CHAPTER 18

TRESPASS TO LAND AND PRIVATE NUISANCE

18:1 TRESPASS — ELEMENTS OF LIABILITY

For the plaintiff, *(name)***, to recover from the defendant,** *(name)***, on** *(insert applicable pronoun)* **claim of trespass, you must find that (both) (all) of the following have been proved by a preponderance of the evidence:**

1. The plaintiff was (the owner) (in lawful possession of) *(insert appropriate description of property)***; and**

2. The defendant intentionally (entered upon) (caused another to enter upon) (caused *[insert appropriate description]* **to come upon) that property.**

(3. The *[insert appropriate description]* **caused physical damage to plaintiff's property.)**

If you find that one of these statements has not been proved, then your verdict must be for the defendant.

On the other hand, if you find that (both) (all) of these 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. Use whichever parenthesized phrase is most appropriate.

2. Paragraph 3 should be used only when the intrusion onto property is intangible. *See* **Pub. Serv. Co. v. Van Wyk**, 27 P.3d 377 (Colo. 2001) (intrusions of electromagnetic fields, radiation waves, and noise emitted from power lines do not cause physical damage and, therefore, will not support a claim of trespass).

3. 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 (model unified verdict form). *See also* **Sanderson v. Heath Mesa Homeowners Ass'n**, 183 P.3d 679 (Colo. App. 2008) (on remand, liability for damages may be allocated to "act of God," natural subsidence, and plaintiffs' own irrigation if the evidence supports such an allocation).

4. Instruction 18:2, defining "intentionally," must also be given with this instruction.

5. One may commit a trespass by affirmative conduct other than a direct entry. In such cases, this instruction must be appropriately modified. *See, e.g.*, **Cobai v. Young**, 679 P.2d 121 (Colo. App. 1984) (defendants constructed their house so as to cause snow to slide off the roof and hit the plaintiff's house).

Source and Authority

1. This instruction is supported by **Hugunin v. McCunniff**, 2 Colo. 367 (1874); and RESTATEMENT (SECOND) OF TORTS §§ 158-159 (1965). *See also* **Hoery v. United States**, 64 P.3d 214 (Colo. 2003); **Antolovich v. Brown Grp. Retail, Inc.**, 183 P.3d 582 (Colo. App. 2007); **Trask v. Nozisko**, 134 P.3d 544 (Colo. App. 2006); **Gifford v. City of Colo. Springs**, 815 P.2d 1008 (Colo. App. 1991); **Burt v. Beautiful Savior Lutheran Church**, 809 P.2d 1064 (Colo. App. 1990) (trespass is the physical intrusion upon the property of another without the permission of the person lawfully entitled to possession of such property); **Magliocco v. Olson**, 762 P.2d 681 (Colo. App. 1987); **Docheff v. City of Broomfield**, 623 P.2d 69 (Colo. App. 1980); **Miller v. Carnation Co.**, 33 Colo. App. 62, 516 P.2d 661 (1973).

2. "The elements of the tort of trespass are a physical intrusion upon the property of another without the proper permission from the person legally entitled to possession of that property." **Wal-Mart Stores, Inc. v. United Food & Commercial Workers Int'l Union**, 2016 COA 72, ¶ 12, 382 P.3d 1249 (quoting **Sanderson**, 183 P.3d at 682). Only the person lawfully in actual or constructive possession of the land at the time of the trespass may maintain an action for trespass. **Hugunin**, 2 Colo. at 369; *see also* **Betterview Invs., LLC v. Pub. Serv. Co.**, 198 P.3d 1258 (Colo. App. 2008) (plaintiff may assert trespass claim even though it had no interest in the property when pipeline was placed on it because the trespass continued as long as the pipeline remained). A landlord, notwithstanding a lease, is in constructive possession for the purpose of maintaining a trespass action to vindicate a harm inflicted upon the landlord's reversionary interest. **Plotkin v. Club Valencia Condo. Ass'n**, 717 P.2d 1027 (Colo. App. 1986) (citing and paraphrasing this instruction for the definition of trespass). Similarly, the owner or lessee of a mineral estate may maintain a trespass action for an unauthorized geophysical exploration for that mineral notwithstanding such exploration was made with the consent of the surface owner. **Grynberg v. City of Northglenn**, 739 P.2d 230 (Colo. 1987). Either a landlord with a reversionary interest or a tenant in possession of premises is entitled to sue for trespass. **Gifford**, 815 P.2d at 1012.

3. A trespass may occur when the defendant originally had permission to be on the land, but such permission was subsequently revoked or otherwise terminated and defendant remained on the land. RESTATEMENT § 158; *see also* **Hugunin**, 2 Colo. at 371. Similarly, a trespass may occur when the defendant originally had a privilege to come upon the premises, but remained for a longer time than was reasonably necessary to accomplish the purposes of the privilege. **Walker v. City of Denver**, 720 P.2d 619 (Colo. App. 1986). In these cases, this instruction must be modified accordingly. *See also* **Gerrity Oil & Gas Corp. v. Magness**, 946 P.2d 913 (Colo. 1997) (where the privilege is defined in terms of reasonableness, trespass may occur only when holder of privilege acts unreasonably or unnecessarily); **Steiger v. Burroughs**, 878 P.2d 131 (Colo. App. 1994).

4. Plaintiff need not establish defendant's "willfulness" to prevail on a trespass claim. **Bittersweet Farms, Inc. v. Zimbelman**, 976 P.2d 326 (Colo. App. 1998); **Engler v. Hatch**, 472 P.2d 680 (Colo. App. 1970) (not published pursuant to C.A.R. 35(f)). However, liability for trespass requires a showing that the defendant "intended" to perform conduct that either constituted or caused an intrusion onto the property of another. **Antolovich**, 183 P.3d at 603; **Burt**, 809 P.2d at 1067; *see also* RESTATEMENT § 158.

5. Trespass may occur without direct entry: "A landowner who sets in motion a force which, in the usual course of events, will damage property of another is guilty of a trespass on such property." **Hoery**, 64 P.3d at 217; **Blakeland Drive Inv'rs, LLP v. Taghavi**, 2023 COA 30M, ¶¶ 15, 36, 532 P.3d 369 (a continuing trespass occurred with "the migrating contamination" of BTEX and MTBE on and under plaintiff's property "through groundwater and soil vapors").

6. Comparative negligence is not a defense to a claim for trespass, even though defendant's conduct may also have been negligent. **Burt**, 809 P.2d at 1067 (comparative negligence only a defense to negligence claims).

7. For a discussion of what constitutes a "geophysical trespass," see **Mallon Oil Co. v. Bowen/Edwards Associates, Inc.**, 965 P.2d 105 (Colo. 1998).

8. There are no Colorado appellate decisions that address the issues of whether "privilege," "consent," and "license" are affirmative defenses to a claim for trespass. However, other jurisdictions that have considered the matter have concluded that such is the case. *See, e.g.*, **United States v. Imperial Irrigation Dist.**, 799 F. Supp. 1052 (S.D. Cal. 1992) (collecting cases); RESTATEMENT (SECOND) OF TORTS § 167.

9. For a discussion of the distinction between a continuing and a permanent trespass, see **Hoery**, 64 P.3d at 217-22 (continuing migration and ongoing presence of toxic pollution on plaintiff's property constitutes a continuing trespass for limitation purposes, even though the condition causing the pollution has ceased). The statute of limitations for a continuing trespass does not begin to run until the defendant removes or stops the improper invasion. *Id.* at 220; **Sanderson**, 183 P.3d at 682. Continuing trespass and nuisance may occur when a defendant does not stop or remove continuing harmful physical conditions that are wrongfully placed on plaintiff's land. **Smokebrush Found. v. City of Colo. Springs**, 2018 CO 10, ¶ 47, 410 P.3d 1236.

10. Section 34-45-101, C.R.S., elaborates on the rules of constructive possession for actions in which the plaintiff seeks to recover damages for the wrongful taking of ore.

18:2 INTENTIONALLY — DEFINED

A person intentionally (enters upon) (causes another to enter upon) (causes *[insert appropriate description]* **to come upon) property when it is** *(insert applicable pronoun)* **purpose to (enter upon) (cause another to enter upon) (cause** *[insert appropriate description]* **to come upon) property, or when it is** *(insert applicable pronoun)* **purpose to do the act that in the natural course of events results in the intrusion.**

Notes on Use

This instruction should be used with Instruction 18:1.

Source and Authority

1. This instruction is supported by **Hoery v. United States**, 64 P.3d 214 (Colo. 2003); **Antolovich v. Brown Grp. Retail, Inc.**, 183 P.3d 582 (Colo. App. 2007) (plaintiffs alleged that defendant caused chemical to come into plaintiffs' soil and groundwater); and **Miller v. Carnation Co.**, 33 Colo. App. 62, 516 P.2d 661 (1973). In **Hoery**, 64 P.3d at 218, the Colorado Supreme Court, in dicta, cited the language of RESTATEMENT (SECOND) OF TORTS § 158(a) cmt. i (1965): "It is enough that an act is done with knowledge that it will to a substantial certainty result in the entry of the foreign matter." As a result, there is a question about whether knowledge is an element of trespass.

2. Colorado has rejected the tort of negligent trespass. **Burt v. Beautiful Savior Lutheran Church**, 809 P.2d 1064 (Colo. App. 1990). The only intent required is to do the act that itself constitutes or inevitably causes the intrusion.

3. For a discussion of the "natural course of events" language in this instruction, see **Antolovich**, 183 P.3d at 603.

18:3 CONSENT

The defendant, *(name)***, is not legally responsible to the plaintiff,** *(name)***, on** *(insert applicable pronoun)* **claim of trespass if the affirmative defense of consent is proved. This defense is proved if you find both of the following:**

1. By words or conduct or both, the plaintiff led the defendant to reasonably believe that the plaintiff consented to (the defendant's entry) (the entry of *[name of third person]***) (the** *[insert description]* **coming) upon the** *(insert description of property)***; and**

2. (The defendant entered) (*[name of third person]* **entered) (The** *[insert description]* **came) upon** *(insert description of property)* **in a manner that was the same as or substantially similar to the manner consented to by the plaintiff.**

Notes on Use

Where the defendant raises the defense of privilege or license, the unnumbered introductory paragraph of this instruction, appropriately modified, should be used.

Source and Authority

This instruction is based on RESTATEMENT (SECOND) OF TORTS § 167 cmt. c (1965) ("The burden of establishing the possessor's consent is upon the person who relies upon it.").

18:4 ACTUAL OR NOMINAL DAMAGES

Plaintiff, *(name)***, has the burden of proving the nature and extent of** *(insert applicable pronoun)* **damages by a preponderance of the evidence. 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 trespass of the 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. *[Version a]* **The difference between the reasonable market value of the real estate immediately before the trespass and its reasonable market value immediately after the trespass [; and])**

(1. *[Version b]* **The reasonable cost of [restoring] [repairing] [rebuilding] the property (and the decrease, if any, in market value of the property as [restored] [repaired] [rebuilt]) [; and])**

(2. *[insert any consequential damages the jury might reasonably find the plaintiff suffered as a result of the defendant's trespass]***.)**

If you find in favor of the plaintiff but do not find any actual damages, you shall award *(insert applicable pronoun)* **nominal damages of one dollar.**

Notes on Use

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

2. Use whichever parenthesized and bracketed words and phrases are appropriate. For most cases, either the "diminution in value" measure of damages (Version a of parenthesized numbered paragraph 1) or the "cost of restoration" measure of damages (alternative Version b of parenthesized numbered paragraph 1) will be the proper measure for any physical injuries to the property.

3. There are, however, certain situations where yet another measure may be proper. *See, e.g.*, **Bd. of Cty. Comm'rs v. Slovek**, 723 P.2d 1309 (Colo. 1986); **Heritage Vill. Owners Ass'n v. Golden Heritage Inv'rs, Ltd.**, 89 P.3d 513 (Colo. App. 2004). In such situations, this instruction must be appropriately modified.

4. In addition to recovering nominal or actual damages for physical injury to the property, the plaintiff may also be entitled to recover damages for certain consequential damages. When recoverable, if proved, these damages should be identified in the parenthesized numbered paragraph 2 and in additionally numbered paragraphs if necessary. *See also* **Calvaresi v. Nat'l Dev. Co.**, 772 P.2d 640 (Colo. App. 1988).

Source and Authority

1. Version a of paragraph 1, the "diminution of value" rule, is supported by **Colorado Bridge & Construction Co. v. Preuit**, 75 Colo. 107, 224 P. 222 (1924); **Big Five Mining Co. v. Left Hand Ditch Co.**, 73 Colo. 545, 216 P. 719 (1923); **Mogote-Northeastern Consolidated Ditch Co. v. Gallegos**, 70 Colo. 550, 203 P. 668 (1922); and **Mustang Reservoir, Canal & Land Co. v. Hissman**, 49 Colo. 308, 112 P. 800 (1911). *See also* **Dandrea v. Bd. of Cty. Comm'rs**, 144 Colo. 343, 356 P.2d 893 (1960); **Denver, Tex. & Ft. Worth R.R. v. Dotson**, 20 Colo. 304, 38 P. 322 (1894).

2. Version b of paragraph 1, the "cost of restoration" rule, is supported by **Slovek**, 723 P.2d at 1316, which disapproved the view expressed in some earlier cases that the "diminution of value" rule is the only appropriate measure. Other cases that support the "cost of restoration" rule include **Colorado Bridge & Construction Co.**, 75 Colo. at 109, 224 P. at 223 (allowing as damages cost of removing asphalt that had been dumped on the plaintiff's property and stating, "[t]he rule to be applied should be such as will enable the jury to determine, as near as may be, the actual loss suffered"); and **Big Five Mining Co.**, 73 Colo. at 549, 216 P. 721 (allowing cost of restoration, as well as compensation for loss of use during repair, where injury is susceptible of remedy at moderate expense, and cost of restoring may be shown with reasonable certainty (distinguishing **Mogote-Northeastern Consolidated Ditch Co.**, 70 Colo. 550, 203 P. 668, and **Mustang Reservoir, Canal & Land Co.**, 49 Colo. 308, 112 P. 800)). *See also* **Zwick v. Simpson**, 193 Colo. 36, 572 P.2d 133 (1977) (cost of restorations not the appropriate measure where plaintiff had sold property prior to trial); **Bobrick v. Taylor**, 171 Colo. 375, 467 P.2d 822 (1970) (costs of restoration allowed as appropriate measure of damages); **Burt v. Beautiful Savior Lutheran Church**, 809 P.2d 1064 (Colo. App. 1990) (actual damages may include diminution of market value or costs of restoration, loss of use of the property, and discomfort and annoyance to the occupant); **Gladin v. Von Engeln**, 651 P.2d 905 (Colo. App. 1982) (even though not technically a trespass action, proper to award cost of repair and loss of use where property damaged by removal of lateral support); **Evans v. Colo. Ute Elec. Ass'n**, 653 P.2d 63 (Colo. App. 1982) (costs of restoration allowed).

3. When either the "diminution of market value" or the "cost of restoration" would be an appropriate measure for the recovery of damages for physical injury to property, the trial court must use its sound discretion to determine which measure would be the more appropriate, that is, Version a or Version b of parenthesized numbered paragraph 1. *See* **Slovek**, 723 P.2d at 1317 (if cost of restoration, though more than the market value of the property, is not "wholly unreasonable" and market value is not adequate compensation for some personal or special reason, restoration costs may be awarded); **Fed. Ins. Co. v. Ferrellgas, Inc.**, 961 P.2d 511 (Colo. App. 1997). A "cost of restoration" measure may be used even though in some cases it may exceed either the diminution in market value caused by the trespass or the value of the land as it existed before the trespass occurred. **Slovek**, 723 P.2d at 1317. However, the cost of restoration measure is generally not applicable where no "personal or special use" of the property is shown. **Razi v. Schmitt**, 36 P.3d 102 (Colo. App. 2001) (award of damages to owner of commercial building that was damaged by arsonist's fire limited to diminution in market value rather than cost of restoration where building was not used for any personal or special purpose).

4. For a discussion of the difference in damages recoverable for a "continuing trespass" as distinguished from a "permanent trespass," see **Hawley v. Mowatt**, 160 P.3d 421 (Colo. App. 2007) (party injured by continuing trespass may not recover future damages, but party injured by permanent trespass may recover both past and future damages). *See also* **Rinker v. Colina-Lee**, 2019 COA 45, ¶ 83, 452 P.3d 161, 174 ("the traditional and preferred equitable remedy for a continuing trespass is a mandatory injunction requiring the removal of the encroachment"); **Hunter v. Mansell**, 240 P.3d 469 (Colo. App. 2010) (reversing legal remedy of damages for continuing trespass where equitable remedy of mandatory injunction was more appropriate).

5. Nominal damages are recoverable in an action for damages to real property if the action is one in trespass, C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 22 (1935), but not if the action is one in negligence. *See* **Hoover v. Shott**, 68 Colo. 385, 189 P. 848 (1920). Only nominal damages are recoverable when there is insufficient evidence of any actual damages resulting from a trespass. **Crawford v. French**, 633 P.2d 524 (Colo. App. 1981).

6. In appropriate circumstances, exemplary damages are recoverable in a trespass action. **Carlson v. McNeill**, 114 Colo. 78, 162 P.2d 226 (1945); **Livingston v. Utah-Colo. Land & Live Stock Co.**, 106 Colo. 278, 103 P.2d 684 (1940).

7. Several cases have recognized the right to recover consequential damages, in addition to damages for physical injury to the property. *See, e.g.*, **Slovek**, 723 P.2d at 1318 (loss of use value as well as personal injury to owner-occupant in form of discomfort, annoyance, sickness, physical harm); **Big Five Mining Co.**, 73 Colo. at 548, 216 P. at 720 (value of loss of use during repairs); **Sanderson v. Heath Mesa Homeowners Ass'n**, 183 P.3d 679 (Colo. App. 2008) (discomfort and annoyance, along with diminution of market value, costs of restoration, and loss of use damages); **Webster v. Boone**, 992 P.2d 1183 (Colo. App. 1999) (annoyance and discomfort, but not emotional distress); **Montgomery Ward & Co., Inc. v. Andrews**, 736 P.2d 40 (Colo. App. 1987) (destruction of business and termination of contract with third person); **Miller v. Carnation Co**., 39 Colo. App. 1, 564 P.2d 127 (1977) (in a nuisance and trespass action, damages allowed for loss of use and enjoyment and annoyance, discomfort, inconvenience, and loss of ability to enjoy their lives); **Traver v. Dodd**, 24 Colo. App. 273, 133 P. 1117 (1913) (damages for wrongful occupancy as measured by reasonable rental value); *see also* **Valley Dev. Co. v. Weeks**, 147 Colo. 591, 597, 364 P.2d 730, 733 (1961) (in dictum, damages for mental suffering if trespass was "inspired by fraud, malice, or like motives").

Damages for Destruction of Improvements (Buildings, Fences, etc.)

8. Where a structure or improvement has been destroyed, as opposed to only being damaged, and it can be treated as a unit apart from the land, a more appropriate measure of damages may be the value of the improvement at the time of its destruction as shown by original cost of replacement, less depreciation. MCCORMICK, *supra*, § 126.

Damages for Injuries to Crops

9. If plaintiff is prevented from planting his land, then the measure of damages is the rental value of the land for the season. *Id.*; *see* **Roberts v. Lehl**, 27 Colo. App. 351, 149 P. 851 (1915) (loss is rental value of land with water less rental value of land without water).

10. For an annual, unmatured crop that is destroyed, the measure of damages is the value of the unmatured crop at the time and place of loss. MCCORMICK, *supra*, § 126; *see* **Roberts**, 27 Colo. App. 357, 149 P. 853. *But see* **Harsh v. Cure Feeders**, **L.L.C.**, 116 P.3d 1286 (Colo. App. 2005) (farmer whose immature corn crop was partially destroyed by trespassing cattle was entitled to recover damages from owner of cattle based on difference between actual contract price for mature crop and what price would have been had crop not been damaged).

11. The measure of damages for crop loss caused by breach of warranty is "the amount the crop would have brought on the market less the costs incurred to raise, harvest, and sell" it, in other words, the farmer's gross profits less the costs of operations. **Deacon v. Am. Plant Food Corp.**, 782 P.2d 861, 865 (Colo. App. 1989), *rev'd on other grounds sub nom.* **Stone's Farm Supply, Inc. v. Deacon**, 805 P.2d 1109 (Colo. 1991).

12. For an annual, mature crop injured or destroyed, the measure of damages is the value of the crop at the time or place of its injury or destruction. **Smith v. Eichheim**, 147 Colo. 180, 363 P.2d 185 (1961).

13. Where a crop that does not require annual planting is injured or destroyed, if just this year's crop is injured or destroyed, the rules are the same as for annual crops. *See* **Hoover**, 68 Colo. at 387-88, 189 P. at 849 (by implication). If the injury goes deeper, damaging the roots, the measure of damage is diminution in the value of the land itself, or, alternatively, the cost of replanting plus loss of use of the land while it is being restored. MCCORMICK, *supra*, § 126; *see* **Frankfort Oil Co. v. Abrams**, 159 Colo. 535, 413 P.2d 190 (1966) (diminution of value of land); **Bullerdick v. Pritchard**, 90 Colo. 272, 8 P.2d 705 (1932) (plaintiff recovered under the loss of the use of the land method for damage to his sheep from defendant's destruction of plaintiff's pasturage grass); **Traver**, 24 Colo. App. at 277, 133 P. at 1119 (diminution in value theory).

Damages for Injuries to Trees and Timber

14. When injury to or destruction of fruit trees or shade trees occurs, the better measure of damages is to let plaintiff choose either: (1) diminution in value of land (amount of reduction in the value of the realty), or (2) loss of value of trees considered separately (market value of the standing timber). MCCORMICK, *supra*, § 126 (1935). The value of a unique growing tree is not limited to its value as lumber. Its aesthetic value may also be considered either by measuring damages by the diminution in the market value of the real property or by adding the aesthetic value of the tree to its value as lumber. **Kroulik v. Knuppel**, 634 P.2d 1027 (Colo. App. 1981).

15. For mature, standing timber, both methods give the same results, but the diminution in value of land method gives plaintiff a larger recovery when the trees are too small for cutting or are immature. MCCORMICK, *supra*, § 126. This fact was implicitly recognized in **Manitou & Pike's Peak Ry. v. Harris**, 45 Colo. 185, 101 P. 61 (1909).

16. For cutting and appropriation of trees (not injury or destruction of trees), the rules are: (1) Where the trespasser made an innocent mistake, the measure of damage is the diminution in value of land or the value of the trees before cutting. MCCORMICK, *supra*, § 126; (2) Where the trespasser knew he or she was taking another's property, the measure of damages is the value of

the timber and its products as improved by defendant's labor without any allowance for costs of cutting, milling, or other processing. *Id.*

Damages for Appropriation of Gravel, Ore, Coal, Oil, or other Minerals

17. Where the trespasser made an innocent mistake, the measure of damages is the value of the substance or mineral in place in the ground. *Id.* This may be measured in two ways. The first is the value in place as shown by "royalty value," which is the amount for which the landowner could sell the privilege of mining or removing the mineral. *Id.*; *see* **Colo. Cent. Consol. Mining Co. v. Turck**, 70 F. 294 (8th Cir. 1895). The second is the value of material at the surface less direct cost of extracting and lifting the mineral. MCCORMICK, *supra*, § 126; *see* **O'Connor v. Rolfes**, 899 P.2d 227 (Colo. App. 1994); **St. Clair v. Cash Gold Mining & Milling Co.**, 9 Colo. App. 235, 47 P. 466 (1896) (defendant gets credited only with cost of extraction from plaintiff's claim, not with the cost of reaching plaintiff's claim). Where plaintiff's and defendant's ores were mingled, plaintiff gets the value of all the ore taken as shown by defendant's books unless defendant can show just what came from him or her and what came from plaintiff. **Little Pittsburg Consol. Mining Co. v. Little Chief Consol. Mining Co.**, 11 Colo. 223, 17 P. 760 (1888); *see* **St. Clair**, 9 Colo. App. at 244, 47 P. at 469. For a discussion of the alternative methods of measuring the value of minerals in place, such as the "royalty" value or the value of the minerals at the surface less the direct costs of extraction, see **Kroulik**, 634 P.2d at 1030-31 (citing this instruction).

18. Against a deliberate, willful appropriator, the measure of damages is the value at the mouth of the pit, or value when prepared and loaded in cars for final marketing, or amount of proceeds realized, with no deduction for labor, extracting, lifting, or processing. MCCORMICK, *supra*, § 126; *see* **United Coal Co. v. Canon City Coal Co.**, 24 Colo. 116, 48 P. 1045 (1897) (Court announces the willful rule, but allowed trial court to apply nonwillful rule; conversion, however, was also involved.); **St. Clair**, 9 Colo. App. at 242, 47 P. at 468.

19. Plaintiff may choose to sue for conversion instead of trespass where the measure of damages is the value of the mineral after being severed less the reasonable cost of mining, raising, and hauling it. **Omaha & Grant Smelting & Ref. Co. v. Tabor**, 13 Colo. 41, 21 P. 925 (1889) (in action where plaintiff sued the party to whom the trespasser sold the ore, plaintiff receives no damages for diminished value of plaintiff's land, and it makes no difference whether the entry was intentional or innocent).

Damages for Obstruction of Easements

20. Damages may be awarded to easement holder when denied access to his land. **Amada Family Ltd. P'ship v. Pomeroy**, 2021 COA 73, ¶ 83, 494 P.3d 633, 651 ("Pomeroys committed trespass by locking the gate at the entrance to the access easement [requiring plaintiff] to leave his residence in Arizona, drive to Colorado, and spend two nights in a hotel room.").

21. A trespass occurs when a ditch easement is unilaterally altered. **Roaring Fork Club, L.P. v. St. Jude's Co.**, 36 P.3d 1229 (Colo. 2001). However, there must be evidence of an actual movement or alteration. Accidental damage and repair is not movement or alteration. **Glover v. Serratoga Falls LLC**, 2021 CO 77, ¶ 33, 498 P.3d 1106.

18:5 PRIVATE NUISANCE — ELEMENTS OF LIABILITY

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

1. The plaintiff is (the owner) (in lawful possession of) *(describe the real property)***;**

2. The defendant, by *(describe the alleged activity)***, (negligently) (intentionally) interfered or is interfering with the plaintiff's use and enjoyment of plaintiff's** *(describe the real property)***; and**

3. The defendant's interference with plaintiff's use and enjoyment of *(describe the real property)* **(is) (was) unreasonable and substantial, such that it would offend or cause inconvenience or annoyance to a person of ordinary temperament and sensibility in the community.**

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

On the other hand, if you find that all of these 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

Use whichever parenthesized words and phrases are appropriate.

Source and Authority

1. This instruction is supported by **Public Service Co. v. Van Wyk**, 27 P.3d 377, 391 (Colo. 2001) ("[T]he elements of a claim of nuisance are an intentional, negligent, or unreasonably dangerous activity resulting in the unreasonable and substantial interference with a plaintiff's use and enjoyment of her property.") (remanding to trial court to evaluate whether noise, radiation, and electromagnetic fields of a power line were unreasonable interference). *See* **Green v. Castel Concrete Co.**, 181 Colo. 309, 314, 509 P.2d 588, 591 (1973) ("a reading of the record convinces us that there is not sufficient substantial, competent evidence to support a finding" that a proposed quarry would constitute a private nuisance); **Baughman v. Cosler**, 169 Colo. 534, 544, 459 P.2d 294, 299 (1969) ("The trial court predicated the nuisance upon the

alleged negligent maintenance of a dangerous condition . . . [but] knowledge, actual or constructive, is an essential ingredient of liability based upon the negligent maintenance of a nuisance.") (reversing jury verdict where plaintiff was injured by explosion occurring on defendant's property); **Krebs v. Hermann**, 90 Colo. 61, 6 P.2d 907 (1931) (holding that evidence of annoyance and discomfort to plaintiff's family by defendants' maintenance of dog kennel and canine hospital was sufficient to support claim for private nuisance); **St. John's Church in the Wilderness v. Scott**, 194 P.3d 475 (Colo. App. 2008) (defendant's shouting from sidewalk during church service substantially and unreasonably interfered with use of church property and constituted a private nuisance); **Woodward v. Bd. of Dirs.**, 155 P.3d 621 (Colo. App. 2007) (reversing summary judgment and holding that whether modifications of adjoining property that increased light and noise in plaintiff's unit was reasonable created a question of fact for the jury); **Staley v. Sagel**, 841 P.2d 379, 381-82 (Colo. App. 1992) (jury was properly instructed to determine "that the hog facility's operation unreasonably and substantially interfered with plaintiffs' use and enjoyment of their property. . . [and] that interference is unreasonable and substantial only if the activity is disturbing to a person of ordinary temperament and sensibility"); **Labbe v. Steffens**, 752 P.2d 1067, 1067 (Col. App. 1988) ("We find no merit in defendant's contention that the trial court erroneously determined the car wash to be a nuisance."); **Allison v. Smith**, 695 P.2d 791 (Colo. App. 1984) (conducting well drilling, car dealership, and construction business in a mountain residential neighborhood created a private nuisance); **Lowder v. Tina Marie Homes, Inc.**, 43 Colo. App. 225, 601 P.2d 657 (1979) (defendant's scraping of vegetation from a residential lot negligently causing soil to blow onto plaintiff's adjoining property created a private nuisance); **Miller v. Carnation Co.**, 33 Colo. App. 62, 67, 516 P.2d 661, 664 (Colo. App. 1973) ("there is evidence that defendants' failure to remove manure from underneath the chicken houses resulted in a breeding ground for flies . . . and that these flies annoyed plaintiffs and damaged their property. . . . It was therefore error for the trial court to dismiss the nuisance claim at the conclusion of plaintiffs' evidence."); *see also* **Hoery v. United States**, 64 P.3d 214, 218 (Colo. 2003) ("A claim for nuisance is predicated upon a substantial invasion of an individual's interest in the use and enjoyment of his property.").

2. Whether conduct amounts to an absolute nuisance, and thus determined as a matter of law, is a question for the court. Absolute nuisances include conduct that has been declared a nuisance by a governing authority, nuisances that result from abnormal and unduly hazardous activities, and situations where the defendants' purposes on its own land is clearly an unreasonable act in view of surrounding circumstances. **Nw. Water Corp. v. Pennetta**, 29 Colo. App. 1, 479 P.2d 398 (1970) ("In the absence of the tank's being an absolute nuisance, the question of whether it constituted a nuisance in fact is one which should have been submitted to the jury.").

3. Conduct and activity permitted by zoning regulations may constitute a private nuisance. **Hobbs v. Smith**, 29 Colo. App. 301, 303, 484 P.2d 804, 805 (1971) ("Even though zoning regulations permit an act to be done, and the act is being done with due care, the courts may grant relief where they find that the acts complained of constitute a nuisance."), *aff'd*, 177 Colo. 299, 493 P.2d 1352 (1972). Conversely, conduct that violates a zoning ordinance is not necessarily a nuisance. **Nw. Water Corp.**, 29 Colo. App. at 4, 479 P.2d at 400 (construction of water tank did not amount to a nuisance per se) ("[T]he fact that a zoning ordinance has been violated is not totally controlling in determining whether a private nuisance exists.").

18:6 INTENTIONALLY OR NEGLIGENTLY — DEFINED

(A defendant intentionally interferes with a plaintiff's use and enjoyment of a plaintiff's property when the defendant's purpose is to cause such interference, or when the defendant knows that *[insert applicable pronoun]* **conduct is likely to cause such interference.)**

(A defendant negligently interferes with the use and enjoyment of plaintiff's property when a defendant fails to do an act which a reasonably careful person would do, or the defendant does an act which a reasonably careful person would not do, which in the natural course of events interfered with plaintiff's use of *[insert applicable pronoun]* **property.)**

Notes on Use

This instruction and the appropriate parenthetical should be used with Instruction 18:5.

Source and Authority

This instruction is supported by **Public Service Co. v. Van Wyk**, 27 P.3d 377, 391 (Colo. 2001) ("[T]he elements of a claim of nuisance are an intentional, negligent, or unreasonably dangerous activity resulting in the unreasonable and substantial interference with a plaintiff's use and enjoyment of her property.") (remanding to trial court to evaluate whether noise, radiation, and electromagnetic fields of a power line were unreasonable interference); and **St. John's Church in the Wilderness v. Scott**, 194 P.3d 475, 479 (Colo. App. 2008) ("To prove a private nuisance claim, a plaintiff must establish that (1) the defendant's conduct unreasonably interfered with the use and enjoyment of the plaintiff's property, (2) the interference was so substantial that it would have been offensive or caused inconvenience or annoyance to a reasonable person in the community, and (3) the interference was either negligent or intentional.").

18:7 ACTUAL OR NOMINAL DAMAGES

Plaintiff, *(name)*, **has the burden of proving the nature and extent of** *(insert applicable pronoun)* **damages by a preponderance of the evidence. 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 nuisance.**

In determining these the plaintiff's damages, you shall consider

1. (The difference between the reasonable market value of the real estate without the nuisance and its reasonable market value with the nuisance) (The loss of the property's rental value for the period during which the nuisance continued); (and)

(2. Consequential damages the jury might reasonably find the plaintiff suffered as a result of the defendant's nuisance, including loss of use of the property, discomfort, annoyance, or physical illness.)

Notes on Use

1. Use parentheticals that are supported by the evidence.

2. A landowner is not entitled to both a permanent injunction terminating a nuisance and to an award of damages for the market value. **Staley v. Sagel**, 841 P.2d 379 (Colo. App. 1992).

3. In trespass actions plaintiffs may recover the cost of restoring, repairing, and rebuilding their property, plus any decrease in market value after repairs. *See* Note on Use 2 to Instruction 18:4. While a private nuisance claim does not require proof of physical damage to plaintiff's property, costs of restoration and repair may be available if proven, *see* **Webster v. Boone**, 992 P.2d 1183, 1185 (Colo. App. 1999) (dicta), and paragraph 1 may be modified accordingly.

Source and Authority

This instruction is supported by **Webster**, 992 P.2d at 1185 ("Damages available on trespass and nuisance claims can include not only diminution of market value or costs of restoration and loss of use of the property, but also discomfort and annoyance to the property owner as the occupant."); **Calvaresi v. National Development Co.**, 772 P.2d 640, 645 (Colo. App. 1988) ("The trial court must permit an injured landowner to recover damages for . . . the loss of the use of the property, if any, and any separate injuries in the nature of discomfort, annoyance or physical illness."); **Allison v. Smith**, 695 P.2d 791, 795 (Colo. App. 1984) (the trial court "found a diminution in market value of $8,200 arising from the loss of the well, . . . $7,400 because of the unsightliness resulting from the Smith's use of their property, . . . and $5,000 for five years' loss of use"); **Nw. Water Corp. v. Pennetta**, 29 Colo. App. 1, 3, 479 P.2d 398, 400 (1970) ("Plaintiffs were awarded $2,500 for diminution in property value; $1,500 for annoyance, discomfort and inconvenience; and interest on such sums from the date the complaint was filed.").