



# **SUPREME COURT OF MISSOURI**

## **en banc**

October 31, 2006

Effective January 1, 2007

IN RE: REVISIONS TO MAI-CIVIL

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**ORDER**

1. Additions and revisions of previously approved MAI-CIVIL Instructions, Notes on Use and Committee Comments as listed above, having been prepared by the Committee on Jury Instructions - Civil and reviewed by the Court, are hereby adopted and approved.

2. The Instructions, Notes on Use and Committee Comments revised as set forth in the specific exhibits attached hereto must be used on and after January 1, 2007, and may be used prior thereto; any such use shall not be presumed to be error.

3. It is further ordered that this order and the specific exhibits attached hereto shall be published in the South Western Reporter and the Journal of The Missouri Bar.

Day - to - Day

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MICHAEL A. WOLFF  
Chief Justice

## **2.01 [2006 Revision] Explanatory Instruction For All Cases**

### **Committee Comment (2007 Revision)**

**(Approved October 31, 2006; Effective January 1, 2007)**

#### Directions or admonitions:

Directions or admonitions given by a trial judge to a jury during the course of trial are technically not instructions. Examples of such directions or admonitions include a direction not to visit the scene of an accident or an oral repetition of the admonition to refrain from discussing the case during a recess. Considerable discretion is afforded to the trial judge, subject to appropriate requests or objections of counsel, to determine the scope and frequency of such directions or admonitions. An appropriate admonition may be in the following form and may be given orally.

Justice requires that you not make up your mind about the case until all of the evidence has been seen and heard. You must not discuss this case among yourselves or with anyone else or comment on anything you hear or learn in this trial until the case is concluded and you retire to the jury room for your deliberations. Also, you must not remain in the presence of anyone who is discussing the case when the court is not in session. You should not consult the Internet concerning the issues in this case or conduct any other research or investigation on your own.

Cell phones or other electronic devices: The trial court has considerable discretion regarding the use of cell phones or other electronic devices in the courthouse and during trial. Judicial discretion may be exercised by oral admonition, the addition of a paragraph regarding such devices at the end of MAI 2.01, or using a separate instruction.

Other appropriate admonitions or directions to the jury may be formulated and

given by the trial judge as determined in light of the particular facts or circumstances of a given date.

Juror note-taking:

Supreme Court Rules 69.03 provides:

Upon the court's own motion or upon the request of any party, the court shall permit jurors to take notes. If jurors are permitted to take notes, the court shall supply each juror with suitable materials.

Jurors shall not take their notes out of the courtroom except to use their notes during deliberations immediately before discharge of the jury.

The court should collect all juror notes.

After the jury is discharged, the court shall destroy the notes promptly without permitting their review by the court or any other person.

Juror notes shall not be used to impeach a verdict.

Distribution of instructions:

Rule 70.02(f) requires that the final instructions of the court be given to the jury in writing. While Rule 70.02 does not explicitly require that each juror be provided with a copy of the final instructions, such approach is implicitly permitted. In its report to the Supreme Court of October 2000, the Civil Jury Study Committee recommended "that each juror be given a copy of the instructions before instruction reading, final argument, and deliberation." (Emphasis supplied.) That committee also noted that juror "understanding increased significantly when each juror received his or her own copy of the instructions." The MAI Committee encourages compliance with this recommendation whenever feasible.

## **11.06 [1990 Revision] Definitions—Negligence—Health Care Providers**

### **Committee Comment (2007 Revision)**

**(Approved October 31, 2006; Effective January 1, 2007)**

This instruction conforms to the Court’s holding in *Gridley v. Johnson*, 476 S.W.2d 475 (Mo. 1972), where the Court approved of the deletion from the former instruction of the words “in good standing” and did away with the locality rule in medical malpractice cases.

This instruction has been used to define “negligence” of certain other professions. See *Annen v. Trump*, 913 S.W.2d 16 (Mo.App. 1995)(engineer’s design); *Davidson v. Otis Elevator Company*, 811 S.W.2d 802, (Mo.App. 1991)(elevator inspection and repair); and *Yantzie v. Norton*, 927 S.W.2d 427 (Mo.App. 1996)(foundation inspection). MAI 11.06 may be modified for other professions if appropriate.

**23.05 [2007 Revision] Verdict Directing – Fraudulent Misrepresentations**

**(Approved October 31, 2006; Effective January 1, 2007)**

Your verdict must be for plaintiff if you believe:

First, defendant (*describe act such as "represented to plaintiff that the motor vehicle was never in an accident"*), and

Second, such representation was made by defendant with the intent that plaintiff rely on such representation in (*purchasing the motor vehicle*), and

Third, the representation was false, and

Fourth, [defendant knew that it was false] [defendant knew that it was false at the time the representation was made] [defendant made the representation without knowing whether it was true or false]<sup>1</sup>, and

Fifth, the representation was material to the (*purchase of the motor vehicle*), and

Sixth, plaintiff relied on the representation in (*making the purchase*) and such reliance was reasonable under the circumstances, and

Seventh, as a direct result of such representation, 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 (2007 Revision)**

**(Approved October 31, 2006; Effective, January 1, 2007)**

1. Select the appropriate phrase. The second alternate for Paragraph Third is

required to submit a misrepresentation of a future event. The third alternate is not appropriate for submission of a misrepresentation of a future event. See *Klecker v. Sutton*, 523 S.W.2d 558 (Mo. App. 1975), and *Wolk v. Churchill*, 696 F.2d 621 (8<sup>th</sup> Cir.1982).

\*Add if affirmative defense is submitted.

### **Committee Comment (2007 Revision)**

**(Approved October 31, 2006; Effective January 1, 2007)**

For negligent misrepresentations, see MAI 31.26.

Where agency is in issue see MAI 18.01

*Wengert v. Thomas L. Meyer*, 152 S.W.3d 379 (Mo.App. 2004) involves negligent failure to disclose a water drainage problem. This instruction should not be used to submit a misrepresentation by omission (fraudulent or negligent) contemplated by Restatement (Second) Torts §551.

For a discussion of the distinction between negligent misrepresentation and reckless disregard for truth or falsity (as submitted by MAI 23.05), see *Colgan v. Washington Realty*, 879 S.W.2d at 689, n. 1 (Mo.App. 1994).

The Restatement (Second) Torts distinguishes between misrepresentations that cause pecuniary loss (§551 and §552) and those that result in physical injury (§311). MAI 23.05 and MAI 31.26 are intended to apply to "pecuniary loss" cases.

1. The elements of an action for fraudulent representation are listed in *John T. Brown, Inc. v. Weber Implement & Auto Co.*, 260 S.W.2d 751, 755 (Mo. 1953) as follows:

“It was essential to a recovery to establish a representation; its falsity; its materiality; the speaker’s knowledge of its falsity; his intent that it be acted on by the hearer and in the manner reasonably contemplated; that hearer’s ignorance of its falsity; his reliance on its truth; his right to reply thereon; and his consequent and proximate injury. A failure to establish any one of these elements is fatal to a recovery.”

See also *Joel Bianco Kawasaki Plus v. Meramec Valley Bank*, 81 S.W. 3d 528, 536 (Mo. banc 2002).

2. To recover for fraudulent representations, it is not necessary that it be shown that defendant had actual knowledge of the falsity of the facts stated by him. It is sufficient that he made the representations with the consciousness that he was without knowledge as to their truth or falsity, when in fact, they were false. See *Wilson v. Murch*, 354 S.W.2d 332, 338 (Mo.App. 1962). However, if a verdict directing instruction submits in the alternative that defendant knowingly made false representations and that defendant made the representations without knowing whether they were true or false, there must be evidence to support both theories. See *Emily v. Bayne*, 371 S.W.2d 663 (Mo.App. 1963).

3. Although the basic elements of fraudulent misrepresentation have long been settled and a plaintiff must show that he had a right to rely on the misrepresentation, more recent case law puts less emphasis on the “duty to investigate,” In *Orlann v. Laederich*, 338 Mo. 783, 791, 92 S.W.2d 190, 194 (1936), the Court quotes from *McCaw v.*

*O'Malley*, 298 Mo. 783 Mo. 401, 249 S.W. 41, 44 (1923), which said: “. . . the burden is upon the plaintiff . . . to establish by proof that there was not only a false representation, but that he relied upon it, and that such reliance ‘was an act of ordinary, prudence’, and that such representations thus prudently relied upon influenced plaintiff to his damage.” This language has never been expressly overruled although it seems to have been tempered by later causes.

In *Meyer v. Brown*, 312 S.W.2d 158, 161 (Mo.App. 1958), the court quoted with approval 37 CJS Fraud §34, pp. 279-80:

“However, the mere presence of opportunities for investigation will not of itself preclude the right of reliance; and this is especially true where the circumstances were such that a prudent man would not have been put on inquiry, as where positive statements were made in a manner not calculated to cause inquiry, where the relations between the parties were involuntary, where, although it was possible to ascertain the facts, an investigation would have been difficult, or where there was intentional fraud, as where the representations were made for the very purpose of preventing inquiry;’ . . .”

In *Schechter v. Brewer*, 344 S.W.2d 784, 788 (Mo.App. 1961), the court said: “The tendency of modern decisions is not to extend, but to restrict the rule requiring diligence, and similar rules, such as *caveat emptor*, and the rule granting immunity for dealers talk; to condemn the falsehood of the fraud feisor rather than the credulity of his victim . . . . Since the very purpose of fraud is to cheat its victim by making him neglect the case essential to prevent injury, to deny relief because the victim was negligent would encourage the evil.”

See also *Keefhaver v. Kimbrell*, 58 S.W.3d 54 (Mo.App. 2001), which discusses the duty to investigate in the context of the sale of a home and which also deals with the

issue of misrepresentation by silence or concealment where the silent party has a duty to speak.

Restatement (Second) of Torts §541 (1977) expresses the rule as follows: “The recipient of a fraudulent misrepresentation is not justified in relying upon its truth if he knows that it is false or its falsity is obvious to him.”

*Cases involving multiple misrepresentations.*

Submission of multiple representations in a single verdict directing instruction may create a problem in determining whether all requisite elements (i.e., falsity, materiality, knowledge, etc.) have been found as to the same representation. A possible approach would be to submit a separate verdict directing instruction as to each alleged misrepresentation, all in a single package with a single damage instruction and a single verdict form.

**31.24 [2005 New] Verdict Directing- Employment Discrimination –  
Missouri Human Rights Act**

**Notes on Use (2007 Revision)**

**(Approved October 31, 2006; Effective January 1, 2007)**

1. If the evidence in the case demonstrates a course of conduct or harassment constituting discrimination on any grounds contained in § 213.055, RSMo, then paragraph First of this instruction may be appropriately modified.

\*Add if affirmative defense is submitted.

This bracketed phrase should not be used to submit lawful justification under MAI

31.25.

**31.26 [2007 New] Verdict Directing – Negligent Misrepresentation**

**(Approved October 31, 2006; Effective January 1, 2007)**

Your verdict must be for plaintiff if you believe:

First, defendant in the course of his [business] [profession] [employment]<sup>1</sup>

*(describe act such as "represented to plaintiff that the motor vehicle was never in an accident")*, and

Second, such representation was made by defendant with the intent that

plaintiff rely on such representation in *(purchasing the motor vehicle)*, and

Third, such representation was material to the *(purchase of the motor vehicle)*,

and

Fourth, such representation was false, and

Fifth, defendant failed to use ordinary care<sup>2</sup> in making such representation,

and

Sixth, plaintiff relied on such representation in *(making the purchase)* and

such reliance was reasonable under the circumstances, and

Seventh, as a direct result of such representation, 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 (2007 New)**

**(Approved October 31, 2006; Effective January 1, 2007)**

1. Select the appropriate phrase. If the transaction is one involving some other

"pecuniary interest" of the defendant as that phrase is used in Restatement (Second) Torts §552 (1977), insert an appropriate phrase.

2. The phrase "ordinary care" must be defined. See definitions in MAI Chapter 11.00.

\*Add if affirmative defense is submitted.

**Committee Comment (2007 New)**

**(Approved October 31, 2006; Effective January 1, 2007)**

For fraudulent misrepresentation, see MAI 23.05

Where agency is in issue, see MAI 18.01.

This instruction results from the adoption of Restatement (Second) Torts §552 (1977) in the cases of *Colgan v. Washington Realty Co.*, 879 S.W.2d 686 (Mo.App. (1994)); *Kesselring v. St. Louis Group, Inc.*, 74 S.W.3d 809, 813 (Mo.App. 2002); and the discussion of the verdict directing instruction in *Gurley v. Montgomery First National Bank*, 160 S.W.3d 863 (Mo.App. 2005).

Unlike Restatement (Second) Torts §551 (1977) (which deals with misrepresentation by omission), §552 is not limited to business transactions. It takes into account any transaction involving a pecuniary interest.

The elements of the cause of action as set forth in *Colgan v. Washington Realty*, 879 S.W.2d 686, 689, are:

(1) speaker supplied information in the course of his/her business or

because of some other pecuniary interest;

(2) due to speaker's failure to exercise reasonable care or competence in obtaining or communicating this information, the information was false;

(3) speaker intentionally provided the information for the guidance of a limited group of persons in a particular business transaction;

(4) listener justifiably relied on the information; and

(5) as a result of listener's reliance on the statement, he/she suffered a pecuniary loss.

*Wengert v. Thomas L. Meyer*, 152 S.W.3d 379 (Mo.App. 2004), involves negligent failure to disclose a water drainage problem. This instruction should not be used to submit a misrepresentation by omission (fraudulent or negligent) contemplated by Restatement (Second) Torts §551.

For a discussion of the distinction between negligent misrepresentation and reckless disregard for truth or falsity (as submitted by MAI 23.05), see *Colgan*, 879 S.W.2d at 689, n.1.

The Restatement (Second) Torts distinguishes between misrepresentations that cause pecuniary loss (§551 and §552) and those which result in physical injury (§311). MAI 23.05 and MAI 31.26 are intended to apply to "pecuniary loss" cases.

*Cases involving multiple misrepresentations.*

Submission of multiple representations in a single verdict directing instruction may create a problem in determining whether all requisite elements (i.e. falsity, materiality, knowledge, etc.) have been found as to the same representation. A possible

approach would be to submit a separate verdict directing instruction as to each alleged misrepresentation, all in a single package with a single damage instruction and a single verdict form.