6.02 [1998 Revision] Aggravating Circumstances

[No change to Instruction.]

Committee Comment (2022 Revision)

(Approved November 23, 2021; Effective July 1, 2022)

A. CAUTION: S.B. 591 (Laws 2020) purports to effect changes to the law of punitive damages for cases filed after the effective date thereof (as opposed to the accrual date) in the following areas: (1) generally (§ 510.261.1, RSMo), (2) related to master servant, principal agent (§ 510.261.3, RSMo), (3) pleadings and discovery (§ 510.261.5, RSMo), (4) but retains prior common law and statutory law unless expressly inconsistent (§ 510.261.8, RSMo), and (5) additional, distinct changes for punitive damages in medical malpractice cases (§ 538.210.8, RSMo). Case law will determine the extent of those changes and the impact on jury instructions. The Committee takes no position on the constitutionality of any provision of S.B. 591 (Laws 2020).

B. See *Bennett v. Owens-Corning Fiberglas Corp.*, 896 S.W.2d 464 (Mo. banc 1995).

C. Where issues of "harm to others" arise in the context of aggravating circumstances in a wrongful death case, the requirements of the Supreme Court in *Philip Morris USA v. Williams*, 549 U.S. 346, 127 S.Ct. 1057, 166 L.Ed.2d 940 (2007), will be implicated. See the bracketed paragraph and accompanying Note on Use 1 to MAI 10.02 for appropriate modification of an instruction submitting "damages for aggravating circumstances" in such cases.

9.00

EMINENT DOMAIN

General Notice

In 2017, the burden of proof to be used in all eminent domain cases, MAI 9.03, was revised. The 2017 revised version of the eminent domain burden of proof instruction should be used in Illustrations 9.06 (Instruction No. 4) and 9.07 (Instruction No. 4). For each Illustration, MAI 9.03, the burden of proof instruction, should read as follows:

The burden is on the defendant to cause you to believe that defendant has sustained damage and the amount thereof. In determining the amount of your verdict, you must consider only the evidence and the reasonable conclusions you draw from the evidence.

Research References

West's Key Number Digest
Damages 215(1)

A.L.R. Library

A.L.R. Index, Damages; Exemplary Damages; Instructions to Jury; Negligence; Strict or Absolute Liability

West′s A.L.R. Digest, Damages 215(1)

Legal Encyclopedias

Am. Jur. 2d, Damages §§ 584, 617 to 619; Products Liability § 1620 C.J.S., Damages §§ 238, 239

10.00 [2022 Revision] General Comment

(Approved November 23, 2021; Effective July 1, 2022)

The provisions of H.B. 393 (Laws 2005), applicable to actions filed after August 28, 2005, do not appear to impact jury instructions in the view of the Committee except (1) on the subject of apportionment of fault in a medical malpractice case to a settling tortfeasor under § 538.230, RSMo (repealed by H.B. 393), and (2) possibly the revisions by H.B. 393 with respect to punitive damages in § 510.265 or § 537.067, RSMo, which may or may not affect the method of submission of instructions on punitive damages in all cases. The Committee takes no position on the meaning or impact of § 510.265 or § 537.067, RSMo, on the method of submission of punitive damages. The Committee takes no position on the constitutionality of any provision of H.B. 393.

CAUTION: S.B. 591 (Laws 2020) purports to effect changes to the law of punitive damages for cases filed after the effective date thereof (as opposed to the accrual date) in the following areas: (1) generally (§ 510.261.1, RSMo), (2) related to master servant, principal agent (§ 510.261.3, RSMo), (3) pleadings and discovery (§ 510.261.5, RSMo), (4) but retains prior common law and statutory law unless expressly inconsistent (§

510.261.8, RSMo), and (5) additional, distinct changes for punitive damages in medical malpractice cases (§ 538.210.8, RSMo). Case law will determine the extent of those changes and the impact on jury instructions. The Committee takes no position on the constitutionality of any provision of S.B. 591 (Laws 2020).

10.01 [2008 Revision] Outrageous Conduct— Intentional Torts

[No change to Instruction or Notes on Use.]

Committee Comment (2022 Revision)

(Approved November 23, 2021; Effective July 1, 2022)

A. CAUTION: S.B. 591 (Laws 2020) purports to effect changes to the law of punitive damages for cases filed after the effective date thereof (as opposed to the accrual date) in the following areas: (1) generally (§ 510.261.1, RSMo), (2) related to master servant, principal agent (§ 510.261.3, RSMo), (3) pleadings and discovery (§ 510.261.5, RSMo), (4) but retains prior common law and statutory law unless expressly inconsistent (§ 510.261.8, RSMo), and (5) additional, distinct changes for punitive damages in medical malpractice cases (§ 538.210.8, RSMo). Case law will determine the extent of those changes and the impact on jury instructions. The Committee takes no position on the constitutionality of any provision of S.B. 591 (Laws 2020).

B. In *Burnett v. Griffith*, 769 S.W.2d 780 (Mo. banc 1989), the court adopted this instruction for the submission of punitive damages in intentional tort cases and held that the definition of "legal malice" in MAI 16.01 should no longer be used.

C. See MAI 4.15 and 4.16 for submission of punitive damages in libel and slander cases.

D. See Illustration 35.19 for an example of a submission of punitive damages in a bifurcated trial pursuant to § 510.263, RSMo. The amendments in H.B. 393 (Laws 2005) to § 510.265, RSMo, impose limitations on punitive damages in certain cases. The Committee takes no position on the constitutionality of any provision of H.B. 393.

10.02 [2008 Revision] Negligence Constituting Conscious Disregard for Others

[No change to Instruction or Notes on Use.]

Committee Comment (2022 Revision)

(Approved November 23, 2021; Effective July 1, 2022)

A. CAUTION: S.B. 591 (Laws 2020) purports to effect changes to the law of punitive damages for cases filed after the effective date thereof (as opposed to the accrual date) in the following areas: (1) generally (§ 510.261.1, RSMo), (2) related to master servant, principal agent (§ 510.261.3, RSMo), (3) pleadings and discovery (§ 510.261.5, RSMo), (4) but retains prior common law and statutory law unless expressly inconsistent (§ 510.261.8, RSMo), and (5) additional, distinct changes for punitive damages in medical malpractice cases (§ 538.210.8, RSMo). Case law will determine the extent of those changes and the impact on jury instructions. The Committee takes no position on the constitutionality of any provision of S.B. 591 (Laws 2020).

B. Existing MAI 10.01 fits some cases but does not fit the drunken driver case.

C. In *Nichols v. Bresnahan*, 357 Mo. 1126, 1130–31, 212 S.W.2d 570, 573 (1948), the court cited with approval Restatement of Torts § 500 (1935), as follows:

> The actor's (defendant's) conduct is in reckless disregard of the safety of another if he intentionally does an act or fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize that the actor's conduct not only creates an unreasonable risk of bodily harm to the other but also involves a high degree of probability that substantial harm will result to him.

D. The court approved an instruction requiring a finding that defendant's conduct exhibited "a conscious disregard and indifference to the. . . consequences." Id.

E. In *Evans v. Illinois Central Railroad Co.*, 289 Mo. 493, 233 S.W. 397, 400 (Mo. banc 1921), the court said:

> A wanton act is a wrongful act done on purpose, or in malicious disregard of the rights of others. Recklessness is an indifference to the rights of others and an indifference whether wrong or injury is done or not. As we understand the words "conscious disregard of the life and bodily safety," they add nothing to the words "willful, wanton and reckless," and are included within the meaning of those words. As applied to an act, they necessarily mean that such act was intentionally done without regard to the rights of others, and in full realization of the probable results thereof.

F. See also *Stojkovic v. Weller*, 802 S.W.2d 152 (Mo. banc 1991), regarding the submissibility of punitive damages in a case involving an intoxicated driver.

G. See Illustration 35.19 for an example of a submission of punitive damages in a bifurcated trial pursuant to § 510.263, RSMo. The amendments in H.B. 393 (Laws 2005) to § 510.265, RSMo, impose limitations on punitive damages in certain cases. The Committee takes no position on the constitutionality of any provision of H.B. 393.

10.03 [1983 Revision] Multiple Defendants

[No change to Instruction.]

Committee Comment (2022 New)

(Approved November 23, 2021; Effective July 1, 2022)

A. CAUTION: S.B. 591 (Laws 2020) purports to effect changes to the law of punitive damages for cases filed after the effective date thereof (as opposed to the accrual date) in the following areas: (1) generally (§ 510.261.1, RSMo), (2) related to master servant, principal agent (§ 510.261.3, RSMo), (3) pleadings and discovery (§ 510.261.5, RSMo), (4) but retains prior common law and statutory law unless expressly inconsistent (§ 510.261.8, RSMo), and (5) additional, distinct changes for punitive damages in medical malpractice cases (§ 538.210.8, RSMo). Case law will determine the extent of those changes and the impact on jury instructions. The Committee takes no position on the constitutionality of any provision of S.B. 591 (Laws 2020).

10.04 [2008 Revision] Strict Liability—Either Product Defect or Failure to Warn Submitted

[No change to Instruction or Notes on Use.]

Committee Comment (2022 Revision)

(Approved November 23, 2021; Effective July 1, 2022)

A. CAUTION:S.B. 591 (Laws 2020) purports to effect changes to the law of punitive damages for cases filed after the effective date thereof (as opposed to the accrual date) in the following areas: (1) generally (§ 510.261.1, RSMo), (2) related to master servant, principal agent (§ 510.261.3, RSMo), (3) pleadings and discovery (§ 510.261.5, RSMo), (4) but retains prior common law and statutory law unless expressly inconsistent (§ 510.261.8, RSMo), and (5) additional, distinct changes for punitive damages in medical malpractice cases (§ 538.210.8, RSMo). Case law will determine the extent of those changes and the impact on jury instructions. The Committee takes no position on the constitutionality of any provision of S.B. 591 (Laws 2020).

B. It was held in *Racer v. Utterman*, 629 S.W.2d 387 (Mo. App. 1981), that MAI 10.02 is inappropriate for submission of punitive damages in a case wherein compensatory damages are awarded against a strict liability defendant but that:

> If plaintiff, in addition to proving the conduct necessary to support the strict liability claim, can also establish a degree of fault in such conduct sufficient to justify punitive damages, those damages may also be recovered. *Id.* at 396.

C. MAI 10.04 is drafted to submit the issue of punitive damages under the evidence detailed in the *Racer* opinion. If the substantive law and evidence support a submission on

a theory other than actual knowledge of the product defect, then there should be an appropriate modification of paragraph First.

D. See Illustration 35.19 for an example of a submission of punitive damages in a bifurcated trial pursuant to § 510.263, RSMo. The amendments in H.B. 393 (Laws 2005) to § 510.265, RSMo, impose limitations on punitive damages in certain cases. The Committee takes no position on the constitutionality of any provision of H.B. 393.

10.05 [2008 Revision] Strict Liability—Both Product Defect and Failure to Warn Submitted

[No change to Instruction or Notes on Use.]

Committee Comment (2022 Revision)

(Approved November 23, 2021; Effective July 1, 2022)

A. CAUTION: S.B. 591 (Laws 2020) purports to effect changes to the law of punitive damages for cases filed after the effective date thereof (as opposed to the accrual date) in the following areas: (1) generally (§ 510.261.1, RSMo), (2) related to master servant, principal agent (§ 510.261.3, RSMo), (3) pleadings and discovery (§ 510.261.5, RSMo), (4) but retains prior common law and statutory law unless expressly inconsistent (§ 510.261.8, RSMo), and (5) additional, distinct changes for punitive damages in medical malpractice cases (§ 538.210.8, RSMo). Case law will determine the extent of those changes and the impact on jury instructions. The Committee takes no position on the constitutionality of any provision of S.B. 591 (Laws 2020).

B. See Illustration 35.19 for an example of a submission of punitive damages in a bifurcated trial pursuant to § 510.263, RSMo. The amendments in H.B. 393 (Laws 2005) to § 510.265, RSMo, impose limitations on punitive damages in certain cases. The Committee takes no position on the constitutionality of any provision of H.B. 393

10.06 [2008 Revision] Both Negligence and Strict Liability Submitted

[No change to Instruction or Notes on Use.]

Committee Comment (2022 Revision)

(Approved November 23, 2021; Effective July 1, 2022)

A. CAUTION: S.B. 591 (Laws 2020) purports to effect changes to the law of punitive damages for cases filed after the effective date thereof (as opposed to the accrual date) in the following areas: (1) generally (§ 510.261.1, RSMo), (2) related to master servant, principal agent (§ 510.261.3, RSMo), (3) pleadings and discovery (§ 510.261.5, RSMo), (4) but retains prior common law and statutory law unless expressly inconsistent (§ 510.261.8, RSMo), and (5) additional, distinct changes for punitive damages in medical malpractice cases (§ 538.210.8, RSMo). Case law will determine the extent of those changes and the impact on jury instructions. The Committee takes no position on the constitutionality of any provision of S.B. 591 (Laws 2020).

B. See Illustration 35.19 for an example of a submission of punitive damages in a bifurcated trial pursuant to § 510.263, RSMo. The amendments in H.B. 393 (Laws 2005) to § 510.265, RSMo, impose limitations on punitive damages in certain cases. The Committee takes no position on the constitutionality of any provision of H.B. 393.

10.07 [2008 Revision] Modification of MAI 10.02—Submission of Specific Acts and Knowledge

[No change to Instruction or Notes on Use.]

Committee Comment (2022 Revision)

(Approved November 23, 2021; Effective July 1, 2022)

A. CAUTION: S.B. 591 (Laws 2020) purports to effect changes to the law of punitive damages for cases filed after the effective date thereof (as opposed to the accrual date) in the following areas: (1) generally (§ 510.261.1, RSMo), (2) related to master servant, principal agent (§ 510.261.3, RSMo), (3) pleadings and discovery (§ 510.261.5, RSMo), (4) but retains prior common law and statutory law unless expressly inconsistent (§ 510.261.8, RSMo), and (5) additional, distinct changes for punitive damages in medical malpractice cases (§ 538.210.8, RSMo). Case law will determine the extent of those changes and the impact on jury instructions. The Committee takes no position on the constitutionality of any provision of S.B. 591 (Laws 2020).

B. See Illustration 35.19 for an example of a submission of punitive damages in a bifurcated trial pursuant to § 510.263, RSMo. The amendments in H.B. 393 (Laws 2005) to § 510.265, RSMo, impose limitations on punitive damages in certain cases. The Committee takes no position on the constitutionality of any provision of H.B. 393.

17.17 [1978 Revision] Per se Negligence—Improper Turn

[No change to Instruction.]

Notes on Use (2022 Revision)

(Approved November 23, 2021; Effective July 1, 2022)

MAI 17.17 is based on the model traffic ordinance Section 300.215, RSMo (assuming it is adopted by local ordinance). Although the violation of a traffic statute or ordinance may be negligence per se (*Rowe v. Kansas City Pub. Serv. Co.*, 248 S.W.2d 445, 448 (Mo. App. 1952)), "[u]nder the circumstances of a particular case there may be a valid excuse for failing to comply with a statutory rule of the road, as where nonobservance of the statute is induced by considerations of safety … or where compliance is impossible …." *MacArthur v. Gendron*, 312 S.W.2d 146, 150 (Mo. App. 1958).

*Add if affirmative defense is submitted. This bracketed phrase should not be used to submit comparative fault.

An affirmative converse instruction should not be used to submit in the affirmative the same issue as has already been submitted in the verdict directing instruction. See *Stover v. Patrick*, 459 S.W.2d 393 (Mo. banc 1970); *Oliver v. Bi-State Dev. Agency*, 494 S.W.2d 49 (Mo. 1973). Use a true converse instruction to converse an element that is submitted by the verdict director.

Caution: Where an affirmative converse instruction is properly submitted, the verdict director must be modified by adding a phrase, commonly referred to as an "affirmative defense" tail, that refers the jury directly from the verdict director to the affirmative converse instruction. No such "tail" is required when a true converse instruction is submitted. See the discussion in MAI 33.01. In *Goudeaux v. Board of Police Commissioners*, 409 S.W.3d 508 (Mo. App. 2013), the court held that the facts constituting

a legal justification or excuse must be pleaded as an affirmative defense and that such a submission does not preclude the submission of negligence per se. Cf. *Hiers v. Lemley*, 834 S.W.2d 729 (Mo. banc 1992).

Committee Comment (2012 Revision)

[No change to Committee Comment.]

17.18 [1978 Revision] Per se Negligence—Violating Speed Limit

[No change to Instruction.]

Notes on Use (2022 Revision)

(Approved November 23, 2021; Effective July 1, 2022)

MAI 17.18 is based on Section 304.010, RSMo. Violation of other statutes or ordinances may be submitted as negligence per se using MAI 17.18. Although the violation of a traffic statute or ordinance may be negligence per se (*Rowe v. Kansas City Pub. Serv. Co.*, 248 S.W.2d 445, 448 (Mo. App. 1952)), "[u]nder the circumstances of a particular case there may be a valid excuse for failing to comply with a statutory rule of the road, as where nonobservance of the statute is induced by considerations of safety … or where compliance is impossible …."*MacArthur v. Gendron*, 312 S.W.2d 146, 150 (Mo. App. 1958).

*Add if affirmative defense is submitted. This bracketed phrase should not be used to submit comparative fault.

An affirmative converse instruction should not be used to submit in the affirmative the same issue as has already been submitted in the verdict directing instruction. See *Stover*

v. Patrick, 459 S.W.2d 393 (Mo. banc 1970); *Oliver v. Bi-State Dev. Agency*, 494 S.W.2d 49 (Mo. 1973). Use a true converse instruction to converse an element that is submitted by the verdict director.

Caution: Where an affirmative converse instruction is properly submitted, the verdict director must be modified by adding a phrase, commonly referred to as an "affirmative defense" tail, that refers the jury directly from the verdict director to the affirmative converse instruction. No such "tail" is required when a true converse instruction is submitted. See the discussion in MAI 33.01. In *Goudeaux v. Board of Police Commissioners*, 409 S.W.3d 508 (Mo. App. 2013), the court held that the facts constituting a legal justification or excuse must be pleaded as an affirmative defense and that such a submission does not preclude the submission of negligence per se. Cf. *Hiers v. Lemley*, 834 S.W.2d 729 (Mo. banc 1992).

Committee Comment (2012 Revision)

[No change to Committee Comment.]

33.16 [1991 New] Conversing Exemplary Damages

[No change to Instruction or Notes on Use.]

Committee Comment (2022 Revision)

(Approved November 23, 2021; Effective July 1, 2022)

A. CAUTION: S.B. 591 (Laws 2020) purports to effect changes to the law of punitive damages for cases filed after the effective date thereof (as opposed to the accrual

date) in the following areas: (1) generally (§ 510.261.1, RSMo), (2) related to master servant, principal agent (§ 510.261.3, RSMo), (3) pleadings and discovery (§ 510.261.5, RSMo), (4) but retains prior common law and statutory law unless expressly inconsistent (§ 510.261.8, RSMo), and (5) additional, distinct changes for punitive damages in medical malpractice cases (§ 538.210.8, RSMo). Case law will determine the extent of those changes and the impact on jury instructions. The Committee takes no position on the constitutionality of any provision of S.B. 591 (Laws 2020).

B. Exemplary or punitive damages instructions at MAI 10.01, 10.02, 10.04, 10.05, 10.06, and 10.07 contain bracketed sentences to be added if necessary to comply with the requirement of the United States Supreme Court decision in *Philip Morris USA v. Williams*, 549 U.S. 346, 127 S. Ct. 1057, 166 L. Ed. 2d 940 (2007). These bracketed sentences complying with *Williams* should *not* be conversed. The proper method of conversing an exemplary damages instruction from Chapter 10 is as demonstrated in the MAI 33.16.

35.00
ILLUSTRATIONS

General Notice

In 2016, the general burden of proof instruction (MAI 3.01) was revised. The 2016 revised version of the burden of proof instruction should be used in Illustrations 35.02 (Instruction No. 5), 35.03 (Instruction No. 5), 35.04 (Instruction No. 5), 35.05 (Instruction No. 6), 35.07 (Instruction No. 4), 35.10 (Instruction No. 5), 35.14 (Instruction 5), 35.15 (Instruction No. 5), 35.16 (Instruction No. 5), 35.17 (Instruction No. 5), 35.18 (Instruction No. 5), 35.19 (Instruction No. 5), 35.20 (Instruction No. 4), 35.21 (Instruction No. 5), and 35.22 (Instruction No. 5). For each illustration, MAI 3.01, the burden of proof instruction, should read as follows:

> Your verdict will depend on the facts you believe after considering all the evidence. The party who relies upon any disputed fact has the burden to cause

you to believe that such fact is more likely true than not true. In determining whether or not you believe any fact, you must consider only the evidence and the reasonable conclusions you draw from the evidence.

Research References

West's Key Number Digest
Automobiles 246(22), 246(38.5); Contracts 294; Damages 216(1); Eminent Domain 222(5); Negligence 1746; Products Liability 423; Wills 333

A.L.R. Library
A.L.R. Index, Collisions; Eminent Domain; Instructions to Jury; Products Liability; Wills
West's A.L.R. Digest, Automobiles 246(22), 246(38.5); Contracts 294; Damages 216(1); Eminent Domain 222(5); Negligence 1720, 1746; Products Liability 423; Wills 333

35.00 [2022 Revision] General Comment

(Approved November 23, 2021; Effective July 1, 2022)

1. The Committee furnishes for your use illustrations prepared by the Committee in certain hypothetical cases using court-approved instructions. If any conflict exists between an instruction and an illustration, the court-approved instruction governs. *Northeast Mo. Elec. Power Co-op. v. Fulkerson*, 542 S.W.2d 26 (Mo. App. 1976); *State ex rel. State Highway Com'n v. Schwartz*, 526 S.W.2d 952 (Mo. App. 1975).

2. In referring to the illustrations, care should be used to be certain that the illustration and its instructions apply to the facts and legal theory of the case being submitted and that none of the instructions used in the illustration has been revised by the Committee. (Always check the most recent pocket part.)

3. In the illustrations in this edition of MAI, factual situations may differ from those used in illustrations in prior editions of MAI. The annotations to the prior illustrations will vary in applicability depending on the extent to which the former factual situation was carried over into the present illustration.

4. The provisions of H.B. 393 (Laws 2005), applicable to actions filed after August 28, 2005, do not appear to impact jury instructions in the view of the Committee except: (1) on the subject of apportionment of fault in a medical malpractice case to a settling tortfeasor under § 538.230, RSMo, (repealed by H.B. 393) and (2) possibly the revisions by H.B. 393 with respect to punitive damages in § 510.265 and § 537.067, RSMo, which may or may not affect the method of submission of instructions on punitive damages in all cases. The Committee takes no position on the meaning or impact of § 510.265 or § 537.067 on the method of submission of punitive damages. The Committee takes no position on the constitutionality of any provision of H.B. 393.

CAUTION: S.B. 591 (Laws 2020) purports to effect changes to the law of punitive damages for cases filed after the effective date thereof (as opposed to the accrual date) in the following areas: (1) generally (§ 510.261.1, RSMo), (2) related to master servant, principal agent (§ 510.261.3, RSMo), (3) pleadings and discovery (§ 510.261.5 RSMo), (4) but retains prior common law and statutory law unless expressly inconsistent (§ 510.261.8, RSMo), and (5) additional, distinct changes for punitive damages in medical malpractice cases (§ 538.210.8, RSMo). Case law will determine the extent of those changes and the impact on jury instructions. The Committee takes no position on the constitutionality of any provision of S.B. 591 (Laws 2020).

5. MAI 2.04 instructs a jury that nine or more jurors must agree in order to return any verdict. See article I, sec. 22(a) of the Missouri Constitution and § 494.490, RSMo.

In *dicta*, the Supreme Court stated that the same nine jurors must agree on all elements necessary for a verdict for or against any particular party. *Stacy v. Truman Med. Ctr.*, 836 S.W.2d 911, 924 (Mo. banc 1992), abrogated on other grounds, *Southers v. City of Farmington*, 263 S.W.3d 603 (Mo. banc 2008). See also, *State ex rel. Boyer v Perigo*, 979 S.W.2d 953, 956 (Mo. App. 1998).

The general rule is not applicable where the jury is required to return more than one verdict. Where there are multiple packages, each with a separate verdict form, a different group of nine jurors can agree to all of the elements of each verdict. *Mackey v. Smith*, 438 S.W.3d 465, 474 (Mo. App. 2014); *Kemp v. Burlington Northern R. Co.*, 930 S.W.2d 10, 12 (Mo. App. 1996). Nine jurors may agree to liability and damages, but a different nine may apportion fault among the defendants. *Powell v. Norman Lines, Inc.*, 674 S.W.2d 191, 199 (Mo. App. 1984). A different nine also may assess the amount of punitive damages in the second stage of trial under Illustration 35.19 in a bifurcated trial after nine jurors agree on liability, amount of compensatory damages, and liability for punitive damages in the first stage of trial. *Ellison v. O'Reilly Automotive Stores, Inc.*, 463 S.W.3d 426, 439 (Mo. App. 2015). Jurors who disagree with the remaining jurors on the resolution of one package (verdict) may not be prohibited by jury instructions from deliberating on another package (verdict). To do so would deny the parties the right to a jury of twelve persons deliberating on all issues. *Ellison*, 463 S.W.3d at 440; *Mackey*, 438 S.W.3d at 474; *Powell*, 674 S.W.2d at 199.

See Illustrations 35.02, 35.03, 35.04, 35.05, 35.15, and 35.19 for examples of cases in which packaging is employed to submit multiple claims. On each verdict form within those Illustrations, a different nine may return any verdict in accordance with MAI 2.04.

35.19 [2021 Revision] Punitive Damages—Bifurcated Trial Under § 510.263—No Comparative Fault—Two Defendants—Apportionment of Fault Between Defendants

[No change to Instruction.]

Notes on Use (1992 New)

[No change to Notes on Use.]

Committee Comment (2022 Revision)

(Approved November 23, 2021; Effective July 1, 2022)

A. Under *Menaugh v. Resler Optometry, Inc.*, 799 S.W.2d 71 (Mo. banc 1990), the amount of punitive damages assessed against a defendant is *not* to be reduced by any percentage of fault assessed to plaintiff in a comparative fault case.

B. Caution: The provisions of H.B. 393 (Laws 2005), applicable to actions filed after August 28, 2005, do not appear to impact jury instructions in the view of the Committee except (1) on the subject of apportionment of fault in a medical malpractice case to a settling tortfeasor under § 538.230, RSMo (repealed by H.B. 393), and (2) possibly the revisions by H.B. 393 with respect to punitive damages in §§ 510.265 and 537.067, which may or may not affect the method of submission of instructions on punitive damages in all cases. The Committee takes no position on the meaning or impact of §

510.265 or § 537.067 on the method of submission of punitive damages. The Committee takes no position on the constitutionality of any provision of H.B. 393.

C. Caution: Section 538.210.5, RSMo, provides that punitive damages may be assessed against a health care provider in actions accruing after February 3, 1986, only where the health care provider demonstrated willful, wanton, or malicious misconduct. The Committee takes no position on the constitutionality of Senate Bill 663, 1986 Mo. Laws 879.

D. The Committee takes no position on the constitutionality of House Bill 700, 84th General Assembly, 1st Regular Session (1987), of which § 510.263, RSMo, was a part, and which was perpetuated in House Bill 393 of the 93rd General Assembly (2005) with limitations on punitive damages in certain cases.

E. CAUTION: S.B. 591 (Laws 2020) purports to effect changes to the law of punitive damages for cases filed after the effective date thereof (as opposed to the accrual date) in the following areas: (1) generally (§ 510.261.1, RSMo), (2) related to master servant, principal agent (§ 510.261.3, RSMo), (3) pleadings and discovery (§ 510.261.5, RSMo), (4) but retains prior common law and statutory law unless expressly inconsistent (§ 510.261.8, RSMo), and (5) additional, distinct changes for punitive damages in medical malpractice cases (§ 538.210.8, RSMo). Case law will determine the extent of those changes and the impact on jury instructions. The Committee takes no position on the constitutionality of any provision of S.B. 591 (Laws 2020).

F. The trial judge should exercise sound discretion in affording attorneys appropriate leeway during the various stages of trial to describe to the jury the proceedings

contemplated by § 510.263, RSMo.

G. After the first stage of trial, there may be additional evidence in the second stage relating to the net worth of the defendants found liable for punitive damages. There may also be additional argument by counsel as to the amount (possibly "zero") to be assessed by the jury as punitive damages. The Committee takes no position as to whether additional evidence, other than net worth, may be admissible in the second stage of trial.

H. The method in this Illustration of splitting MAI 10.04 and modifying its component parts for submission of punitive damages in a bifurcated trial pursuant to § 510.263 may be utilized with any punitive damage instruction in Chapter 10.

I. The word "assess" is used in Instruction Number 18 rather than the phrase "award plaintiff" because the award of punitive damages may not inure entirely to the benefit of the plaintiff. § 537.675, RSMo, provides a mechanism for the State of Missouri to obtain one-half of any final judgment awarding punitive damages. The Committee takes no position on the constitutionality of § 537.675 or whether the potential interest of the State of Missouri and the "Tort Victims Compensation Fund" created by § 537.675.1 may be argued to the jury.

37.00 [2022 Revision] Comparative Fault - General Comment

(Approved November 23, 2021; Effective July 1, 2022)

A. Missouri has adopted pure comparative fault as set forth in the Uniform Comparative Fault Act, 12 U.L.A. 135 (1996), "insofar as possible." *Gustafson v. Benda*, 661 S.W.2d 11 (Mo. banc 1983). The Uniform Comparable Fault Act may be a bit difficult

to locate, but it is attached as an Appendix to the *Gustafson* decision. A thorough analysis of comparative fault is not possible within the limitations of this General Comment. However, a few observations on the interrelationship of comparative fault with instructional issues are appropriate.

B. The adoption of pure comparative fault in Missouri does not mean that comparative fault will be submitted in all cases. The doctrine does not eliminate or reduce the defendant's burden of pleading and proving a prima facie case of fault on the part of the plaintiff. The doctrine only eliminates that aspect of contributory negligence that would operate to bar a plaintiff's recovery. Rather, such negligence on the part of the plaintiff, if supported by law and fact, translates that conduct into a reduction of plaintiff's recovery in proportion to the percentage of fault assessed to plaintiff.

C. An instruction submitting comparative fault of the plaintiff must be supported by substantial evidence, and by the law, or it will be erroneous. *Herrington v. Medevac Med. Response*, 438 S.W.3d 417 (Mo. App. 2014); *Roy v. Mo. Pac. R.R. Co.*, 43 S.W.3d 351 (Mo. App. 2001); *Brown v. Shawneetown Feed & Seed Co.*, 730 S.W.2d 587 (Mo. App. 1987).

D. In a premises case, there must also be evidence that the plaintiff had actual (or constructive) knowledge and appreciation of the danger actually encountered, that the plaintiff could have seen the danger, and that the plaintiff could have taken precautionary action to avoid the danger. *Rider v. YMCA of Greater Kansas City*, 460 S.W.3d 378 (Mo. App. 2015); *Brown*, supra; *Burns v. Schnuck Mkts., Inc.*, 719 S.W.2d 499 (Mo. App. 1986).

E. Under some circumstances, the doctrine of assumption of the risk (implied primary assumption of the risk) is a question of law for the court. On the other hand, "implied secondary assumption of the risk" would ordinarily be submitted as a "failure to keep a careful lookout." See *Coomer v. Kansas City Royals Baseball Corp.*, 437 S.W.3d 184 (Mo. banc 2014).

F. If there is evidence from which a jury could conclude that a plaintiff's negligence was legally sufficient, and a contributing cause to the plaintiff's own damages, the case may be submitted to the jury under approved comparative fault instructions in the format provided in Chapter 37. A comparative fault instruction must be tendered by either the defendant, or the plaintiff, if the case is to be submitted under comparative fault. However, the submission of comparative fault is not the exclusive province of the defendant. See *Smith v. Brown & Williamson Tobacco Corp.*, 275 S.W.3d 748, 810 (Mo. App. 2008); *Thompson v. Brown & Williamson Tobacco Corp.*, 207 S.W.3d 76 (Mo. App. 2006). In the *Brown & Williamson Tobacco Corp.* cases, the court noted that allowing a defendant to withdraw consideration of comparative fault after introduction of evidence of the plaintiff's fault would negate the concept of comparative fault and effectively reinstate the concept of contributory negligence as an absolute bar to recovery.

G. If neither side tenders a comparative fault instruction, the case may be submitted on the basis of the existence or nonexistence of defendant's fault. *Henderson v. Terminal R.R. Ass'n of St. Louis*, 736 S.W.2d 594 (Mo. App. 1987); *Earll v. Consol. Aluminum Corp.*, 714 S.W.2d 932 (Mo. App. 1986).

H. Comparative fault has been applied legislatively to the doctrine of strict liability in tort for a product defect. See § 537.765, RSMo; *Egelhoff v. Holt*, 875 S.W.2d 543, 547 (Mo. banc 1994). Any instruction that simply quotes statutory language from § 537.765 for a submission of comparative fault may be erroneous as not complying with Rule 70.02(b) requirements that all instructions are to be simple, brief, impartial, and neither submit, nor require findings of, detailed evidentiary matters. The subparagraphs of § 537.765 are necessarily general and do not specify any act of the plaintiff on which to base a finding of comparative negligence and may implicate judicial prohibitions against roving commissions.

I. Comparative fault has also been applied to other forms of statutory strict liability. See *Coble v. Taylor*, 480 S.W.3d 467 (Mo. App. 2016) (strict liability claim under the Animal Enclosure Act, § 272.030, RSMo).

J. In a case involving multiple defendants, the defendants are permitted only one, jointly submitted comparative fault instruction related to the plaintiff's fault; it would be error to give two or more. *Egelhoff*, 875 S.W.2d 543; *Cornell v. Texaco, Inc.*, 712 S.W.2d 680 (Mo. banc 1986). It is important to note that a defendant may rely on multiple submissions of plaintiff's fault — submitted in the alternative in a single instruction — even though inconsistent. *Michael v. Kowalski*, 813 S.W.2d 6 (Mo. App. 1991).

K. The doctrine of comparative fault is concerned only with the relative fault among the parties. It does not contemplate an inquiry into all causative agents for an injury. Therefore, the 100% figure determined by the jury is related only to the combined fault of the parties. There may be other causative agents — e.g., immune parties, settling

tortfeasors, persons not joined, etc. — that may be considered to be partly at fault, but these are not part of the determination of all or any part of the fault assessed by the jury. *Freight House Lofts Ass'n v. VSI Meter Servs.*, 402 S.W.3d 586 (Mo. App. 2013). The Comment to § 2 of the Uniform Comparative Fault Act, 12 ULA 135, 136 (1996), requires that the conduct or fault of non-parties be ignored. Thus, the verdict form should not contain a space for the assessment of fault to a nonparty or settling tortfeasor. *Fahy v. Dresser Indus., Inc.*, 740 S.W.2d 635 (Mo. banc 1987). Likewise, a verdict form may not allow an assessment of a percentage of fault to a party on an unpleaded theory. *Bradley v. Waste Mgmt. of Mo., Inc.*, 810 S.W.2d 525 (Mo. App. 1991).

L. Under *Gustafson*, the doctrine of joint and several liability was not affected by the adoption of pure comparative fault as contained in the Uniform Comparative Fault Act. However, in 2005, the Missouri legislature revised § 537.067, RSMo, and changed responsibility for damage awards depending on the parties' percentages of fault. That revised statute now provides that any party found to be less than 51% responsible is only liable for that percentage of a damage award. Any party responsible for 51% fault or more can be made to pay the entire amount of an award. § 537.067.1.

M. When a case involves a primary injury to one spouse, and a consortium claim on behalf of the other spouse, the same percentage of fault assessed to the primary claim also applies to the consortium claim. See *Johnson v. Hyster Co.*, 777 S.W.2d 281 (Mo. App. 1989); MAI (Civil) 37.08 and 37.09.

N. General principles applicable to verdict-directing instructions also apply to comparative fault cases. A party has a right to try or defend a case based on that party's

own theory as long as the verdict-directing instruction submitting that party's theories is supported by the law, the evidence, and in proper form. *Mitchell v. Evans*, 284 S.W.3d 591 (Mo. App. 2008); *Coleman v. Meritt*, 292 S.W.3d 339 (Mo. App. 2009). Neither an opposing party, nor the trial court itself, has the right to interfere with a party's selection of an appropriate submission of recovery or defense.

O. As a general proposition, the appellate courts may remand for new trial on all issues because of an erroneous comparative fault instruction — the issues of fault and damages are generally considered to be blended and interwoven. *Secrist v. Treadstone, LLC*, 356 S.W.3d 276 (Mo. App. 2011); *Talley v. Swift Transp. Co.*, 320 S.W.3d 752 (Mo. App. 2010).

P. The Supreme Court of Missouri also held that the doctrine of pure comparative fault applied to a claim of purely economic loss. *Children's Wish Found. Int'l, Inc. v. Mayer Hoffman McCann, P.C.*, 331 S.W.3d 648 (Mo. banc 2011).

Q. Under § 537.765, RSMo, the defendant in a products liability action may plead and prove the fault of the plaintiff as an affirmative defense. Any fault chargeable to the plaintiff shall diminish proportionately the amount awarded as compensatory damages but shall not bar recovery. Under Subsection 3 of the statute, "fault" is limited to: (1) the failure to use the product as reasonably anticipated by the manufacturer; (2) use of the product for a purpose not intended by the manufacturer; (3) use of the product with knowledge of a danger involved in such use with reasonable appreciation of the consequences and the voluntary and unreasonable exposure to said danger; (4) unreasonable failure to appreciate the danger involved in use of the product or the consequences thereof and the unreasonable

exposure to said danger; (5) the failure to undertake the precautions a reasonably careful user of the product would take to protect himself against dangers which he would reasonably appreciate under the same or similar circumstances. See Committee Comment S regarding mitigation of damages under § 537.765.3(6), RSMo.

R. The enumerated items in Section 537.765.3(1)-(5) provide a conceptual basis for submission of comparative fault in a product liability claim. However, these concepts do not lend themselves to a literal insertion in a comparative fault instruction. The specific facts of each case must be analyzed and incorporated consistent with MAI, utilizing the MAI format to submit ultimate facts and not evidentiary detail. See, e.g., MAI 37.02 and *Hoeft v. Louisville Ladder Co.*, 904 S.W.2d 298 (Mo. App. 1995), *Thompson v. Brown & Williamson Tobacco Corp.*, 207 S.W.3d 76 (Mo. App. 2006), *Morrison v. Kubota Tractor Corp.*, 891 S.W.2d 422 (Mo. App. 1994), and *Schaedler v. Rockwell Graphic Sys., Inc.*, 817 S.W.2d 499 (Mo. App. 1991). See Committee Comment S regarding mitigation of damages under § 537.765.3(6), RSMo.

S. Subparagraph (6) of § 537.765.3, RSMo, provides that "(6) The failure to mitigate damages" is included in the statute as one of the limitations on "fault" in a strict liability products case. See § 537.760, RSMo. The Committee believes that "failure to mitigate damages" is conceptually different from the types of "fault" of the plaintiff enumerated in § 537.765.3(1)-(5), RSMo, and that the legislative intent is best effectuated by submitting "failure to mitigate damages" in accordance with the method provided in MAI 32.29, and the bracketed phrase associated with Note 4 of the Notes on Use to MAI 4.01. For a comparative fault case in which "failure to mitigate damages" is also an issue,

MAI 32.29 would be used to submit that issue, and the above bracketed phrase from 4.01 would be inserted at the end of the first paragraph of MAI 37.03. Under this method, the jury is instructed not to include in total damages any amount of damages caused by plaintiff's failure to mitigate. See the discussion of "mitigation of damages" in Committee Comments D and E to MAI 4.01.

37.01 [1986 New] Verdict Directing Modification

[No change to Instruction.]

Notes on Use (2012 Revision)

[No change to Notes on Use.]

Committee Comment (2022 Revision)

(Approved November 23, 2021; Effective July 1, 2022)

A. This modification of traditional verdict directing instructions is for use in submitting comparative fault as adopted in *Gustafson v. Benda*, 661 S.W.2d 11 (Mo. banc 1983). The optional bracketed phrase in the opening sentence is intended to alleviate any doubt the jury may have about returning a verdict for plaintiff in a situation where plaintiff is partly at fault. For submission of a true affirmative defense in a comparative fault case, see MAI 37.06.

B. Under § 537.765, RSMo, the defendant in a products liability action may plead and prove the fault of the plaintiff as an affirmative defense. Any fault chargeable to the plaintiff shall diminish proportionately the amount awarded as compensatory damages but shall not bar recovery. Under Subsection 3 of the statute, "fault" is limited to: (1) the failure

to use the product as reasonably anticipated by the manufacturer; (2) use of the product for a purpose not intended by the manufacturer; (3) use of the product with knowledge of a danger involved in such use with reasonable appreciation of the consequences and the voluntary and unreasonable exposure to said danger; (4) unreasonable failure to appreciate the danger involved in use of the product or the consequences thereof and the unreasonable exposure to said danger; (5) the failure to undertake the precautions a reasonably careful user of the product would take to protect himself against dangers which he would reasonably appreciate under the same or similar circumstances. See Committee Comment D regarding mitigation of damages under § 537.765.3(6), RSMo.

C. The enumerated items in Section 537.765.3(1)-(5) provide a conceptual basis for submission of comparative fault in a product liability claim. However, these concepts do not lend themselves to a literal insertion in a comparative fault instruction. The specific facts of each case must be analyzed and incorporated consistent with MAI, utilizing the MAI format to submit ultimate facts and not evidentiary detail. See, e.g., MAI 37.02 and *Hoeft v. Louisville Ladder Co.*, 904 S.W.2d 298 (Mo. App. 1995), *Thompson v. Brown & Williamson Tobacco Corp.*, 207 S.W.3d 76 (Mo. App. 2006), *Morrison v. Kubota Tractor Corp.*, 891 S.W.2d 422 (Mo. App. 1994), and *Schaedler v. Rockwell Graphic Sys., Inc.*, 817 S.W.2d 499 (Mo. App. 1991). See Committee Comment D regarding mitigation of damages under § 537.765.3(6), RSMo.

D. Subparagraph (6) of § 537.765.3, RSMo, provides that "(6) The failure to mitigate damages" is included in the statute as one of the limitations on "fault" in a strict liability products case. See § 537.760, RSMo. The Committee believes that "failure to

mitigate damages" is conceptually different from the types of "fault" of the plaintiff enumerated in § 537.765.3(1)-(5), RSMo, and that the legislative intent is best effectuated by submitting "failure to mitigate damages" in accordance with the method provided in MAI 32.29, and the bracketed phrase associated with Note 4 of the Notes on Use to MAI 4.01. For a comparative fault case in which "failure to mitigate damages" is also an issue, MAI 32.29 would be used to submit that issue, and the above bracketed phrase from 4.01 would be inserted at the end of the first paragraph of MAI 37.03. Under this method, the jury is instructed not to include in total damages any amount of damages caused by plaintiff's failure to mitigate. See the discussion of "mitigation of damages" in Committee Comments D and E to MAI 4.01.

37.03 [1986 New] Damages

[No change to Instruction.]

Notes on Use (2002 Revision)

[No change to Notes on Use]

Committee Comment (2022 Revision)

(Approved November 23, 2021; Effective July 1, 2022)

A. When appropriate, other damage instructions such as those applicable to wrongful death, etc., may be modified in the format of this instruction to submit comparative fault.

B. Under § 537.765, RSMo, the defendant in a products liability action may plead and prove the fault of the plaintiff as an affirmative defense. Any fault chargeable to the

plaintiff shall diminish proportionately the amount awarded as compensatory damages but shall not bar recovery. Under Subsection 3 of the statute, "fault" is limited to: (1) the failure to use the product as reasonably anticipated by the manufacturer; (2) use of the product for a purpose not intended by the manufacturer; (3) use of the product with knowledge of a danger involved in such use with reasonable appreciation of the consequences and the voluntary and unreasonable exposure to said danger; (4) unreasonable failure to appreciate the danger involved in use of the product or the consequences thereof and the unreasonable exposure to said danger; (5) the failure to undertake the precautions a reasonably careful user of the product would take to protect himself against dangers which he would reasonably appreciate under the same or similar circumstances. See Committee Comment D regarding mitigation of damages under § 537.765.3(6), RSMo.

C. The enumerated items in Section 537.765.3(1)-(5) provide a conceptual basis for submission of comparative fault in a product liability claim. However, these concepts do not lend themselves to a literal insertion in a comparative fault instruction. The specific facts of each case must be analyzed and incorporated consistent with MAI, utilizing the MAI format to submit ultimate facts and not evidentiary detail. See, e.g., MAI 37.02 and *Hoeft v. Louisville Ladder Co.*, 904 S.W.2d 298 (Mo. App. 1995), *Thompson v. Brown & Williamson Tobacco Corp.*, 207 S.W.3d 76 (Mo. App. 2006), *Morrison v. Kubota Tractor Corp.*, 891 S.W.2d 422 (Mo. App. 1994), and *Schaedler v. Rockwell Graphic Sys., Inc.*, 817 S.W.2d 499 (Mo. App. 1991). See Committee Comment D regarding mitigation of damages under § 537.765.3(6), RSMo.

D. Subparagraph (6) of § 537.765.3, RSMo, provides that "(6) The failure to mitigate damages" is included in the statute as one of the limitations on "fault" in a strict liability products case. See § 537.760, RSMo. The Committee believes that "failure to mitigate damages" is conceptually different from the types of "fault" of the plaintiff enumerated in § 537.765.3(1)-(5), RSMo, and that the legislative intent is best effectuated by submitting "failure to mitigate damages" in accordance with the method provided in MAI 32.29, and the bracketed phrase associated with Note 4 of the Notes on Use to MAI 4.01. For a comparative fault case in which "failure to mitigate damages" is also an issue, MAI 32.29 would be used to submit that issue, and the above bracketed phrase from 4.01 would be inserted at the end of the first paragraph of MAI 37.03. Under this method, the jury is instructed not to include in total damages any amount of damages caused by plaintiff's failure to mitigate. See the discussion of "mitigation of damages" in Committee Comments D and E to MAI 4.01.

38.01(A) [2018 Revision] Verdict Directing—Missouri Human Rights Act—Employment Discrimination (for actions accruing before August 28, 2017)

[No change to Instruction.]

Notes on Use (2014 Revision)

[No change to Notes on Use.]

Committee Comment (2022 Revision)

(Approved November 23, 2021; Effective July 1, 2022)

A. Section 213.055, RSMo, Unlawful Employment Practices, provides in part:

1. It shall be an unlawful employment practice:

(1) For an employer, because of the race, color, religion, national origin, sex, ancestry, age or disability of any individual:

(a) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, national origin, sex, ancestry, age or disability;

…

B. Section 213.070, RSMo, Additional Unlawful Discriminatory Practices, provides in part:

1. It shall be an unlawful discriminatory practice for an employer, employment agency, labor organization, or place of public accommodation:

…

(2) To retaliate or discriminate in any manner against any other person because such person has opposed any practice prohibited by this chapter or because such person has filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding or hearing conducted pursuant to this chapter;

…

In *McCrainey v. Kansas City Missouri Sch. Dist.,* 337 S.W. 3d 746, 754 (Mo. App. 2011), the Court held that a "plaintiff need only have a good faith, reasonable belief that the conduct he or she opposed was prohibited by the MHRA in order to prevail on a

retaliation claim." Additionally, the court concluded "that a plaintiff can oppose a practice which is not actually unlawful under the MHRA, yet still proceed with a retaliation claim based on his or her opposition to that practice." *Id.* at 753. The Committee takes no position on whether "a good faith, reasonable belief" modification to the verdict director is appropriate or required.

C. In *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82 (Mo. banc 2003), the Supreme Court held that there is a right to a jury trial in actions for damages under the Missouri Human Rights Act, §§ 213.055 *et seq.*, RSMo.

D. "Garden variety" emotional distress under the Missouri Human Rights Act, §§ 213.055 *et seq.*, RSMo, need not be supported by expert testimony. *State ex rel. Dean v. Cunningham*, 182 S.W.3d 561 (Mo. banc 2006).

E. In *Hervey v. Missouri Department of Corrections,* 379 S.W.3d 156 (Mo. banc 2012), the Court required that the issue as to whether or not plaintiff was a member of a protected class be set forth in this instruction if it is a disputed element. While *Hervey* addressed a disability discrimination cause of action, the holding in this regard is applicable to other protected classifications where membership in that class is in dispute. See Note on Use 2. Do not use this instruction for a disability discrimination claim where the issue of disability is disputed. Where plaintiff's disability is disputed, use MAI 38.01(B).

F. In *Wells v. Lester E. Cox Medical Centers*, 379 S.W.3d 919 (Mo. App. 2012), the court questioned whether the Missouri Human Rights Act provides for the use of any affirmative defense. The Committee takes no position on the availability of affirmative defenses in Missouri Human Rights Act cases.

G. *Thomas v. McKeever's Enterprises, Inc.*, 388 S.W.3d 206 (Mo. App. 2012), addressed the issue of causation in a Missouri Human Rights Act claim in view of the trial court's attempt to provide the jury with a curative instruction based upon a "but for" argument in closing. In reversing the trial court, the court in *Thomas* stated:

> The trial court's wording of the but for issue— "but for … their age …, they would not have been terminated" —effectively told the jury that it would not be enough for Appellants to prove that their age was an actual contributing cause of their discharge. Under the law, Appellants could prevail if the jury believed that age was a "contributing factor" in their discharge; this oral instruction said they could prevail only if the jury believed that their age was ***the*** cause, in and of itself, of their discharge. 388 S.W.3d at 216.

The court acknowledged that terms such as "but for causation" are not to be used when instructing the jury as it creates the potential for confusion. It is generally error for a trial court to attempt to instruct the jury on "but for causation." But see, S.B. 43 (2017) and Historical Note, below.

H. Where suit involves multiple causes of damage, see MAI 19.01 and *Hurst v. Kansas City Missouri School District*, 437 S.W.3d 327 (Mo. App. 2014). But see, S.B. 43 (2017) and Historical Note, below.

38.01(B) [2018 Revision] Verdict Directing—Missouri Human Rights Act—Employment Discrimination by Reason of Disability–Existence of Disability Disputed (for actions accruing before August 28, 2017)

[No change to Instruction.]

Notes on Use (2014 New)

[No change to Notes on Use.]

Committee Comment (2022 Revision)

(Approved November 23, 2021; Effective July 1, 2022)

A. Section 213.055, RSMo, Unlawful Employment Practices, provides in part:

1. It shall be an unlawful employment practice:

(1) For an employer, because of the race, color, religion, national origin, sex, ancestry, age or disability of any individual:

(a) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, national origin, sex, ancestry, age or disability;

…

B. Section 213.070, RSMo, Additional Unlawful Discriminatory Practices, provides in part:

1. It shall be an unlawful discriminatory practice for an employer, employment agency, labor organization, or place of public accommodation:

…

(2) To retaliate or discriminate in any manner against any other person because such person has opposed any practice prohibited by this chapter or because such person has filed a complaint, testified, assisted, or participated

in any manner in any investigation, proceeding or hearing conducted pursuant to this chapter;

…

In *McCrainey v. Kansas City Missouri Sch. Dist.,* 337 S.W. 3d 746, 754 (Mo. App. 2011), the Court held that a "plaintiff need only have a good faith, reasonable belief that the conduct he or she opposed was prohibited by the MHRA in order to prevail on a retaliation claim." Additionally, the court concluded "that a plaintiff can oppose a practice which is not actually unlawful under the MHRA, yet still proceed with a retaliation claim based on his or her opposition to that practice." *Id.* at 753. The Committee takes no position on whether "a good faith, reasonable belief" modification to the verdict director is appropriate or required.

C. In *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82 (Mo. banc 2003), the Supreme Court held that there is a right to a jury trial in actions for damages under the Missouri Human Rights Act, §§ 213.055 *et seq.*, RSMo.

D. "Garden variety" emotional distress under the Missouri Human Rights Act, §§ 213.055 *et seq.*, RSMo, need not be supported by expert testimony. *State ex rel. Dean v. Cunningham*, 182 S.W.3d 561 (Mo. banc 2006).

E. This instruction is based on *Hervey v. Missouri Department of Corrections*, 379 S.W.3d 156 (Mo. banc 2012), wherein the Court required that the issue as to whether or not plaintiff was a member of a protected class be set forth in this instruction if it is a disputed element. While *Hervey* addressed a disability discrimination cause of action, the holding in this regard is applicable to other protected classifications where membership in

that class is in dispute. See Note on Use 2 to MAI 38.01(A). Use this instruction only for disability discrimination claims where the issue of disability is disputed. Where plaintiff's disability is not in dispute use MAI 38.01(A).

F. "Disability" is statutorily defined for purposes of the Missouri Human Rights Act in § 213.010(4), RSMo. For a thorough discussion of the definition of "disability" within the context of a Missouri Human Rights Act claim, see *Wells v. Lester E. Cox Medical Centers*, 379 S.W.3d 919 (Mo. App. 2012), where the court addressed that issue as well as the meaning of "reasonable accommodation." The court also questioned whether the Missouri Human Rights Act provides for the use of any affirmative defense. The Committee takes no position on the availability of affirmative defenses in Missouri Human Rights Act cases.

G. *Thomas v. McKeever's Enterprises, Inc.*, 388 S.W.3d 206 (Mo. App. 2012), addressed the issue of causation in a Missouri Human Rights Act claim in view of the trial court's attempt to provide the jury with a curative instruction based upon a "but for" argument in closing. In reversing the trial court, the court in *Thomas* stated:

> The trial court's wording of the but for issue—" but for … their age …, they would not have been terminated" —effectively told the jury that it would not be enough for Appellants to prove that their age was an actual contributing cause of their discharge. Under the law, Appellants could prevail if the jury believed that age was a "contributing factor" in their discharge; this oral instruction said they could prevail only if the jury believed that their age was ***the*** cause, in and of itself, of their discharge. 388 S.W.3d at 216.

The court acknowledged that terms such as "but for causation" are not to be used when instructing the jury as it creates the potential for confusion. It is generally error for a trial court to attempt to instruct the jury on "but for causation." But see, S.B. 43 (2017) and Historical Note, below.

H. Where suit involves multiple causes of damage, see MAI 19.01 and *Hurst v. Kansas City Missouri School District*, 437 S.W.3d 327 (Mo. App. 2014). But see, S.B. 43 (2017) and Historical Note, below.

38.06 [2018 New] Verdict Directing—Missouri Human Rights Act—Employment Discrimination (for actions accruing on or after August 28, 2017)

[No change to Instruction or Notes on Use.]

Committee Comment (2022 Revision)

(Approved November 23, 2021; Effective July 1, 2022)

A. Section 213.055, RSMo, Unlawful Employment Practices, provides in part:

1. It shall be an unlawful employment practice:

(1) For an employer, because of the race, color, religion, national origin, sex, ancestry, age or disability of any individual:

(a) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, national origin, sex, ancestry, age or disability;

…

B. Section 213.070, RSMo, Additional Unlawful Discriminatory Practices, provides in part:

> 1. It shall be an unlawful discriminatory practice for an employer, employment agency, labor organization, or place of public accommodation:
>
> …
>
> (2) To retaliate or discriminate in any manner against any other person because such person has opposed any practice prohibited by this chapter or because such person has filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding or hearing conducted pursuant to this chapter;
>
> …

In *McCrainey v. Kansas City Missouri Sch. Dist.,* 337 S.W. 3d 746, 754 (Mo. App. 2011), the Court held that a "plaintiff need only have a good faith, reasonable belief that the conduct he or she opposed was prohibited by the MHRA in order to prevail on a retaliation claim." Additionally, the court concluded "that a plaintiff can oppose a practice which is not actually unlawful under the MHRA, yet still proceed with a retaliation claim based on his or her opposition to that practice." *Id.* at 753. The Committee takes no position on whether "a good faith, reasonable belief" modification to the verdict director is appropriate or required.

C. In *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82 (Mo. banc 2003), the Supreme Court held that there is a right to a jury trial in actions for damages under the Missouri

Human Rights Act, §§ 213.055 *et seq.*, RSMo. The Missouri legislature specifically recognized such a right to trial by jury in § 213.111.3, RSMo.

D. "Garden variety" emotional distress under the Missouri Human Rights Act, §§ 213.055 *et seq.*, RSMo, need not be supported by expert testimony. *State ex rel. Dean v. Cunningham*, 182 S.W.3d 561 (Mo. banc 2006).

E. In *Hervey v. Missouri Department of Corrections,* 379 S.W.3d 156 (Mo. banc 2012), the Court required that the issue as to whether or not plaintiff was a member of a protected class be set forth in this instruction if it is a disputed element. While *Hervey* addressed a disability discrimination cause of action, the holding in this regard is applicable to other protected classifications where membership in that class is in dispute. See Note on Use 2. For a disability discrimination claim where the issue of disability is disputed, this instruction must be modified. See e.g., MAI 38.07 and modify accordingly.

F. In *Wells v. Lester E. Cox Medical Centers*, 379 S.W.3d 919 (Mo. App. 2012), the court questioned whether the Missouri Human Rights Act provides for the use of any affirmative defense. The Committee takes no position on the availability of affirmative defenses in Missouri Human Rights Act cases.

38.07 [2018 New] Verdict Directing—Missouri Human Rights Act—Employment Discrimination by Reason of Disability–Existence of Disability Disputed (for actions accruing on or after August 28, 2017)

[No change to Instruction or Notes on Use.]

Committee Comment (2022 Revision)

(Approved November 23, 2021; Effective July 1, 2022)

A. Section 213.055, RSMo, Unlawful Employment Practices, provides in part:

1. It shall be an unlawful employment practice:

(1) For an employer, because of the race, color, religion, national origin, sex, ancestry, age or disability of any individual:

(a) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, national origin, sex, ancestry, age or disability;

…

B. Section 213.070, RSMo, Additional Unlawful Discriminatory Practices, provides in part:

1. It shall be an unlawful discriminatory practice for an employer, employment agency, labor organization, or place of public accommodation:

…

(2) To retaliate or discriminate in any manner against any other person because such person has opposed any practice prohibited by this chapter or because such person has filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding or hearing conducted pursuant to this chapter;

…

In *McCrainey v. Kansas City Missouri Sch. Dist.,* 337 S.W. 3d 746, 754 (Mo. App. 2011), the Court held that a "plaintiff need only have a good faith, reasonable belief that the conduct he or she opposed was prohibited by the MHRA in order to prevail on a

retaliation claim." Additionally, the court concluded "that a plaintiff can oppose a practice which is not actually unlawful under the MHRA, yet still proceed with a retaliation claim based on his or her opposition to that practice." *Id.* at 753. The Committee takes no position on whether "a good faith, reasonable belief" modification to the verdict director is appropriate or required.

C. In *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82 (Mo. banc 2003), the Supreme Court held that there is a right to a jury trial in actions for damages under the Missouri Human Rights Act, §§ 213.055 *et seq.*, RSMo.

D. "Garden variety" emotional distress under the Missouri Human Rights Act, §§ 213.055 *et seq.*, RSMo, need not be supported by expert testimony. *State ex rel. Dean v. Cunningham*, 182 S.W.3d 561 (Mo. banc 2006).

E. In *Hervey v. Missouri Department of Corrections,* 379 S.W.3d 156 (Mo. banc 2012), the Court required that the issue as to whether or not plaintiff was a member of a protected class be set forth in this instruction if it is a disputed element. While *Hervey* addressed a disability discrimination cause of action, the holding in this regard is applicable to other protected classifications where membership in that class is in dispute. See Note on Use 2 to MAI 38.01(A). Use this instruction only for disability discrimination claims there the issue of disability is disputed. Where plaintiff's disability is not in dispute use MAI 38.06.

F. "Disability" is statutorily defined for purposes of the Missouri Human Rights Act in § 213.010(4), RSMo. For a thorough discussion of the definition of "disability" within the context of a Missouri Human Rights Act claim, see *Wells v. Lester E. Cox*

Medical Centers, 379 S.W.3d 919 (Mo. App. 2012), where the court addressed that issue as well as the meaning of "reasonable accommodation." The court also questioned whether the Missouri Human Rights Act provides for the use of any affirmative defense. The Committee takes no position on the availability of affirmative defenses in Missouri Human Rights Act cases.

39.01 [2022 Revision] Verdict Directing – Violation of Missouri Merchandising Practices Act where S.B. 591 (Laws 2020) does not apply

(Approved November 23, 2021; Effective July 1, 2022)

Your verdict must be for plaintiff if you believe:

First, in connection with the [purchase][sale][1] of (*here identify merchandise afforded protection under the statute*),[2] defendant (*here insert the alleged method, act or practice declared unlawful by § 407.020, RSMo, such as "misrepresented the (merchandise previously identified)" or "concealed a material fact")*,[3] and

Second, plaintiff [purchased] [leased][1] the (*insert merchandise previously identified*) primarily for [personal] [family] [household][4] purposes, and

Third, as a direct result of defendant's conduct, plaintiff sustained damage.

Notes on Use (2022 Revision)

(Approved November 23, 2021; Effective July 1, 2022)

1. Select the appropriate term.

2. Merchandise is defined at § 407.010.4, RSMo, as any "objects, wares, goods, commodities, intangibles, real estate or services."

3. The particular term or phrase incorporated from § 407.020, RSMo, may need to be defined. See discussion in Committee Comment, paragraph F.

4. Select one or more of the appropriate term(s). If more than one term is selected, they should be joined by the word "or".

Committee Comment (2022 Revision)

(Approved November 23, 2021; Effective July 1, 2022)

A. In a private lawsuit for violation of the Missouri Merchandising Practices Act (MMPA), plaintiffs must demonstrate that they (1) purchased merchandise (which includes services) from defendants; (2) for personal, family or household purposes; and (3) suffered an ascertainable loss of money or property; (4) as a result of an act declared unlawful under the Merchandising Practices Act. *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758, 773 (Mo. banc 2007); *Edmonds v. Hough*, 344 S.W.3d 219 (Mo. App. 2011). For cases where S.B. 591 (Laws 2020) applies, the person seeking to recover damages shall also establish (a) that the person acted as a reasonable consumer would in light of all circumstances; (b) that the method, act or practice declared unlawful would cause a reasonable person to enter into the transaction that resulted in damages; and (c) individual damages with sufficiently definitive and objective evidence to allow the loss to be calculated with a reasonable degree of certainty. Section 407.025.1, RSMo (2020), see MAI 39.02. The Committee used the phrase "ordinary care," a defined term, to incorporate these reasonableness requirements. See MAI 39.02.

B. The MMPA prohibits "deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce" by defining such activity as an unlawful practice. Section 407.020.1, RSMo.

Civil actions may be brought under the MMPA to recover actual damages by "[a]ny person who purchases or leases merchandise primarily for personal, family or household purposes and thereby suffers an ascertainable loss of money or property, real or personal, as a result of [an unlawful practice]." Section 407.025.1, RSMo.

C. The statute does not contain a scienter requirement for civil liability for actual damages. "It is the defendant's conduct, not his intent, which determines whether a violation has occurred." *State ex rel. Webster v. Areaco Inv. Co.*, 756 S.W.2d 633, 635 (Mo. App. 1988). Of course, for punitive damages, a different standard applies. See MAI 10.07.

D. Section 407.025 was revised in 2020. For cases in which the prior version of the law applies, a consumer's reliance on an unlawful practice is not required under the MMPA. *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d at 774; 15 CSR §§ 60-9.020, -9.070, -9.110.

E. An MMPA violation occurs regardless of whether the unlawful practice is committed "before, during or after the sale." Section 407.020.1 RSMo.

F. The Supreme Court has cautioned that terms used in the MMPA may have a broader meaning than similar terms used in common law. The Court noted that MMPA regulations define "material fact" as "any fact which a reasonable consumer would likely consider to be important in making a purchasing decision …" 15 C.S.R. 60-9.010(1)(C). This definition of "material fact" is broader than the materiality requirement of common law fraud. See, *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d at 773.

G. Absence of privity of contract is not a defense in an MMPA action. See, *Gibbons v. J. Nuckolls, Inc.*, 216 S.W.3d 667 (Mo. banc 2007).

H. The "voluntary payment doctrine" was held not to be a defense to an action under the MMPA in *Huch v. Charter Communications, Inc.*, 290 S.W.3d 721 (Mo. banc 2009).

I. In cases where S.B. 591 (Laws 2020) applies, a person or class action representative seeking to recover damages shall establish "individual damages with sufficiently definitive and objective evidence to allow the loss to be calculated with a reasonable degree of certainty." Section 407.025(2)(c); 407.025(5)(3), RSMo. In a class action, other class members shall establish "individual damages in a manner determined by the court." Section 407.025(5), RSMo.

J. Under the MMPA, the measure of damages is often determined by the "benefit of the bargain" rule. See MAI 4.03; *Sunset Pools of St. Louis, Inc. v. Schaefer*, 869 S.W.2d 883 (Mo. App. 1994), and *Shiplet v. Copeland*, 450 S.W.3d 433 (Mo. App. 2014). Missouri Courts have recognized that where the benefit of the bargain rule is inadequate, other measures of damages may be used. See MAI 4.01; *Kerr v. Vatterott Educational Centers, Inc.*, 439 S.W.3d 802 (Mo. App. 2014) (MAI 4.01 held appropriate where a case involved intangible services and the value of the education was zero). Where plaintiff receives nothing of value, the benefit of the bargain rule does not apply. See *Lollar v. A.O. Smith Harvestore Products, Inc.*, 795 S.W.2d 441, 450–51 (Mo. App. 1990) (purchaser who received nothing of value, may properly recover the amount paid with interest from the date of payment, plus incidental losses and expenses suffered as a result of the seller's

misrepresentations). See also, *Herberer v. Shell Oil Co.*, 744 S.W.2d 441, 443 (Mo. banc 1988) ("[t]he benefit of the bargain rule does not apply where the purchaser rescinds and returns the property received or where he received nothing of value.").

K. The Committee takes no position on the constitutionality of any provision of S.B. 591 (Laws 2020).

39.02 [2022 New] Verdict Directing – Violation of Missouri Merchandising Practices Act where S.B. 591 (Laws 2020) applies

(Approved November 23, 2021; Effective July 1, 2022)

Your verdict must be for plaintiff if you believe:

First, in connection with the [purchase] [sale][1] of (*here identify merchandise afforded protection under the statute*),[2] defendant (*here insert the alleged method, act or practice declared unlawful by 407.020, RSMo, such as "misrepresented the (merchandise previously identified)" or "concealed a material fact")*,[3] and

Second, such conduct caused plaintiff, in the exercise of ordinary care,[4] to [purchase] [lease][1] (*here identify merchandise afforded protection under the statute*),[2] and

Third, such [purchase] [lease][1] was primarily for [personal] [family] [household][5] purposes, and

Fourth, as a direct result of defendant's conduct, plaintiff sustained damage.

Notes on Use (2022 New)

(Approved November 23, 2021; Effective July 1, 2022)

1. Select the appropriate term.

2. Merchandise is defined at § 407.010.4, RSMo, as any "objects, wares, goods, commodities, intangibles, real estate or services."

3. The particular term or phrase incorporated from § 407.020, RSMo, may need to be defined. See discussion in Committee Comment, paragraph F.

4 The term "ordinary care" must be defined. See MAI 11.05.

5. Select one or more of the appropriate term(s). If more than one term is selected, they should be joined by the word "or".

Committee Comment (2022 New)

(Approved November 23, 2021; Effective July 1, 2022)

A. In a private lawsuit for violation of the Missouri Merchandising Practices Act (MMPA), plaintiffs must demonstrate that they (1) purchased merchandise (which includes services) from defendants; (2) for personal, family or household purposes; and (3) suffered an ascertainable loss of money or property; (4) as a result of an act declared unlawful under the Merchandising Practices Act. *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758, 773 (Mo. banc 2007); *Edmonds v. Hough*, 344 S.W.3d 219 (Mo. App. 2011). For cases where S.B. 591 (Laws 2020) applies, the person seeking to recover damages shall establish (a) that the person acted as a reasonable consumer would in light of all circumstances; (b) that the method, act or practice declared unlawful would cause a reasonable person to enter into the transaction that resulted in damages; and (c) individual damages with sufficiently definitive and objective evidence to allow the loss to be calculated with a reasonable degree of certainty. Section 407.025.1, RSMo (2020). The Committee used the phrase "ordinary care," a defined term, to incorporate these reasonableness requirements.

B. The MMPA prohibits "deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce" by defining such activity as an unlawful practice. Section 407.020.1, RSMo. Civil actions may be brought under the MMPA to recover actual damages by "[a]ny person who purchases or leases merchandise primarily for personal, family or household purposes and thereby suffers an ascertainable loss of money or property, real or personal, as a result of [an unlawful practice]." Section 407.025.1, RSMo.

C. The statute does not contain a scienter requirement for civil liability for actual damages. "It is the defendant's conduct, not his intent, which determines whether a violation has occurred." *State ex rel. Webster v. Areaco Inv. Co.*, 756 S.W.2d 633, 635 (Mo. App. 1988). Of course, for punitive damages, a different standard applies. See MAI 10.07.

D. Section 407.025 was revised in 2020. For cases in which the prior version of the law applies, a consumer's reliance on an unlawful practice is not required under the MMPA. *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d at 774; 15 CSR §§ 60-9.020, -9.070, -9.110. For cases in which the new version of the law applies, Section 407.025(2)(b) states "[t]hat the method, act or practice declared unlawful by section 407.020 would cause a reasonable person to enter into the transaction that resulted in damages." See Section 402.025(4), RSMo.

E. An MMPA violation occurs regardless of whether the unlawful practice is committed "before, during or after the sale." Section 407.020.1 RSMo.

F. The Supreme Court has cautioned that terms used in the MMPA may have a broader meaning than similar terms used in common law. The Court noted that MMPA regulations define "material fact" as "any fact which a reasonable consumer would likely consider to be important in making a purchasing decision …" 15 C.S.R. 60-9.010(1)(C). This definition of "material fact" is broader than the materiality requirement of common law fraud. See, *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d at 773.

G. Absence of privity of contract is not a defense in an MMPA action. See, *Gibbons v. J. Nuckolls, Inc.*, 216 S.W.3d 667 (Mo. banc 2007).

H. The "voluntary payment doctrine" was held not to be a defense to an action under the MMPA in *Huch v. Charter Communications, Inc.*, 290 S.W.3d 721 (Mo. banc 2009).

I. A person or class action representative seeking to recover damages shall establish "individual damages with sufficiently definitive and objective evidence to allow the loss to be calculated with a reasonable degree of certainty." Section 407.025(2)(c); 407.025(5)(3), RSMo. In a class action, other class members shall establish "individual damages in a manner determined by the court." Section 407.025(5), RSMo. Under the MMPA, the measure of damages is often determined by the "benefit of the bargain" rule. See MAI 4.03; *Sunset Pools of St. Louis, Inc. v. Schaefer*, 869 S.W.2d 883 (Mo. App. 1994), and *Shiplet v. Copeland*, 450 S.W.3d 433 (Mo. App. 2014).

J. Missouri Courts have recognized that where the benefit of the bargain rule is inadequate, other measures of damages may be used. See MAI 4.01; *Kerr v. Vatterott Educational Centers, Inc.*, 439 S.W.3d 802 (Mo. App. 2014) (MAI 4.01 held appropriate

where a case involved intangible services and the value of the education was zero). Where plaintiff receives nothing of value, the benefit of the bargain rule does not apply. See *Lollar v. A.O. Smith Harvestore Products, Inc.*, 795 S.W.2d 441, 450–51 (Mo. App. 1990) (purchaser who received nothing of value, may properly recover the amount paid with interest from the date of payment, plus incidental losses and expenses suffered as a result of the seller's misrepresentations). See also, *Herberer v. Shell Oil Co.*, 744 S.W.2d 441, 443 (Mo. banc 1988) ("[t]he benefit of the bargain rule does not apply where the purchaser rescinds and returns the property received or where he received nothing of value.").

K. The Committee takes no position on the constitutionality of any provision of S.B. 591 (Laws 2020).