SUPREME COURT OF MISSOURI
en banc

November 2, 2010

Effective July 1, 2011

IN RE: REVISIONS TO MAI-CIVIL

TABLE OF INSTRUCTIONS

MAI 13.01 DEFINITIONS – AGENCY – GENERAL COMMENT
(Instruction – Revision)

MAI 13.02 DEFINITION – AGENCY – BATTERY COMMITTED BY SERVANT
(Committee Comment – Revision)

MAI 13.06 DEFINITION – AGENCY – SCOPE OF AGENCY – SERVANT OR INDEPENDENT CONTRACTOR
(Notes on Use – Revision)
(Committee Comment – Revision)

MAI 22.00 VERDICT DIRECTING – OWNERS AND OCCUPIERS OF LAND – GENERAL COMMENT
(Instruction – New)

MAI 31.00 GENERAL NEGLIGENCE – SINGLE NEGLIGENT ACT SUBMITTED
(Instruction – New)
(Notes on Use – New)
(Committee Comment – New)

MAI 31.27 VERDICT DIRECTING – WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY
(Instruction – New)
(Notes on Use – New)
(Committee Comment – New)

O R D E R

1. 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 July 1, 2011, 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

_____
WILLIAM RAY PRICE, JR.
Chief Justice

13.01 [2011 Revision] Definitions – Agency – General Comment

(Approved November 2, 2010; Effective July 1, 2011)

A. As the pattern instructions submit only ultimate issues, a question of respondeat superior liability might be submitted simply "The driver Jones was operating the (*defendant's*) motor vehicle within the scope and course of his agency for (*defendant*)." But these words alone are not apt to mean much to lay jurors, so some clarification is needed. The definitions following are intended to supply this clarification.

B. Agency questions arise in a variety of cases. Typical are:

1. Tort actions by third persons against an alleged principal who raises the defense that the tort-feasor was an independent contractor.

2. Tort actions by third persons against master who raises the defense that the servant was not engaged in master's business at time of tort. These include route deviations, dual purpose trips and independent frolics of the servant.

3. Tort actions by third persons against the master for battery by a servant where the master raises the defense that the servant acted beyond the scope of his authority.

C. A universally applicable definition of "scope of agency" is not practicable. For this reason the Committee has prepared definitions to fit the most common cases. Other definitions may be needed for other problems, but these patterns should serve as a guide in those areas not specifically covered. The purpose of these definitions is to call to the jury's attention the fact issues that determine liability in a particular case.

D. The difference between an agent and a servant is sometimes misunderstood, and this causes confusion when instructing. Missouri courts have consistently defined a "servant" as a person "whose physical conduct in the performance of the service is controlled or subject to the right of control by the master." *Madsen v. Lawrence,* 366 S.W.2d 413, 415 (Mo. 1963). By way of contrast, an independent contractor is a person who contracts with another to do something for him or her, but who is neither controlled by the other nor subject to the other's right to control with respect to the person's physical conduct in the performance of the undertaking. *Id.*

E. In drawing the distinction between a servant and an independent contractor, Missouri courts have frequently cited Restatement (Second) of Agency's definition of a "servant" in § 220. See, e.g., *Scott v. SSM Healthcare St. Louis*, 70 S.W.3d 560, 567 (Mo. App. 2002). Subsection (1) of § 220 set forth the "control or right to control" test, and subsection (2) listed the ten factors that have historically been considered by courts in distinguishing between servants and independent contractors.

F. Restatement (Third) of Agency § 7.07 (3), though not presently adopted in Missouri, substitutes the term "employee" for "servant" and defines an "employee" as "an agent whose principal controls or has the right to control the manner and means of the agent's performance of work." See Comment f to Restatement (Third) of Agency § 7.07 for a discussion of the "definition of employee" and the ten factors previously listed in § 220 of Restatement (Second) of Agency. The Committee takes no position on whether any portion of Restatement (Third) of Agency should be adopted in Missouri.

G. See MAI 13.06 for a discussion of how to submit the issue of whether a master/principal/employer may be held responsible for the tortious acts of an alleged servant/agent/employee.

H. See MAI 37.05(1) and (2) for submission of vicarious liability issues in comparative fault cases.

13.02 [1978 Revision] Definition – Agency – Battery Committed by Servant

Committee Comment (2011 Revision)

(Approved November 2, 2010; Effective July 1, 2011)

A. For many years the leading Missouri case on this subject was *Haehl v. Wabash R. Co.*, 119 Mo. 325, 24 S.W. 737 (1893). In language that still sets forth the applicable considerations, the Court said:

> The principle of respondeat superior applies only when what is complained of was done in the course of employment. The principal is responsible, not because the servant has acted in his name or under color of his employment, but because the servant was actually engaged in and about his business, and carrying out his purposes. He is then responsible, because the thing complained of, although done through the agency of another, was done by himself; and it matters not in such case whether the injury with which it is sought to charge him is the result of negligence, unskillfulness or of wrongful conduct, for he must choose fit agents for the transaction of his business. But if his business is done, or is taking care of itself, and his servant, not being engaged in it, not concerned about it, but impelled by motives that are wholly personal to himself, and simply to gratify his own feeling of resentment, whether provoked or unprovoked, commits an assault upon another, when that has and can have no tendency to promote any purpose in which the principal is interested, and to promote that for which the servant was employed, then the wrong is the purely personal wrong of the servant, for which he, and he alone, is responsible.

B. In *Wellman v. Pacer Oil Co.*, 504 S.W.2d 55, 58 (Mo. banc 1974), the Court criticized certain language in *Haehl* when it held as a matter of law that the actions of a service station attendant who shot a customer were "so outrageous and criminal – so excessively violent as to be totally without reason or responsibility – and hence must be said, as a matter of law, not to be within the scope of his employment." The Court cited Restatement (Second) of Agency § 231, Comment a, to the effect that "the master is not

responsible for acts [that] are clearly inappropriate to or unforeseeable in the accomplishment of the authorized result." *Id*. *Wellman* was followed in *Noah v. Ziehl*, 759 S.W.2d 950 (Mo. App. 1988), where the court set aside a verdict against a tavern owner when it found that the actions of a doorman were so outrageous as to fall outside the scope of employment as a matter of law.

C. Restatement (Third) of Agency § 7.07 (2), although not presently adopted in Missouri, deals with this topic by stating:

> An employee acts within the scope of employment when performing work assigned by the employer or engaging in a course of conduct subject to the employer's control. An employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer.

Comment b to Restatement (Third) of Agency § 7.07 discusses the preference of that Restatement for a test based on the agent's *intention* as opposed to the test of "foreseeability" favored by the Restatement (Second) (and expressly adopted by the Court in *Wellman*). The Committee takes no position on whether any portion of Restatement (Third) of Agency should be adopted in Missouri.

D. The Committee further notes that when an employee's tortious conduct is outside the scope of employment, alternate theories of liability may be available against the employer, such as the independent torts of negligent hiring/retention or negligent failure to supervise. See, e.g., *Gibson v. Brewer*, 952 S.W.2d 239, 247 (Mo. banc 1997), citing Restatement (Second) of Torts § 317 (1965); *St. John Bank & Trust Co. v. City of St. John*, 679 S.W.2d 399 (Mo. App. 1984); and *Gaines v. Monsanto Co.*, 655 S.W.2d 568 (Mo. App. 1983). See also Restatement (Second) of Agency § 235, Comment c,

which provides under "outrageous acts" that the principal is liable if the principal has violated a personal duty to the person injured or due to the nature of the instrumentality entrusted to the servant.

13.06 [1990 Revision] Definition — Agency — Scope of Agency — Servant or Independent Contractor

Notes on Use (2011 Revision)

(Approved November 2, 2010; Effective July 1, 2011)

1. A phrase describing the general conduct that is the subject of the alleged employment or agency, such as "operation of the motor vehicle," may be substituted for the word "acts." Grammatical changes to the remainder of this instruction then may be appropriate.

2.a. Select the appropriate term.

b. This definition is to be used only when defendant is charged with *respondeat superior* liability and there is a dispute that the alleged tort-feasor was not his servant. See MAI 13.04 and MAI 13.05 where there is no dispute as to the master-servant relationship.

c. When the phrase "scope and course of employment" or the phrase "scope and course of agency" is used, it must be defined. See MAI 18.01.

Where the phrase is used only in one instruction, this definition may be added to the instruction using the phrase. If it is used in more than one instruction, the definition should be given as a separate instruction.

d. The phrase "scope and course of agency" is to be used where the issue is whether the tort-feasor was a servant rather than an independent contractor. Liability is imposed on the principal even though he engages another for only one task. See *Liedy v. Taliaferro*, 260 S.W.2d 504 (Mo. 1953). To use the phrase "scope and course of

employment" in such a case might be misleading to lay jurors who probably think of employees as those who receive regular weekly paychecks. The phrase "scope and course of agency" is less apt to mislead and, therefore, is preferable although technically "scope and course of employment" would be more appropriate.

Committee Comment (2011 Revision)

(Approved November 2, 2010; Effective July 1, 2011)

A. In *Bach v. Winfield-Foley Fire Protection District*, 257 S.W.3d 605, 608 (Mo. banc 2008)**,** the Court said: "Agency is the fiduciary relationship resulting from the manifestation of consent by an agent to a principal that the agent will act on the principal's behalf and subject to his control." Restatement (Second) of Agency § 1. The parties may not have intended to create the legal relationship or to have subjected themselves to the liabilities that the law imposes as a result of it; nevertheless, the relationship exists "if there has been a manifestation by the principal to the agent that the agent may act on his account, and consent by the agent so to act." See *Leidy v. Taliaferro*, 260 S.W.2d 504, 505 (Mo. 1953).

B. As noted by the Court in *Leidy*: ". . . compensation to the agent is not essential to the relationship." *Id*. at 507.

C. For a thorough review of Missouri law on the requirements for agency in Missouri, see *State ex rel. Ford Motor Co. v. Bacon*, 63 S.W.3d 641 (Mo. banc 2002). *Compare also*, Restatement (Second) of Agency § 220.

D. In *Wigger v. Consumers Cooperative Ass'n*, 301 S.W.2d 56, 60 (Mo. App. 1957), the court said:

> The courts have many times held that in determining whether the relationship of master and servant or employer and employee exists, one of the essential or primary elements is the right to control the means and manner of the service as distinguished from controlling the ultimate results of the service. McFarland v. St. Louis Car Co., 262 S.W.2d 344; O'Brien v. Rindskopf, 334 Mo. 1233, 70 S.W.2d 1085; McFarland v. Dixie Machinery & Equipment Co., 348 Mo. 341, 153 S.W.2d 67, 136 A.L.R. 516; Hackler v. Swisher Mower & Machine Co., 284 S.W.2d 55, 58. However, it is equally well established that "every case has been decided on its particular facts, and while the element of control is of the greatest significance in determining the existence of the required relationship, *the fact of control standing alone is not conclusive*."

See also: *Garber v. Scott*, 525 S.W.2d 114 (Mo. App. 1975).

E. By way of contrast, *Williamson v. Southwestern Bell Tel. Co.*, 265 S.W.2d 354 (Mo. 1954), defines an independent contractor as a person who "contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking." This definition is the general rule of and definition of "independent contractor." See also: *Kaplan v. U.S. Bank, N.A.*, 166 S.W.3d 60 (Mo. App. 2003).

F. As discussed in the Committee Comment to MAI 13.01, Restatement (Third) of Agency § 7.07 (3) substitutes the term "employee" for "servant" and defines an "employee" as "an agent whose principal controls or has the right to control the manner and means of the agent's performance of work." See Comment f to Restatement (Third) of Agency § 7.07 for a discussion of the "definition of employee" and the ten factors that have historically been considered in distinguishing between a servant/employee and an

independent contractor. The Committee takes no position on whether any portion of Restatement (Third) of Agency should be adopted in Missouri.

22.00 [2011 New] Verdict Directing – Owners and Occupiers of Land - General Comment

(Approved November 2, 2010; Effective July 1, 2011)

Counsel should take care to distinguish between a premises liability case as set forth in this Chapter and a "general negligence" case as set forth in MAI 31.00.

31.00 [2011 New] General Negligence - Single Negligent Act Submitted

(Approved November 2, 2010; Effective July 1, 2011)

Your verdict must be for plaintiff [1] if you believe:

First, defendant (*here insert an act or omission consistent with the theory of general negligence*), and

Second, defendant was thereby negligent,[2] and

Third, as a direct result of such negligence [2] 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 (2011 New)

(Approved November 2, 2010; Effective July 1, 2011)

1.a. See MAI 17.02 for the format for submission of multiple negligent acts or omissions. In any case involving more than one plaintiff or defendant, any reference to a particular party should include the name of that party or other descriptive term. Where plaintiff submits against more than one defendant in separate verdict directors, the first line of the verdict director should be modified to indicate the particular defendant covered by this verdict director, i.e.:

Your verdict must be for plaintiff against defendant John Jones if you believe:

b. If the verdict director is applicable to the plaintiff's claim against more than one defendant, it can be described as follows:

Your verdict must be for plaintiff [against both defendants] [against defendant John Jones and defendant Ace Trucking Lines] if you believe:

2.a. 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. For modification of verdict directing instructions to submit comparative fault, see MAI 37.01.

Committee Comment (2011 New)

(Approved November 2, 2010; Effective July 1, 2011)

A. Where agency is in issue, see MAI 18.01.

B. Where suit involves multiple causes of damages, see MAI 19.01.

C. Where suit is for wrongful death, see MAI 20.01 and 20.02.

D. Where suit is for loss of services or medical expense of dependent, see MAI 31.04.

E. The "general negligence" theory has been the subject of several cases and should not be confused with a "premises liability" theory. For submission of a premises liability case, see Chapter 22. The "general negligence" theory is premised on basic negligence principles of duty, breach of duty, and injury proximately caused by the breach of duty. In a "general negligence" case, allegations are directed to the acts or omissions of the defendant and not to a possessor's liability for the condition of premises. See *Smith v. Dewitt and Associates, Inc.*, 279 S.W. 3d 220 (Mo. App. 2009) (worker

delivered cabinets to job site and fell from third floor guardrail that collapsed due to alleged removal and reinstallation of rail by subcontractor using same nail holes); *Cossey v. Air Systems International, Inc.*, 273 S.W. 3d 588 (Mo. App. 2009) (bulk petroleum storage operator undertook but failed to ground and drain a tank in preparation for repair and relining of the tank by an independent contractor); *Richey v. Philipp*, 259 S.W. 3d 1 (Mo. App. 2008) (insurance agent told insured that homeowner's insurance did not cover removal of tree limb from roof and homeowner's brother fell from roof attempting to remove limb); *Griffith v. Dominic*, 254 S.W. 3d 195 (Mo. App. 2008) (independent contractor working at abbey injured when a monk attempted to assist with moving drywall but caused drywall to fall on contractor); *Daoukas v. City of St. Louis*, 228 S.W. 3d 30 (Mo. App. 2007) (airport electrician had responsibility to de-energize electrical cabinets, failed to do so, and affirmatively dismantled interlock safety system, causing severe injuries to independent contractor working on cabinets); and *Nagaragadde v. Pandurangi*, 216 S.W. 3d 241 (Mo. App. 2007) (homeowner failed to extinguish ceremonial lamp burning in basement prayer area causing guest's sari to catch fire).

31.27 [2011 New] Verdict Directing – Wrongful Discharge in Violation of Public Policy

(Approved November 2, 2010; Effective July 1, 2011)

Your verdict must be for plaintiff if you believe:

First, plaintiff (*here describe plaintiff's act or refusal to act such as "refused to submit duplicate billing to Medicare," or "reported suspected child abuse to the Division of Family Services"*)[1], and

Second, defendant discharged plaintiff, and

Third, such conduct of plaintiff as submitted in paragraph First was a contributing factor in his/her discharge, and

Fourth, as a direct result of his/her discharge, 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 (2011 New)

(Approved November 2, 2010; Effective July 1, 2011)

1. a. The act(s) inserted must be in accordance with *Fleshner v. Pepose Vision Institute, P.C.*, 304 S.W.3d 81, 92 (Mo. banc 2010), which adopted the public policy exception for discharge of an at-will employee stating:

> An at-will employee may not be terminated (1) for refusing to violate the law or any well established and clear mandate of public policy as expressed in the Constitution, statutes, regulations promulgated pursuant to statute, or rules created by a governmental body or (2) for reporting wrongdoing or violations of law to superiors or public authorities.

b. See also *Keveney v. Missouri Military Academy*, 304 S.W.3d 98 (Mo. banc 2010) (adopting the public policy exception for an employee under contract).

c. For submitting multiple acts in the disjunctive, refer to the form in MAI 17.02. As is the case with all disjunctive submissions, there must be sufficient evidence to support each submission or the instruction will be erroneous.

*Add if affirmative defense is submitted.

Committee Comment (2011 New)

(Approved November 2, 2010; Effective July 1, 2011)

A. If the case involves constructive discharge, demotion, or adverse job consequences, this instruction can be easily modified. The Committee takes no position as to whether the public policy exception applies to cases in which the employee's action has resulted in constructive discharge, demotion, or adverse job consequences.

B. In *Fleshner v. Pepose Vision Institute, P.C.*, 304 S.W.3d 81, 92 (Mo. banc 2010), the employee was discharged for talking to federal investigators about the employer's violation of Fair Labor Standards Act requirements to pay overtime compensation. The Court expressly adopted a public policy exception to the "at will" doctrine where the employee is discharged for reporting violations of law to authorities or for refusing to perform illegal acts. *Id*.

C. The public policy must be found in a constitutional provision, statute, regulation promulgated pursuant to statute, or a rule created by a governmental body.

However, the public policy need only be *reflected* by a constitutional provision, statute, regulation promulgated pursuant to statute, or a rule created by a governmental body, and there need not be a direct violation by the employer of that same statute or regulation. Additionally, "there is no requirement that the violation that the employee reports affect the employee personally, nor that the law violated prohibit or penalize retaliation against those reporting its violation." *Fleshner,* 304 S.W.3d at 97. Moreover, the public policy is applicable to communications made to federal or state officials as well as to the employee's supervisors. *Fleshner*, 304 S.W.3d at 97. See also, *Margiotta v. Christian Hospital Northeast-Northwest*, 315 S.W.3d 342 (Mo. banc 2010).

D. In *Fleshner* the Court also cited the "contributing factor" standard expressed in MAI 31.24 with approval as the standard for causation in this type of wrongful discharge case. *Fleshner,* 304 S.W.3d at 94-95.

E. In *Keveney v. Missouri Military Academy*, 304 S.W.3d 98, 103 (Mo. banc 2010), the Court extended the public policy exception to the at-will doctrine to "contract employees" in addition to "at-will" employees.

F. The Court, under the facts in *Keveney*, also determined that in order to survive a motion to dismiss, an employee must plead the following in order to state a cause of action for wrongful discharge under the public policy exception:

(1) That the employee refused to perform an illegal act or act in a manner contrary to public policy;

(2) That the employee was discharged; and

(3) That there is a causal connection between the employee's discharge and the employee's refusal to engage in the actions at issue.

Id. at 103.

G. The *Margiotta* case limited the public policy exception by excluding situations in which the claimed "public policy" is vague or general and not a specific statute, rule, regulation, or constitutional requirement. The Court found that the two regulations cited in *Margiotta* were vague statements and did not specifically proscribe conduct in the alleged incidents. One regulation was extremely broad as to patient safety, and the other regulation clearly dealt with building safety and not patient treatment. For these reasons the Court found that summary judgment was appropriately granted. *Margiotta*, 315 S.W.3d at 347-48.

H. In *Bennartz v. City of Columbia, Missouri*, 300 S.W.3d 251, 261-62 (Mo. App. 2009), the court held that a municipal employee may not maintain a wrongful discharge cause of action against the municipality or another municipal employee under the public policy exception because the defendants are protected by sovereign immunity.