

31.16 [2023 Revision] Waiver of Sovereign Immunity – Dangerous Condition of Public Entity's Property – Actual or Constructive Notice

(Approved August 30, 2022; Effective July 1, 2023)

Your verdict must be for plaintiff if you believe¹:

First, defendant (here identify the public entity) owned (*describe the property, such as "sidewalk", "manhole", "drainage ditch"*),² and

Second, (*here describe condition that made the public entity's property dangerous, such as "there was oil on the gymnasium floor" or "the table saw was unguarded"*), and as a result the defendant's (*describe property, such as "gymnasium floor" or "table saw"*) was not reasonably safe, and

Third, defendant knew or by using ordinary care³ could have known of this condition in time to [either] [remedy such condition] [warn of such condition] [make the condition reasonably safe]⁴, and

Fourth, defendant failed to use ordinary care³ to [either] [remedy such condition] [warn of such condition] [make the condition reasonably safe]⁴, and

Fifth, as a direct result of such failure, plaintiff sustained damage.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number _____ (*here insert number of affirmative defense instruction*)].

Notes on Use (2023 Revision)

(Approved August 30, 2022; Effective July 1, 2023)

1. Where comparative fault ismissible, modify this instruction in accordance with MAI 37.01. For submission of plaintiff's comparative fault for failure to keep a careful lookout, see MAI 32.28.

2. If ownership is not in dispute, omit Paragraph First, then renumber the other paragraphs of the verdict directing instruction. When the public entity does not own the property, it must have "exclusive possession and control" over it. *Allen v. 32nd Judicial*

Circuit, 638 S.W.3d 880 (Mo. banc 2022). If there is a factual dispute about the control of the property, substitute the following for Paragraph First: "First, defendant (*identify the public entity*) had exclusive possession and control of the (*describe the property, such as "sidewalk", "manhole", "drainage ditch"*), and . . .". See *Walton v. City of Seneca*, 420 S.W.3d 640 (Mo. App. 2013); *Spielvogel v. City of Kansas City*, 302 S.W.3d 108 (Mo. App. 2009); *Thomas v. Clay County Election Board*, 261 S.W.3d 574 (Mo. App. 2008). Compare, *Randel v. City of Kansas City*, 467 S.W.3d 383 (Mo. App. 2015).

3. The phrase "ordinary care" must be defined. See definition at MAI 11.05.

4. If more than one phrase is used, they must be submitted in the disjunctive and each must be supported by the evidence. Other submissions of negligence, such as "barricade it", "remove it", or another appropriate submission, may also be proper if supported by the facts of the case.

* Add if affirmative defense is submitted. This bracketed material should not be used to submit comparative fault. See MAI 37.01.

Committee Comment (2021 Revision) [NO CHANGE]

31.17 [2023 Revision] Waiver of Sovereign Immunity—Dangerous Condition of Public Entity's Property Created by Employee

(Approved August 30, 2022; Effective July 1, 2023)

Your verdict must be for plaintiff if you believe¹:

First, defendant (here identify the public entity) owned (*describe the property, such as "sidewalk", "manhole", "drainage ditch"*),² and

Second, *(here describe condition that made the public entity's property dangerous, such as "there was oil on the gymnasium floor" or "the table saw was unguarded")*, and as a result the defendant's *(describe property, such as "gymnasium floor" or "table saw")* was not reasonably safe, and

Third, such condition was created by an employee of *(name of public entity)* within the scope and course of employment³, and

Fourth, the employee was thereby negligent⁴, and

Fifth, as a direct result of such negligence, plaintiff sustained damage.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number _____ *(here insert number of affirmative defense instruction)*].

Notes on Use (2023 Revision)

(Approved August 30, 2022; Effective July 1, 2023)

1. Where comparative fault ismissible, modify this instruction in accordance with MAI 37.01. For submission of plaintiff's comparative fault for failure to keep a careful lookout, see MAI 32.28.

2. If ownership is not in dispute, omit Paragraph First, then renumber the other paragraphs of the verdict directing instruction. When the public entity does not own the property, it must have "exclusive possession and control" over it. *Allen v. 32nd Judicial Circuit*, 638 S.W.3d 880 (Mo. banc 2022). If there is a factual dispute about the control of the property, substitute the following for Paragraph First: "First, defendant *(identify the public entity)* had exclusive possession and control of the *(describe the property, such as "sidewalk", "manhole", "drainage ditch")*, and . . .". See *Walton v. City of Seneca*, 420 S.W.3d 640 (Mo. App. 2013); *Spielvogel v. City of Kansas City*, 302 S.W.3d 108 (Mo.

App. 2009); *Thomas v. Clay County Election Board*, 261 S.W.3d 574 (Mo. App. 2008). Compare, *Randel v. City of Kansas City*, 467 S.W.3d 383 (Mo. App. 2015).

3. Delete the phrase "within the scope and course of employment" if not in issue. If in issue, the phrase must be defined. See Chapter 13.00 and particularly MAI 13.05, which will fit the facts of most cases.

4. The terms "negligent" and "negligence" must be defined. See definitions in Chapter 11.00.

* Add if affirmative defense is submitted. This bracketed material should not be used to submit comparative fault. *See* MAI 37.01.

Committee Comment (1993 Revision) [NO CHANGE]