

CHAPTER 21

FALSE IMPRISONMENT OR ARREST

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A. LIABILITY

21:1 ELEMENTS OF LIABILITY

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

1. The defendant intended to restrict the plaintiff's freedom of movement;
2. The defendant, directly or indirectly, restricted the plaintiff's freedom of movement for a period of time, no matter how short; and
3. The plaintiff was aware that (his) (her) freedom of movement was restricted.

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.

In determining whether the affirmative defense of privilege *[describe privilege]* has been proved, you must also determine whether the defendant abused that privilege as explained in Instruction No. *[insert instruction number that corresponds with Instruction 21:19]*.

However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved by a preponderance of the evidence, 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. In cases involving multiple defendants or designated nonparties where the pro rata liability statute, § 13-21-111.5, C.R.S., is applicable, see the Notes on Use to Instruction 4:20.
3. Use whichever parenthesized phrase, "false imprisonment" or "false arrest," is more appropriate.

4. Omit the last three paragraphs if the defendant has put no affirmative defense in issue or there is insufficient evidence to support any defense. Omit the clause dealing with abuse of a privilege to arrest unless (1) the affirmative defense is that of a privilege to arrest and (2) there is sufficient evidence of abuse of such privilege to warrant giving this portion of the instruction. *See* Instruction 21:19.

5. Other appropriate instructions defining the terms used in this instruction, for example, Instruction 21:2, defining restriction on freedom of movement, must also be given with this instruction.

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

Source and Authority

1. This instruction is supported by RESTATEMENT (SECOND) OF TORTS § 35 (false imprisonment) and § 41 (confinement by false arrest) (1965); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 11 (5th ed. 1984); and 1 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS §§ 3.7, 3.8 (3d ed. 2006). *See also* **Blackman v. Rifkin**, 759 P.2d 54 (Colo. App. 1988).

2. In **Union Pacific Railroad v. Dennis**, 73 Colo. 66, 213 P. 332 (1923), there is a statement that the plaintiff, in order to prove a false arrest, must prove the arrest was without legal justification. However, in **Crews-Beggs Dry Goods Co. v. Bayle**, 97 Colo. 568, 51 P.2d 1026 (1935), legal justification is treated as a matter of affirmative defense. *Accord* RESTATEMENT § 118; PROSSER AND KEETON ON THE LAW OF TORTS, *supra*, § 11, at 53; *see also* **Goodboe v. Gabriella**, 663 P.2d 1051 (Colo. App. 1983) (citing and discussing this instruction with approval, noting in particular that since a justified detention is a matter of affirmative defense, the plaintiff need not prove as a necessary element of liability that the detention was “unlawful”). *But see* **Rose v. City & Cty. of Denver**, 990 P.2d 1120 (Colo. App. 1999) (the court concluded as a matter of law that officer had probable cause to arrest plaintiff).

3. One may be liable for a false arrest or imprisonment, though his or her conduct, for example, as an instigator, was only an indirect cause of the false arrest or imprisonment. RESTATEMENT § 45A; *see also* Notes on Use and Source and Authority to Instruction 21:3.

4. The Colorado Governmental Immunity Act waives governmental immunity for the operation of a jail only for injuries due to negligence. **Cisneros v. Elder**, 2020 COA 163M, ¶ 22, 490 P.3d 985, 988 (“Because sovereign immunity for the operation of a jail is waived only when an inmate’s injury is the result of negligence, we must conclude that the waiver of immunity under section 24-10-106(1.5)(b) does not apply to injuries caused by intentional torts.”) (*cert. granted* May 24, 2021).

21:2 RESTRICTION OF FREEDOM OF MOVEMENT — DEFINED

A person's freedom of movement has been restricted when:

(1. A person's freedom of movement is actually limited, or he or she believes that it has been limited to a certain area by physical barriers and does not know of any way to escape without causing an unreasonable risk of harm to him or herself or to property.)

(2. The person is restrained by physical force, however slight, which overpowered the person or to which the person submitted.)

(3. The person complies with actual or apparent threats that he or she or a member of his or her family will be immediately harmed if he or she moves beyond or refuses to go to a certain area.)

(4. The person complies with actual or apparent threats that his or her property will be damaged or destroyed if he or she refuses to move past or to a certain area.)

(5. The person submits to another who states that he or she has the legal authority to [arrest the person] [take that person into custody].)

(6. The person is stopped and prevented from leaving by another under circumstances that caused the person to reasonably believe that if he or she tried to leave, he or she would be immediately subjected to social disgrace or to *[describe any sufficiently severe economic sanction, e.g., loss of job, with which the evidence shows the plaintiff may have been threatened]*).

Notes on Use

1. Use whichever parenthesized paragraph or paragraphs (and bracketed portions thereof) are appropriate. When more than one numbered paragraph is used, the paragraphs should be clearly stated as alternatives.

2. This instruction is intended to cover most, but not necessarily all, of the situations which may give rise to a sufficient detention, restraint or confinement to support a claim for false imprisonment or arrest. If the circumstances of a particular case are unique, a more appropriate instruction should be substituted.

3. Numbered paragraph 1: When a person's freedom of movement has been restricted in one or more directions, but other avenues are open to the person — for example, when a highway is blocked — the person's freedom of movement has not been restricted sufficiently to constitute the tort of false imprisonment. RESTATEMENT (SECOND) OF TORTS § 36 cmt. d (1965).

4. Numbered paragraphs 3 and 4: Sound policy may justify in particular cases extending the scope of either of these clauses to include threats against the person or property of others than those named, for example, close friends or customers in a store. In such cases, the instruction should be modified accordingly.

5. Numbered paragraph 5: In most cases, the word “custody” need not be defined. However, if that is not the case, an appropriate instruction should be given. Also, in most cases, the legal authority asserted will be that of arrest. However, in some cases it may not, for example, the recapture of an escaped mental incompetent who has been confined to an institution.

6. Numbered paragraph 6: There appears to be little authority for this form of restriction. To the extent it has been recognized, it would appear that the social disgrace or economic sanction which is impliedly or expressly threatened must have been sufficient to constitute duress. *See* RESTATEMENT § 40A; W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 11, at 50 (5th ed. 1984).

Source and Authority

This instruction is supported by **McDonald v. Lakewood Country Club**, 170 Colo. 355, 461 P.2d 437 (1969) (supporting paragraphs 2 and 3 and involving restraint imposed by force or threat of force); **Crews-Beggs Dry Goods Co. v. Bayle**, 97 Colo. 568, 51 P.2d 1026 (1935) (supporting paragraph 2 and involving restraint by only slight force to which plaintiff submitted because any restraint by force or fear constitutes false imprisonment); **Union Pacific Railroad v. Dennis**, 73 Colo. 66, 213 P. 332 (1923) (paragraph 5); **Kettelhut v. Edwards**, 65 Colo. 506, 177 P. 961 (1919) (paragraph 5); RESTATEMENT §§ 36-38 (paragraph 1); RESTATEMENT § 39 (paragraph 2); RESTATEMENT § 40 (paragraph 3); RESTATEMENT § 40A cmt. a (paragraphs 3 and 4); RESTATEMENT § 41 (paragraph 5); PROSSER AND KEETON ON THE LAW OF TORTS, *supra*, § 11, at 49-51; and 1 F. HARPER ET AL. HARPER, JAMES, AND GRAY ON TORTS § 3.8 (3d ed. 2006). *See also* **Havens v. Hardesty**, 43 Colo. App. 162, 600 P.2d 116 (1979) (lawyer held liable for false arrest even though he was acting in good faith for his client and arrest of plaintiff was result of “mistaken identity”).

21:3 INTENT — DEFINED

A person intends to restrict freedom of movement if he or she acts for the purpose of restricting another's freedom of movement or acts with knowledge that a restriction will probably result. This intent exists even if a person acts without malice or ill will or acts under a mistaken belief that he or she is privileged to restrict the other's freedom of movement.

Notes on Use

Instruction 21:4 should be used rather than this instruction when there is sufficient evidence that the claimed false imprisonment was a result of the defendant's refusal or failure to release the plaintiff from a confinement, which the defendant was under a duty to do.

Source and Authority

1. This instruction is supported by RESTATEMENT (SECOND) OF TORTS §§ 37, 43-44 (1965); 1 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS § 3.7 (3d ed. 2006); and W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 11, at 52-53 (5th ed. 1984).

2. If the restriction of one's freedom of movement is caused by negligent or even reckless conduct on the part of the defendant, it is not sufficient to create the intent necessary for false imprisonment or arrest. HARPER, JAMES, AND GRAY ON TORTS, *supra*, § 3.7, at 333-34.

3. The most common occurrences where the defendant would have knowledge that a restriction would probably result from the defendant's act is where the defendant directs a peace officer to arrest the plaintiff and the arrest is not privileged, or where the defendant assists a third person who is not a peace officer to make an arrest which the third person is not privileged to make. *See, e.g.*, **Grimes v. Greenblatt**, 47 Colo. 495, 107 P. 1111 (1910) (defendant instigated or ratified unlawful arrest by police officer); **Harris v. McReynolds**, 10 Colo. App. 532, 51 P. 1016 (1898) (defendant directed police officer to make arrest).

21:4 INTENT TO RESTRICT BY FAILURE TO RELEASE

A person intends to restrict the freedom of movement of another if:

- 1. That person knows the other is confined to fixed physical boundaries;**
- 2. That person is under a legal duty (to release the other) (to provide the other a reasonable means of release from the place of confinement); and**
- 3. That person refuses or knowingly fails to perform that duty for the purpose of continuing the confinement of the other.**

Notes on Use

1. Use whichever parenthesized words are appropriate.
2. This instruction is meant to cover the situations where the defendant has refused to release the plaintiff at the termination of a lawful confinement in jail, or where the plaintiff voluntarily entered into a confinement upon the assurance of the defendant that the defendant would release the plaintiff and the defendant thereafter refused to do so.
3. If there is a dispute as to whether a legal duty existed, an additional instruction should be given. Such an instruction might read: “A legal duty existed if *(insert the basis for the claimed legal duty, for example, a contract between the plaintiff and the defendant, or a duty created by statute or common law)*.”

Source and Authority

This instruction is supported by RESTATEMENT (SECOND) OF TORTS § 45 (1965); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 11, at 51-52 (5th ed. 1984); and 1 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS § 3.8, at 335-38 (3d ed. 2006).

21:5 ACTUAL OR NOMINAL 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 (insert appropriate description, e.g., "false imprisonment" or "arrest") of the plaintiff by defendant(s), (name[s]), (and the [insert appropriate description, e.g., "negligence"], if any, of any designated nonparties).

In determining these damages, you shall consider the following:

1. Any noneconomic losses or injuries the plaintiff has had to the present time or that the plaintiff will probably have in the future, including: physical and mental pain and suffering, inconvenience, emotional stress, fear, anxiety, embarrassment, humiliation, impairment of the quality of life, and [insert any other recoverable noneconomic losses for which there is sufficient evidence]. (In considering damages in this category, you shall not include actual damages for [physical impairment] [or] [disfigurement], because these damages, if any, are to be considered in a separate category.)

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

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

If you find in favor of the plaintiff, but do not find any actual damages, you shall award (him) (her) nominal damages of one dollar.

Notes on Use

1. Use only those numbered parenthesized paragraphs or portions that are appropriate to the evidence in the case.

2. Comparative negligence is not a defense to an intentional tort claim. **Carman v. Heber**, 43 Colo. App. 5, 601 P.2d 646 (1979). Therefore, the first paragraph of this instruction varies from the comparable damage instructions in "simple" negligence cases by eliminating any reference to plaintiff's own negligence.

3. Where the original arrest was privileged but subsequently abused by a failure to take the plaintiff promptly before a proper magistrate, *see* numbered paragraph 2 of Instruction 21:19, there is a split of authority on the question whether the defendant is liable for damages for the

entire period of detention or only for that portion of time which constituted the unreasonable delay. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 25, at 150-52 (5th ed. 1984). If it is determined in these cases that under the proper law the arrest should not be viewed as being false *ab initio*, then this instruction, when given in such cases, should be appropriately modified.

4. In some cases, an appropriate instruction relating to causation may need to be given with this instruction. *See* Instructions 9:18-9:21.

Source and Authority

This instruction is supported by **Union Pacific Railroad v. Dennis**, 73 Colo. 66, 213 P. 332 (1923) (approving damages for medical and other expenses, lost wages, physical pain and suffering, humiliation, and injured reputation); and PROSSER AND KEETON ON THE LAW OF TORTS, *supra*, § 11, at 48-49.

B. AFFIRMATIVE DEFENSES

21:6 CONSENT

The defendant, (*name*), is not legally responsible to the plaintiff, (*name*), on (his) (her) claim of (false imprisonment) (false arrest) if the affirmative defense of consent is proved. This defense is proved if you find that the plaintiff, with full knowledge that (his) (her) freedom of movement was to be restricted, willingly submitted to the restriction.

However, one does not willingly consent to a restriction of his or her freedom of movement by expressly or impliedly agreeing to submit him or herself to the control or direction of another when that submission has been obtained by

(1. [An arrest] [A taking of the person into custody] that the person submitting believes is valid [or if in doubt as to its validity, nevertheless submits]).

(2. Exerting any physical force, or making any actual or apparent threats of physical harm to the person submitting or to any member of his or her family).

(3. Making any actual or apparent threats of physical harm to, or loss of, property of the person submitting).

Notes on Use

1. Use whichever numbered parenthesized paragraph or paragraphs (and bracketed portions thereof) as are appropriate. When more than one numbered paragraph is used, the paragraphs should be clearly stated as alternatives.

2. In the first unnumbered paragraph, use whichever phrase, “false imprisonment” or “false arrest,” is more appropriate.

3. If there is a dispute as to whether the defendant restricted the plaintiff’s freedom of movement, this instruction must be appropriately modified.

4. Implied consent based on emergency has been recognized as an affirmative defense to the tort of false imprisonment. **Blackman v. Rifkin**, 759 P.2d 54 (Colo. App. 1988). Consequently, when supported by sufficient evidence, Instruction 15:9, appropriately modified, may be given in lieu of, or, if appropriate, in addition to, this instruction.

Source and Authority

1. This instruction is supported by W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 11, at 49-51 (5th ed. 1984); and 1 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS §§ 3.8, 3.10 (3d ed. 2006). *See also* **People v. Diaz**, 793 P.2d 1181 (Colo. 1990)

(consent is voluntary when it is the product of free and unconstrained choice and not the result of force, threat, or promise).

2. Submitting to a claim of lawful authority does not constitute consent. **Kaupp v. Texas**, 538 U.S. 626 (2003) (seventeen-year-old defendant's failure to struggle and response of "okay" to statement of police officer did not constitute consent where defendant was awakened in his bedroom by three police officers at three o'clock in the morning and taken from his home in handcuffs for questioning).

21:7 STATUTORY PRIVILEGE TO DETAIN FOR INVESTIGATION

The defendant, (*name*), is not legally responsible to the plaintiff, (*name*), on (his) (her) claim of (false imprisonment) (false arrest) if the affirmative defense of a privilege to detain for investigation is proved. This defense is proved if you find all of the following:

- 1. The defendant was a peace officer, or an owner or employee of a (store) (business establishment selling merchandise);**
- 2. The defendant acted in good faith and had probable cause based upon reasonable grounds to believe that the plaintiff:**
 - a. Triggered an alarm or a theft detection device, or**
 - b. Concealed upon (his) (her) person any unpurchased goods, wares, or merchandise held or owned by the store or business establishment selling merchandise, or**
 - c. Otherwise carried away any unpurchased goods, wares, or merchandise held or owned by the store or business establishment selling merchandise;**
- 3. The defendant detained and questioned the plaintiff in a reasonable manner for the purpose of determining whether the plaintiff committed theft.**

Notes on Use

1. Use whichever parenthesized words are appropriate.
2. Omit any numbered paragraphs, the facts of which are not in dispute.
3. When this instruction is given, another instruction defining “theft” should also be given. *See* § 18-4-401, C.R.S. For the appropriate definition of “peace officer,” see sections 16-2.5-101 to -151, C.R.S., and for “concealment,” see section 18-4-406, C.R.S.
4. If there is a dispute as to whether the defendant detained or questioned the plaintiff at all, numbered paragraphs 3 and 4 of this instruction must be appropriately modified.
5. “Theft detection device” is defined by § 18-4-417(2)(b), C.R.S. The court should determine whether the device at issue qualifies as a theft detection device under the statute. If it does not, then subparagraph 2a of this instruction should be deleted.
6. In **Gonzales v. Harris**, 34 Colo. App. 282, 528 P.2d 259 (1974) *rev’d on other grounds*, 189 Colo. 518, 542 P.2d 842 (1975), the court construed section 18-4-407, C.R.S., in conjunction with section 18-4-406, which defines “concealment” for purposes of making concealment prima facie evidence of intent to commit theft, and held: (1) the “concealment” could be on the person of the plaintiff or elsewhere, whether on or off the premises; (2) the person could be detained under the statute (if other conditions were met) while a search was

being made of the premises; and (3) to this extent the statutory privilege codified and was broader than the common-law privilege. *See* Source and Authority to Instruction 21:8.

7. In some circumstances different from those involved in **Gonzales**, the defendant may wish to rely as well on the common-law privilege set out in Instruction 21:8, for example, a case involving a drug store serving food as well as selling goods, and the plaintiff was detained both for investigation of payment for food service as well as payment for goods. In such circumstances, if both instructions are given, each must be appropriately modified in order to identify the privileges and to make it clear to the jury that they are distinct, separate privileges.

8. Similarly, under section 16-3-103(1), C.R.S., a peace officer has a broader statutory privilege to “stop any person who he reasonably suspects is committing, has committed, or is about to commit a crime and . . . require him to give his name and address, identification if available, and an explanation of his actions. . . . The stopping shall not constitute an arrest.” In certain cases, a defendant may seek to rely on this statutory privilege as well, and produce sufficient evidence for this privilege as well as the privilege set out in this instruction or in Instruction 21:8. In such circumstances, if instructions covering more than one privilege are given, each must be appropriately modified in order to identify it and to make it clear to the jury that they are distinct, separate privileges.

9. For modifications that may be required in this instruction when a child is detained, see section 19-2-502, C.R.S.

10. Under section 18-4-407, the privilege set out in this instruction would appear to apply whether the plaintiff is an employee, a customer, or some other person.

Source and Authority

This instruction is supported by the statutory privilege conferred by section 18-4-407. In **J.S. Dillon & Sons Stores Co. v. Carrington**, 169 Colo. 242, 455 P.2d 201 (1969), the court, interpreting the statute as it was worded prior to its amendment in 1967, held that in order to rely on the statutory privilege, the defendant was not required to prove the plaintiff had, in fact, committed the crime of shoplifting. *See also* **Gonzales**, 34 Colo. App. at 288-89, 528 P.2d at 263 (decided after the 1967 amendment).

21:8 COMMON-LAW PRIVILEGE TO DETAIN FOR INVESTIGATION

The defendant, (*name*), is not legally responsible to the plaintiff, (*name*), on (his) (her) claim of (false imprisonment) (false arrest) if the affirmative defense of a privilege to detain for investigation is proved. This defense is proved if you find all of the following:

1. The defendant was (the owner, agent or employee of a business) (a peace or police officer);

2. The defendant believed and had reasonable grounds to believe the plaintiff had wrongfully (taken items) (secured services) from (the defendant's business premises) (a business establishment) or had failed to make arrangements for the payment of (the items the plaintiff had received) (the services which had been rendered to the plaintiff);

3. The defendant detained the plaintiff solely for the purpose of questioning the plaintiff about the matter;

4. The defendant questioned the plaintiff in a reasonable manner and only for a reasonable period of time; and

5. The plaintiff was in the place of business or had just left and was in the immediate vicinity.

Notes on Use

1. Notes 7 and 8 of the Notes on Use to Instruction 21:7 are also applicable to this instruction. This instruction is intended to cover those circumstances in which the statutory privilege set out in Instruction 21:7 would not be applicable, for example, because of the nature of the establishment or the property involved.

2. Use whichever parenthesized words are appropriate.

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

4. When this instruction is given, another instruction defining "wrongfully" may be required. "Wrongfully" would include tortious as well as criminal conduct. For the appropriate definition of "peace or police officer," see sections 16-2.5-101 to -151, C.R.S.

5. This instruction does not apply where the detention is in the form of a purported arrest or a taking of the plaintiff into custody. In such circumstances, however, Instruction 21:10 or Instruction 21:11 may be applicable.

6. This instruction applies whether the plaintiff is an employee, customer, or some other third person.

7. If there is a dispute as to whether the defendant detained or questioned the plaintiff, numbered paragraph 3 or 4, or both, must be appropriately modified.

Source and Authority

1. This instruction is based on RESTATEMENT (SECOND) OF TORTS § 120A (1965); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 22, at 141-42 (5th ed. 1984); and 1 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS § 3.14 (3d ed. 2006).

2. In **Crews-Beggs Dry Goods Co. v. Bayle**, 97 Colo. 568, 51 P.2d 1026 (1935), the facts were such that the defendant might have been able to raise the privilege set out in this instruction. The defendant, however, did not, and the court held that, without a showing of justification, the defendant's conduct in temporarily detaining a customer suspected of shoplifting constituted a false imprisonment.

3. As to when a police officer may properly detain a person for investigative purposes generally, see the cases cited in paragraph 7 of the Source and Authority to Instruction 21:11.

21:9 PRIVILEGE TO DEFEND PERSON OR PROPERTY

The defendant, (*name*), is not legally responsible to the plaintiff, (*name*), on (his) (her) claim of (false imprisonment) (false arrest) if the affirmative defense of privilege to defend (person) (property) is proved. This defense is proved if you find both of the following:

1. When the defendant restricted the plaintiff's freedom of movement, (he) (she) believed and had reasonable grounds to believe that the plaintiff intended to (inflict harm upon [his] [her] person or that of another) (or) (interfere or continue to interfere with the defendant's right to possess [his] [her] land or personal property); and

2. This restriction of the plaintiff's freedom of movement was reasonably imposed, under the circumstances, to prevent the plaintiff's actions, considering the length of the time of the restriction, the seriousness of the threatened harm to, or interference with, the defendant's (person) (or) (property), and the seriousness of any harm that might result to the plaintiff from the restriction.

Notes on Use

1. Use whichever parenthesized or bracketed words are appropriate.
2. Omit any portions of this instruction, the facts of which are not in dispute.
3. If there is a dispute as to whether the defendant did, in fact, restrict the plaintiff's freedom of movement, the first numbered paragraph of this instruction must be appropriately modified.

Source and Authority

1. This instruction is supported by RESTATEMENT (SECOND) OF TORTS sections 67, 76, 80, and 87 (1965), and the authorities cited in Source and Authority to Instructions 20:12 to 20:17.

2. In general, the same requirements apply to the exercise of a privilege to defend persons or property by way of force which would otherwise amount to a false imprisonment or arrest as apply to force which would otherwise amount to an assault or battery. The instructions setting forth the privileges to use force in the form of assault or battery to defend persons or property are Instructions 20:12 through 20:17. This instruction has been drafted in terms which will usually be more appropriate to a false imprisonment or false arrest case. However, it has been drafted in more general terms and does not necessarily include all the conditions which may have to be met in order to qualify for a particular privilege in a particular case. For example, in using a confinement to defend property, the defendant may not, in most cases, have used a force which would inflict death or serious bodily injury, and, before imposing any confinement, the circumstances may have been such that the defendant should first have requested the plaintiff to desist. *See, e.g.*, Instructions 20:16 and 20:17. In any particular case, therefore, when this instruction would not cover all the necessary conditions for the exercise of a particular privilege, this instruction should be modified accordingly.

21:10 PRIVILEGE OF ANY PERSON TO ARREST WITHOUT A WARRANT

The defendant, (*name*), is not legally responsible to the plaintiff, (*name*), on (his) (her) claim of (false imprisonment) (false arrest) if the affirmative defense of a privilege to arrest without a warrant is proved (and you do not find such privilege, if any, was abused). The defendant was privileged to arrest the plaintiff without a warrant if you find (any of) the following (has) (have) been proved:

(1. The plaintiff, at the time of the arrest, was committing a crime in the presence of the defendant, and the defendant arrested the plaintiff for that crime) (or)

(2. The plaintiff had committed a crime in the presence of the defendant, and the defendant arrested the plaintiff for that crime immediately or after a fresh pursuit) (or)

(3. The plaintiff or someone else had committed a felony, though not necessarily in the defendant's presence, and the defendant arrested the plaintiff for that felony, reasonably believing the plaintiff had committed it) (or)

(4. The plaintiff knew that his or her conduct would cause the defendant to believe that the plaintiff was committing a crime in the defendant's presence, and the defendant arrested the plaintiff for that crime) (or)

(5. The plaintiff knew that his or her conduct would cause the defendant to believe that the plaintiff had committed a crime in the defendant's presence, and the defendant arrested the plaintiff for the crime immediately or after a fresh pursuit) (or)

(6. The plaintiff knew that his or her conduct would cause the defendant to believe that a felony had been committed and the defendant arrested the plaintiff for that felony, reasonably believing the plaintiff was the person who had committed it.)

Notes on Use

1. As to the privilege of a peace officer to effect an arrest without a warrant, see Instruction 21:11.

2. In the first paragraph, use whichever parenthesized phrase, "false imprisonment" or "false arrest," is more appropriate, and omit the parenthesized phrase relating to abuse of privilege unless there is evidence to support it.

3. Use whichever parenthesized numbered paragraphs are appropriate to the case. If only one numbered paragraph is used, omit the parenthesized phrase "any of" in the first unnumbered paragraph.

4. Depending on the circumstances, other appropriate instructions defining such terms as, for example, "reasonable grounds" (Instruction 21:13), "fresh pursuit" (Instruction 21:14), and an instruction setting forth the elements of the claimed "crime," "criminal offense" or "felony" involved should be given with this instruction.

5. For modifications which may be required in this instruction when a child is detained, see sections 19-2-502 and 19-2-503, C.R.S.

6. If there is a dispute as to whether the defendant did in fact restrict the plaintiff's freedom of movement by an arrest or otherwise, this instruction must be appropriately modified.

7. In order to have an arrest at all on which a privilege to arrest without a warrant may be based, the person making the arrest, unless excused because of the circumstances, must indicate (1) his intent to make an arrest and (2) the offense or conduct for which the arrest is being made. RESTATEMENT (SECOND) OF TORTS § 128 (1965); 1 F HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS § 3.18, at 426 (3d. ed. 2006). If there is a dispute as to either of these matters, then Instruction 21:12 (defining arrest) and, if appropriate, Instruction 21:16 (explaining when a manifestation to make an arrest may be excused) must be given with this instruction. Also the instruction should be modified to state, in effect, that when the defendant made the claimed arrest, the defendant must have indicated an intent to arrest the plaintiff and indicated to the plaintiff the offense or conduct for which the arrest was being made, unless, because of the circumstances (Instruction 21:16), the failure to do so was excusable.

8. The privileges set out in this instruction do not extend to one who reasonably believes a criminal offense or felony has been committed when, in fact, one has not been, unless this belief was knowingly caused by the plaintiff. However, an attempt to commit a crime may itself be a crime, *see, e.g.*, section 18-2-101, C.R.S., in which case the defendant may have been privileged to make an arrest for the crime of attempt. In those cases, in order to clarify this point, it may be necessary to modify this instruction.

Source and Authority

1. Numbered paragraphs 2 and 3 of this instruction are supported by section 16-3-201, C.R.S.

2. The common-law privileges set out in numbered paragraphs 3 and 6 are supported by RESTATEMENT § 119. Paragraphs 4 and 5 are supported by both the relevant Colorado statutes and RESTATEMENT § 119(e). *See also* PROSSER AND KEETON ON THE LAW OF TORTS, *supra*, § 26; HARPER, JAMES, AND GRAY ON TORTS, *supra*, § 3.18.

3. In addition to the common-law and statutory privileges of a private person set out in this instruction, a private person may have other privileges when acting upon the command of a peace officer to assist the officer in making an arrest. § 16-3-202, C.R.S.

4. "The 'in presence' requirement is met if the arrestor observes acts which are in themselves sufficiently indicative of a crime in the course of commission." **People v. Olguin**, 187 Colo. 34, 37, 528 P.2d 234, 236 (1974).

5. In addition to statutory crimes, "criminal offense" may include the violation of a municipal ordinance. **Boyer v. Elkins**, 154 Colo. 294, 390 P.2d 460 (1964).

21:11 PRIVILEGE OF PEACE OFFICER TO ARREST WITHOUT A WARRANT

The defendant, (*name*), is not legally responsible to the plaintiff, (*name*), on (his) (her) claim of (false imprisonment) (false arrest) if the affirmative defense of a privilege to arrest without a warrant is proved (and you do not find such privilege, if any, was abused). The defendant was privileged to arrest the plaintiff without a warrant if you find (any of) the following (has) (have) been proved:

(1. [*Insert any of the privileges afforded a private person in Instruction 21:10 which may be applicable*]) (or)

(2. a. The defendant was a peace officer acting within the scope of [his] [her] authority at the time of the arrest; and

b. The plaintiff had committed or was committing a criminal offense in the presence of the defendant; and

c. The defendant arrested the plaintiff for that offense) (or)

(3. a. The defendant was a peace officer acting within the scope of [his] [her] authority at the time of the arrest; and

b. The defendant believed and had probable cause to believe that a criminal offense had been committed, whether it had or not; and

c. The defendant believed and had probable cause to believe the plaintiff had committed that criminal offense; and

d. The defendant arrested the plaintiff for that offense).

Notes on Use

1. In the first paragraph, use whichever parenthesized phrase, “false imprisonment” or “false arrest,” is more appropriate and omit the parenthesized phrase relating to abuse of privilege unless there is evidence to support it.

2. Use whichever parenthesized numbered paragraphs are appropriate to the case, omitting any portions thereof, the facts of which are not in dispute. If only one numbered paragraph is used, omit the parenthesized phrase “any of” in the first unnumbered paragraph.

3. In appropriate cases, a more suitable phrase, for example, “police officer,” may be substituted for the phrase “peace officer.” Also, for the various statutory definitions of “peace officer,” see sections 16-2.5-101 to -151, C.R.S.

4. Depending on the circumstances, other appropriate instructions defining such terms as, for example, “reasonable grounds” or “probable cause” (Instruction 21:13), and instructions

setting forth the elements of the claimed “criminal offense,” the scope of the defendant’s “authority”, etc., should be given with this instruction.

5. For modifications that may be required in this instruction when a child is detained, see sections 19-2-502 and 19-2-503, C.R.S.

6. In order to have an arrest at all on which a privilege to arrest without a warrant may be based, the person making the arrest, unless excused because of the circumstances, must indicate (1) his or her intent to make an arrest and (2) the offense or conduct for which the arrest is being made. RESTATEMENT (SECOND) OF TORTS § 128 (1965); 1 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS § 3.18, at 426 (3d ed. 2006). If there is a dispute as to such matters, then Instruction 21:12, defining “arrest” and, if appropriate, Instruction 21:16, explaining when a manifestation to make an arrest may be excused, must be given with this instruction. Also an additional requirement should be added to this instruction stating in effect that when the defendant made the claimed arrest the defendant must have indicated an intent to arrest the plaintiff and indicated to the plaintiff the offense or conduct for which the arrest was being made, unless, because of the circumstances (Instruction 21:16), such indication was excusable.

7. If there is a dispute as to whether the defendant did, in fact, restrict the plaintiff’s freedom of movement by an arrest or otherwise, this instruction must be appropriately modified.

8. A peace officer may make a valid arrest without a warrant in certain circumstances other than those set out in this instruction. In such cases, this instruction should be appropriately modified. *See, e.g., People v. Gouker*, 665 P.2d 113 (Colo. 1983) (outstanding arrest warrant from a sister state, if valid, may provide the necessary probable cause to make a warrantless arrest in Colorado, even though the detained person is arrested for a different offense, if the arresting officer was aware of the outstanding sister-state warrant and was at least partially motivated by it).

9. Concerning numbered paragraph 1 of this instruction referring to Instruction 21:10 (privileges to arrest afforded a private person), to make a valid arrest under section 16-3-201, C.R.S., a peace officer must have been acting as a private citizen. **People v. Wolf**, 635 P.2d 213 (Colo. 1981).

10. This instruction should be modified in cases where an arrest is made in a private home. *See People v. Summitt*, 104 P.3d 232 (Colo. App. 2004) (absent consent, exigent circumstances, or the need to render emergency aid, police officers may not arrest person without warrant in a private home even if police have probable cause to believe that the person arrested has committed a crime), *rev’d on other grounds*, 132 P.3d 320 (Colo. 2006).

Source and Authority

1. For authorities in support of paragraph 1, see the Source and Authority to Instruction 21:10.

2. Numbered paragraphs 2 and 3 are supported by the statutory privilege contained in sections 16-3-102(b) and (c), C.R.S. The common-law privilege now covered by numbered

paragraph 3 related at common law only to felonies. *See* RESTATEMENT § 121(b); *see also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 26 (5th ed. 1984); HARPER, JAMES, AND GRAY ON TORTS, *supra*, § 3.18.

3. As to the territorial limits of a peace officer's authority while in fresh pursuit, see section 16-3-106, C.R.S. Also, as to the authority of a peace officer from another state, see section 16-3-104, C.R.S. To make a valid arrest as a peace officer without a warrant under section 16-3-102, C.R.S., outside the territorial limits of the peace officer's authority, the officer must have been engaged in fresh pursuit (Instruction 21:14), **People v. Wolf**, 635 P.2d 213 (Colo. 1981), unless the officer was acting under authority conferred by section 16-3-110(2), C.R.S. (authority of full-time, certified peace officer to make an arrest outside the jurisdiction of the law enforcement agency employing the officer of a person who has or is committing a felony or misdemeanor in the officer's presence).

4. "The 'in presence' requirement is met if the arrestor observes acts which are in themselves sufficiently indicative of a crime in the course of commission." **People v. Olguin**, 187 Colo. 34, 37, 528 P.2d 234, 236 (1974).

5. In addition to statutory crimes, "criminal offense" may include the violation of a municipal ordinance. **Boyer v. Elkins**, 154 Colo. 294, 390 P.2d 460 (1964).

6. The detention and questioning by a peace officer as part of a valid and properly conducted "investigatory stop" would appear to be an effective affirmative defense to the tort of "false arrest," whether or not a subsequent arrest is validly made, with or without a warrant. *See* § 16-3-103, C.R.S. In such cases, this instruction must be appropriately modified.

7. Under **Terry v. Ohio**, 392 U.S. 1 (1968), an investigatory stop of reasonable scope and duration is a seizure, but is valid under the Fourth Amendment to the United States Constitution if the officer had reasonable suspicion to believe the person stopped had committed or was committing a crime. *See* **Arizona v. Johnson**, 555 U.S. 323 (2009) (proper **Terry** traffic stop justifies continued seizure of car occupants pending inquiry into vehicular offense, without evidence of any other criminal activity); **United States v. Arvizu**, 534 U.S. 266 (2002); **Illinois v. Wardlow**, 528 U.S. 119 (2000); **Stone v. People**, 174 Colo. 504, 485 P.2d 495 (1971); **People v. Barrus**, 232 P.3d 264 (Colo. App. 2009) (officer had reasonable suspicion for stop, and nature of detention was proper, even though it escalated when defendant tried to escape); *see also* **Minnesota v. Dickerson**, 508 U.S. 366 (1993) (permissible scope of pat-down search after investigatory stop); **People v. Bowles**, 226 P.3d 1125 (Colo. App. 2009) (request for identification during proper **Terry** stop is permissible); **People v. Perez**, 852 P.2d 1297 (Colo. App. 1992) (permissible scope of search).

8. A court may conclude as a matter of law that an officer had probable cause to arrest the plaintiff. **Rose v. City & Cty. of Denver**, 990 P.2d 1120 (Colo. App. 1999).

21:12 ARREST — DEFINED

An arrest is taking another into custody (by physical force) (or) (by asserting legal authority over him or her) for the apparent purpose of having that person dealt with as provided by law.

Notes on Use

1. Use whichever parenthesized words are appropriate.
2. This instruction should be given in conjunction with other Instructions such as 21:10 and 21:11.

Source and Authority

1. This instruction is supported by **Hart v. Herzig**, 131 Colo. 458, 464, 283 P.2d 177, 180-81 (1955) (“[A]ctual use of force is not necessary to constitute an arrest; but the intention to arrest, i.e., to take into custody, must be there, and must be evidenced by some unequivocal act, as by keeping the arrested party in sight and controlling his actions.” (quoting **Berry v. Bass**, 102 So. 76, 77 (La. 1924)); and RESTATEMENT (SECOND) OF TORTS § 112 (1965). *See also* **People v. Tottenhoff**, 691 P.2d 340 (Colo. 1984).

2. As to when and with what force an arrest may be effected, see sections 16-3-101 and 18-1-707, C.R.S.

3. For a discussion of the differences between an “investigatory stop” and an arrest without a warrant, see section 16-3-103(1), C.R.S.; **People v. Taylor**, 41 P.3d 681 (Colo. 2002); **Tottenhoff**, 691 P.2d at 343-44; **People v. Hazelhurst**, 662 P.2d 1081 (Colo. 1983); **People v. O’Neal**, 32 P.3d 533 (Colo. App. 2000); and **People v. Whitaker**, 32 P.3d 511 (Colo. App. 2000), *aff’d on other grounds*, 48 P.3d 555 (Colo. 2002). For additional cases involving investigatory stops, see those cited in Note 7 of the Source and Authority to Instruction 21:11.

21:13 REASONABLE GROUNDS FOR BELIEVING AND PROBABLE CAUSE TO BELIEVE — DEFINED

(A person has reasonable grounds to believe a fact exists) (or) (A person has probable cause to believe a fact exists) if a reasonable person under the same or similar circumstances would believe the fact exists.

Notes on Use

This instruction should be given in conjunction with other Instructions such as 21:7, 21:8, 21:9, 21:10, and 21:11. When given, use whichever parenthesized portions are appropriate.

Source and Authority

This instruction is supported by **People v. Brown**, 217 P.3d 1252 (Colo. 2009) (probable cause exists when there is a fair probability that defendant committed a crime, based on the facts known to officer at the time of arrest); **People v. King**, 16 P.3d 807 (Colo. 2001) (probable cause not measured by a “more likely true than false” level of certitude but by a nontechnical common-sense standard of reasonable cause to believe); **People v. Davis**, 903 P.2d 1 (Colo. 1995); **People v. McCoy**, 870 P.2d 1231 (Colo. 1994); **People v. Washington**, 865 P.2d 145 (Colo. 1994); **People v. Diaz**, 793 P.2d 1181 (Colo. 1990); **People v. Thompson**, 793 P.2d 1173 (Colo. 1990) (in determining the question of probable cause, probability, as opposed to certainty, is the touchstone of reasonableness and involves probabilities similar to the factual and practical questions of everyday life upon which reasonable and prudent persons act); **People v. Foster**, 788 P.2d 825 (Colo. 1990) (insufficient evidence of probable cause); **People v. Fields**, 785 P.2d 611 (Colo. 1990) (knowledge of fellow officer cannot be used to supply necessary information for probable cause if, at time of the actual arrest, that officer would not have had lawful authority to make an arrest); **People v. Contreras**, 780 P.2d 552 (Colo. 1989) (anonymous informant’s tip corroborated by information gained from independent police investigation sufficient evidence of probable cause under the “totality of the circumstances” test); **People v. Ratcliff**, 778 P.2d 1371 (Colo. 1989) (discusses differences between information required for a valid arrest without a warrant and information required for a valid investigatory stop, i.e., probable cause and reasonable suspicion); **People v. Tufts**, 717 P.2d 485 (Colo. 1986); **People v. Pate**, 705 P.2d 519, 521-22 (Colo. 1985) (“Probability, not certainty, is the touchstone of probable cause. . . . [P]robable cause does not mean mathematical probability [but] must be equated with reasonable grounds . . . [giving due] consideration . . . to the law enforcement officer’s knowledge, experience, and training in determining the significance of his observations.”); **People v. Florez**, 680 P.2d 219 (Colo. 1984) (test is whether facts available to a reasonably cautious officer would warrant belief); **People v. Villiard**, 679 P.2d 593 (Colo. 1984) (“probable cause” and “reasonable grounds” are equivalent terms); **People v. Freeman**, 668 P.2d 1371, 1377 (Colo. 1983) (“An officer who does not personally possess sufficient information to constitute probable cause may nevertheless make a valid arrest if he acts upon the direction or as a result of a communication from a fellow officer, and the police, as a whole, possess sufficient information to constitute probable cause.”); **People v. Gouker**, 665 P.2d 113 (Colo. 1983) (outstanding arrest warrant from another state, if valid, may provide the necessary probable cause to make a warrantless arrest in Colorado, even though the detained person is arrested for a different

offense, if the arresting officer was aware of and was at least partially motivated by it); **People v. Hazelhurst**, 662 P.2d 1081, 1086 (Colo. 1983) (“In assessing probable cause, the totality of the evidence known to the arresting officer, including information obtained from fellow officers, and such other circumstances as support a conclusion that a crime has been committed, may be considered. Admissibility of the evidence relied upon by the trained police officer is not the test.”); **People v. Roybal**, 655 P.2d 410 (Colo. 1982); **People v. Rueda**, 649 P.2d 1106, 1108-09 (Colo. 1982) (“Probable cause exists where the facts and circumstances within the arresting officer’s knowledge are sufficient to warrant a person of reasonable caution to believe an offense has been or is being committed. . . . Where [the] officer does not directly observe the criminal activity . . . he may rely on information from a trustworthy informant as an appropriate basis for establishing probable cause”); **Scott v. People**, 166 Colo. 432, 444 P.2d 388 (1968); **Lavato v. People**, 159 Colo. 223, 411 P.2d 328 (1966); **Gonzales v. People**, 156 Colo. 252, 398 P.2d 236 (1965); **Baldwin v. Huber**, 223 P.3d 150 (Colo. App. 2009) (circumstantial evidence provided probable cause, even if evidence might also support other inferences); **People v. Robinson**, 226 P.3d 1145 (Colo. App. 2009) (informant’s reliability, veracity, and basis for knowledge, corroborated by other evidence, adequate to support probable cause); **People v. Holmberg**, 992 P.2d 705 (Colo. App. 1999); **Rose v. City & County of Denver**, 990 P.2d 1120 (Colo. App. 1999); **People v. Fears**, 962 P.2d 272 (Colo. App. 1997); **People v. Quintana**, 701 P.2d 1264 (Colo. App. 1985); **People v. Lesko**, 701 P.2d 638 (Colo. App. 1985); and **People v. Cook**, 665 P.2d 640, 643 (Colo. App. 1983) (“Probable cause may be [based on] hearsay But, where the information originates from an anonymous informer, the information supplied must contain sufficient facts to establish the basis for [the informer’s] knowledge of criminal activity and also must establish adequate circumstances to justify the officer’s belief in the informer’s credibility or the reliability of the information.”). *See also* § 18-1-707(4), C.R.S.; RESTATEMENT (SECOND) OF TORTS § 119 cmt. j (1965); 1 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS § 3.18 (3d ed. 2006).

21:14 FRESH PURSUIT — DEFINED

“Fresh pursuit” means the pursuit without unnecessary delay of a person who has committed a criminal offense, or who is reasonably believed to have committed a criminal offense.

Notes on Use

When applicable, this instruction should be used in conjunction with Instruction 21:10, or with Instruction 21:11 or 21:15 when there is a question of the officer’s authority to make an arrest beyond the territorial limits of the officer’s normal authority under section 16-3-106 or section 16-3-104(2), C.R.S.

Source and Authority

1. This instruction is supported by the statutory definition in section 16-3-104(1)(c) (arrest by a peace officer from another jurisdiction), and **Charnes v. Arnold**, 198 Colo. 362, 600 P.2d 64 (1979) (interpreting section 16-3-104(1)(c)). *See also* RESTATEMENT (SECOND) OF TORTS § 119 cmt. q (1965).

2. Unless the officer was acting under authority conferred by section 16-3-110, C.R.S. (authority of full-time, certified peace officer to make an arrest outside the jurisdiction of the law enforcement agency employing the officer of a person who has or is committing a felony or misdemeanor in the officer’s presence), to make a valid arrest as a peace officer without a warrant under section 16-3-102, C.R.S., outside the territorial limits of the peace officer’s jurisdictional authority, the officer must have been engaged in fresh pursuit as required by sections 16-3-104(2) and 16-3-106. *See* **People v. Wolf**, 635 P.2d 213 (Colo. 1981) (arrests without a warrant); **People v. Hamilton**, 666 P.2d 152 (Colo. 1983) (arrests with a warrant). In the absence of fresh pursuit, public officers acting outside their territorial jurisdictions must obtain the aid of local officers who have authority to make arrests in the “foreign” jurisdiction. It is immaterial, however, who executes the arrest warrant, provided that individuals with lawful authority to make an arrest are actually present at the scene of the arrest and participate in the arrest process. **People v. Florez**, 680 P.2d 219 (Colo. 1984).

3. A police officer in “fresh pursuit” is only authorized to make an extra-territorial warrantless arrest if, at the time the pursued party crosses the territorial boundary, the officer has probable cause to believe that the pursued party has committed a crime. **People v. McKay**, 10 P.3d 704 (Colo. App. 2000).

21:15 PRIVILEGE TO ARREST WITH A WARRANT

The defendant, (*name*), is not legally responsible to the plaintiff, (*name*), on (his) (her) claim of (false imprisonment) (false arrest) if the affirmative defense of a privilege to arrest with a warrant is proved (and you do not find such privilege, if any, was abused). This defense is proved if you find all of the following:

- (1. The warrant was [valid] [or] [appeared to be valid];)**
- 2. The plaintiff was the person for whose arrest the warrant was issued (or the plaintiff knew that [his] [her] conduct would cause the defendant to assume [he] [she] was);**
- 3. The arrest was made within the territory in which the (court) (official) issuing the warrant had authority to order the arrest;**
- 4. (The defendant had possession of the warrant at the time of the arrest and [he] [she] showed it to the plaintiff immediately upon plaintiff's request, if any) (or) (if defendant did not have possession of the warrant, [he] [she] informed plaintiff of the alleged offense and that a warrant had been issued and that upon the plaintiff's request [he] [she] would show [him] [her] the warrant as soon as possible);**
- 5. The defendant was a person authorized to execute the warrant within the territory where the arrest was made; and**
- 6. The defendant indicated (his) (her) intent to arrest the plaintiff by (his) (her) appearance, words, or conduct (or if the defendant did not have to indicate that intent at the time of the arrest, [he] [she] did so at the first reasonable opportunity).**

Notes on Use

1. In the first paragraph use whichever parenthesized phrase, "false imprisonment" or "false arrest," is more appropriate and omit the parenthesized phrase relating to abuse unless there is evidence to support it.

2. Omit the parenthesized numbered paragraph 1, unless the validity or fairness of the warrant involves a disputed question of fact, such as forgery. If for that reason the paragraph is not omitted, Instruction 21:17 must also be given with this instruction. Part of the proof required to establish that a warrant was valid or fair on its face is that a warrant was in fact issued. If that is a disputed question of fact, paragraph 1 should be used with any necessary modifications.

3. Use whichever remaining parenthesized or bracketed words or phrases are appropriate, and omit any remaining numbered paragraphs, the facts of which are not in dispute.

4. Depending on the circumstances, other appropriate instructions, for example, Instruction 21:16, explaining when an indication of an intent to make an arrest may be excused, should be given with this instruction.

5. Additional instructions dealing with the authority of the court issuing the warrant (numbered paragraph 3) and the authority of the person executing the warrant (numbered paragraph 5) may be required. For that purpose, see Crim. P. 4, 4.1, 4.2, and 9 and section 16-1-104(18), C.R.S. (by definition, a warrant must be issued by a judge of a court of record and be “directed to any peace officer”); section 16-3-106, C.R.S. (authorizing a peace officer, if in fresh pursuit and the alleged offender has crossed a boundary line marking the territorial limit of the officer’s authority, to “pursue him beyond such boundary line and make the arrest”); section 16-2.5-101 to -151, C.R.S. (setting forth various statutory definitions of “peace officer”); section 16-3-108, C.R.S. (issuance of arrest warrant without information or complaint); and section 16-5-205, C.R.S. (issuance of arrest warrants based on indictment, information, or filing of a felony complaint in county court).

6. In cases involving juveniles and persons charged with violation of municipal ordinances or charter provisions, the appropriate counterpart statutes and court rules should be consulted.

7. Numbered paragraph 4 of the instruction sets out the provisions of Crim. P. 4(c)(1)(III), which vary somewhat from older common-law rules. For the common-law rules, see the Source and Authority below.

8. If there is a dispute as to whether the defendant did, in fact, restrict the plaintiff’s freedom of movement by an arrest or otherwise, this instruction must be appropriately modified.

9. Concerning numbered paragraph 5, “it is immaterial who executes the arrest warrant provided that individuals with lawful authority to make an arrest are actually present at the scene of the arrest and participate in the arrest process.” **People v. Schultz**, 200 Colo. 47, 49, 611 P.2d 977, 979 (1980). *See also* **People v. Florez**, 680 P.2d 219 (Colo. 1984); **People v. Hamilton**, 666 P.2d 152 (Colo. 1983). When otherwise appropriate to the evidence in the case, numbered paragraph 5 should be appropriately modified to reflect the rule of the **Schultz** case.

Source and Authority

In addition to the authorities discussed above, this instruction is supported generally by RESTATEMENT (SECOND) OF TORTS § 122 (stating the privilege in general); RESTATEMENT § 125 (name of person arrested); RESTATEMENT § 129 (place of arrest); RESTATEMENT § 126 (possession of warrant); RESTATEMENT § 128 (manifestation of intent to arrest and of possession of warrant) (1965); 1 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS § 3.17 (3d ed. 2006); and W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 25 (5th ed. 1984). *See also* **Pomeranz v. Class**, 82 Colo. 173, 257 P. 1086 (1927) (in a false imprisonment case, sheriff not liable because warrant fair on its face, but private citizens who knowingly caused issuance of invalid warrant liable).

21:16 INDICATION OF INTENT TO ARREST — WHEN EXCUSED

A person does not have to indicate an intent to arrest if he or she reasonably believes that:

- 1. The indication would be dangerous to him or herself or a third person; (or)**
- 2. The indication would be likely to frustrate the arrest; (or)**
- 3. The indication would be useless or unnecessary because the person being arrested would be incapable of understanding it; (or)**
- 4. The person being arrested knows or as a reasonable person should know that he or she is being arrested and for what offense.**

Notes on Use

1. When appropriate, this instruction should be given in conjunction with Instructions 21:10, 21:11, and 21:15.
2. Only such portions of this instruction should be used as are supported by the evidence.
3. For the same reasons an indication of intent to arrest may be excused, the requirement that the defendant indicate the offense or conduct for which the arrest is being made may also be excused. When necessary, this instruction should be appropriately modified to include this rule.

Source and Authority

1. This instruction is supported by RESTATEMENT (SECOND) OF TORTS § 128(2) (1965); and 1 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS § 3.17, at 361, and § 3.18, at 408 (3d ed. 2006).
2. Numbered paragraph 4 is supported by **People v. Olguin**, 187 Colo. 34, 528 P.2d 234 (1974).

21:17 VALID WARRANT OR WARRANT FAIR ON ITS FACE — DEFINED

To be (valid) (apparently valid), a warrant must be *(insert those disputed facts the jury must resolve, if any, to determine whether or not the warrant was valid or appeared to be valid).*

Notes on Use

1. Use whichever parenthesized words are appropriate.
2. When appropriate, this instruction should be given with Instruction 21:15.

Source and Authority

1. This instruction is supported by **Pomeranz v. Class**, 82 Colo. 173, 257 P. 1086 (1927) (elements of a warrant fair on its face); **Harris v. McReynolds**, 10 Colo. App. 532, 51 P. 1016 (1898) (warrant invalid where plaintiff not sufficiently named, though he was the person whose arrest was intended under the warrant); 1 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS § 3.17, at 402-405 (3d ed. 2006); and W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 25, at 149-50 (5th ed. 1984). *Cf.* **Herring v. United States**, 555 U.S.135 (2009) (evidence not excluded in criminal prosecution where warrant that had been recalled but not properly removed from computer records appeared valid to officers); **People v. Mitchell**, 678 P.2d 990 (Colo. 1984) (evidence properly suppressed in a criminal proceeding, though it had been seized as part of an arrest with a warrant, where the warrant was “void from its issuance” because it had been issued on the mistaken assumption that the defendant had not made timely payment of a traffic fine).

2. It is assumed that in most cases only one or two of the requirements of a valid warrant or one fair on its face will be in dispute.

A warrant is valid if:

- a. The plaintiff is sufficiently named or described in the warrant, and it is otherwise regular in form;
- b. The warrant was issued by a court or official having authority to issue a warrant for the conduct which was described in the warrant;
- c. The court or official, at the time of issuing the warrant, had jurisdiction over the person named or described therein;
- d. All proceedings required for the proper issuance of warrants took place (see rules and statutes cited in Note 5 of Notes on Use to Instruction 21:15); and
- e. The warrant had not expired by a lapse of time from its issuance to the time of arrest.

RESTATEMENT (SECOND) OF TORTS §§ 123, 130(a) (1965).

3. For requirements as to regularity of form, see Crim. P. 4(b)(1) and 9(b)(1).
4. A warrant is fair on its face if:
 - a. The plaintiff is sufficiently named or described in the warrant, and it is otherwise regular in form;
 - b. The court or official who issued the warrant had authority to issue warrants for the general type of conduct that the plaintiff was charged with;
 - c. The facts stated in the warrant, if they all existed, would confer jurisdiction over the person sufficiently named or described therein;
 - d. Nothing appears in the warrant to indicate that one or more of the proceedings required for proper issuance had not taken place; and
 - e. The warrant has not expired by a lapse of time from its issuance to the time of arrest.

RESTATEMENT §§ 124, 130(a).

21:18 GUILT OF PERSON ARRESTED

The defendant, (*name*), is not legally responsible to the plaintiff, (*name*), if the affirmative defense of the guilt of the person arrested is proved. This defense is proved if you find the plaintiff (pleaded guilty to) (or) (was convicted of) the criminal offense for which (he) (she) was arrested.

Notes on Use

1. Use whichever parenthesized words are appropriate.
2. If there is a dispute as to whether the defendant did in fact restrict the plaintiff's freedom of movement by an arrest or otherwise, this instruction must be appropriately modified.

Source and Authority

1. This instruction is supported by **Hushaw v. Dunn**, 62 Colo. 109, 111, 160 P. 1037, 1038 (1916) (“[W]here a person has pleaded guilty or has been convicted of a criminal charge, an action for false imprisonment will not lie. . . . The same rule would seem to be equally applicable where the arrest was for a violation of a municipal ordinance.”); and 1 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS § 3.18, at 421 (3d ed. 2006).

2. The privilege covered by this instruction does not apply if the conviction was for an offense other than that for which the arrest was made. HARPER, JAMES, AND GRAY ON TORTS, *supra*, § 3.18, at 414; accord **Enright v. Groves**, 39 Colo. App. 39, 560 P.2d 851 (1977). *But see Land v. Hill*, 644 P.2d 43 (Colo. App. 1981) (distinguishing **Enright** on the grounds that in **Enright** the conduct for which the plaintiff claimed to have been falsely arrested (failure to produce a driver's license) was totally unrelated to that for which the plaintiff was convicted (violation of dog leash law)). In **Land**, on the other hand, the plaintiff's threats toward a third person for which she appears to have been arrested were “part and parcel” of a single course of conduct involving the battery on the same third person to which the plaintiff pleaded guilty.

21:19 ABUSE OF A PRIVILEGE TO ARREST

If you find that the defendant, (*name*), had a privilege to arrest the plaintiff, (*name*), (with) (or) (without) a warrant, such a privilege is not a defense if:

(1. The defendant's sole purpose in making the arrest was not to bring the plaintiff before a proper court or official or to secure the administration of the criminal law) (or)

(2. The defendant failed to bring the plaintiff without unnecessary delay before [*insert the court or officer before whom the plaintiff should have been brought*]).

Notes on Use

1. Use whichever parenthesized portions are appropriate.
2. For modifications which may be required in this instruction when a child is detained, see sections 19-2-502 and 19-2-503, C.R.S.
3. Paragraph 2 of this Instruction may require modification if a plaintiff was admitted to bail pursuant to section 16-2-111, C.R.S. *See Weld Cty. Court v. Richards*, 812 P.2d 650 (Colo. 1991).

Source and Authority

1. Paragraph 1 is supported by RESTATEMENT (SECOND) OF TORTS § 127 (1965); and 1 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS § 3.18, at 427 (3d ed. 2006).
2. Paragraph 2 is supported by HARPER, JAMES AND GRAY ON TORTS, *supra*, § 3.17, at 427; and W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 25, at 150 (5th ed. 1984).
3. Rule 5(a) of the Colorado Rules of Criminal Procedure requires that a person arrested without a warrant or with a warrant be taken without unnecessary delay before the nearest available county or district court. “[Delay caused by] the decision of law enforcement officers to conduct a custodial interrogation of the defendant before presenting him to a judicial officer for a proper advisement of rights . . . is not a ‘necessary’ delay within the intendment of Crim. P. 5(a).” *People v. Raymer*, 662 P.2d 1066, 1071 (Colo. 1983).
4. Rule 9(c) of the Rules of Criminal Procedure requires that a person arrested with a warrant to be executed under Crim. P. 4(c) be taken before the court without unnecessary delay or, for purpose of admission to bail, before the clerk of the court, the sheriff of the county where the arrest occurs, or any other officer authorized by law to admit to bail.
5. Under certain circumstances set out in section 42-4-1707, C.R.S., a person arrested for a misdemeanor traffic violation must be taken without unnecessary delay before a county judge who has jurisdiction of the offense as provided by law.

6. Other relevant statutes include section 16-2-112, C.R.S. (peace officer making an arrest without a warrant for a misdemeanor or petty offense is required to take arrested person “without unnecessary delay before the nearest available county or district judge”); section 16-3-104(3), C.R.S. (peace officer of another state making an arrest after a fresh pursuit required to take arrested person without unnecessary delay before “the nearest available judge of a court of record”); and section 16-3-108, C.R.S. (peace officer arresting a person with a warrant not based on an information or complaint required to take arrested person “without unnecessary delay before the nearest judge of a court of record”). *But see Richards*, 812 P.2d at 653 (if defendant is arrested and admitted to bail through execution of an appearance bond pursuant to section 16-2-111, the requirements of section 16-2-112 are not applicable).

7. As to the requirements of the Fourth Amendment to the United States Constitution with respect to a prompt judicial determination of probable cause following a warrantless arrest, see **County of Riverside v. McLaughlin**, 500 U.S. 44 (1991) (burden of proof shifts to government to demonstrate existence of a bona fide emergency or other extraordinary circumstance when an individual arrested without a warrant does not receive a judicial determination of probable cause within 48 hours). *See also Powell v. Nevada*, 511 U.S. 79 (1994) (four-day delay between warrantless arrest and judicial probable cause hearing was presumptively unreasonable under **McLaughlin’s** 48-hour rule).