from this instruction. The requirement, however, that the plaintiff must prove actual damages in order to recover them should be set out in the damages instruction in a manner similar to other situations where a plaintiff may be entitled to recover at least nominal damages if the plaintiff fails to prove any actual damages. *See, e.g.*, Instruction 21:5.

7. If there is evidence that the requirement of notification has been met by someone other than the plaintiff, such as the buyer, this instruction should be appropriately modified. Also, the notification need not use the words “breach” or “warranty.” *See* § 4-2-607, cmts. 4 & 5, C.R.S. Consequently, when more appropriate, this paragraph may be rephrased to comport more nearly with the facts of the particular case, for example: “Within a reasonable time after he sustained any injuries or damages caused by the breach of warranty, the plaintiff notified or complained to the defendant of his injuries or damages.” Whatever the plaintiff claims to have done, must, of course, have been sufficient as a matter of law to constitute notification. *See* § 4-1-202, C.R.S.

### Source and Authority

1. This instruction is supported by sections 4-2-714 and 4-2-715, C.R.S., dealing with a buyer’s damages for breach of warranty.

2. The provisions of the Uniform Commercial Code relating to the sale of goods apply to used as well as new goods. **Moore v. Burt Chevrolet, Inc.**, 39 Colo. App. 11, 563 P.2d 369 (1977).

3. Claims for product liability may be made only against sellers who are also “manufacturers” within the definition of sections 13-21-401(1) or 13-21-402, C.R.S. *See* **Carter**, 251 P.3d at 1181-82; **Miller**, 870 P.2d at 563-64. The qualified immunity for sellers and distributors under section 13-21-402 is an affirmative statutory defense that may be considered waived if it is not raised in the defendant’s responsive pleading or answer. **Stone’s Farm Supply, Inc. v. Deacon**, 805 P.2d 1109 (Colo. 1991).

4. For a plaintiff to recover damages for breach of warranty, it is not necessary that the plaintiff have been the buyer, because under section 4-2-318, “[a] seller’s warranty whether express or implied extends to any person who may reasonably be expected to use, consume, or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section.” However, some other exclusions or modifications of a warranty made between a seller and a buyer may be effective against a subsequent buyer, user, or affected person in an action by that person against that seller. *See* **Graham Hydraulic Power, Inc. v. Stewart & Stevenson Power, Inc.**, 797 P.2d 835 (Colo. App. 1990) (subsequent seller must make independent disclaimer to be protected from warranty liability). *Compare* **Wenner Petro. Corp. v. Mitsui & Co. (U.S.A.)**, 748 P.2d 356, 357 (Colo. App. 1987) (“properly executed limitations of warranties or available remedies are equally applicable to any one that would be a beneficiary of a seller’s warranty”), *with* § 4-2-719(3), C.R.S. (recognizing validity of clauses that limit or exclude consequential damages). If there is a dispute as to whether the defendant “sold” the goods within the meaning of section 4-2-106(1), C.R.S., another instruction based on that section may be required.

5. Concerning the requirement that notice of the breach be given the seller within a reasonable time, see section 4-2-607(3), C.R.S., requiring the buyer, where a tender has been accepted, to give notice within a reasonable time or be barred from any remedy. For cases discussing the purposes of notice and its timeliness in a commercial setting, see **Cooley v. Big Horn Harvestore Systems, Inc.**, 813 P.2d 736 (Colo. 1991); and **White v. Mississippi Order Buyers, Inc.**, 648 P.2d 682 (Colo. App. 1982). As to the sufficiency of a notice in a commercial

setting, see **Myers v. Koop**, 757 P.2d 162 (Colo. App. 1988); **International Technical Instruments, Inc. v. Engineering Measurements Co.**, 678 P.2d 558, 561 (Colo. App. 1983) (“Notice of breach is legally sufficient when it provides the seller with an opportunity to investigate the buyer’s complaint, to correct the alleged defect, or to effect a settlement through negotiation.”); and **Western Conference Resorts, Inc. v. Pease**, 668 P.2d 973 (Colo. App. 1983). For cases describing the same purposes, but involving damage claims for injury to persons or property, rather than for commercial damages, see **Palmer v. A.H. Robins Co.**, 684 P.2d 187 (Colo. 1984) (injury to person), and **Prutch v. Ford Motor Co.**, 618 P.2d 657 (Colo. 1980) (injury to property). *See also* **Wallman v. Kelley**, 976 P.2d 330 (Colo. App. 1998) (in case involving injury to person, filing of lawsuit may provide sufficient notice).

6. Section 4-2-607(3) (the notice requirement), refers only to a “buyer” having to give notice. However, official comment 5 to that section suggests that some sort of notice should be given by an injured plaintiff, regardless of whether the plaintiff was a “buyer.” Official comment 5 states:

Under this Article various beneficiaries are given rights for injuries sustained by them because of the seller’s breach of warranty. Such a beneficiary does not fall within the reason of the present section [§ 4-2-607(3)] in regard to discovery of defects and the giving of notice within a reasonable time after acceptance, since he has nothing to do with acceptance. However, the reason of this section does extend to requiring the beneficiary to notify the seller that an injury has occurred. What is said above, with regard to the extended time for reasonable notification from the lay consumer after the injury is also applicable here; but even a beneficiary can be properly held to the use of good faith in notifying, once he has had time to become aware of the legal situation.

7. On the question whether a plaintiff must give notice when the plaintiff is suing a remote seller for physical injury to person or property, and the plaintiff was a buyer, the supreme court has held that this notice requirement is satisfied if the plaintiff-buyer gave the requisite notice to his or her immediate seller. **Palmer**, 684 P.2d at 206; **Prutch**, 618 P.2d at 661. The court of appeals has also held, though without discussion, that a plaintiff who is suing for personal injury damages as a third-party beneficiary under section 4-2-318, and not as a buyer, must still give notice of the breach. **Shultz v. Linden-Alimak, Inc.**, 734 P.2d 146 (Colo. App. 1986); *see also* **Cooley**, 813 P.2d at 741-42 (notice to manufacturer of breach of warranty is not prerequisite to filing commercial litigation against manufacturer).

8. There may be other available statutory remedies relating to express warranties. *See, e.g.*, §§ 42-10-101 to -107, C.R.S. (concerning sales of motor vehicles).

## 14:9 EXPRESS WARRANTY — DEFINED

(1) Express warranties by a seller are created as follows:

(a) Any promise or statement of fact made by the seller to the buyer about the goods that becomes part of the basis of the sale, creates an express warranty that the goods shall conform to the promise or statement.

(b) Any description of the goods that is made part of the basis of the sale creates an express warranty that the goods shall conform to the description.

(c) Any sample or model that is made part of the basis of the sale creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) To create an express warranty, it is not necessary for the seller to use formal words such as “warranty” or “guarantee” or for the seller to have a specific intention to make a warranty. However, a statement that is only about the value of the goods or that is only the seller’s opinion or endorsement of the goods does not create a warranty.

### Notes on Use

1. This instruction should be given in conjunction with Instruction 14:8.
2. Only those subparagraphs (a), (b), or (c) of numbered paragraph 1 should be used as are appropriate in light of the evidence in the case.
3. Section 4-2-316(1), C.R.S., provides: “Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this article on parol or extrinsic evidence (section 4-2-202), negation or limitation is inoperative to the extent that such construction is unreasonable.” *See O’Neil v. Int’l Harvester Co.*, 40 Colo. App. 369, 575 P.2d 862 (1978) (applying statute and concluding that factual issue existed regarding application of warranty exclusion clause in contract where buyer alleged oral warranties before execution of written contract and conduct following sale that tended to show warranties were made). In appropriate cases, when the relevant rules of this section would be applicable, an instruction stating those rules should also be given with this instruction.

### Source and Authority

1. This instruction is supported by the provisions of section 4-2-313, C.R.S. *See also Palmer v. A.H. Robins Co.*, 684 P.2d 187, 208 (Colo. 1984) (discussing various statutory provisions relating to express warranties and noting that “[w]hether a particular statement constitutes an express warranty is generally an issue of fact”); *Shaw v. General Motors Corp.*, 727 P.2d 387, 391 (Colo. App. 1986) (statement of opinion will not constitute express warranty because statement must be an “affirmation of fact or promise”).

2. As to what constitutes “part of the basis of the sale” under (1)(a), (b), or (c) of this instruction, see **Anderson v. Heron Engineering Co.**, 198 Colo. 391, 604 P.2d 674 (1979).

**14:10 BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY — ELEMENTS OF LIABILITY**

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

- 1. The defendant sold the (*insert description of article*);**
- 2. The plaintiff is a person who was reasonably expected to use, consume or be affected by the product;**
- 3. The defendant was a merchant with respect to the type of product involved;**
- 4. The (*description of article*) was not of merchantable quality at the time of sale;**
- 5. This breach of warranty caused the plaintiff (injuries) (damages) (losses); and**
- 6. Within a reasonable time after the plaintiff discovered or should have discovered the alleged breach of warranty, the plaintiff notified the defendant of such breach.**

**If you find that any one or more of these (*number*) statements has not been proved, then your verdict (on this claim) 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. The Notes on Use to Instruction 14:8 are also applicable to this instruction and should be read and applied accordingly.

2. Whenever this instruction is given, Instruction 14:11 and the first paragraph of Instruction 14:16 should also be given. The remaining portion of Instruction 14:16 dealing with the exclusion or modification of implied warranties should only be given if applicable.

3. Unlike the implied warranty of fitness for a particular purpose, which may apply to a seller regardless of whether the seller is a merchant, the implied warranty of merchantability,

including the implied warranty of fitness for ordinary purposes, is applicable only to sellers who are also merchants with respect to the kind of goods they sell. § 4-2-314, C.R.S. If necessary, an instruction defining “merchant,” based on section 4-2-104, C.R.S., should also be given. *Cf. Colo.-Kan. Grain Co. v. Reifschneider*, 817 P.2d 637 (Colo. App. 1991) (applying definition in section 4-2-104, C.R.S., to hold that farmer was “merchant”).

4. If a contract involves the sale of goods as well as the performance of some labor or service, for example, installation, then, before giving this instruction, the court must determine whether the primary purpose of the contract was one for the sale of goods rather than for services. *Persichini v. Brad Ragan, Inc.*, 735 P.2d 168 (Colo. 1987); *Bailey v. Montgomery Ward & Co.*, 690 P.2d 1280 (Colo. App. 1984); *see Miller v. Solaglas Cal., Inc.*, 870 P.2d 559 (Colo. App. 1993). For the factors to be considered in making this determination, see *Colorado Carpet Installation, Inc. v. Palermo*, 668 P.2d 1384 (Colo. 1983), as summarized in *Bailey*, 690 P.2d at 1282.

### Source and Authority

1. This instruction is supported by section 4-2-314, and the authorities cited and discussed in Notes on Use and Source and Authority to Instruction 14:8. *See also Shaw v. General Motors Corp.*, 727 P.2d 387 (Colo. App. 1986) (specifically supporting numbered paragraph 4).

2. For purposes of the implied warranty of merchantability under section 4-2-314(1), “the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.” *See* Instruction 14:12.

3. For a discussion of the differences between an implied warranty of fitness for a particular purpose (Instruction 14:13 and Instruction 14:14) and an implied warranty of fitness for ordinary purposes as a form of the implied warranty of merchantability (Instruction 14:11), see *Palmer v. A.H. Robins Co.*, 684 P.2d 187 (Colo. 1984). Both warranties may arise out of the same transaction and coexist. *Id.*; *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).



## 14:11 IMPLIED WARRANTY OF MERCHANTABILITY — DEFINED

Where a (*description of article*) is sold by a merchant who deals with that product, the law impliedly warrants to any person who is reasonably expected to use, consume or be affected by the product that it is merchantable. The warranty need not be expressed in any fashion, as it is implied by law from such sale.

To be merchantable, the (*description of article*) must have

- (1. Been such as would pass without objection in the trade under the description provided for in the contract) (and)
- (2. Been of fair average quality within the description provided for in the contract) (and)
- (3. Been fit for the ordinary purposes for which such [*insert description of the article*] [is] [are] used) (and)
- (4. Been within the variations permitted by the agreement, of uniform kind, quality, and quantity within each unit and among all units involved) (and)
- (5. Been adequately contained, packaged, and labeled as the agreement may have required) (and)
- (6. Conformed to the promises or statements of fact, if any, made on the container or label).

### Notes on Use

1. Use only those parenthesized or bracketed portions of this instruction as are appropriate.
2. This instruction should be given in conjunction with Instruction 14:10.
3. Under section 4-2-314(3), C.R.S., unless excluded or modified, “other implied warranties may arise from course of dealing or usage of trade.” In such cases, this instruction should be appropriately modified. For the definitions of “course of dealing” and “the usage of trade,” see section 4-1-303(b)–(c), C.R.S. *See Winer’s Pumping Units v. Emerald Gas Operating Co.*, 936 P.2d 627 (Colo. App. 1997) (course of dealing is sequence of previous conduct between parties to a particular transaction that may fairly be regarded as establishing a common basis for understanding their expressions and other conduct (citing § 4-1-303(b) (formerly codified at § 4-1-205(1)))).
4. Numbered paragraph 2 is applicable only to fungible goods. *See* § 4-2-314(2)(b).

### Source and Authority

The reference in the first paragraph of this instruction to third-party beneficiaries is supported by section 4-2-318, C.R.S. The remaining portions of the first paragraph and the instruction set out the basic provisions of section 4-2-314. *See also 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).

## 14:12 IMPLIED WARRANTY OF WHOLESOMENESS OF FOOD — DEFINED

**When a** (*insert an appropriate description, e.g., “packer,” “retailer,” “grocer,” “wholesaler,” “restaurateur,” etc.*) **sells (food) (or) (drink) for human consumption, (he) (she) (it) warrants that the product is wholesome and fit for human consumption at the time of the sale. This warranty is implied by law and need not be expressed in any fashion.**

### Notes on Use

1. Use whichever parenthesized words are appropriate.
2. This instruction, when appropriate, should be used in conjunction with Instructions 14:10 and 14:11.
3. If there is a dispute as to the fact of whether a sale in fact was made, this instruction may need to be modified to make it clear that, in giving this instruction, the court is not impliedly expressing an opinion as to how that disputed fact should be resolved.

### Source and Authority

1. This instruction is supported by **Gonzales v. Safeway Stores, Inc.**, 147 Colo. 358, 363 P.2d 667 (1961) (citing other cases and the implied warranty of merchantability provisions of the Uniform Sales Act). In **Gonzales**, the court also held that this warranty applied to a retailer selling foodstuffs in sealed containers who was unaware of the lack of the ordinary fitness of the food.
2. Section 4-2-314(2)(c), C.R.S., also supports this instruction by providing that food is not merchantable if not “fit for the ordinary purposes” for which it is sold. Also under section 4-2-314(1), “the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.”
3. The burden is on the plaintiff to prove that the food was unwholesome at the time of sale. **Vanadium Corp. of Am. v. Wesco Stores Co.**, 135 Colo. 77, 308 P.2d 1011 (1957).

**14:13 BREACH OF IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE — ELEMENTS OF LIABILITY**

For the plaintiff, *(name)*, to recover from the defendant, *(name)*, on (his) (her) (its) claim of breach of implied warranty of fitness for a particular purpose, you must find all of the following have been proved by a preponderance of the evidence:

1. The defendant sold the *(insert description of article)*;
2. The defendant impliedly warranted the *(description of article)* to be (suitable) (fit) for the particular purpose of *(insert description of the particular purpose claimed by the plaintiff)*;
3. The plaintiff is a person who was reasonably expected to use, consume or be affected by the *(description of article)*;
4. The *(description of article)* was not (suitable) (fit) for the particular purpose for which it was warranted;
5. This breach of warranty caused the plaintiff (injuries) (damages) (losses); and
6. Within a reasonable time after the plaintiff discovered or should have discovered the alleged breach of warranty, the plaintiff notified the defendant of such breach.

If you find that any one or more of these *(number)* statements has not been proved, then your verdict (on this claim) 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 is applicable only to cases involving claims for breach of implied warranty of fitness for a particular purpose under section 4-2-315, C.R.S. Where the claim is one of lack of fitness for ordinary purposes under section 4-2-314, C.R.S., Instruction 14:10 should be used rather than this instruction. For a discussion of the differences between an implied warranty of fitness for a particular purpose and an implied warranty of fitness for ordinary purposes as a form of the implied warranty of merchantability, see **Palmer v. A.H. Robins Co.**,

684 P.2d 187 (Colo. 1984). Both warranties may arise out of the same transaction and coexist. *Id.*; **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).

2. The Notes on Use to Instruction 14:8 are also applicable to this instruction and should be read and applied accordingly.

3. Whenever this instruction is given, Instruction 14:14 and the first paragraph of Instruction 14:16 should also be given. The remaining portion of Instruction 14:16 dealing with exclusion or modification of implied warranties should be given only if applicable.

### **Source and Authority**

1. This instruction is supported by the Colorado statute governing breach of an implied warranty of fitness for a particular purpose, § 4-2-315, as it has been interpreted in the case law. *See Palmer*, 684 P.2d at 208-09; **Simon v. Coppola**, 876 P.2d 10 (Colo. App. 1993) (citing instruction); **Deacon**, 782 P.2d at 864; **Aetna Cas. & Sur. Co. v. Crissy Fowler Lumber Co.**, 687 P.2d 514 (Colo. App. 1984).

2. Unlike the implied warranty of merchantability, *see* § 4-2-314, the implied warranty of fitness for a particular purpose is not limited to sellers who are also merchants; it applies to sellers generally. *See* § 4-2-315 & cmt. 4.

3. In the event of conflict with other express or implied warranties, the implied warranty of fitness for a particular purpose will generally be controlling. § 4-2-317(c), C.R.S.

#### **14:14 IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE — DEFINED**

**An implied warranty that goods are fit or suitable for a particular purpose is created if:**

- 1. At the time the seller makes the contract of sale, (he) (she) (it) has reason to know of any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods for that purpose; and**
- 2. The buyer in fact relies on the skill or judgment of the seller.**

#### **Notes on Use**

Because this instruction deals only with an implied warranty of fitness for a particular purpose under section 4-2-315, C.R.S., it should be used only in conjunction with Instruction 14:13. It does not concern the implied warranty of fitness for ordinary uses, as that warranty is included in the implied warranty of merchantability under section 4-2-314, C.R.S.

#### **Source and Authority**

1. This instruction is supported by section 4-2-315. *See* **Wallman v. Kelley**, 976 P.2d 330 (Colo. App. 1998) (referring to official comment 1 to section 4-2-315); **Aetna Cas. & Sur. Co. v. Crissy Fowler Lumber Co.**, 687 P.2d 514 (Colo. App. 1984); **Klipfel v. Neill**, 30 Colo. App. 428, 494 P.2d 115 (1972); *see also* **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).

2. To establish an implied warranty of fitness for a particular purpose, the buyer must actually be relying upon the seller's skill or judgment to select or furnish the buyer with the particular product. **Wallman**, 976 P.2d at 334 (that plaintiff would have relied on seller's expertise if seller had told plaintiff not to take herbal medicine was insufficient to raise issue of fact as to whether plaintiff actually relied on seller's skill or judgment).

## 14:15 NOTICE OF BREACH OF WARRANTY — WHAT CONSTITUTES

**Plaintiff, (*name*), cannot recover for breach of warranty unless (he) (she) (it) notified the defendant, (*name*), of the breach within a reasonable time after the plaintiff discovered or should have discovered the breach. You must decide what is a reasonable time based upon the facts and circumstances.**

**Notice may be oral or written. No particular form of notice is required as long as it informs the defendant of the breach.**

### Notes on Use

1. This instruction should be used in conjunction with Instructions 14:8, 14:10, or 14:13, when the issue of notice is in dispute and the court has determined that the giving of notice is a necessary element of the plaintiff's claim for relief. *See W. Conference Resorts, Inc. v. Pease*, 668 P.2d 973 (Colo. App. 1983) (under Uniform Commercial Code, whether notice of rejection of goods is satisfactory is question of fact). As to the applicability of this instruction and possible change in language, see the discussion concerning notice in the Notes on Use to Instruction 14:8.

2. When necessary, the second paragraph should be modified to include any applicable rules relating to notice that are contained in section 4-1-202, C.R.S. (notice defined and how made effective).

### Source and Authority

1. In addition to the authority discussed in the Source and Authority to Instruction 14:8 relating to notice, this instruction is supported by section 4-1-205, C.R.S. (defining "reasonable time").

2. In an action against the seller and the manufacturer, where notice of the failure of essential purpose was given to the seller, the commercial buyer could proceed against the manufacturer without giving notice to the manufacturer of the breach of warranty, because the filing of a lawsuit is sufficient notice to encourage settlement of claims, and applicable statutes of limitation protect manufacturers from the difficulties of defending against stale claims. **Cooley v. Big Horn Harvestore Sys., Inc.**, 813 P.2d 736 (Colo. 1991); *see also Wallman v. Kelley*, 976 P.2d 330 (Colo. App. 1998) (in personal injury case, filing of lawsuit may provide sufficient notice).

3. Section 4-2-607(3), C.R.S. (the notice requirement), refers only to a "buyer" having to give notice. However, official comment 5 to that section suggests that some sort of notice should be given by an injured plaintiff, regardless of whether the plaintiff was or was not a "buyer." Official comment 5 states:

Under this Article various beneficiaries are given rights for injuries sustained by them because of the seller's breach of warranty. Such a beneficiary does not fall within the reason of the present section [§ 4-2-607(3)] in regard to discovery of defects and the giving of notice within a reasonable time after acceptance, since he has nothing to do

with acceptance. However, the reason of this section does extend to requiring the beneficiary to notify the seller that an injury has occurred. What is said above, with regard to the extended time for reasonable notification from the lay consumer after the injury is also applicable here; but even a beneficiary can be properly held to the use of good faith in notifying, once he has had time to become aware of the legal situation.



## **14:16 IMPLIED WARRANTIES — CREATION AND EXCLUSION OR MODIFICATION**

**An implied warranty is one created by operation of law and is not dependent upon the intent of the (manufacturer) (wholesaler) (retailer).**

**An implied warranty of (merchantability) (or) (fitness) may, however, be excluded or modified.**

**(1. Any implied warranty is excluded by a [manufacturer] [wholesaler] [retailer] if the [manufacturer] [wholesaler] [retailer] used expressions like “as is,” or “with all faults,” or used other language that in common understanding would call the buyer’s attention to the exclusion of warranty and make it clear there was no implied warranty.)**

**(2. Any implied warranty may be excluded or modified by a [course of dealing] [or] [course of performance] [or] [usage of the trade].)**

**(3. Any implied warranty is excluded as to defects that a reasonable examination would have revealed to the buyer under the circumstances if, before entering into the contract, the buyer examined the goods [or a sample or model of the goods] as fully as the buyer desired or if, upon demand of the seller, the buyer refused to make such an examination when the buyer had a reasonable opportunity to do so.)**

**(4. [Unless an implied warranty of merchantability has been excluded or modified in (the manner just described) (one or more of the ways just described), to] [To] exclude or modify an implied warranty of merchantability or any part of it, the language must, whether spoken or in writing, mention merchantability.)**

**(5. [Unless an implied warranty of fitness has been excluded or modified in (the manner just described) (one or more of the ways just described), to] [To] exclude or modify an implied warranty of fitness, the exclusion must be by a writing. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that, “There are no warranties that extend beyond the description on the face hereof.”)**

### **Notes on Use**

1. When applicable, this instruction should be given with Instruction 14:10 or Instruction 14:13.

2. When given, all bracketed and parenthesized portions of this instruction that are not appropriate in light of the evidence in the case should be omitted.

3. For an exclusion made in a writing under numbered paragraph 4 (merchantability) or an exclusion that must be in a writing under numbered paragraph 5 (implied warranty of fitness for a particular purpose), the writing must be conspicuous. § 4-2-316(2), C.R.S. However, “[w]hether a term or clause is ‘conspicuous’ or not is a decision for the court.” § 4-1-201(10), C.R.S. Consequently, numbered paragraph 4 should not be given if the claimed exclusion is in

writing and numbered paragraph 5 should not be given, unless the court has first determined under the tests set out in section 4-1-201(10) that the written language is conspicuous.

4. When breach of an express warranty is also claimed, this instruction may need to be modified to avoid confusion. *See* § 4-2-317, C.R.S. (Express and implied warranties are cumulative and must be construed as consistent if it is reasonable to do so; express warranties displace inconsistent implied warranties other than the implied warranty of fitness for a particular purpose.); *see also* § 4-2-316 (expressing policy against unreasonable limitations or negations of a warranty).

5. For definitions of “course of performance,” “course of dealing,” and “usage of trade,” see section 4-1-303, C.R.S.

### Source and Authority

1. This instruction is supported by section 4-2-316.

2. For an illustration of whether limiting language accompanying an express warranty may be sufficient to disclaim or exclude an implied warranty of merchantability under numbered paragraph 1 of the instruction, see **Hiigel v. General Motors Corp.**, 190 Colo. 57, 544 P.2d 983 (1975) (distinguishing between commercial and consumer buyers). *See also* **Boyd v. A.O. Smith Harvestore Prods., Inc.**, 776 P.2d 1125 (Colo. App. 1989) (discussing sufficiency of the evidence for trial court to conclude that express warranty had been excluded as a matter of law).

3. As to the applicability of an exclusion or modification to a subsequent buyer, user, or affected person, see **Wenner Petro. Corp. v. Mitsui & Co. (U.S.A.)**, 748 P.2d 356 (Colo. App. 1987).

4. Although a manufacturer has made a disclaimer of warranties that satisfies the pertinent provisions of the Uniform Commercial Code, each subsequent seller must make its own independent disclaimer in order to be protected from warranty liability. **Graham Hydraulic Power, Inc. v. Stewart & Stevenson Power, Inc.**, 797 P.2d 835 (Colo. App. 1990).

5. For discussion of a disclaimer that limited the remedy, but failed of its essential purpose and, therefore, did not preclude the buyer’s recovery, see **Cooley v. Big Horn Harvestore Sys., Inc.**, 813 P.2d 736 (Colo. 1991); *see also* **Keller v. A.O. Smith Harvestore Prods., Inc.**, 819 P.2d 69 (Colo. 1991) (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 those representations).

## C. PRODUCT LIABILITY FOR NEGLIGENCE

### 14:17 MANUFACTURER'S LIABILITY BASED ON NEGLIGENCE — ELEMENTS OF LIABILITY

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

1. The defendant manufactured the (*insert description of article*);
2. The defendant was negligent by failing to exercise reasonable care to prevent the (*description of article*) from creating an unreasonable risk of harm to the person or property of one who might reasonably be expected to (use) (consume) (or) (be affected) by the (*description of article*) while it was being used in the manner the defendant might have reasonably expected;
3. The plaintiff was one of those persons the defendant should reasonably have expected to (use) (consume) (or) (be affected) by the (*description of article*); and
4. The plaintiff had (injuries) (damages) (losses) that were caused by the defendant's negligence, while the (*description of article*) was being used in a manner the defendant should reasonably have expected.

If you find that any one or more of these (*number*) statements has not been proved, then your verdict (on this claim) 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 no affirmative defense has been raised or there is insufficient evidence to support any defense.

3. Although mitigation of damages is an affirmative defense, *see* Instruction 5:2, only rarely, if ever, will it be a complete defense. For this reason, mitigation should not be identified as an affirmative defense in the concluding paragraphs of this instruction. Instead, if supported by sufficient evidence, Instruction 5:2 should be given along with the actual damages instruction appropriate to the claim and the evidence in the case. *See Miller v. Solaglas Cal., Inc.*, 870 P.2d 559 (Colo. App. 1993) (the seat-belt defense, § 42-4-237(7), C.R.S., applies in product liability action only to mitigate noneconomic damages and may not be used in support of a comparative fault defense).

4. When the affirmative defense of comparative fault applies, this instruction must be appropriately modified and should be given in conjunction with the appropriate comparative fault instructions. *See* Instructions 14:28 to 14:33. If, in addition to comparative fault, an affirmative defense has been properly raised that would bar the plaintiff's entire claim — for example, release — additional questions covering such defense must be included in the comparative fault instructions and special verdict forms given in the case. Concerning the issues of comparative fault, causation and misuse, *see States v. R.D. Werner Co.*, 799 P.2d 427 (Colo. App. 1990); and *Patterson v. Magna American Corp.*, 754 P.2d 1385 (Colo. App. 1988) (no evidence plaintiff was using product other than in way intended).

5. Other appropriate instructions defining the terms used in this instruction, for example, Instruction 9:6, defining “negligence,” must also be given with this instruction, in particular, the appropriate instructions relating to causation. *See* Instructions 9:18 to 9:21.

6. In appropriate cases, a more suitable word should be substituted for “manufacturing,” such as, “producing,” “canning,” “packaging,” “inspecting,” etc.

7. For cases involving the doctrine of *res ipsa loquitur* generally, *see* Instruction 9:17. *See also Chapman v. Harner*, 2014 CO 78, ¶¶ 25-26, 339 P.3d 519 (*Res ipsa loquitur* creates a rebuttable presumption that the defendant was negligent; it does not shift the burden of proof to a defendant to show he was not negligent.).

8. For cases involving a manufacturer of food or drink sold in sealed containers, *see* Instructions 14:20 and 14:21.

### Source and Authority

This instruction is supported by *Webb v. Dessert Seed Co.*, 718 P.2d 1057 (Colo. 1986); *Howard v. Avon Products, Inc.*, 155 Colo. 444, 395 P.2d 1007 (Colo. 1964); *Shaw v. General Motors Corp.*, 727 P.2d 387 (Colo. App. 1986); *Downing v. Overhead Door Corp.*, 707 P.2d 1027 (Colo. App. 1985); and *Bailey v. Montgomery Ward & Co.*, 635 P.2d 899 (Colo. App. 1981). *See also Fibreboard Corp. v. Fenton*, 845 P.2d 1168 (Colo. 1993); RESTATEMENT (SECOND) OF TORTS § 395 (1965).

## **14:18 MANUFACTURER’S DUTY AS TO PARTS OBTAINED FROM OTHER SOURCES**

**When the manufacturer of (an article) (a product) uses any material or part obtained from another source, the manufacturer has a duty to inspect (and) (or) test that material or part to the extent a reasonably careful person would under the same or similar circumstances, to make the finished (article) (product) reasonably safe for the uses to which it might reasonably be expected to be put. Failure to fulfill that duty is negligence.**

**However, if the manufacturer performs that duty, the manufacturer is not responsible for (injuries) (damages) (losses) resulting from the use of that material or part, even though it may be defective.**

**On the other hand, if the manufacturer performed that duty, but later becomes aware of a defective or dangerous condition resulting from the use of the material or part, then the manufacturer has the duty to give notice of the defect or danger to such persons and in such manner as a reasonably careful person would give under the same or similar circumstances to avoid (injuries) (damages) (losses) to others.**

### **Notes on Use**

1. Use whichever parenthesized words are appropriate.
2. This instruction, when applicable, should be used in conjunction with Instruction 14:17.
3. The second paragraph should be omitted unless evidence of an inspection has been introduced and that evidence is sufficient to present the questions enumerated in the second paragraph to the jury.
4. Similarly, the third paragraph should be given only when evidence has been introduced that the manufacturer acquired knowledge of the defect or dangerous condition after an inspection and when that evidence is sufficient to present the questions enumerated in the third paragraph to the jury. If the third paragraph is given, Instruction 14:19 may also be applicable.
5. In appropriate cases, a more suitable word should be substituted for “manufacturing,” such as, “producing,” “canning,” etc.
6. For instructions concerning the liability of component parts manufacturers, see Notes on Use to Instruction 14:1.

### **Source and Authority**

The first paragraph of this instruction is supported by **International Harvester Co. v. Sharoff**, 202 F.2d 52 (10th Cir. 1953), as is the second paragraph by implication.

## 14:19 MANUFACTURER'S/SELLER'S DUTY TO WARN

**If a (manufacturer) (seller) of (an article) (a product) knows or in the exercise of reasonable care should know that (1) the use of the (article) (product) may be harmful or injurious to a (consumer) (user), and (2) that risk of harm or injury is not obvious to a reasonable (consumer) (user), then the (manufacturer) (seller) must use reasonable care to warn the (consumer) (user) of the risk of harm or injury if a reasonably careful person would under the same or similar circumstances. The failure to do so is negligence.**

### Notes on Use

1. Use whichever parenthesized words are most appropriate. This instruction should be given in cases involving negligent failure to warn. When the issue of foreseeability is in dispute, the trial court cannot rule on the duty to warn issue as a matter of law, because the issue of foreseeability will be a question for the jury to decide. **Mile Hi Concrete, Inc. v. Matz**, 842 P.2d 198 (Colo. 1992).

2. The usual method of warning a consumer is by labeling. However, unless a warning by label is required by statute, in which case the failure to give the required warning may be negligence per se, *see, e.g.*, **White v. Rose**, 241 F.2d 94 (10th Cir. 1957) (by implication), other methods of giving warning may be reasonable, depending on the circumstances. In those cases, the last sentence of this instruction should be omitted or be appropriately modified.

3. Where the failure to give a warning, or to give a proper warning, would be negligence per se, Instruction 9:14 should be used rather than this instruction. Illustrative statutes requiring warnings by label are parts 4 and 5 of title 25, article 5, of the Colorado Revised Statutes. *See Palmer v. A.H. Robins Co.*, 684 P.2d 187 (Colo. 1984) (evidence supported negligence per se verdict for violations of section 25-5-403(1)(a), C.R.S.).

4. The rule stated in this instruction is applicable to all sellers, not just to manufacturers. *See* RESTATEMENT (SECOND) OF TORTS §§ 388, 399 (1965). There may be situations, however, when a seller, for example, a retailer, would have no reason to know, or in the exercise of reasonable care would not be expected to know, that the use of a particular product may be dangerous. In the absence of sufficient evidence of that knowledge or failure to use reasonable care, this instruction should not be given. There may be other circumstances in which a warning may not be required as a matter of law. In those circumstances, this instruction should not be given.

5. If a seller of a product is aware that the use of its product in conjunction with another product may cause a deterioration of the other product and create a dangerous condition, the seller has a duty to use due care to warn customers of the danger. **Halliburton v. Pub. Serv. Co. of Colo.**, 804 P.2d 213 (Colo. App. 1990) (supplier of natural gas, that knew of a potential gas leak in its customers' appliances, had a duty to take corrective action, including adequately warning of the danger). In these circumstances, this instruction must be appropriately modified.

## Source and Authority

This instruction is supported by RESTATEMENT (SECOND) OF TORTS sections 388 and 399 (1965). *See also* **Fibreboard Corp. v. Fenton**, 845 P.2d 1168 (Colo. 1993) (discussing distinction between claims for negligent failure to warn and strict liability failure to warn); **Palmer**, 684 P.2d at 198; **Howard v. Avon Prods., Inc.**, 155 Colo. 444, 395 P.2d 1007 (1964) (discussing when duty to warn of possibility of allergic reaction may arise); **Vista Resorts, Inc. v. Goodyear Tire & Rubber Co.**, 117 P.3d 60 (Colo. App. 2004) (component-part manufacturer was not entitled to jury instruction that it had no duty to foresee or warn of all dangers that may result from use of final product); **Bond v. E.I. Du Pont De Nemours & Co.**, 868 P.2d 1114 (Colo. App. 1993) (noting that both negligent failure to warn and strict liability failure to warn employ “negligence terms,” and that the same evidence is frequently used to establish both claims); **Deacon v. Am. Plant Food Corp.**, 782 P.2d 861 (Colo. App. 1989) (supplier may be negligent per se under statute protecting consumers against manufacture and sale of contaminated fertilizer, §§ 35-12-101 to -120, C.R.S.), *rev’d on other grounds sub nom. Stone’s Farm Supply, Inc. v. Deacon*, 805 P.2d 1109 (Colo. 1991); **Bailey v. Montgomery Ward & Co.**, 635 P.2d 899 (Colo. App. 1981) (approving instruction and holding that seller has a duty to give user adequate warning of unreasonable danger that seller knows or should know is involved in the use of product).

**14:20 LIABILITY FOR INJURY FROM FOOD OR BEVERAGE IN SEALED CONTAINER — ELEMENTS OF LIABILITY**

For the plaintiff, (*name*), to recover from the defendant, (*name*), on (his) (her) claim of negligence in (manufacturing) (packaging) (bottling) (placing upon the market) a (package of food) (bottle of beverage) for human consumption, you must find all of the following have been proved by a preponderance of the evidence:

1. The defendant (manufactured) (packaged) (bottled) (placed upon the market) the product for human consumption;

2. The plaintiff was one of those persons the defendant should reasonably have expected to (use) (consume) (or) (be affected by) the product;

3. Because of negligence of the defendant the (package) (bottle) contained a foreign substance when it left the possession of the defendant;

4. The plaintiff (ate) (drank) the (food) (beverage) with the foreign substance in it; and

5. The (eating) (drinking) of the (food) (beverage) caused the plaintiff (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 no affirmative defense has been raised or there is insufficient evidence to support any defense.



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

4. When the affirmative defense of comparative fault applies, this instruction must be appropriately modified and should be given in conjunction with the appropriate comparative fault instructions. *See* Instructions 14:28 to 14:33. If, in addition to comparative fault, an affirmative defense has been properly raised that would bar the plaintiff's entire claim — for example, release — additional questions covering that defense must be included in the comparative fault instructions and special verdict forms given in the case.

5. For cases involving *res ipsa loquitur* for a claim relating to the consumption of food or beverage in a sealed container, see the Note to Instruction 14:21. Otherwise, Instruction 9:6, defining “negligence,” should be used. The usual “proximate cause” instruction that should be given with this instruction is Instruction 9:18.

6. If necessary, a definition of “foreign substance” should be given.

#### **Source and Authority**

This instruction is supported by **Safeway Stores, Inc. v. Rees**, 152 Colo. 318, 381 P.2d 999 (1963), and the authorities cited in the Source and Authority to Instruction 14:17.

**14:21 PRIMA FACIE NEGLIGENCE LIABILITY FOR INJURY FROM FOOD OR BEVERAGE IN SEALED CONTAINER (RES IPSA LOQUITUR)**

**INSTRUCTION DELETED**

**Note**

1. The instruction previously included is deleted due to the lack of any Colorado appellate decision specifically dealing with the subject matter of this instruction.

2. Consideration of a res ipsa loquitur instruction tendered in an appropriate case involving a claim resulting from consumption of food or beverage in a sealed container requires conformity with **Chapman v. Harner**, 2014 CO 78, ¶¶ 25-26, 339 P.3d 519, and **Krueger v. Ary**, 205 P.3d 1150 (Colo. 2009). In those cases, the Colorado Supreme Court held that a rebuttable presumption “shifts the burden of going forward to the party against whom it is raised.” **Krueger**, 250 P. 3d at 1154. If the presumption applies and is not rebutted by legally sufficient evidence, then the presumed fact is established as a matter of law. *Id.* at 1156. If the presumption applies and is rebutted by legally sufficient evidence, the presumption is destroyed and leaves only a permissible inference of the presumed fact. **Chapman**, ¶ 25; **Krueger**, 205 P.3d at 1156. In neither scenario is the jury instructed about the presumption. *See* Notes on Use to Instructions 3:5 and 9:17.

## D. STRICT PRODUCT LIABILITY FOR MISREPRESENTATION

### 14:22 ELEMENTS OF LIABILITY

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

1. The defendant sold the *(description of product or component part)*;
2. The defendant was engaged in the business of selling the *(description of product or component part)* for resale, use or consumption;
3. The defendant misrepresented a fact concerning the character or quality of the *(description of product or component part)* that would be material to potential purchasers or users of the product;
4. The misrepresentation was made to potential purchasers or users as members of the public at large;
5. As a purchaser or user, (the plaintiff) (or) (some third person) reasonably relied on the misrepresentation;
6. The plaintiff was a person who would reasonably be expected to (use) (consume) (or) (be affected by) the *(description of product or component part)*; and
7. The plaintiff had (injuries) (damages) (losses) caused by the reasonable reliance of (the plaintiff) (or) (the third person) on the misrepresentation.

If you find that any one or more of these *(number)* statements has not been proved by a preponderance of the evidence, then your verdict (on this claim) 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 appropriate and omit the last two paragraphs if no affirmative defense has been raised or there is insufficient evidence to support any defense.
3. Although mitigation of damages is an affirmative defense, *see* Instruction 5:2, only rarely, if ever, will it be a complete defense. For this reason, mitigation should not be identified as an affirmative defense in the concluding paragraphs of this instruction. Instead, if supported by sufficient evidence, Instruction 5:2 should be given along with the actual damages instruction appropriate to the claim and the evidence in the case.
4. When the affirmative defense of comparative fault applies, this instruction must be appropriately modified and should be given in conjunction with the appropriate comparative fault instructions. *See* Instructions 14:28-14:33. If, in addition to comparative fault, an affirmative defense has been properly raised that would bar the plaintiff's entire claim — for example, release — additional questions covering that defense must be included in the comparative fault instructions and special verdict forms given in the case.
5. Other appropriate instructions defining the terms and phrases used in this instruction, for example, Instruction 14:23, defining “misrepresentation of material fact,” and Instruction 14:24, defining “reasonable reliance,” as well as the applicable instructions relating to causation from Chapter 9, must also be given with this instruction.
6. This instruction is applicable to claims for damages for physical injuries caused to persons or property because of the reasonable reliance of the plaintiff or another on a misrepresentation concerning the character or quality of a product made to the public at large by any seller regularly engaged in the business of selling those products. It applies to such a seller “even though the representation is an innocent one and is not made fraudulently or negligently.” **Am. Safety Equip. Corp. v. Winkler**, 640 P.2d 216, 219 (Colo. 1982).
7. This instruction applies only to a manufacturer, as defined in section 13-21-401(1), C.R.S., that knowingly or otherwise actively engaged in making the misrepresentation to the public.
8. An action under this instruction may also be available against one who “leases” rather than “sells” products. § 13-21-401(3). In a case involving a lease, this instruction must be appropriately modified.

## Source and Authority

1. This instruction is supported by **American Safety Equipment Corp.**, 640 P.2d at 219; RESTATEMENT (SECOND) OF TORTS § 402B (1965); and section 13-21-401(3) (definition of seller).

2. As to the applicability of strict liability in tort rules to manufacturers of component parts, see **Union Supply Co. v. Pust**, 196 Colo. 162, 583 P.2d 276 (1978); and **Hiigel v. General Motors Corp.**, 190 Colo. 57, 544 P.2d 983 (1975). *See also* **Miller v. Solaglas Cal., Inc.**, 870 P.2d 559 (Colo. App. 1993); **Bond v. E.I. Du Pont De Nemours & Co.**, 868 P.2d 1114 (Colo. App. 1993); **Shaw v. Gen. Motors Corp.**, 727 P.2d 387 (Colo. App. 1986).

## **14:23 MISREPRESENTATION OF MATERIAL FACT — DEFINED**

**A misrepresentation of a material fact concerning the character or quality of a product is:**

- 1. Any oral or written words, conduct, or combination of words and conduct that create an untrue or mistaken impression in the mind of another about the character or quality of a product; and**
- 2. The untrue or mistaken impression is of a fact that would be important to a purchaser or user in determining his or her course of action.**

### **Notes on Use**

1. This instruction should be given in conjunction with Instruction 14:22 whenever numbered paragraph 3 of that instruction is given to the jury.
2. If the representation is in some form other than words, such as a picture, drawing, or illustration, this instruction must be appropriately modified.
3. Statements of opinion will not generally constitute a misrepresentation of a material fact. RESTATEMENT (SECOND) OF TORTS § 402B cmt. g (1965). For circumstances in which it may, however, see Instruction 19:15. In those cases, that instruction, appropriately modified, should be given with this instruction.

### **Source and Authority**

This instruction is supported by the authorities cited in the Source and Authority to Instructions 19:3 and 19:4; **American Safety Equipment Corp. v. Winkler**, 640 P.2d 216 (Colo. 1982); and RESTATEMENT (SECOND) OF TORTS section 402B comments g and h.

#### **14:24 REASONABLE RELIANCE — DEFINED**

**A person relies on a misrepresentation if that person takes action that he or she otherwise would not take or decides not to take action that he or she would otherwise take because he or she believes the misrepresented information is true.**

**A person's reliance on a misrepresentation is reasonable if that person believes the information to be true and a reasonable person with the same intelligence, education and experience would also have believed it to be true under the same or similar circumstances.**

#### **Notes on Use**

This instruction should be given in conjunction with Instruction 14:22 whenever numbered paragraph 5 of that instruction is given to the jury.

#### **Source and Authority**

This instruction is supported by the authorities cited in the Source and Authority to Instructions 19:7 and 19:8; **American Safety Equipment Corp. v. Winkler**, 640 P.2d 216 (Colo. 1982); and RESTATEMENT (SECOND) OF TORTS section 402B comment j (1965).

## E. AFFIRMATIVE DEFENSES AND DEFENSE CONSIDERATIONS

### 14:25 AFFIRMATIVE DEFENSE — UNREASONABLE, KNOWING USE OF DEFECTIVE PRODUCT OR PRODUCT NOT IN COMPLIANCE WITH WARRANTY

The voluntary and unreasonable use of a defective product with knowledge of the specific danger created by a defect is an affirmative defense.

The defendant, (*name*), is not legally responsible to the plaintiff, (*name*), on the plaintiff's claim of damages for (sale of a defective product) (breach of warranty) if this affirmative defense is proved. This affirmative defense is proved if you find all of the following:

1. At the time the plaintiff (was) (claims to have been) (injured) (damaged), (he) (she) (it) had actual knowledge of the specific danger created by the defect, and knew that this specific danger created a risk of (injury) (damage);
2. The plaintiff voluntarily and unreasonably exposed (himself) (herself) (itself) to the risk of (injury) (damage); and
3. The plaintiff's (use) (continued use) of the product was a cause of the plaintiff's claimed (injuries) (damages).

#### Notes on Use

1. Use whichever parenthesized words are most appropriate.
2. In cases in which the court has determined that the comparative fault statute, § 13-21-406, C.R.S., applies and that the defense covered by this instruction would constitute comparative fault under that statute, Instruction 14:28 should be used rather than this instruction.
3. If there is evidence that efforts had been made to correct the defect or to remedy the breach of warranty of which the plaintiff was previously aware, the language in numbered paragraph 1 should be modified to substitute or add the following: “or (he) (she) (it) did not have a reasonable basis for believing the (defect) (noncompliance with the warranty), of which (he) (she) (it) was previously aware, had been corrected.” *See Hensley v. Sherman Car Wash Equip. Co.*, 33 Colo. App. 279, 520 P.2d 146 (1974).
4. When this instruction is given, an appropriate instruction from Chapter 9 defining “cause” should also be given.

#### Source and Authority

This instruction and the Notes on Use are supported by **Union Supply Co. v. Pust**, 196 Colo. 162, 583 P.2d 276 (1978) (discussing elements of the defense in action predating enactment of comparative fault statute, § 13-21-406, C.R.S.); **Hügel v. General Motors Corp.**,



190 Colo. 57, 544 P.2d 983 (1975) (strict liability in tort); **White v. Caterpillar, Inc.**, 867 P.2d 100 (Colo. App. 1993) (plaintiff's experience and his previous observation of defect were sufficient evidence that he knew specific danger associated with defect and used product with knowledge of that danger); **Kinard v. Coats Co.**, 37 Colo. App. 555, 553 P.2d 835 (1976) (same); **Culp v. Rexnord & Booth-Rouse Equipment Co.**, 38 Colo. App. 1, 553 P.2d 844 (1976) (same); and **Hensley**, 33 Colo. App. at 283-84, 520 P.2d at 148-49. *See also* **Jackson v. Harsco Corp.**, 673 P.2d 363 (Colo. 1983) (insufficient evidence that plaintiff had actual knowledge of danger created by defect); **Zertuche v. Montgomery Ward & Co.**, 706 P.2d 424 (Colo. App. 1985); **Nelson v. Caterpillar Tractor Co.**, 694 P.2d 867 (Colo. App. 1984); **Littlejohn v. Stanley Structures, Inc.**, 688 P.2d 1130 (Colo. App. 1984); **Roberts v. May**, 41 Colo. App. 82, 583 P.2d 305 (1978); **Good v. A. B. Chance Co.**, 39 Colo. App. 70, 565 P.2d 217 (1977); RESTATEMENT (SECOND) OF TORTS § 402A cmt. n (1965).

## 14:26 AFFIRMATIVE DEFENSE — RISK OF AN UNAVOIDABLY UNSAFE PRODUCT

The defendant, *(name)*, is not legally responsible to the plaintiff, *(name)*, on the plaintiff's claim of damages for (sale of a defective product) (breach of the implied warranty of [*insert specific description*]) if the affirmative defense of an unavoidably unsafe product is proved. This defense is proved if you find all of the following:

At the time the *(insert description of product)* was (manufactured) (sold):

1. The sale and use of *(description of product)* provided a benefit to the users that greatly outweighed the risk of *(insert specific description of risk involved)*, resulting from the use of *(description of product)*;

2. The risk of *(specific description of risk involved)* could not have been avoided by the defendant through the use of the highest standards of scientific and technical knowledge available at the time, even if the defendant knew of them;

3. The benefit to the users of *(description of product)* could not be achieved in another manner with less risk even if the defendant had used the highest standards of scientific and technical knowledge available at the time; and

4. The defendant provided adequate warnings concerning the risk of *(specific description of risk involved)* that met the highest standards of scientific and technical knowledge available at the time, regardless of whether the defendant knew of the standards.

### Notes on Use

Use whichever parenthesized words are appropriate.

### Source and Authority

1. This instruction is supported by **Belle Bonfils Memorial Blood Bank v. Hansen**, 665 P.2d 118 (Colo. 1983) (construing and applying RESTATEMENT (SECOND) OF TORTS § 402A cmt. k (1965)). *See also* **Ortho Pharm. Corp. v. Heath**, 722 P.2d 410 (Colo. 1986).

2. The unavoidably unsafe risk of a product is an affirmative defense in actions brought on the theory of strict liability in tort for the sale of a defective product under Instruction 14:1. **Ortho Pharm. Corp.**, 722 P.2d 415-16; **Belle Bonfils Mem'l Blood Bank**, 665 P.2d at 126-27. In certain instances, it may also be a defense to an action for breach of warranty of fitness for a particular purpose under Instruction 14:13, and for some breaches of the implied warranty of merchantability under Instruction 14:10, in particular, breach of the implied warranty of merchantability in the form of not being "fit for ordinary purposes." **Belle Bonfils Mem'l Blood Bank**, 665 P.2d at 127. It is not, however, a defense to a claim based on negligence (Instruction 14:17) or breach of express warranty (Instruction 14:8). *Id.*

3. An unavoidably unsafe product may be defective and unreasonably dangerous if the manufacturer fails to give an adequate warning of the unsafe risk and that risk is not one within the contemplation of the ordinary user or consumer. See **Belle Bonfils Mem'l Blood Bank**, 665 P.2d at 123-26; **Hamilton v. Hardy**, 37 Colo. App. 375, 549 P.2d 1099 (1976), *overruled on other grounds* by **State Bd. of Med. Exam'rs v. McCroskey**, 880 P.2d 1188 (Colo. 1994); RESTATEMENT (SECOND) OF TORTS § 402A cmts. i, j, & k (1965). The same rule applies to a risk that “manifests itself when [an unavoidably unsafe] product is used in an unintended, but foreseeable, manner.” **Uptain v. Huntington Lab, Inc.**, 685 P.2d 218, 220 (Colo. App. 1984), *aff'd on other grounds*, 723 P.2d 1322 (Colo. 1986).

## 14:27 AFFIRMATIVE DEFENSE — MISUSE OF PRODUCT

**A manufacturer of a product is not legally responsible for (injuries) (damages) (losses) caused by a product if:**

**1. The product was used in a manner or for a purpose other than that which was intended;**

**2. The unintended use could not reasonably have been expected by the manufacturer; and**

**3. The unintended use, rather than a defect, if any, in the product caused the plaintiff's claimed (injuries) (damages) (losses).**

**If you find that all of these three statements have been proved, then your verdict must be for the manufacturer.**

**(On the other hand, if you find that any of these three statements has not been proved, you may still consider whether plaintiff's use of the product constitutes comparative fault, as that term is defined in these instructions.)**

### Notes on Use

1. This instruction should be given in those cases in which the manufacturer denies that the product is defective or that the defect, if any, caused damages, and it further claims that unforeseeable misuse of the product caused plaintiff's damages. *See* **Armentrout v. FMC Corp.**, 842 P.2d 175 (Colo. 1992) (if there was no competent evidence that would support a conclusion that product misuse was unforeseeable, the trial court erred in submitting product misuse instruction to the jury); **Schmutz v. Bolles**, 800 P.2d 1307 (Colo. 1990) (same); **White v. Caterpillar, Inc.**, 867 P.2d 100 (Colo. App. 1993) (distinguishing facts in **Armentrout** and **Schmutz**, and holding that instruction was properly given where manufacturer did not have prior notice of alleged misuse); *see also* **Walcott v. Total Petro., Inc.**, 964 P.2d 609 (Colo. App. 1998) (customer's use of gasoline to set another person on fire constituted unforeseeable misuse of product as a matter of law); **Koehn v. R.D. Werner Co.**, 809 P.2d 1045 (Colo. App. 1990).

2. In 2003, the Legislature codified product misuse in section 13-21-402.5, C.R.S. This statute applies to all product liability claims regardless of the theory. The statute provides that a product liability claim may not be commenced or maintained if, at the time the injury, death or property damage occurred, the product was being used in a manner or for a purpose other than that which was intended and which could not reasonably have been expected, and such misuse was a cause of the injury, death, or property damage. This statute may present an issue as to whether the Legislature intended to eliminate the affirmative defense of misuse and instead require that the plaintiff prove, as an element of liability, that misuse was not a cause of the plaintiff's injuries, damages, or losses. The Committee takes no position on this issue. However, counsel and the trial court should be aware of this issue when the evidence is sufficient to warrant instructing the jury on the issue of misuse.

3. The Colorado appellate courts have recognized that misuse of a product can be a complete bar to a plaintiff's product liability claims. *See, e.g., Uptain v. Huntington Lab, Inc.*, 723 P.2d 1322 (Colo. 1986). They have also recognized that improper use of a product can be a form of comparative fault, reducing plaintiff's damages. *See, e.g., Miller v. Solaglas Cal., Inc.*, 870 P.2d 559 (Colo. App. 1993). Without attempting to resolve the still unanswered questions of whether "misuse" and "improper use" are separate concepts and whether "misuse" as a complete bar is an affirmative defense or simply a negation of causation, the Committee recommends the following approach. If the only issue involving "misuse" is misuse as a complete bar to plaintiff's product liability claims, this instruction should be given without the parenthesized paragraph. If the only issue is improper use or use in an improper fashion as a form of comparative fault that reduces plaintiff's damages, only Instruction 14:29 should be given. If the evidence would support submitting to the jury both issues (whether the conduct was a complete bar or a form of comparative fault) and, thus, permit the jury to find either one, both this instruction (including the final parenthesized paragraph) and Instruction 14:29 should be given.

4. For the affirmative defense of the knowing, unreasonable use of a defective product, see Instruction 14:25.

### Source and Authority

1. This instruction is supported by **Uptain**, 723 P.2d at 1325 (citing an earlier version of this instruction with approval as correctly stating the law of misuse as a question of causation). *See also Jackson v. Harsco Corp.*, 673 P.2d 363, 367 (Colo. 1983) (holding that "misuse by an injured party which cannot reasonably be anticipated . . . can be [used to show] that the conduct of the user, and not the alleged defect . . . actually caused the accident," and concluding that the evidence was insufficient to show that use was reasonably to be expected); **Kysor Indus. Corp. v. Frazier**, 642 P.2d 908 (Colo. 1982) (plaintiff's injuries caused by dangerous condition created solely by plaintiff's own mishandling or misuse rather than by lack or inadequacy of warnings or instructions); **Pratt v. Rocky Mtn. Nat. Gas Co.**, 805 P.2d 1144 (Colo. App. 1990); **Shultz v. Linden-Alimak, Inc.**, 734 P.2d 146 (Colo. App. 1986) (where user with full knowledge of dangers inherent in his own misuse of a product creates a dangerous condition in the product that injures him, there is no factual basis for submitting case to the jury); **Peterson v. Parke Davis & Co.**, 705 P.2d 1001 (Colo. App. 1985) (jury could properly find product not defective where adequate information and warnings made available to prescribing physician, but physician "misused" drug by not consulting that information and heeding warnings); **Nelson v. Caterpillar Tractor Co.**, 694 P.2d 867 (Colo. App. 1984) (citing earlier version of this instruction); Source and Authority to Instruction 14:1.

2. Concerning the issues of misuse, causation, and comparative fault, see **Patterson v. Magna American Corp.**, 754 P.2d 1385 (Colo. App. 1988) (no evidence plaintiff was using product other than in way manufacturer intended); **Armentrout v. FMC Corp.**, 819 P.2d 522 (Colo. App. 1991), *aff'd in part, rev'd in part on other grounds*, 842 P.2d 175 (Colo. 1992); **Miller**, 870 P.2d at 565-66; and **States v. R.D. Werner Co.**, 799 P.2d 427 (Colo. App. 1990).

3. Written warnings on a product that identify various possible misuses of that product do not make a misuse caused by not reading or abiding by those warnings foreseeable by the manufacturer as a matter of law. **Uptain**, 723 P.2d at 1326; *see Koehn*, 809 P.2d at 1049

(manufacturer or seller may reasonably assume that warnings will be read and heeded). Nor is a user's failure to follow written warnings or instructions misuse that entitles a manufacturer to a directed verdict. *See* **Farmland Mut. Ins. Co. v. Chief Indus., Inc.**, 170 P.3d 832 (Colo. App. 2007) (professional installer's failure to heed warnings and instructions simply created jury question regarding design defect). And, if there is evidence that the user of the product did not receive the warnings, the adequacy of those warnings may be a question for the jury. **Armentrout**, 842 P.2d at 188.

**14:28 AFFIRMATIVE DEFENSE — COMPARATIVE FAULT BASED ON UNREASONABLE, KNOWING USE OF PRODUCT INVOLVING NEGLIGENTLY CREATED RISK, PRODUCT NOT IN COMPLIANCE WITH WARRANTY, OR DEFECTIVE OR MISREPRESENTED PRODUCT**

A form of comparative fault is the voluntary and unreasonable use of a defective product with knowledge of the specific danger created by a defect. Such comparative fault is an affirmative defense that is proved if you find all of the following by a preponderance of the evidence:

1. At the time the plaintiff, (*name*), (was) (claims to have been) injured, (he) (she) had actual knowledge of the specific danger created by the defect, and knew that this specific danger created a risk of (injury) (damages);

2. The plaintiff voluntarily and unreasonably exposed (himself) (herself) to the risk of injury; and

3. The plaintiff's (use) (continued use) of the product after acquiring such knowledge was a cause of (his) (her) claimed injuries.

**Notes on Use**

1. This instruction should be used in conjunction with Instructions 14:1, 14:8, 14:10, 14:12, 14:17, 14:20, or 14:22, but only after the court has first determined that (a) there is sufficient evidence to support it, and (b) as a matter of law, under section 13-21-406, C.R.S., the facts set out in the instruction, if proved, would (1) constitute comparative fault and (2) be a valid defense to the particular product liability claim being made. *See States v. R.D. Werner Co.*, 799 P.2d 427 (Colo. App. 1990) (interpreting section 13-21-406).

2. The Notes on Use to Instruction 14:25 are also applicable to this instruction.

**Source and Authority**

This instruction is supported by the authorities cited in the Source and Authority to Instruction 14:25 and in the Introductory Note to this Chapter.

## **14:29 AFFIRMATIVE DEFENSE — COMPARATIVE FAULT BASED ON NEGLIGENCE**

**A form of comparative fault is the negligence, if any, of the plaintiff. Such comparative fault is an affirmative defense that is proved if you find both of the following by a preponderance of the evidence:**

**1. The plaintiff, (*name*), failed to do something that a reasonably careful person would do, or did something that a reasonably careful person would not do, under the same or similar circumstances to protect (himself) (herself) from the (claimed) defect in the product; and**

**2. That conduct by the plaintiff was a cause of the plaintiff's claimed injuries.**

### **Notes on Use**

1. This instruction should be used in conjunction with Instructions 14:1, 14:8, 14:10, 14:13, 14:17, 14:20, or 14:22, but only after the court has first determined that (a) there is sufficient evidence to support it, and (b) as a matter of law, under section 13-21-406, C.R.S., the facts set out in the instruction, if proved, would (1) constitute comparative fault and (2) be a valid defense to the particular product liability claim being made.

2. It is unclear what forms of traditional contributory negligence may or may not constitute comparative “fault” under section 13-21-406(1), for example, contributory negligence that only endangers the plaintiff as opposed to behavior that also endangers third persons. *See Miller v. Solaglas Cal., Inc.*, 870 P.2d 559, 566 (Colo. App. 1993) (approving this instruction as setting forth the applicable principles for comparative fault based on negligence; “[u]nder § 13-21-406, the definition of fault includes misuse, as well as a broad range of culpable behaviors including negligence”); *States v. R.D. Werner Co.*, 799 P.2d 427 (Colo. App. 1990) (in a strict product liability case, the concept of comparative negligence embodied in section 13-21-111, C.R.S., is inapplicable); RESTATEMENT (SECOND) OF TORTS § 402A cmt. n (1965).

3. If this instruction is given because there is sufficient evidence of certain conduct on the plaintiff's part that the court has determined would constitute comparative fault, and there is also evidence of other conduct to which the jury might apply this instruction, but that conduct would not constitute comparative fault under the statute, then another instruction directing the jury not to consider that conduct as comparative fault under this instruction should also be given.

### **Source and Authority**

This instruction is supported by the Source and Authority to Instructions 9:2 and 9:4.



**14:30 COMPARATIVE FAULT — ELEMENTS AND EFFECT — NO COUNTERCLAIM — SINGLE DEFENDANT**

**If you find that the plaintiff, (*name*), had damages and that these damages were caused by the (negligence) (or) (fault) of the defendant, (*name*), you must then determine whether the plaintiff was also (negligent) (or) (at fault), and whether any such (negligence) (or) (fault) of the plaintiff contributed to the plaintiff’s own damages.**

**The (negligence) (or) (fault) of the plaintiff is an affirmative defense that must be proved by a preponderance of the evidence.**

**If you find that the plaintiff was (negligent) (or) (at fault), then you must also determine to what extent the (negligence) (or) (fault) of the defendant and the (negligence) (or) (fault) of the plaintiff contributed to the plaintiff’s damages, expressed as a percentage of 100 percent.**

**If the plaintiff is allowed to recover, the total amount of the damages awarded will be reduced by the percentage of the (negligence) (or) (fault), if any, of the plaintiff.**

**Notes on Use**

1. Use whichever parenthesized parts of the instruction are appropriate.
2. This instruction should be given in conjunction with special verdict forms 14:30A and 14:30B, and with appropriate instructions on damages. *See* Instructions 6:1, 6:1A, & 6:1B.
3. For alternative special verdict forms, see Instruction 4:20.
4. Whenever the affirmative defense of comparative fault has been determined by the court to be applicable, this instruction, Instructions 14:31, 14:32, or 14:33 must be given in conjunction with one or more of Instructions 14:1, 14:8, 14:10, 14:13, 14:17, 14:20, or 14:22, appropriately modified in accord with any applicable Notes on Use. Also, one or more instructions defining “fault” insofar as plaintiff’s conduct is concerned must also be given. *See, e.g.,* Instructions 14:28 & 14:29.
5. For instructions and special verdict forms for use in actions involving designated nonparties under section 13-21-111.5, C.R.S., see Instructions 14:32 through 14:33B. *See also* **Barton v. Adams Rental, Inc.**, 938 P.2d 532 (Colo. 1997) (noting that section 13-21-111.5 applies to claims of strict liability and that an instruction regarding nonparty liability should be submitted to the jury, similar to instructions regarding comparative fault, but only when there is evidence in the record to support such a claim). Similarly, various modifications may be required in order to enable the trial court to apply any applicable limitations on damages set out in sections 13-21-102.5(3)(a) and (b), C.R.S. (quoted and discussed in the Notes on Use to Instruction 6:1). *See also* Instruction 6:1A (mechanics for submitting special interrogatories).
6. If, in addition to the affirmative defense of comparative fault, the affirmative defense of failure to mitigate damages (Instruction 5:2) or any other affirmative defense, for example,

one that would bar the plaintiff's entire claim, such as release or waiver, *see, e.g., Town of Silverton v. Phoenix Heat Source Sys., Inc.*, 948 P.2d 9 (Colo. App. 1997), has been raised, this instruction and its accompanying special verdict forms must be appropriately modified to include those questions necessary to resolve properly all disputed questions of fact relating to such additional affirmative defense, as well as any other matters in dispute between the parties, such as punitive damages.

#### **Source and Authority**

This instruction is supported by sections 13-21-406 and 13-21-111.5, C.R.S. *See also Miller v. Solaglas Cal., Inc.*, 870 P.2d 559 (Colo. App. 1993); *Armentrout v. FMC Corp.*, 819 P.2d 522 (Colo. App. 1991), *aff'd in part, rev'd in part on other grounds*, 842 P.2d 175 (Colo. 1992); *States v. R.D. Werner Co.*, 799 P.2d 427 (Colo. App. 1990).

**14:30A SPECIAL VERDICT — MECHANICS FOR SUBMITTING — NO COUNTERCLAIM — SINGLE DEFENDANT**

**You are instructed to answer the following questions. You must all agree on your answer to each question.**

**1. Do you find that the plaintiff, (name), is entitled to recover damages from the defendant, (name), on (his) (her) claim of (insert appropriate description, e.g., “negligence,” “breach of the warranty of . . .,” etc.), under Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of liability for the claim, as in Instructions 14:1, 14:8, 14:10, 14:13, 14:17, 14:20, or 14:22)?**

*(Insert additional separately numbered similar paragraphs so as to include all product liability claims being made against the defendant.)*

**If your answer to (question No. 1) (all of these questions numbered [insert numbers, e.g., 1 and 2]) is “no,” then your foreperson shall complete only Special Verdict Form A, and all jurors must sign it.**

**On the other hand, if your answer to (question No. 1) (any one or more of questions numbered [insert numbers]), is “yes,” then you shall answer the following question(s):**

**2. Do you find that the plaintiff was (negligent) (or) (at fault) in causing (his) (her) own (injuries) (damages) (losses) as set forth in Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of any form of comparative fault, e.g., as in Instruction 14:28 or 14:29)?**

*(Insert, as above in question 2, but in separately numbered questions, any additional forms of comparative fault.)*

**If your answer to (question No.) (all of these questions numbered) (insert specific numbers of questions relating to the comparative fault of plaintiff, e.g., 2, 3, etc.) is “no,” you shall answer the following question and then your foreperson shall complete only Special Verdict Form B, and all jurors must sign it.**

**3. State the total amount of plaintiff’s (injuries) (damages) (losses) under Instruction No. (insert the number assigned in the case to the instruction that sets forth recoverable damages) that were caused by the (negligence) (or) (fault) of the defendant.**

**On the other hand, if your answer to (question No.) (any one or more of questions numbered) (insert specific numbers of questions relating to the comparative fault of the plaintiff) is “yes,” you shall answer the following questions, and then your foreperson shall complete only Special Verdict Form C and all jurors must sign it.**

**4. State the total amount of plaintiff’s (injuries) (damages) (losses) under Instruction No. (insert the number assigned in the case to the instruction that sets forth recoverable damages) that were caused by the combined (negligence) (or) (fault) of the defendant and by the (negligence) (or) (fault) of the plaintiff.**

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

**Notes on Use**

1. Whenever the affirmative defense of comparative fault has been determined by the court to be applicable, this instruction or Instruction 14:32 must be given in conjunction with one or more of Instructions 14:1, 14:8, 14:10, 14:13, 14:17, 14:20, or 14:22, appropriately modified in accord with any applicable Notes on Use.

2. Use whichever parenthesized words and phrases are most appropriate.

3. For instructions and special verdict forms for use in actions involving designated nonparties under section 13-21-111.5, C.R.S., see Instructions 14:32 through 14:33B. *See also Barton v. Adams Rental, Inc.*, 938 P.2d 532 (Colo. 1997) (noting that section 13-21-111.5 applies to claims of strict liability, and that an instruction regarding nonparty liability should be submitted to the jury, similar to instructions regarding comparative fault, but only when there is evidence in the record to support such a claim). Similarly, various modifications may be required in order to enable the trial court to apply any applicable limitations on damages set out in section 13-21-102.5(3) (a) and (b), C.R.S. (quoted and discussed in the Notes on Use to Instruction 6:1). See also Instruction 6:1A (mechanics for submitting special interrogatories).

4. Whenever this instruction is given, the three special verdict forms in Instruction 14:30B and one or more appropriate instructions defining "fault" insofar as the plaintiff's conduct is concerned, *see, e.g.*, Instructions 14:28 and 14:29, must also be given.

5. If, in addition to the affirmative defense of comparative fault, the affirmative defense of failure to mitigate damages (Instruction 5:2) or any other affirmative defense, for example, one that would bar the plaintiff's entire claim, such as release, has been raised, this instruction and its accompanying special verdict forms must be appropriately modified to include those questions necessary to resolve properly all disputed questions of fact relating to that additional affirmative defense, as well as any other matters in dispute between the parties, such as punitive damages.

6. If the plaintiff is seeking the same damages for the same injuries under more than one claim for relief and if it is determined as a matter of law that a particular form of comparative fault, for example, contributory negligence, may be applicable as a defense to one of the plaintiff's claims, for example, negligence, but not to another, for example, breach of warranty, then this instruction and its accompanying special verdict forms must be appropriately modified.

7. The Notes on Use to Instruction 14:30 are also applicable to this Instruction. *See also* Notes on Use to Instructions 4:4 and 9:33 through 9:34B.

8. For alternative special verdict forms, see Instruction 4:20.

### Source and Authority

This instruction is supported by section 13-21-406, C.R.S. *See also* **Miller v. Solaglas Cal., Inc.**, 870 P.2d 559 (Colo. App. 1993); **Armentrout v. FMC Corp.**, 819 P.2d 522 (Colo. App. 1991), *aff'd in part, rev'd in part on other grounds*, 842 P.2d 175 (Colo. 1992); **States v. R.D. Werner Co.**, 799 P.2d 427 (Colo. App. 1990).

**14:30B SPECIAL VERDICT FORMS — NO COUNTERCLAIM — SINGLE DEFENDANT — FORMS A, B, AND C**

**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 EITHER SPECIAL VERDICT FORM B OR SPECIAL VERDICT FORM C.**

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

**1. Do you find that the plaintiff, (name), is entitled to recover damages from the defendant, (name), on (his) (her) claim of (insert appropriate description, e.g., “negligence,” “breach of the warranty of...,” etc.) under Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of liability for the claim, as in Instructions 14:1, 14:8, 14:10, 14:13, 14:17, 14:20, or 14:22)? (Yes or No)**

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

*(Insert additional separately numbered similar paragraphs so as to include all product liability claims being made against the defendant.)*

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

**We, the jury, having answered (question No. 1) ([all] [both] of these questions numbered [insert number]) “no,” find the issues for the defendant, (name).**

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_ Foreperson

**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 AND ALL JURORS HAVE SIGNED EITHER SPECIAL VERDICT FORM A OR SPECIAL VERDICT FORM C.**

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

**1. Do you find that the plaintiff, *(name)*, is entitled to recover damages from the defendant, *(name)*, on *(his)* *(her)* claim of *(insert appropriate description, e.g., “negligence,” “breach of the warranty of...,” etc.)*, under **Instruction No.** *(insert the number assigned in the case to the instruction that sets forth the basic elements of liability for the claim, as in Instructions 14:1, 14:8, 14:10, 14:13, 14:17, 14:20, or 14:22)? (Yes or No)***

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

*(Insert additional separately numbered similar paragraphs so as to include all product liability claims being made against the defendant.)*

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

**2. Do you find that the plaintiff was (negligent) (or) (at fault) in causing (his) (her) own (injuries) (damages) (losses) as set forth in Instruction No.** *(insert the number assigned in the case to the instruction that sets forth the basic elements of any form of comparative fault, e.g., as in Instruction 14:28 or 14:29)? (Yes or No)*

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

*(Insert, as above in question 2, but in separately numbered questions, any additional forms of comparative fault.)*

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

**3. State the total amount of plaintiff's (injuries) (damages) (losses) under Instruction No.** *(insert the number assigned in the case to the instruction that sets forth recoverable damages)* **that were caused by the (negligence) (or) (fault) of the defendant.**

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

**We, the jury, having answered (question No. 1) (one or more of the questions numbered** *[insert specific numbers of all questions relating to claims of liability against the defendant]* **“yes,” but having answered (question No. 2) ([all] [both] of the questions numbered** *[insert specific numbers of all questions relating to the comparative fault of the plaintiff]* **“no,” find the issues for the plaintiff, (name).**

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

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

**Foreperson**

**FORM C**

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

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



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

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

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

**1. Do you find that the plaintiff, (name), is entitled to recover damages from the defendant, (name), on (his) (her) claim of (insert appropriate description, e.g., “negligence,” “breach of the warranty of...,” etc.) under Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of liability for the claim, as in Instructions 14:1, 14:8, 14:10, 14:13, 14:17, 14:20, or 14:22)? (Yes or No)**

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

*(Insert additional separately numbered similar paragraphs so as to include all product liability claims being made against the defendant.)*

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

**2. Do you find that the plaintiff was (negligent) (or) (at fault) in causing (his) (her) own (injuries) (damages) (losses) as set forth in Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of any form of comparative fault, e.g., as in Instruction 14:28 or 14:29)? (Yes or No)**

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

*(Insert, as above in question 2, but in separately numbered questions, any additional forms of comparative fault.)*

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

**3. State the total amount of plaintiff’s (injuries) (damages) (losses) under Instruction No. (insert the number assigned in the case to the instruction that sets forth recoverable damages) that were caused by the combined (negligence) (or) (fault) of the defendant and by the (negligence) (or) (fault) of the plaintiff.**

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

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

**ANSWER:**

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

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

**MUST TOTAL: 100%** \_\_\_\_\_%

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

**Notes on Use**

1. See Notes on Use to Instructions 14:30 and 14:30A.
2. For alternative special verdict forms, see Instruction 4:20.

**14:31 COMPARATIVE FAULT — ELEMENTS AND EFFECT — NO  
COUNTERCLAIM — MULTIPLE DEFENDANTS**

**If you find that the plaintiff, (*name*), had damages and that these damages were caused by the (negligence) (or) (fault) of one or more of the defendants, (*names*), you must then determine whether the plaintiff was also (negligent) (or) (at fault), and whether any such (negligence) (or) (fault) of the plaintiff contributed to the plaintiff's own damages.**

**The (negligence) (or) (fault) of the plaintiff is an affirmative defense that must be proved by a preponderance of the evidence.**

**If you find that the plaintiff was (negligent) (or) (at fault), then you must also determine to what extent the (negligence) (or) (fault) of each of the defendants, if any, and the (negligence) (or) (fault), of the plaintiff, contributed to the plaintiff's damages, expressed as a percentage of 100 percent.**

**If the plaintiff is allowed to recover, the total amount of the damages awarded will be reduced by the percentage of the (negligence) (or) (fault), if any, of the plaintiff.**

**If you find that the plaintiff was not (negligent) (or) (at fault), you must still determine to what extent the (negligence) (or) (fault) of each of the defendants contributed to the plaintiff's damages, expressed as a percentage of 100 percent.**

**Notes on Use**

1. See Notes on Use to Instruction 14:30.
2. Use whichever parenthesized parts of the instruction are appropriate.
3. This instruction should be given in conjunction with Instructions 14:31A and 14:31B, and with appropriate instructions on damages. *See* Instruction 6:1, 6:1A, & 6:1B.
4. For alternative special verdict forms, see Instruction 4:20.

**Source and Authority**

This instruction is supported by sections 13-21-406 and 13-21-111.5, C.R.S.

**14:31A SPECIAL VERDICT — MECHANICS FOR SUBMITTING — NO COUNTERCLAIM — MULTIPLE DEFENDANTS**

**You are instructed to answer the following questions. You must all agree on your answer to each question.**

**1. Do you find that the plaintiff, (name), is entitled to recover damages from the defendant, (name of first defendant), on (his) (her) claim of (insert appropriate description, e.g., “negligence,” “breach of the warranty of . . . ,” etc.) under Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of liability for the claim, as in Instructions 14:1, 14:8, 14:10, 14:13, 14:17, 14:20, or 14:22)?**

*(Insert additional separately numbered similar paragraphs so as to include all product liability claims being made against the first defendant.)*

**2. Do you find that the plaintiff is entitled to recover damages from the defendant, (name of second defendant), on (his) (her) claim of (insert appropriate description, e.g., “negligence,” “breach of the warranty of . . . ,” etc.), under Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of liability for the claim, as in Instructions 14:1, 14:8, 14:10, 14:13, 14:17, 14:20, or 14:22)?**

*(Insert additional separately numbered similar paragraphs so as to include all product liability claims being made against the second defendant.)*

**If your answer to (both) (all) of these questions numbered (insert numbers) is “no,” then your foreperson shall complete only Special Verdict Form A and all jurors must sign it.**

**On the other hand, if your answer to any one or more of these questions numbered (insert numbers), is “yes,” then you shall answer the following question(s):**

**3. Do you find that the plaintiff was (negligent) (or) (at fault) in causing (his) (her) own (injuries) (damages) (losses) as set forth in Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of any form of comparative fault, e.g., as in Instruction 14:28 or 14:29)?**

*(Insert, as above in question 3, but in separately numbered questions, any additional forms of comparative fault.)*

**If your answer to (question No.) ([all] [both] of these questions numbered) (insert specific numbers of questions relating to the comparative fault of plaintiff, e.g., 3, 4, etc.) is “no,” you shall answer the following two questions, and then your foreperson shall complete only Special Verdict Form B and all jurors must sign it.**

**4. State the total amount of plaintiff’s (injuries) (damages) (losses) under Instruction No. (insert the number assigned in the case to the instruction that sets forth recoverable damages) that were caused by the combined (negligence) (or) (fault) of all of the defendants from whom you have found that plaintiff is entitled to recover.**

**5. Taking as 100 percent the combined (negligence) (or) (fault) that caused the plaintiff's (injuries) (damages) (losses), what percentage was caused by the (negligence) (or) (fault), if any, of:**

- a. the defendant, (*name of first defendant*); and**
- b. the defendant, (*name of second defendant*).**

**You must enter the figure of zero, "0," for any defendant you have found was not (negligent) (or) (at fault).**

**On the other hand, if your answer to (question No.) (any one or more of questions numbered) (*insert specific numbers of questions relating to the comparative fault of the plaintiff*) is "yes," you shall answer the following two questions, and then your foreperson shall complete only Special Verdict Form C and all jurors must sign it.**

**6. State the total amount of plaintiff's (injuries) (damages) (losses) under Instruction No. (*insert the number assigned in the case to the instruction that sets forth recoverable damages*) that were caused by the combined (negligence) (or) (fault) of all of the defendants from whom the plaintiff is entitled to recover and by the (negligence) (or) (fault) of the plaintiff.**

**7. Taking as 100 percent the combined (negligence) (or) (fault) that caused the plaintiff's (injuries) (damages) (losses), what percentage was caused by the (negligence) (or) (fault), if any, of:**

- a. the plaintiff, (*name*); and**
- b. the defendant, (*name of first defendant*); and**
- c. the defendant, (*name of second defendant*).**

**You must enter the figure of zero, "0," for any defendant you have found was not (negligent) (or) (at fault).**

#### **Notes on Use**

1. Notes on Use to Instruction 14:30 are also applicable to this instruction.
2. For alternative special verdict forms, see Instruction 4:20.

#### **Source and Authority**

This instruction is supported by sections 13-21-406 and 13-21-111.5, C.R.S.

**14:31B SPECIAL VERDICT FORMS — NO COUNTERCLAIM — MULTIPLE DEFENDANTS — FORMS A, B, AND C**

**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 EITHER SPECIAL VERDICT FORM B OR SPECIAL VERDICT FORM C.**

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

**1. Do you find that the plaintiff, (name), is entitled to recover damages from the defendant, (name of first defendant), on (his) (her) claim of (insert appropriate description, e.g., “negligence,” “breach of the warranty of . . . ,” etc.) under Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of liability for the claim, as in Instructions 14:1, 14:8, 14:10, 14:13, 14:17, 14:20, or 14:22)? (Yes or No)**

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

*(Insert additional separately numbered similar paragraphs so as to include all product liability claims being made against the first defendant.)*

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

**2. Do you find that the plaintiff, (name), is entitled to recover damages from the defendant, (name of second defendant), on (his) (her) claim of (insert appropriate description, e.g., “negligence,” “breach of the warranty of . . . ,” etc.), under Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of liability for the claim, as in Instructions 14:1, 14:8, 14:10, 14:13, 14:17, 14:20, or 14:22)? (Yes or No)**

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

(Insert additional separately numbered similar paragraphs so as to include all product liability claims being made against the second defendant.)

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

We, the jury, having answered (both) (all) of these questions numbered (insert numbers) “no,” find the issues for (both) (all) the Defendants, (names).

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

**FORM B**

**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 B</b>
_____ )	
<b>Defendant.</b> )	

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

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

**1. Do you find that the plaintiff, (name), is entitled to recover damages from the defendant, (name of first defendant), on (his) (her) claim of (insert appropriate description, e.g., “negligence,” “breach of the warranty of . . . ,” etc.) under Instruction No. (insert the**

number assigned in the case to the instruction that sets forth the basic elements of liability for the claim, as in Instructions 14:1, 14:8, 14:10, 14:13, 14:17, 14:20, or 14:22)? (Yes or No)

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

*(Insert additional separately numbered similar paragraphs so as to include all product liability claims being made against the first defendant.)*

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

**2. Do you find that the plaintiff, (name), is entitled to recover damages from the defendant, (name of second defendant), on (his) (her) claim of (insert appropriate description, e.g., “negligence,” “breach of the warranty of . . . ,” etc.), under Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of liability for the claim, as in Instructions 14:1, 14:8, 14:10, 14:13, 14:17, 14:20, or 14:22)? (Yes or No)**

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

*(Insert additional separately numbered similar paragraphs so as to include all product liability claims being made against the second defendant.)*

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

**3. Do you find that the plaintiff was (negligent) (or) (at fault) in causing (his) (her) own (injuries) (damages) (losses) as set forth in Instruction No. (insert the number of the instruction assigned in the case to the instruction that sets forth the basic elements of any form of comparative fault, e.g., as in Instruction 14:28 or 14:29)? (Yes or No)**

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

*(Insert, as above in question 3, but in separately numbered questions, any additional forms of comparative fault.)*

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

**4. State the total amount of plaintiff’s (injuries) (damages) (losses) under Instruction No. (insert the number assigned in the case to the instruction that sets forth recoverable damages) that were caused by the combined (negligence) (or) (fault) of all of the Defendants from whom you have found that plaintiff is entitled to recover.**

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

**5. Taking as 100 percent the combined (negligence) (or) (fault) that caused the plaintiff’s (injuries) (damages) (losses), what percentage was caused by the (negligence) (or) (fault), if any, of:**



- a. the defendant, *(name of first defendant)*; and
- b. the defendant, *(name of second defendant)*.

You must enter the figure of zero, "0," for any defendant you have found was not (negligent) (or) (at fault).

**ANSWER:**

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

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

**MUST TOTAL: 100%** \_\_\_\_\_%

	<b>Foreperson</b>

**FORM C**

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 C</b>
<b>Defendant.</b>	)	

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

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

**1. Do you find that the plaintiff, (name), is entitled to recover damages from the defendant, (name of the first defendant), on (his) (her) claim of (insert appropriate description, e.g., “negligence”, “breach of the warranty of . . . ,” etc.) under Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of liability for the claim, as in Instructions 14:1, 14:8, 14:10, 14:13, 14:17, 14:20, or 14:22)? (Yes or No)**

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

*(Insert additional separately numbered similar paragraphs so as to include all product liability claims being made against the first defendant.)*

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

**2. Do you find that the plaintiff, (name), is entitled to recover damages from the defendant, (name of second defendant), on (his) (her) claim of (insert appropriate description, e.g., “negligence,” “breach of the warranty of . . . ,” etc.) under Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of liability for the claim, as in Instructions 14:1, 14:8, 14:10, 14:13, 14:17, 14:20, or 14:22)? (Yes or No)**

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

*(Insert additional separately numbered similar paragraphs so as to include all product liability claims being made against the second defendant.)*

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

**3. Do you find that the plaintiff was (negligent) (or) (at fault) in causing (his) (her) own (injuries) (damages) (losses) as set forth in Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of any form of comparative fault, e.g., as in Instruction 14:28 or 14:29)? (Yes or No)**

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

*(Insert, as above in question 3, but in separately numbered questions, any additional forms of comparative fault.)*

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

**4. State the total amount of plaintiff’s (injuries) (damages) (losses) under Instruction No. (insert the number assigned in the case to the instruction that sets forth recoverable damages) that were caused by the combined (negligence) (or) (fault) of all of the defendants from whom you have found that plaintiff is entitled to recover and the (negligence) (or) (fault) of the plaintiff.**

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

**5. Taking as 100 percent the combined (negligence) (or) (fault) that caused the plaintiff's (injuries) (damages) (losses), what percentage was caused by the (negligence) (or) (fault), if any, of:**

- a. the plaintiff, (*name*); and**
- b. the defendant, (*name of first defendant*); and**
- c. the defendant, (*name of second defendant*).**

**You must enter the figure of zero, "0," for any defendant you have found was not (negligent) (or) (at fault).**

**ANSWER:**

**Percentage charged to plaintiff, (*name*):** \_\_\_\_\_ %  
**Percentage, if any, charged to defendant, (*name of first defendant*):** \_\_\_\_\_ %  
**Percentage, if any, charged to defendant, (*name of second defendant*):** \_\_\_\_\_ %  
**MUST TOTAL: 100%** \_\_\_\_\_ %

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

**Notes on Use**

The Notes on Use to Instruction 14:30 are also applicable to this instruction, except this instruction should be used in conjunction with Instruction 14:31.

**Source and Authority**

This instruction is supported by sections 13-21-406 and 13-21-111.5, C.R.S.

**14:32 COMPARATIVE FAULT — ELEMENTS AND EFFECT — NO COUNTERCLAIM — SINGLE DEFENDANT — DESIGNATED NONPARTY OR NONPARTIES INVOLVED**

If you find that the plaintiff, *(name)*, had damages and that such damages were caused by the (negligence) (or) (fault) of the defendant, *(name)*, you must then determine:

1. Whether the plaintiff was (negligent) (or) (at fault);
2. Whether any such (negligence) (or) (fault) of the plaintiff contributed to the plaintiff's own damages;
3. Whether (the designated nonparty, *(name)*, was) (any one or more of the designated nonparties, [names], were) (negligent) (or) (at fault); and
4. Whether any such (negligence) (or) (fault) of the designated (nonparty) (nonparties) contributed to the plaintiff's damages.

The (negligence) (or) (fault) of the plaintiff and the (negligence) (or) (fault) of (the designated nonparty) (any or all of the designated nonparties) are affirmative defenses that must be proved by a preponderance of the evidence.

If you find that either the plaintiff or (the designated nonparty) (one or more of the designated nonparties) was (negligent) (or) (at fault), then you must also determine to what extent the (negligence) (or) (fault) of the defendant, the (negligence) (or) (fault) of the plaintiff, if any, and the (negligence) (or) (fault) of (the designated nonparty) (each of the designated nonparties), if any, contributed to the plaintiff's damages, expressed as a percentage of 100 percent.

If the plaintiff is allowed to recover, the total amount of the damages awarded will be reduced by the percentage of the (negligence) (or) (fault), if any, of the plaintiff and by the percentage of the (negligence) (or) (fault), if any, of the designated (nonparty) (nonparties).

**Notes on Use**

1. See the Notes on Use to Instruction 14:30.
2. Use whichever parenthesized parts of the instruction are appropriate.
3. This instruction should be given in conjunction with Instructions 14:32A and 14:32B, and with appropriate instructions on damages. *See* Instructions 6:1, 6:1A, & 6:1B.
4. For alternative special verdict forms, see Instruction 4:20.

### **Source and Authority**

This instruction is supported by sections 13-21-406 and 13-21-111.5, C.R.S.

**14:32A SPECIAL VERDICT — MECHANICS FOR SUBMITTING — NO COUNTERCLAIM — SINGLE DEFENDANT — DESIGNATED NONPARTY OR NONPARTIES INVOLVED**

**You are instructed to answer the following questions. You must all agree on your answer to each question.**

**1. Do you find that the plaintiff, (name), is entitled to recover damages from the defendant, (name), on (his) (her) claim of (insert appropriate description, e.g., “negligence,” “breach of the warranty of . . .,” etc.), under Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of liability for the claim, as in Instructions 14:1, 14:8, 14:10, 14:13, 14:17, 14:20, or 14:22)?**

*(Insert additional separately numbered similar paragraphs so as to include all product liability claims being made against the first defendant.)*

**If your answer to (this question) ([all] [both] of these questions) is “no,” then your foreperson shall complete only Special Verdict Form A, and all jurors must sign it.**

**On the other hand, if your answer to (this question) (any one or more of these questions), is “yes,” then you shall answer the following question(s):**

**2. Do you find that the plaintiff was (negligent) (or) (at fault) in causing (his) (her) own (injuries) (damages) (losses) as set forth in Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of any form of comparative fault, e.g., as in Instruction 14:28 or 14:29)?**

*(Insert, as above in question 2, but in separately numbered questions, any additional forms of comparative fault.)*

**3. Do you find that the designated nonparty, (name of first designated nonparty), was (negligent) (or) (at fault) in causing plaintiff’s (injuries) (damages) (losses) as set forth in Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of any form of comparative fault e.g., as in Instruction 14:28 or 14:29)? (Yes or No)**

*(Insert, as above in question 3, but in separately numbered questions, any additional forms of comparative fault.)*

**4. Do you find that the designated nonparty, (name of second designated nonparty), was (negligent) (or) (at fault) in causing plaintiff’s (injuries) (damages) (losses) as set forth in Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of any form of comparative fault, as in Instruction 14:28 or 14:29)?**

*(Insert, as above in question 4, but in separately numbered questions, any additional forms of comparative fault.)*

**If your answer to all of these questions numbered** *(insert specific numbers of questions relating to the comparative fault of plaintiff, and the designated nonparty or nonparties, e.g., 2, 3, etc.)* **is “no,” you shall answer the following question, and then your foreperson shall complete only Special Verdict Form B and all jurors must sign it.**

**5. State the total amount of plaintiff’s (injuries) (damages) (losses) under Instruction No.** *(insert the number assigned in the case to the instruction that sets forth recoverable damages)* **that were caused by the (negligence) (or) (fault) of the defendant.**

**On the other hand, if your answer to any one or more of these questions numbered** *(insert specific numbers of questions relating to the comparative fault of the plaintiff and the designated nonparty or nonparties)* **is “yes,” you shall then answer the following questions, and your foreperson shall complete only Special Verdict Form C and all jurors must sign it.**

**6. State the total amount of plaintiff’s (injuries) (damages) (losses) under Instruction No.** *(insert the number assigned in the case to the instruction that sets forth recoverable damages)* **that were caused by the combined (negligence) (or) (fault), if any, of:**

- a. the plaintiff; and**
- b. each of the defendants from whom the plaintiff is entitled to recover; and**
- c. (the designated nonparty) (any one or more of the designated nonparties).**

**7. Taking as 100 percent the combined (negligence) (or) (fault) that caused the plaintiff’s (injuries) (damages) (losses), what percentage was caused by the (negligence) (or) (fault), if any, of:**

- a. the plaintiff;**
- b. each of the defendants from whom the plaintiff is entitled to recover; and**
- c. (the designated nonparty) (any one or more of the designated nonparties).**

**You must enter the figure of zero, “0,” for any party or designated nonparty you have found was not (negligent) (or) (at fault).**

#### **Notes on Use**

For alternative special verdict forms, see Instruction 4:20.

#### **Source and Authority**

This instruction is supported by sections 13-21-406 and 13-21-111.5, C.R.S.

**14:32B SPECIAL VERDICT FORMS — NO COUNTERCLAIM — SINGLE DEFENDANT — DESIGNATED NONPARTY OR NONPARTIES INVOLVED — FORMS A, B, AND C**

**FORM A**

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

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

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

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

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

**1. Do you find that the plaintiff, (name), is entitled to recover damages from the defendant, (name), on (his) (her) claim of (insert appropriate description, e.g., “negligence,” “breach of the warranty of . . .,” etc.), under Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of liability for the claim, as in Instructions 14:1, 14:8, 14:10, 14:13, 14:17, 14:20, or 14:22)? (Yes or No)**

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

*(Insert additional separately numbered similar paragraphs so as to include all product liability claims being made against the defendant.)*

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

**We, the jury, having answered (this) ([both] [all] of these [number]) question(s) “no,” find the issues for the defendant, (name).**



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

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

**Foreperson**

**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 EITHER SPECIAL VERDICT FORM A OR SPECIAL VERDICT FORM C.**

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

**1. Do you find that the plaintiff, (name), is entitled to recover damages from the defendant, (name), on (his) (her) claim of (insert appropriate description, e.g., "negligence," "breach of the warranty of . . .," etc.) under Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of liability for the claim, as in Instructions 14:1, 14:8, 14:10, 14:13, 14:17, 14:20, or 14:22)? (Yes or No)**

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

*(Insert additional separately numbered similar paragraphs so as to include all product liability claims being made against the first defendant.)*

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

**2. Do you find that the plaintiff was (negligent) (or) (at fault) in causing (his) (her) own (injuries) (damages) (losses) as set forth in Instruction No.** *(insert the number assigned in the case to the instruction that sets forth the basic elements of any form of comparative fault, e.g., as in Instruction 14:28 or 14:29)? (Yes or No)*

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

*(Insert, as above in question 2, but in separately numbered questions, any additional forms of comparative fault.)*

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

**3. Do you find that the designated nonparty, (name), was (negligent) (or) (at fault) in causing plaintiff's (injuries) (damages) (losses) as set forth in Instruction No.** *(insert the number assigned in the case to the instruction that sets forth the basic elements of any form of comparative fault e.g., as in Instruction 14:28 or 14:29)? (Yes or No)*

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

*(Insert, as above in question 3, but in separately numbered questions, any additional forms of comparative fault.)*

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

**4. Do you find that the designated nonparty, (name), was (negligent) (or) (at fault) in causing plaintiff's (injuries) (damages) (losses) as set forth in Instruction No.** *(insert the number assigned in the case to the instruction that sets forth the basic elements of any form of comparative fault, e.g., as in Instruction 14:28 or 14:29)? (Yes or No)*

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

*(Insert, as above in question 4, but in separately numbered questions, any additional forms of comparative fault.)*

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

**5. State the total amount of plaintiff's (injuries) (damages) (losses) under Instruction No.** *(insert the number assigned in the case to the instruction that sets forth recoverable damages)* **that were caused by the (negligence) (or) (fault) of the defendant.**

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

**We, the jury, having answered (question No. 1) (one or more of the questions numbered** *[insert specific numbers of all questions relating to claims of liability against the defendant]* **) “yes,” but having answered all of the questions numbered** *(insert specific*

numbers of all questions relating to the comparative fault of the plaintiff and the designated nonparty or nonparties) “no,” find the issues for the plaintiff (name).

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_ Foreperson

**FORM C**

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

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

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

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

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

**1. Do you find that the plaintiff, (name), is entitled to recover damages from the defendant, (name), on (his) (her) claim of (insert appropriate description, e.g., “negligence,” “breach of the warranty of . . . ,” etc.), under Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of liability for the claim, as in Instructions 14:1, 14:8, 14:10, 14:13, 14:17, 14:20, or 14:22)? (Yes or No)**

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

*(Insert additional separately numbered similar paragraphs so as to include all product liability claims being made against the defendant.)*

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

**2. Do you find that the plaintiff was (negligent) (or) (at fault) in causing (his) (her) own (injuries) (damages) (losses) as set forth in Instruction No.** *(insert the number assigned in the case to the instruction that sets forth the basic elements of any form of comparative fault, e.g., as in Instruction 14:28 or 14:29)? (Yes or No)*

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

*(Insert, as above in question 2, but in separately numbered questions, any additional forms of comparative fault.)*

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

**3. Do you find that the designated nonparty, (name of first designated nonparty), was (negligent) (or) (at fault) in causing plaintiff's (injuries) (damages) (losses) as set forth in Instruction No.** *(insert the number assigned in the case to the instruction that sets forth the basic elements of any form of comparative fault, e.g., as in Instruction 14:28 or 14:29)? (Yes or No)*

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

*(Insert, as above in question 3, but in separately numbered questions, any additional forms of comparative fault.)*

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

**4. Do you find that the designated nonparty, (name of second designated nonparty), was (negligent) (or) (at fault) in causing plaintiff's (injuries) (damages) (losses) as set forth in Instruction No.** *(insert the number of the instruction assigned in the case to the instruction that sets forth the basic elements of any form of comparative fault, e.g., as in Instruction 14:28 or 14:29)? (Yes or No)*

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

*(Insert, as above in question 4, but in separately numbered questions, any additional forms of comparative fault.)*

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

**5. State the total amount of plaintiff's (injuries) (damages) (losses) under Instruction No.** *(insert the number assigned in the case to the instruction that sets forth recoverable damages) that were caused by the combined (negligence) (or) (fault), if any, of:*

- a. the plaintiff; and
- b. the defendant; and
- c. (the designated nonparty) (any one or more of the designated nonparties).

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

6. Taking as 100 percent the combined (negligence) (or) (fault) that caused the plaintiff's (injuries) (damages) (losses), what percentage, if any, was caused by the (negligence) (or) (fault) of:

- a. the plaintiff; and
- b. the defendant; and
- c. (the designated nonparty) (any one or more of the designated nonparties)?

You must enter the figure of zero, "0," for any party or designated nonparty you have found was not (negligent) (or) (at fault).

ANSWER:

Percentage, if any, charged to plaintiff, <i>(name)</i> :	_____%
Percentage charged to defendant, <i>(name)</i> :	_____%
Percentage, if any, charged to designated nonparty, <i>(name of first designated nonparty)</i> :	_____%
Percentage, if any, charged to designated nonparty, <i>(name of second designated nonparty)</i> :	_____%
<b>MUST TOTAL: 100%</b>	_____%

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

**Notes on Use**

For alternative special verdict forms, see Instruction 4:20.

**Source and Authority**

This instruction is supported by sections 13-21-406 and 13-21-111.5, C.R.S.

**14:33 COMPARATIVE FAULT — ELEMENTS AND EFFECT — MULTIPLE DEFENDANTS — DESIGNATED NONPARTY OR NONPARTIES INVOLVED**

If you find that the plaintiff, *(name)*, had damages and that these damages were caused by the (negligence) (or) (fault) of any one or more of the defendants, *(names)*, you must then determine:

1. Whether the plaintiff was (negligent) (or) (at fault);
2. Whether any such (negligence) (or) (fault) of the plaintiff contributed to the plaintiff's own damages;
3. Whether (the designated nonparty, *[name]*, was) (any or all of the designated nonparties, *[name or names]*, were) (negligent) (or) (at fault); and
4. Whether any such (negligence) (or) (fault) of the designated (nonparty) (nonparties) contributed to the plaintiff's damages.

The (negligence) (or) (fault) of the plaintiff and the (negligence) (or) (fault) of (the designated nonparty) (any or all of the designated nonparties) are affirmative defenses that must be proved by a preponderance of the evidence.

If you find that either the plaintiff or (the designated nonparty was) (one or more of the designated nonparties were) (negligent) (or) (at fault), then you must also determine to what extent the (negligence) (or) (fault) of each of the defendants, the (negligence) (or) (fault) of the plaintiff, if any, and the (negligence) (or) (fault) of (the designated nonparty) (each of the designated nonparties), if any, contributed to the plaintiff's damages, expressed as a percentage of 100 percent.

If the plaintiff is allowed to recover, the total amount of the damages awarded will be reduced by the percentage of the (negligence) (or) (fault), if any, of the plaintiff and by the percentage of the (negligence) (or) (fault), if any, of the designated (nonparty) (nonparties).

If you find that neither the plaintiff nor (the designated nonparty) (any of the designated nonparties) was (negligent) (or) (at fault), you must still determine to what extent the (negligence) (or) (fault) of each of the defendants contributed to the plaintiff's damages, expressed as a percentage of 100 percent.

**Notes on Use**

1. See the Notes on Use to Instruction 14:30.
2. Use whichever parenthesized parts of the instruction are appropriate.
3. This instruction should be given in conjunction with Instructions 14:33A and 14:33B, and with appropriate instructions on damages. See Instructions 6:1, 6:1A, & 6:1B.

4. For alternative special verdict forms, see Instruction 4:20.

**Source and Authority**

This instruction is supported by sections 13-21-406 and 13-21-111.5, C.R.S.

**14:33A SPECIAL VERDICT — MECHANICS FOR SUBMITTING — NO COUNTERCLAIM — 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.**

**1. Do you find that the plaintiff, (name), is entitled to recover damages from the defendant, (name of first defendant), on (his) (her) claim of (insert appropriate description, e.g., “negligence,” “breach of the warranty of . . . ,” etc.), under Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of liability for the claim, as in Instructions 14:1, 14:8, 14:10, 14:13, 14:17, 14:20, or 14:22)?**

*(Insert additional separately numbered similar paragraphs so as to include all product liability claims being made against the first defendant.)*

**2. Do you find that the plaintiff is entitled to recover damages from the defendant, (name of second defendant), on (his) (her) claim of (insert appropriate description, e.g., “negligence,” “breach of the warranty of . . . ,” etc.), under Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of liability for the claim, as in Instructions 14:1, 14:8, 14:10, 14:13, 14:17, 14:20, or 14:22)?**

*(Insert additional separately numbered similar paragraphs so as to include all product liability claims being made against the second defendant.)*

**If your answer to (both of) (all of) these (number) questions is “no,” then your foreperson shall complete only Special Verdict Form A and all jurors must sign it.**

**On the other hand, if your answer to any one or more of these (number) questions, is “yes,” then you shall answer the following questions:**

**3. Do you find that the plaintiff was (negligent) (or) (at fault) in causing (his) (her) own (injuries) (damages) (losses) as set forth in Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of any form of comparative fault, e.g., as in Instruction 14:28 or 14:29)?**

*(Insert, as above in question 3, but in separately numbered questions, any additional forms of comparative fault.)*

**4. Do you find that the designated nonparty, (name of first designated nonparty), was (negligent) (or) (at fault) in causing plaintiff’s (injuries) (damages) (losses) as set forth in Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of any form of comparative fault, e.g., as in Instruction 14:28 or 14:29)?**

*(Insert, as above in question 4, but in separately numbered questions, any additional forms of comparative fault.)*



**5. Do you find that the designated nonparty, (name of second designated nonparty), was (negligent) (or) (at fault) in causing plaintiff's (injuries) (damages) (losses) as set forth in Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of any form of comparative fault, e.g., as in Instruction 14:28 or 14:29)?**

*(Insert, as above in question 5, but in separately numbered questions, any additional forms of comparative fault.)*

**If your answer to all of these questions numbered (insert specific numbers of questions relating to the comparative fault of the plaintiff and the designated nonparty or nonparties, e.g., 3, 4, etc.) is "no," you shall answer the following two questions, and then your foreperson shall complete only Special Verdict Form B and all jurors must sign it.**

**6. State the total amount of plaintiff's (injuries) (damages) (losses) under Instruction No. (insert the number assigned in the case to the instruction that sets forth recoverable damages) that were caused by the combined (negligence) (or) (fault) of all of the defendants from whom you have found that plaintiff is entitled to recover.**

**7. Taking as 100 percent the combined (negligence) (or) (fault) that caused the plaintiff's (injuries) (damages) (losses), what percentage was caused by the (negligence) (or) (fault), if any, of:**

- a. the defendant, (name of first defendant); and**
- b. the defendant, (name of second defendant).**

**You must enter the figure of zero, "0," for any defendant you have found was not (negligent) (or) (at fault).**

**On the other hand, if your answer to any one or more of questions numbered (insert specific numbers of questions relating to the comparative fault of the plaintiff and the designated nonparty or nonparties) is "yes," you shall answer the following questions, and then your foreperson shall complete only Special Verdict Form C and all jurors must sign it.**

**8. State the total amount of plaintiff's (injuries) (damages) (losses) under Instruction No. (insert the number assigned in the case to the instruction that sets forth recoverable damages) that were caused by the combined (negligence) (or) (fault), if any, of:**

- a. the plaintiff; and**
- b. all of the defendants from whom the plaintiff is entitled to recover; and**
- c. (the designated nonparty) (all of the designated nonparties that you have found to be [negligent] [or] [at fault]).**

**9. Taking as 100 percent the combined (negligence) (or) (fault) that caused the plaintiff's (injuries) (damages) (losses), what percentage was caused by the (negligence) (or) (fault), if any, of:**

- a. the plaintiff; and**
- b. each of the defendants from whom the plaintiff is entitled to recover; and**

**c. (the designated nonparty) (each of the designated nonparties that you have found to be [negligent] [or] [at fault]).**

**You must enter the figure of zero, “0,” for any party or designated nonparty you have found was not (negligent) (or) (at fault).**

#### **Notes on Use**

For alternative special verdict forms, see Instruction 4:20.

#### **Source and Authority**

This instruction is supported by sections 13-21-406 and 13-21-111.5, C.R.S.

**14:33B SPECIAL VERDICT FORMS — NO COUNTERCLAIM — MULTIPLE DEFENDANTS — DESIGNATED NONPARTY OR NONPARTIES INVOLVED — FORMS A, B, AND C**

**FORM A**

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

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

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

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

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

**1. Do you find that the plaintiff, (name), is entitled to recover damages from the defendant, (name of first defendant), on (his) (her) claim of (insert appropriate description, e.g., “negligence,” “breach of the warranty of . . . ,” etc.), under Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of liability for the claim as in Instructions 14:1, 14:8, 14:10, 14:13, 14:17, 14:20, or 14:22)? (Yes or No)**

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

*(Insert additional separately numbered similar paragraphs so as to include all product liability claims being made against the first defendant.)*

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

**2. Do you find that the plaintiff, (name), is entitled to recover damages from the defendant, (name of second defendant), on (his) (her) claim of (insert appropriate description, e.g., “negligence,” “breach of the warranty of . . . ,” etc.), under Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of liability for the claim, as in Instructions 14:1, 14:8, 14:10, 14:13, 14:17, 14:20, or 14:22)? (Yes or No)**

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

*(Insert additional separately numbered similar paragraphs so as to include all product liability claims being made against the second defendant.)*

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

We, the jury, having answered (both) (all) of these (number) questions “no,” find the issues for (both) (all) the defendants, (names).

_____	_____
_____	_____
_____	_____
	<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 AND ALL JURORS HAVE SIGNED EITHER SPECIAL VERDICT FORM A OR SPECIAL VERDICT FORM C.**

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

**1. Do you find that the plaintiff, (name), is entitled to recover damages from the defendant, (name of first defendant), on (his) (her) claim of (insert appropriate description,**

*e.g., “negligence,” “breach of the warranty of . . . ,” etc.), under Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of liability for the claim, as in Instructions 14:1, 14:8, 14:10, 14:13, 14:17, 14:20, or 14:22)? (Yes or No)*

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

*(Insert additional separately numbered similar paragraphs so as to include all product liability claims being made against the first defendant.)*

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

**2. Do you find that the plaintiff, (name), is entitled to recover damages from the defendant, (name of second defendant), on (his) (her) claim of (insert appropriate description, e.g., “negligence,” “breach of the warranty of . . . ,” etc.) under Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of liability for the claim, as in Instructions 14:1, 14:8, 14:10, 14:13, 14:17, 14:20, or 14:22)? (Yes or No)**

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

*(Insert additional separately numbered similar paragraphs so as to include all product liability claims being made against the second defendant.)*

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

**3. Do you find that the plaintiff was (negligent) (or) (at fault) in causing (his) (her) own (injuries) (damages) (losses) as set forth in Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of any form of comparative fault, e.g., as in Instruction 14:28 or 14:29)? (Yes or No)**

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

*(Insert, as above in question 3, but in separately numbered questions, any additional forms of comparative fault).*

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

**4. Do you find that the designated nonparty, (name of first designated nonparty), was (negligent) (or) (at fault) in causing plaintiff’s (injuries) (damages) (losses) as set forth in Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of any form of comparative fault, e.g., as in Instruction 14:28 or 14:29)? (Yes or No)**

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

*(Insert, as above in question 4, but in separately numbered questions, any additional forms of comparative fault.)*

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

**5. Do you find that the designated nonparty, (name of second designated nonparty), was (negligent) (or) (at fault) in causing plaintiff's (injuries) (damages) (losses) as set forth in Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of any form of comparative fault, e.g., as in Instruction 14:28 or 14:29)? (Yes or No)**

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

*(Insert, as above in question 5, but in separately numbered questions, any additional forms of comparative fault.)*

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

**6. State the total amount of plaintiff's (injuries) (damages) (losses) under Instruction No. (insert the number assigned in the case to the instruction that sets forth recoverable damages) that were caused by the combined (negligence) (or) (fault) of all of the defendants from whom you have found that plaintiff is entitled to recover.**

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

**7. Taking as 100 percent the combined (negligence) (or) (fault) that caused the plaintiff's (injuries) (damages) (losses), what percentage was caused by the (negligence) (or) (fault), if any, of:**

- a. the defendant, (name of first defendant); and**
- b. the defendant, (name of second defendant).**

**You must enter the figure of zero, "0", for any defendant you have found was not (negligent) (or) (at fault).**

ANSWER:

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

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

**MUST TOTAL: 100% \_\_\_\_\_%**

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

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

Foreperson

**FORM C**

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

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

\_\_\_\_\_)  
**Plaintiff,** )  
 )  
 )  
 v. )  
 )  
 \_\_\_\_\_) )  
**Defendant.** )

**SPECIAL VERDICT  
 FORM C**

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

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

**1. Do you find that the plaintiff, (name), is entitled to recover damages from the defendant, (name of the first defendant), on (his) (her) claim of (insert appropriate description, e.g., "negligence," "breach of the warranty of . . .," etc.) under Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of liability for the claim, as in Instructions 14:1, 14:8, 14:10, 14:13, 14:17, 14:20, or 14:22)? (Yes or No)**

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

*(Insert additional separately numbered similar paragraphs so as to include all product liability claims being made against the first defendant.)*

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

**2. Do you find that the plaintiff, (name), is entitled to recover damages from the defendant, (name of second defendant), on (his) (her) claim of (insert appropriate description, e.g., “negligence,” “breach of the warranty of . . . ,” etc.), under Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of liability for the claim, as in Instructions 14:1, 14:8, 14:10, 14:13, 14:17, 14:20, or 14:22)? (Yes or No)**

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

*(Insert additional separately numbered similar paragraphs so as to include all product liability claims being made against the second defendant.)*

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

**3. Do you find that the plaintiff was (negligent) (or) (at fault) in causing (his) (her) own (injuries) (damages) (losses) as set forth in Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of any form of comparative fault, e.g., as in Instruction 14:28 or 14:29)? (Yes or No)**

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

*(Insert, as above in question 3, but in separately numbered questions, any additional forms of comparative fault.)*

**4. Do you find that the designated nonparty, (name of first designated nonparty), was (negligent) (or) (at fault) in causing plaintiff’s (injuries) (damages) (losses) as set forth in Instruction No. (insert the number of the instruction assigned in the case to the instruction that sets forth the basic elements of any form of comparative fault, e.g., as in Instruction 14:28 or 14:29)? (Yes or No)**

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

*(Insert, as above in question 4, but in separately numbered questions, any additional forms of comparative fault.)*

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

**5. Do you find that the designated nonparty, (name of second designated nonparty), was (negligent) (or) (at fault) in causing plaintiff’s (injuries) (damages) (losses) as set forth in Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of any form of comparative fault, e.g., as in Instruction 14:28 or 14:29)? (Yes or No)**

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

*(Insert, as above in question 5, but in separately numbered questions, any additional forms of comparative fault.)*



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

**6. State the total amount of plaintiff's (injuries) (damages) (losses) under Instruction No. (insert the number assigned in the case to the instruction that sets forth recoverable damages) that were caused by the combined (negligence) (or) (fault), if any, of:**

- a. the plaintiff, (name); and**
- b. the defendant, (name of first defendant); and**
- c. the defendant, (name of second defendant); and**
- d. the designated nonparty, (name of first designated nonparty); and**
- e. the designated nonparty, (name of second designated nonparty).**

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

**7. Taking as 100 percent the combined (negligence) (or) (fault) that caused the plaintiff's (injuries) (damages) (losses), what percentage, if any, was caused by the (negligence) (or) (fault) of:**

- a. the plaintiff, (name); and**
- b. the defendant, (name of first defendant); and**
- c. the defendant, (name of second defendant); and**
- d. the designated nonparty, (name of first designated nonparty)(.)(; and**
- e. the designated nonparty, [name of second designated nonparty]).**

**You must enter the figure zero, "0," for any party or designated nonparty you have found was not (negligent) (or) (at fault).**

**ANSWER:**

<b>Percentage, if any, charged to plaintiff, (name):</b>	_____ %
<b>Percentage, if any, charged to defendant, (name of first defendant):</b>	_____ %
<b>Percentage, if any, charged to defendant, (name of second defendant):</b>	_____ %
<b>Percentage, if any, charged to designated nonparty, (name of first designated nonparty):</b>	_____ %
<b>(Percentage, if any, charged to designated nonparty, [name of second designated nonparty]:)</b>	_____ %
<b>MUST TOTAL: 100%</b>	_____ %

	<b>Foreperson</b>

**Notes on Use**

For alternative special verdict forms, see Instruction 4:20.

**Source and Authority**

This instruction is supported by sections 13-21-406 and 13-21-111.5, C.R.S.