



# **SUPREME COURT OF MISSOURI**

## **en banc**

July 14, 2014

Effective January 1, 2015

IN RE: REVISIONS TO MAI-CIVIL

### **TABLE OF INSTRUCTIONS**

- MAI 17.17     PER SE NEGLIGENCE – IMPROPER TURN  
(Notes on Use – Revision)
- MAI 17.18     PER SE NEGLIGENCE – VIOLATING SPEED LIMIT  
(Notes on Use – Revision)
- MAI 33.05(1)   CONVERSING VERDICT DIRECTING INSTRUCTION  
                  USING AFFIRMATIVE CONVERSE – "IF YOU BELIEVE"  
                  INTRODUCTION  
                  (Notes on Use – Revision)
- MAI 33.05(2)   AFFIRMATIVE CONVERSE – LEGAL JUSTIFICATION FOR  
                  NEGLIGENCE PER SE  
                  (Notes on Use – Revision)
- MAI 38.04     VERDICT DIRECTING – RETALIATORY DISCHARGE OR  
                  DISCRIMINATION – WORKERS' COMPENSATION  
                  (Instruction – Revision)  
                  (Committee Comment – Revision)

### **ORDER**

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 January 1, 2015, 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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MARY R. RUSSELL  
Chief Justice

## **17.17 [1978 Revision] Per se Negligence - Improper Turn**

### **Notes on Use (2015 Revision)**

**(Approved July 14, 2014; Effective January 1, 2015)**

Although the violation of a traffic statute or ordinance may be negligence per se (*Rowe v. Kansas City Public Service 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 Development 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 pled 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).

## **17.18 [1978 Revision] Per se Negligence - Violating Speed Limit**

### **Notes on Use (2015 Revision)**

**(Approved July 14, 2014; Effective January 1, 2015)**

Although the violation of a traffic statute or ordinance may be negligence per se (*Rowe v. Kansas City Public Service Co.*, 248 S.W.2d 445, 448 (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 Development 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 pled 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).

### **33.05(1) [1993 Revision] Conversing Verdict Directing Instruction Using Affirmative Converse - "If You Believe" Introduction**

#### **Notes On Use (2015 Revision)**

**(Approved July 14, 2014; Effective January 1, 2015)**

**Caution:** *Hiers v. Lemley*, 834 S.W.2d 729 (Mo. banc 1992), held that "[a]n affirmative converse instruction is appropriate where the verdict director assumes as true or omits a disputed ultimate issue", and "[a]n affirmative converse instruction may be appropriate where it is used by a defendant to submit an ultimate issue that was erroneously excluded from plaintiff's verdict director."

Use of this form carries with it the risk of nonpersuasion because the jurors are told in the burden of proof instruction that if they do not form a belief on a proposition, that proposition fails. Use of this type of converse instruction requires independent evidence to support the facts submitted. These facts must be sufficient in law to defeat the plaintiff's claim. See *Shepard v. Ford Motor Company*, 457 S.W.2d 255 (Mo. App. 1970). *Hiers* does not suggest that defendant is obligated to tender an affirmative converse instruction to cure a plaintiff's verdict director that omits an essential ultimate issue; the defendant is entitled to make an appropriate objection to such a verdict director and stand on that objection. 834 S.W.2d at 735, n. 3.

The 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 Development 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 pled 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).

### 33.05(2) [2002 Revision] Affirmative Converse - Legal Justification for Negligence Per Se

#### Notes On Use (2015 Revision)

(Approved July 14, 2014; Effective January 1, 2015)

1. This bracketed phrase is to be used to submit that element of plaintiff's verdict directing instruction that constitutes "negligence per se".

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

This instruction may only be used where plaintiff submits on negligence per se and only if it is supported by the evidence and the facts show that legal justification or excuse is applicable.

**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 pled 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).

**38.04 [2015 Revision] Verdict Directing - Retaliatory Discharge or Discrimination - Workers' Compensation**

**(Approved July 14, 2014; Effective January 1, 2015)**

Your verdict must be for plaintiff if you believe:

First, plaintiff was employed by defendant, and

Second, plaintiff filed a workers' compensation claim,<sup>1</sup> and

Third, defendant discharged<sup>2</sup> plaintiff, and

Fourth, plaintiff's filing of the workers' compensation claim<sup>1</sup> was a contributing factor to plaintiff's discharge,<sup>2</sup> and

Fifth, as a direct result of such discharge,<sup>2</sup> plaintiff sustained damage.

**Committee Comment (2015 Revision)**

**(Approved July 14, 2014; Effective January 1, 2015)**

This instruction is for use in a retaliatory discharge case under § 287.780, RSMo.

*Templemire v. W & M Welding, Inc.*, \_\_\_ S.W.3d \_\_\_ (Mo. banc 2014), held that "contributing factor" is the standard for causation in retaliatory discharge under § 287.780, RSMo. Prior cases to the contrary have been overruled. This instruction may be modified to submit acts of discrimination other than discharge where appropriate.