

CHAPTER 28

INVASION OF PRIVACY

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28:1 INVASION OF PRIVACY BY INTRUSION — ELEMENTS OF LIABILITY

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

- 1. The defendant intentionally invaded the plaintiff's privacy by [*insert description of act(s) alleged to constitute intrusion*];**
- 2. The invasion would be very offensive to a reasonable person;**
- 3. The plaintiff had (injuries) (damages) (losses); and**
- 4. The invasion was a cause of the plaintiff's (injuries) (damages) (losses).**

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

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

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

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

Notes on Use

1. Omit any numbered paragraph, the facts of which are not in dispute.
2. In cases involving multiple defendants or designated nonparties where the pro rata liability statute, § 13-21-111.5, C.R.S., is applicable, see Notes on Use to Instruction 4:20.
3. If the defendant has put no affirmative defense in issue, or there is insufficient evidence to support a defense, the last two paragraphs should be omitted.
4. Though mitigation of damages is an affirmative defense, see Instruction 5:2, only rarely, if ever, will it be a complete defense. For this reason, mitigation should not be identified as an affirmative defense in the concluding paragraphs of this instruction. Instead, if supported by sufficient evidence, Instruction 5:2 should be given along with the actual damages instruction appropriate to the claim and the evidence in the case.

5. Other instructions defining terms used in this instruction, e.g., Instructions 28:2, defining “very offensive to a reasonable person,” 28:3, defining “intentional,” and 9:18 to 9:21, relating to causation, should be given with this instruction.

Source and Authority

1. **Rugg v. McCarty**, 173 Colo. 170, 476 P.2d 753 (1970); **Pearson v. Kancilia**, 70 P.3d 594 (Colo. App. 2003) (evidence that plaintiff was subjected to unwanted sexual advances and contact by her employer, including early morning visits to plaintiff’s apartment, was sufficient to support claim for invasion of privacy by intrusion); **Doe v. High-Tech Inst., Inc.**, 972 P.2d 1060 (Colo. App. 1998), *cert. denied* (1999); RESTATEMENT (SECOND) OF TORTS § 652B (1977).

2. The right of privacy has been defined as “the right to be let alone,” and the invasion of privacy torts are concerned primarily with redress for injury to feelings caused by invasions of that right. RESTATEMENT (SECOND) OF TORTS § 652A cmt. a (1977); Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). As it has developed in the courts, the tort of invasion of the right of privacy has been divided into four forms: (1) unreasonable intrusion upon the seclusion of another; (2) appropriation of the name or likeness of another; (3) unreasonable publicity given to another’s private life; and (4) publicity that unreasonably places another in a false light before the public. RESTATEMENT § 652A cmt. a; Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960). For instructions dealing with forms (2), (3), and (4), see Instructions 28:4, 28:5, and 28:10, respectively. Colorado does not recognize the tort of “false light” invasion of privacy *See* Instruction 28:10.

3. Because corporations, associations, and partnerships have no “feelings” or any right to personal privacy, they may not recover for an invasion thereof; suits for invasion of privacy can be brought only by individuals. RESTATEMENT (SECOND) OF TORTS § 652I cmt. c (1977). Except for the tort of invasion of privacy by appropriation, the right is personal, and cannot be assigned. RESTATEMENT § 652C cmt. a and 652I; *see also McKenna v. Oliver*, 159 P.3d 697 (Colo. App. 2006), *cert. denied* (2007). There is no Colorado decision and a split of authority in other jurisdictions as to whether an unaccrued right for appropriation survives the death of the individual. *See* RESTATEMENT § 652C cmt. a and § 652I. *See also* J. MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 9.5 (1997). There is no “relational” right of privacy on behalf of family or associates of the person whose privacy has been invaded; thus, only the person referred to may maintain the action. R. SACK & S. BARON, LIBEL, SLANDER AND RELATED PROBLEMS § 12:3.3 (4th ed. 2014).

4. The Colorado Supreme Court first recognized the tort of invasion of privacy in **Rugg v. McCarty**, 173 Colo. 170, 476 P.2d 753 (1970). **Rugg** involved circumstances that implicate invasion of privacy by intrusion, and the court declined “comprehensively [to] define the right of privacy, [or] to categorize the character of all invasions which may constitute a violation of such right.” *Id.* at 755. The court acknowledged the four forms of invasion of privacy in **People v. Home Ins. Co.**, 197 Colo. 260, 263, 591 P.2d 1036, 1038 (1979), but the reference was dictum. In **Robert C. Ozer, P.C. v. Borquez**, 940 P.2d 371 (Colo. 1997), the court again acknowledged the four theories and specifically adopted the tort of public disclosure of private facts. More recently, the Colorado Supreme Court recognized a form of the appropriation tort in **Joe**

Dickerson & Assocs., LLC v. Dittmar, 34 P.3d 995 (Colo. 2001). The court declined to recognize the false light theory in **Denver Publ’g Co. v. Bueno**, 54 P.3d 893 (Colo. 2002).

5. Invasion of privacy by intrusion does not depend upon any publicity, or communication to the public generally, nor does it require a physical intrusion. **Doe v. High-Tech Inst., Inc.**, 972 P.2d 1060 (Colo. App. 1998), *cert. denied* (1999); RESTATEMENT (SECOND) OF TORTS § 652B cmt. a (1977). The gist of the tort is interference with the plaintiff’s solitude, seclusion, or private affairs and concerns, and this can occur by an unauthorized entry to the plaintiff’s premises, electronic eavesdropping, unauthorized opening of the plaintiff’s mail, or repeated hounding and harassment. *Id.* cmt. b. The testing of the plaintiff’s bodily fluids without the plaintiff’s consent may also invade the plaintiff’s privacy. **Doe**, 972 P.2d 1060. The intrusion into the plaintiff’s privacy requires intentional rather than merely reckless conduct. **Fire Ins. Exch. v. Sullivan**, 224 P.3d 348 (Colo. App. 2009), *cert. denied* (2010).

6. A private cause of action exists under federal law for illegal wiretapping, *see* 18 U.S.C. § 2520, except where one party to the conversation consented to the interception. *See* 18 U.S.C. § 2511(2)(d). Colorado’s criminal law prohibiting wiretapping similarly exempts from liability any interception of an aural communication where the sender or receiver consented to the recording. *See* § 18-9-303(1)(a), C.R.S. No Colorado court has yet recognized an implied private cause of action under the Colorado anti-wiretapping statute.

7. For statutory actions for wrongful debt collection practices, *see* § 12-14-113, C.R.S.

8. Privacy claims for intrusions by governmental regulation in areas of personal choice that are protected by the Constitution are beyond the scope of this chapter. *See* J. MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 5.7 (1997). Also, actions against governmental agencies or authorities in violation of privacy rights protected by the Fourth Amendment are not treated in this chapter.

9. There is no liability for examining public records or other information that is properly available for public inspection. RESTATEMENT (SECOND) OF TORTS § 652B cmt. c (1977). Neither is there liability for observing or photographing the plaintiff in a public place. *Id.*

10. Where the alleged intrusion is an entry onto private property, a plaintiff must demonstrate a “possessory or proprietary” interest in the property. **Sundheim v. Bd. of Cnty. Comm’rs**, 904 P.2d 1337 (Colo. App. 1995), *aff’d on other grounds*, 926 P.2d 545 (Colo. 1996) (plaintiff who leased property to business tenant lacks standing to assert privacy right invaded by an intrusion on the property). When an intrusion occurs on business premises which are open to the public and “is based upon the nature of the business activities there taking place,” there may be no actionable intrusion. *Id.* Observation and photographs of plaintiff’s premises from a vantage point outside the perimeter of the property is not an intrusion, and neither is the use of lenses to enhance the view of what is readily visible. *Id.*

11. In **Rugg v. McCarty**, 173 Colo. 170, 476 P.2d 753 (1970), the court observed that “reasonable” debt collection practices “may result to a certain degree in the invasion of the debtor’s right of privacy” and emphasized that an actionable invasion of privacy occurs only “when unreasonable action in pursuing a debtor is taken, which foreseeably will probably result

in extreme mental anguish, embarrassment, humiliation, or mental suffering, and injury to a person possessed of ordinary sensibilities, under the same or similar circumstances.” *Id.* at 755. It appears that this language was intended to define the scope of conduct that is unreasonably intrusive and, therefore, actionable. It may be that this language was intended to impose a requirement that the plaintiff in fact suffer “extreme mental anguish,” but the court has not declared that this is an element of the tort.

12. There are no Colorado appellate court cases, and there is divided authority in other jurisdictions, as to whether the plaintiff may recover for injury resulting from the publication of information obtained through an actionable intrusion when the publication itself would not be actionable. R. SACK & S. BARON, *LIBEL, SLANDER AND RELATED PROBLEMS* § 12:6 (4th ed. 2014). The Tenth Circuit Court of Appeals has predicted that Colorado courts would answer the question in the negative. **Quigley v. Rosenthal**, 327 F.2d 1044 (10th Cir. 2003), *cert. denied sub nom. Anti-Defamation League v. Quigley*, 540 U.S. 1229, 124 S. Ct. 1507, 158 L. Ed. 2d 172 (2004).

28:2 INTRUSION — VERY OFFENSIVE TO A REASONABLE PERSON — DEFINED

In determining whether an invasion is very offensive to a reasonable person, you should consider all of the evidence, including the degree of invasion, the circumstances surrounding the intrusion and the manner in which it occurred, the defendant's motives and objectives, the setting in which the intrusion occurs, and the plaintiff's expectations of privacy in that setting.

The right of privacy does not protect people from minor annoyance, indignities, or insults, or the normal, expected contacts with and exposure to life in a modern society.

Notes on Use

The First Amendment to the Constitution of the United States creates no privilege for journalists to commit an intrusion in the course of gathering news; however, the purpose of the defendant in seeking information may be relevant to whether the intrusion would be "highly offensive to a reasonable person." See R. SACK & S. BARON, *LIBEL, SLANDER AND RELATED PROBLEMS* § 12:6 (4th ed. 2014).

Source and Authority

Rugg v. McCarty, 476 P.2d 753 (Colo. 1970); **Pearson v. Kancilia**, 70 P.3d 594 (Colo. App. 2003) (evidence that plaintiff was subjected to unwanted sexual advances and contact by her employer, including early morning visits to plaintiff's apartment, was sufficient to support claim for invasion of privacy by intrusion); **Doe v. High-Tech Inst., Inc.**, 972 P.2d 1060 (Colo. App. 1998), *cert. denied* (1999); RESTATEMENT (SECOND) OF TORTS § 652B cmts. b and d (1977); W. PROSSER & W. KEETON, *TORTS* § 117, at 854-56 (5th ed. 1984); J. MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 5.10[A][1] (1997).

28:3 INTENTIONAL INTRUSION — DEFINED

A defendant intends to invade the plaintiff’s privacy when (he) (she) (it) means to invade the plaintiff’s privacy, or knows that (his) (her) (its) conduct will almost certainly cause an invasion of privacy.

Notes on Use

1. The element of intent may also require that the defendant have knowledge to a substantial certainty that he lacks permission or consent to commit the intrusive act. J. MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 5.10[A] [1] (1997). *See also Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 97 S. Ct. 2849, 53 L. Ed. 2d 965 (1977).

Source and Authority

This instruction is supported by RESTATEMENT (SECOND) OF TORTS § 8A (1977); J. MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 5.10[A] [1] (1997).

28:4 INVASION OF PRIVACY BY APPROPRIATION — ELEMENTS OF LIABILITY

For the plaintiff, (*name*), to recover from the defendant, (*name*), on (his) (her) claim of invasion of privacy by improper use of plaintiff's (name) (likeness) (or) (identity), you must find all of the following have been proved by a preponderance of the evidence:

- 1. The defendant used the plaintiff's (name) (likeness) (or) (identity);**
- 2. The use of the plaintiff's (name) (likeness) (or) (identity) was for the defendant's own purposes or benefit, commercially or otherwise;**
- 3. The plaintiff had (damages) (injuries) (losses); and**
- 4. The defendant's use of the plaintiff's (name) (likeness) (or) (identity) was a cause of the plaintiff's (damages) (injuries) (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 the plaintiff's claim*]).

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

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

Notes on Use

1. Omit any numbered paragraph, the facts of which are not in dispute.
2. In cases involving multiple defendants or designated nonparties where the pro rata liability statute, § 13-21-111.5, C.R.S., is applicable, see Notes on Use to Instruction 4:20.
3. If the defendant has put no affirmative defense in issue, or there is insufficient evidence to support a defense, the parenthesized portion of the last two paragraphs should be omitted.
4. 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 paragraph of this instruction. Instead, Instruction 5:2

should be given along with the damages instruction appropriate to the claim and the evidence in the case.

5. Other appropriate instructions, including Instructions 9:18 to 9:21, relating to causation, should also be given with this instruction.

6. See Notes 6 to 8 of Notes on Use to Instruction 28:1.

7. For a use of the plaintiff's name or likeness to be an appropriation, the plaintiff must be identifiable as the person who is the subject of the defendant's use. When identifiability is in issue, a separate instruction must be given. *See* J. MCCARTHY, RIGHTS OF PUBLICITY AND PRIVACY § 3.4 (1997).

8. The extent to which constitutional limits may apply to the privacy torts that involve publication but not falsity (namely, appropriation and public disclosure of private facts) has not yet been determined. *See Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 97 S. Ct. 2849, 53 L. Ed. 2d 965 (1977); RESTATEMENT §§ 564 cmts. f and g, 580A cmts. d and i, and 580B cmt. d (1977); MCCARTHY §§ 3.5[B], 3.6, 3.8 (1997). If the court determines that intent or fault in some form is required, or that the plaintiff has the burden of proving that the use was unauthorized, this instruction must be modified accordingly.

Source and Authority

1. This instruction is supported by **Joe Dickerson & Assocs., LLC v. Dittmar**, 34 P.3d 995 (Colo. 2001); RESTATEMENT (SECOND) OF TORTS § 652C.

2. In **Joe Dickerson & Assocs., LLC v. Dittmar**, 34 P.3d 995 (Colo. 2001), the Colorado Supreme Court adopted the cause of action of appropriation of name, likeness, or identity, but limited the tort as so recognized to recovery of "personal damages," including mental anguish and injured feelings. The court did not reach the question whether Colorado would permit recovery for commercial damages related to one's identity or persona, and, if permitted, whether the plaintiff must prove the value of his or her identity to recover such damages. The court did not specify what damages and losses would be included within the term "personal damages," but apparently intended those damages to include emotional injury, harm to reputation and related financial losses, but not damages based upon the commercial value of one's persona. In other jurisdictions, courts have recognized a "right of publicity" against one who appropriates, without consent, the plaintiff's name, likeness or identity, under which commercial damages are recoverable if the plaintiff proves value in his or her identity. *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995).

3. In **Dittmar**, 34 P.3d 995, the court also recognized that use of the plaintiff's name, likeness or identity is privileged under the First Amendment and not actionable when it is made in a context that is relevant to a subject that is "newsworthy" or of "legitimate public concern"; such use is to be distinguished from a use that is "predominantly commercial," which is not so protected. *Id.* at 1003. The court indicated that the public interest privilege is a broad one that bars the claim unless the use is "mainly for purposes of trade, without a redeeming public interest, news, or historical value," *id.* Social or political commentaries, lifestyle features, artistic

and entertainment works, including parody and satire, may also be protected as long as they are not predominantly commercial. R. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS § 12:5 (4th ed. 2014). It is not sufficient for the plaintiff to show that defendant's use of his or her name, likeness or identity was in connection with a profitmaking enterprise, such as a newspaper, magazine, or television station. **Dittmar**, 34 P.3d at 1004.

4. The determination of whether the public interest privilege applies is a question of law for the court. **Dittmar**, 34 P.3d at 1003. In making that determination, the court is to consider the content of the speech at issue and not the motivation of the speaker, even if that motive is primarily to promote the defendant's products or services. *Id.*

5. Under the common law of defamation, one who is not an originator of a communication, but is merely its conduit or distributor, cannot be held liable unless the actor knew or should have known of the defamatory nature of the publication. *See* RESTATEMENT §§ 577, 581. The "distributor" doctrine has also been applied in privacy tort cases that do not involve the element of falsity, and it requires that the communicator have knowledge of the actionable character of the communication. MCCARTHY § 3.7[D]. The "distributor" doctrine has been applied generally to bookstores, magazine stands, libraries, and others. It has been applied also to newspapers when they publish advertisements submitted by others. *See* Instruction 22:24.

**28:5 INVASION OF PRIVACY BY PUBLIC DISCLOSURE OF PRIVATE FACTS —
ELEMENTS OF LIABILITY**

For the plaintiff, (*name*), to recover from the defendant, (*name*), on (his) (her) claim for invasion of privacy by public disclosure of private facts, you must find all of the following have been proved by a preponderance of the evidence:

- 1. The defendant made (a) fact(s) about the plaintiff public;**
- 2. Before this disclosure, the (fact was) (facts were) private;**
- 3. A reasonable person would find the disclosure of (that fact) (those facts) very offensive;**
- 4. At the time of the disclosure, the defendant knew or should have known that the fact or facts (he) (she) (it) disclosed were private;**
- 5. The plaintiff had (injuries) (losses) (damages); and**
- 6. The public disclosure of (this fact was) (these facts were) a cause of the plaintiff's (injuries) (losses) (damages).**

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

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

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

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

Notes on Use

1. Omit any numbered paragraph, the facts of which are not in dispute.
2. In cases involving multiple defendants or designated nonparties where the pro rata liability statute, Section 13-21-111.5, C.R.S., is applicable, see Notes on Use to Instruction 4:20.
3. If the defendant has put no affirmative defense in issue, or there is insufficient evidence to support a defense, the last two paragraphs should be omitted.

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

5. Other appropriate instructions defining the terms used in this instruction, e.g., Instructions 28:6, defining “public,” 28:7, defining “about the plaintiff,” 28:8, defining “private” facts, 28:9, defining “very offensive to a reasonable person,” and 9:18 to 9:21, relating to causation, should also be given with this instruction.

6. The disclosure must be of a matter that has previously been private, thus excluding information that is already public, available from public records, or which the plaintiff leaves open to the public. RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (1977). Embarrassing and otherwise private facts are not considered private for purposes of the public disclosure tort after they have been disclosed in an arbitration proceeding in which confidentiality was not required by agreement, order, or rule. **A.T. v. State Farm Mut. Auto. Ins. Co.**, 989 P.2d 219 (Colo. App.), *cert. denied* (1999).

7. See Notes 8 and 9 of Notes on Use to Instruction 28:4.

Source and Authority

1. This instruction is supported by **Robert C. Ozer, P.C. v. Borquez**, 940 P.2d 371 (Colo. 1997); RESTATEMENT (SECOND) OF TORTS § 652D (1977).

2. In **Robert C. Ozer, P.C. v. Borquez**, 940 P.2d 371 (Colo. 1997), the court recognized the privacy tort of public disclosure of private facts and that the tort requires that the following elements be proved: (1) the fact or facts disclosed must be private in nature; (2) the disclosure must be made to the public; (3) the disclosure must be one which would be highly offensive to a reasonable person; (4) the facts disclosed cannot be of legitimate concern to the public; and (5) the defendant acted with reckless disregard of the private nature of the fact or facts disclosed. The court clarified that for the disclosure to be “made to the public” it must be made to the “public in general or to a large number of persons, as distinguished from one individual or a few.” *Id.* at 379. The court also held that the requirement of “reckless disregard” for the private nature of the disclosure is met when the defendant “knew or should have known that the fact or facts disclosed were private in nature.” *Id.* See also **Fire Ins. Exch. v. Sullivan**, 224 P.3d 348 (Colo. App. 2009), *cert. denied* (2010).

3. In **Borquez**, the court also noted that “public disclosure may occur where the defendant merely initiates the process whereby the information is eventually disclosed to a large number of persons,” citing **Beaumont v. Brown**, 401 Mich. 80, 101, 257 N.W.2d 522, 530 (1977). *Id.* at 377. When the defendant did not actually make the public disclosure, but may nonetheless be held responsible for it, this instruction should be modified accordingly.

4. The fourth element, that the facts disclosed cannot be of legitimate concern to the public, is not covered by this instruction because it appears to be a question of law. The

determination of what is a matter of public or general concern in the defamation context is a question of law for the court to decide. **Walker v. Colo. Springs Sun, Inc.**, 188 Colo. 86, 538 P.2d 450 (1975). The same legal issue is presented in the privacy context. **Lewis v. McGraw-Hill Broad. Co.**, 832 P.2d 1118, 1121 (Colo. App. 1992). The United States Supreme Court has also treated the issue as one of law for the court to decide. *See* **Connick v. Myers**, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983). Thus, if the court determines that the facts disclosed by the defendant(s) touch upon a matter of legitimate public interest or concern, in light of authorities cited below, the statements are immune from liability.

5. Because the “public disclosure” privacy tort challenges the right to disseminate truthful information to the public, it “most directly confront[s] the constitutional freedoms of speech and press.” **Cox Broad. Corp. v. Cohn**, 420 U.S. 469, 489, 95 S. Ct. 1029, 1043, 43 L. Ed. 2d 328 (1975). Although the United States Supreme Court has not yet determined whether such disclosures may ever be actionable, the Court has indicated that sanctions may not be imposed for disseminating matters of legitimate public interest, and in particular, a party disseminating matters that are contained in a government record available to the public may not be subject to liability. *Id.* at 496. In **Florida Star v. B.J.F.**, 491 U.S. 524, 109 S. Ct. 2603, 105 L. Ed. 2d 443 (1989), the Court considered the actionability of publication of the identity of a rape victim, which the authorities had inadvertently disclosed to the media, contrary to Florida law. In considering the First Amendment implications of civil liability for this publication, the Court held that “where a newspaper publishes truthful information which it has lawfully obtained, punishment may be lawfully imposed, if at all, only when narrowly tailored to a state interest of the highest order.” *Id.* at 541. Applying this standard, the court concluded that “no such interest is satisfactorily served by imposing liability . . . on appellant under the facts of this case.” *Id.* The precedent relied upon by the Court in **Fla. Star** indicates that to receive First Amendment protection the matter must be of “public significance.” *Id.* at 533, 536, quoting **Smith v. Daily Mail Publ’g Co.**, 443 U.S. 97, 103, 99 S. Ct. 2667, 2670, 61 L. Ed. 2d 399 (1979).

6. Although courts recognizing the common-law public disclosure tort have also recognized immunity under the common law for publication of material that is “newsworthy” or of legitimate interest to the public, RESTATEMENT (SECOND) OF TORTS § 652D cmt. d (1977), those have been subsumed by the First Amendment’s protection of disclosures that are relevant to a matter of public or general concern. The First Amendment protects disclosures even of private facts that are highly offensive to a person of ordinary sensibilities, when those facts have a reasonable nexus to a matter of legitimate public interest. **Robert C. Ozer, P.C. v. Borquez**, 940 P.2d 371 (Colo. 1997), following **Gilbert v. Med. Econs. Co.**, 665 F.2d 305 (10th Cir. 1981) (applying Colorado law). This includes information that would otherwise be private concerning individuals who, voluntarily or not, have become involved in a matter that is the legitimate subject of public interest. RESTATEMENT (SECOND) OF TORTS § 652D cmts. d-f (1977). The topics include homicide and other crimes, arrests, police raids, suicides, marriages and divorces, accidents, fires, catastrophes of nature, death from use of narcotics, a rare disease, the birth of a child to a 12-year-old girl, and many other similar matters of genuine, even if more or less deplorable, popular appeal. *Id.* cmt. g. Disclosing the identities of the individuals involved in such matters is necessary to “obviate any impression that the problems raised in the article are remote or hypothetical.” **Gilbert**, 665 F.2d at 308. However, even for those that become involved in such matters, there may be some intimate details of a person’s life that the person is entitled to keep to himself or herself. RESTATEMENT § 652D cmt. h.

7. The scope of a matter of legitimate public concern may include disclosures about members of family of a person involved in a newsworthy matter. RESTATEMENT, § 652D cmt. i. Immune publicity is not limited to news, but also includes matters published for purposes of education, entertainment, or amusement. **Lewis v. McGraw-Hill Broad. Co.**, 832 P.2d 1118 (Colo. App. 1992); RESTATEMENT § 652D cmt. j. A matter of public or general concern does not lose that status due to the passage of time. **Lindemuth v. Jefferson Cnty. Sch. Dist. R-1**, 765 P.2d 1057 (Colo. App. 1988); RESTATEMENT § 652D cmt. k.

8. In phrasing the element in terms deferential to free speech (“the fact . . . disclosed cannot be of legitimate concern to the public”), the Colorado Supreme Court has explained that the “test ‘properly restricts liability for disclosure of private facts to the extreme case, thereby providing the breathing space needed by the press.’ ” **Robert C. Ozer, P.C. v. Borquez**, 940 P.2d 371, 378-79 (Colo. 1997), quoting **Gilbert v. Med. Econs. Co.**, 665 F.2d at 308 (10th Cir. 1981).

28:6 PUBLIC STATEMENT OR DISCLOSURE — DEFINED

A (fact) (disclosure) (statement) is “public” if it is communicated to the general public. It is also public if it is communicated to a large number of persons. There is no specific number of people that the law considers to be a large number; you must consider the particular circumstances in determining whether the disclosure is sufficiently public to be an invasion of privacy. In making that determination, you may consider, in addition to the number of persons to whom the disclosure was made, *(insert description of circumstances that the court has determined are relevant to the determination of what constitutes a large number of people)*.

Notes on Use

1. The torts of invasion of privacy by public disclosure of private facts and by placing the plaintiff in a false light before the public require “publicity” as an element of each tort. RESTATEMENT (SECOND) OF TORTS § 652D cmt. a, § 652E cmt. a (1977); R. SACK, LIBEL, SLANDER, & RELATED PROBLEMS § 12.3.1.1 (3d ed. 1999). “Publicity” means more than “publication” in the defamation sense, and disclosure to one person or a small group is not sufficient. **Robert C. Ozer, P.C. v. Borquez**, 940 P.2d 371 (Colo. 1997). In **Borquez**, the court stated that “there is no threshold number which constitutes a large number of persons. Rather the facts and circumstances of a particular case must be taken into consideration in determining whether the disclosure is sufficiently public so as to support a claim for invasion of privacy.” *Id.* at 378, citing **Kinsey v. Macur**, 107 Cal.App.3d 265, 165 Cal. Rptr. 608, 611 (1980) (defendant’s dissemination of copies of a letter to over 20 people constituted public disclosure).

2. There are no decisions indicating under what circumstances the determination as to whether a disclosure is “public” or made to a “large number of persons” is a jury question.

Source and Authority

This instruction is supported by **Robert C. Ozer, P.C. v. Borquez**, 940 P.2d 371 (Colo. 1997); RESTATEMENT (SECOND) OF TORTS § 652D cmt. a (1977).

28:7 ABOUT THE PLAINTIFF — DEFINED

A public (disclosure) (statement) is about the plaintiff if people who (see) (hear) (read) the (disclosure) (statement) would reasonably understand that it refers to the plaintiff.

Source and Authority

This instruction is supported by R. SACK, *LIBEL, SLANDER & RELATED PROBLEMS* § 12:4.3 (4th ed. 2014); J. MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* §§ 3.3[B][2] and 3.4[C] (1997).

28:8 PRIVATE FACTS — DEFINED

Private facts are those that relate to the plaintiff's private life and are not already known in the community, contained in a public record, or properly available to the public. Events that take place in public places, information available to the public, or facts that the plaintiff leaves open to the public are not private.

Notes on Use

1. This instruction is to be used with Instruction 28:5.
2. There are no Colorado cases, and other jurisdictions are divided as to whether there is a limited exception for giving publicity to extraordinarily embarrassing events that occur in public places. *See* R. SACK, LIBEL, SLANDER & RELATED PROBLEMS § 12:4.4 (4th ed. 2014).

Source and Authority

This instruction is supported by **Robert C. Ozer, P.C. v. Borquez**, 940 P.2d 371 (Colo. 1997); **Tonnessen v. Denver Publ'g Co.**, 5 P.3d 959 (Colo. App. 2000); **A.T. v. State Farm Mut. Auto. Ins. Co.**, 989 P.2d 219 (Colo. App.), *cert. denied* (1999); **Lincoln v. Denver Post, Inc.**, 501 P.2d 152 (Colo. App. 1972); RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (1977); R. SACK, LIBEL, SLANDER & RELATED PROBLEMS § 12:4.4 (4th ed. 2014).

28:9 PUBLIC DISCLOSURE OF PRIVATE FACTS — VERY OFFENSIVE TO A REASONABLE PERSON — DEFINED

Public disclosure of private facts is “very offensive” when a reasonable person would feel seriously upset or embarrassed by it. Public disclosure of normal daily activities or of unflattering conduct that would cause minor or even moderate annoyance to a person of ordinary sensitivities cannot be considered “very offensive.”

Notes on Use

1. This instruction is to be used with Instruction 28:5.

Source and Authority

1. This instruction is supported by **Robert C. Ozer, P.C. v. Borquez**, 940 P.2d 371 (Colo. 1997).

2. In **Robert C. Ozer, P.C. v. Borquez**, 940 P.2d 371 (Colo. 1997), the court compared, as illustrative of this standard, **Urbaniak v. Newton**, 226 Cal.App.3d 1128, 277 Cal.Rptr. 354, 360 (1991) (disclosure of HIV positive status was highly offensive to a reasonable person), and **Virgil v. Sports Illustrated**, 424 F. Supp. 1286 (S.D. Cal. 1976) (disclosure of a person’s unflattering habits and idiosyncrasies was not highly offensive to a reasonable person). *See also* RESTATEMENT (SECOND) OF TORTS § 652D cmt. c (1977); R. SACK, LIBEL, SLANDER & RELATED PROBLEMS § 12:4.6 (4th ed. 2014).

28:10 INVASION OF PRIVACY BY PUBLICITY PLACING PLAINTIFF IN A FALSE LIGHT

No instruction to be given.

Source and Authority

In **Denver Publ'g Co. v. Bueno**, 54 P.3d 893 (Colo. 2002), the Colorado Supreme Court declined to recognize the tort of false light invasion of privacy.

28:11 INVASION OF PRIVACY — AFFIRMATIVE DEFENSE — PRIVILEGE

See Instructions 22:18 and 22:19.

Notes on Use

1. The privileges applicable to a defamation action may also be applicable to the privacy torts set forth in Instructions 28:4 and 28:5, involving dissemination of information.

RESTATEMENT (SECOND) OF TORTS §§ 652F and 652G (1977). Therefore, Notes on Use to Instructions 22:17 through 22:20 should be consulted, and Instructions 22:18 and 22:19 on defamation should be used, as appropriately modified.

2. Where the tort at issue is appropriation or public disclosure, Instruction 22:18 should be modified to omit numbered paragraph 1 and if Instruction 22:19 is given, omit element 2.

Source and Authority

For the cause of action of public disclosure of private facts, the court has embraced the privilege for dissemination of information that is “newsworthy” or of “public or general concern” recognized by the RESTATEMENT (SECOND) OF TORTS § 652D cmt. d (1977), and has required that the plaintiff prove, as part of his or her case, that the defendant’s disclosure is not protected by these doctrines. **Robert C. Ozer, P.C. v. Borquez**, 940 P.2d 371 (Colo. 1997). In **Joe Dickerson & Assocs., LLC v. Dittmar**, 34 P.3d 995 (Colo. 2001), the court also embraced the privilege protecting publication of matters that are “newsworthy” or “of public or general concern,” but did not determine whether defeating the privilege was an element of the plaintiff’s case or whether the privilege is a matter of affirmative defense that must be pled by the defendant. The court also has not indicated whether the scope of free speech protection embraced in **Dittmar** for the tort of appropriation is of the same scope as the protective standard that the court made an element of the plaintiff’s case in **Borquez**.

28:12 INVASION OF PRIVACY — AFFIRMATIVE DEFENSE — STATUTE OF LIMITATIONS

See Instruction 22:23.

Notes

1. With respect to statutes of limitations, Instruction 22:23 and its Notes on Use and Source and Authorities should be used, including the “single publication rule.” If the conduct at issue is something other than “publication,” the instruction should be modified accordingly.

2. There are no Colorado decisions concerning which statute of limitations applies in privacy actions. The general two-year tort statute of limitation, § 13-80-102, C.R.S., probably applies to invasion of privacy torts of intrusion, use of the plaintiff’s name or likeness, and public disclosure of private facts. RESTATEMENT (SECOND) OF TORTS § 652E cmt. e (1977); R. SACK, LIBEL, SLANDER & RELATED PROBLEMS § 12:3.4.[B] and 12:5.2 (4th ed. 2014).

28:13 INVASION OF PRIVACY — AFFIRMATIVE DEFENSE — CONSENT

The defendant, (*name*), is not legally responsible to the plaintiff, (*name*), on the claim of invasion of privacy by (intrusion) (appropriation of plaintiff's name or likeness) (public disclosure of private facts) (placing plaintiff in a false light), if the affirmative defense of consent has been proved. The defense is proved if you find both of the following:

1. The plaintiff, by words or conduct or both, led the defendant reasonably to believe that (he) (she) (it) had (authorized) (or) (agreed to) the defendant's conduct in (*describe conduct in issue, e.g., entering the plaintiff's home, recording of plaintiff's conversation, publicizing of facts concerning plaintiff, use of plaintiff's picture, etc.*); and

2. The defendant acted in a manner and for a purpose (to which the plaintiff agreed) (to which the defendant reasonably believed the plaintiff agreed) (that the plaintiff authorized) (that the defendant reasonably believed the plaintiff authorized).

Notes on Use

1. Use whichever parenthesized words and phrases are appropriate in light of the evidence in the case.

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

3. Some cases use the term “waiver” in lieu of “consent,” but apply the same principle as set forth in this instruction. **Borquez v. Robert C. Ozer, P.C.**, 923 P.2d 166, 175 (Colo. App. 1995), *rev'd on other grounds*, 940 P.2d 371 (Colo. 1997).

4. This instruction applies in situations in which there is a dispute over the scope of consent or whether it has been exceeded. *See Doe v. High-Tech Inst., Inc.*, 972 P.2d 1060 (Colo. App. 1998), *cert. denied* (1999).

5. When plaintiff discloses embarrassing and otherwise private facts in an arbitration proceeding and the disclosure is not subject to a requirement of confidentiality by rule, order, or agreement, the plaintiff has waived the right of privacy with respect to disclosures by parties to the arbitration. **A.T. v. State Farm Mut. Auto. Ins. Co.**, 989 P.2d 219 (Colo. App.), *cert. denied* (1999). The plaintiff's consent may bar an intrusion claim even if the consent is procured by false pretenses. **Sundheim v. Bd. of Cnty. Comm'rs**, 904 P.2d 1337 (Colo. App. 1995), *aff'd on other grounds*, 926 P.2d 545 (Colo. 1996).

Source and Authority

This instruction is supported by RESTATEMENT (SECOND) OF TORTS § 652F cmt. b (1977), incorporating RESTATEMENT § 583 (pertaining to the defense of consent in defamation actions). *See also* R. SACK, LIBEL, SLANDER, & RELATED PROBLEMS §§ 12:4.8 and 12:6 (4th ed. 2014).

28:14 INVASION OF PRIVACY — DAMAGES

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

In determining such damages, you shall consider the following:

1. Any noneconomic losses or injuries which the plaintiff has had to the present time, or which the plaintiff will probably have in the future, including: physical and mental pain and suffering, inconvenience, emotional stress, impairment of the quality of life, injury to the plaintiff's reputation, and (*insert any other recoverable noneconomic losses for which there is sufficient evidence*).

2. Any economic losses which the plaintiff has had to the present time, or which plaintiff will probably have in the future, including: loss of earnings, the ability to earn money in the future, ([reasonable and necessary] medical, hospital, and other expenses), and (*insert any other recoverable economic losses for which there is sufficient evidence*).

Notes on Use

1. This instruction and special interrogatories and verdict form conforming to Instructions 6:1A and 6:1B should be used in cases in which the limitations of damages for noneconomic loss or injury set forth in § 13-21-102.5, C.R.S., may be applicable. In cases in which only noneconomic loss or injury is in issue, this instruction may be modified and given without the special interrogatories or special verdict form.

2. The elements of damages typically applicable in an invasion of privacy action are personal humiliation, mental anguish and suffering, and impairment to the plaintiff's reputation incurred by the plaintiff as a result of the defendant's conduct. *See Doe v. High-Tech Inst., Inc.*, 972 P.2d 1060 (Colo. App. 1998), *cert. denied* (1999).

3. In cases in which the evidence supports them, the instruction may also refer to physical suffering, loss or injury to credit standing, loss of income, and other elements of compensable damages incurred by the plaintiff.

4. In cases of invasion of privacy by use of the plaintiff's name or likeness, the evidence may also support damages based upon the value of the use of the plaintiff's likeness which has been made by the defendant.

5. The Notes on Use to Instruction 6:1 are also applicable to this instruction.

Source and Authority

This instruction is supported by **Doe v. High-Tech Inst., Inc.**, 972 P.2d 1060 (Colo. App. 1998), *cert. denied* (1999); RESTATEMENT (SECOND) OF TORTS § 652H (1977). See also Source and Authority for Instruction 6:1.

28:15 INVASION OF PRIVACY — EXEMPLARY OR PUNITIVE DAMAGES

See Instruction 5:4.

Notes

1. When otherwise applicable to the evidence in the case, Instruction 5:4 should be used for instructing on punitive damages.

2. Except as otherwise provided in § 24-10-118(5), C.R.S., punitive damages are not recoverable against a public entity. *See* § 24-10-114(4), C.R.S.; **Martin v. Cnty. of Weld**, 598 P.2d 532 (Colo. App. 1979).