3.01 [2016 Revision] General

(Approved July 13, 2015; Effective January 1, 2016)

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.

[There is a different burden of proof that applies only to punitive damages.[1] A party seeking to recover punitive damages has the burden to cause you to believe that the evidence has clearly and convincingly established the facts necessary to recover punitive damages.][2]

23.05 [2007 Revision] Fraudulent Misrepresentations - Pecuniary Loss

Notes on Use (2016 Revision)

(Approved July 13, 2015; Effective January 1, 2016)

1. Select the appropriate phrase. The second alternate for Paragraph Fourth is required to submit a misrepresentation of a future event. *Stevens v. Markirk Construction, Inc.*, 454 S.W.3d 875 (Mo. banc 2015). 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 (8th Cir. 1982).

* Add if affirmative defense is submitted.

Committee Comment (2016 Revision)

(Approved July 13, 2015; Effective January 1, 2016)

A. For negligent misrepresentations, see MAI 31.26.

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

C. *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.

D. 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).

E. 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.

F. 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 rely thereon; and his consequent and proximate injury. A failure to establish any one of these elements is fatal to a recovery.

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

H. 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 defendant (except for a misrepresentation as to a future event). 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).

I. 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. 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 cases.

J. 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; . . . . "

K. In *Shechter 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 feasor rather than the credulity of his victim. . . . Since the very purpose of fraud is to cheat its victim by making him neglect the care essential to prevent injury, to deny relief because the victim was negligent would encourage the evil."

L. 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.

M. 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.

N. 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.

24.01(A) [2016 Revision] Verdict Directing - Constructive Knowledge Not In Issue - Failure to Provide Safe Place to Work

(Approved July 13, 2015; Effective January 1, 2016)

Your verdict must be for plaintiff if you believe:

First, plaintiff was an employee of defendant,[1] and

Second, a part of plaintiff's employment in some way closely and substantially affected interstate commerce,[2] and

Third[3], defendant either failed to provide:
reasonably safe conditions for work, or
reasonably safe [appliances][4], or
reasonably safe methods of work, or
reasonably adequate help, and[5]

Fourth, defendant in any one or more of the respects submitted in Paragraph Third was negligent,[6, 7] and

Fifth, such negligence[6] resulted in whole or in part in [injury to plaintiff] [the death of *(decedent's name)*].[8]

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

Notes on Use (2016 Revision)

(Approved July 13, 2015; Effective January 1, 2016)

1. Paragraph First will seldom be in issue. Omit the entire paragraph First if not in dispute.

2. Paragraph Second will seldom be in issue. Omit the entire paragraph Second if not in dispute**.**

3. The specifications of negligence set forth in this instruction concern conditions of which the defendant had constructive knowledge. See MAI 24.01(B) for cases in which constructive knowledge is disputed.

4. The term “equipment” or any other statutory term used in 45 U.S.C. §51 may be substituted for the word “appliances.”

5. In the event that the negligence charged is based upon the acts of the defendant's employee, the following alternate paragraphs Third and Fourth must be used.

“Third, defendant's employee *(characterize the negligent conduct, i.e., failed to keep a careful lookout, etc.),* and”

“Fourth, defendant's employee was thereby negligent, and”

6. The terms “negligent” and “negligence” must be defined. See definitions in Chapter 11.00.

7. In the event that there is only a single submission of negligence under paragraph Third, then paragraph Fourth must be modified to read as follows:

“Fourth, defendant was thereby negligent, and”

8. Select the appropriate phrase.

* Add if a complete affirmative defense is submitted. Do not use this bracketed phrase to submit contributory negligence or failure to mitigate damages in an F.E.L.A. case, which are partial defenses. See MAI 24.04(A) and (B).

Committee Comment (2016 Revision)

(Approved July 13, 2015; Effective January 1, 2016)

A. In F.E.L.A. cases, common law negligence rules are controlling *except* that these rules have been modified by F.E.L.A. Because of the “in whole or in part” language of the statute (Title 45, U.S.C.A., Section 51), the traditional doctrine of proximate (direct) cause is not applicable. A railroad is liable if its negligence is only the *slightest* cause of the employee's injury. *Rogers v. Missouri Pac. Ry.*, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957).

B. In the traditional negligence case, it is mandatory for the plaintiff to include the word "direct" or "directly" in the verdict directing instruction because of the proximate (direct) cause requirements. This prevents the jury from awarding damages or finding for plaintiff because of some indirectly contributing causative factors. This is not so with F.E.L.A. The F.E.L.A. "was enacted because the Congress was dissatisfied with the common law duty of the master to his servant. The statute supplants that duty with the far more drastic duty of paying damages for injury or death at work due in whole or in part to the employer's negligence." *Rogers v. Missouri Pac. Ry.*, 352 U.S. 500, 507, 77 S.Ct. 443, 1 L.Ed.2d 493. The test of a jury case under F.E.L.A. is simply "whether the proofs justify within reason the conclusion that employer's negligence played *any part, even the slightest,* in producing injury or death for which damages are sought." (Emphasis added.) *Rogers v. Mo. Pac. Ry.*, 352 U.S. at 506, 77 S.Ct. 443, 1 L.Ed.2d 493. The fact that there may have been a number of causes of the injury is, therefore, irrelevant as long as one cause may be attributable to the railroad's negligence. *Heater v. Chesapeake & O. Ry. Co.*, 497 F.2d 1243, 1246 (7th Cir. 1974).

C. As the United States Supreme Court has stated in *Rogers v. Missouri Pac. Ry.*, in an F.E.L.A. case, the employer railroad is stripped of its common law defenses. The statute is an avowed departure from the rules of common law. Our state Supreme Court has consistently held that the federal interpretation of F.E.L.A. is binding on the Missouri state courts. *Headrick v. Kansas City Southern Ry. Co.*, 305 S.W.2d 478 (Mo. 1957); *Adams v. Atchison, T. & S.F. Ry.*, 280 S.W.2d 84 (Mo. 1955).

D. In *Cluck v. Union Pacific R.R. Co.*, 367 S.W.3d 25 (Mo. banc 2012), the Court considered the applicability of the doctrine of respondeat superior liability in F.E.L.A. actions. The Court rejected plaintiff's contention that respondeat superior liability does not apply in

F.E.L.A. cases. In so doing, the Court rejected plaintiff's further argument that the test for liability was merely a temporal test of whether the employee causing the injury was generally acting within the course and scope of employment at the time of the incident.

E. If *respondeat superior* liability is an issue, refer to Chapter 13 generally and specifically the definition at MAI 13.05.

F. These instructions may also be considered for use in cases brought under the Jones Act, 46 U.S.C. Appx. § 688(a). *See, e.g.*, *Futrell v. Luhr Bros., Inc.*, 916 S.W.2d 348 (Mo. App. 1996).

24.01(B) [2016 Revision] Verdict Directing - Constructive Knowledge Disputed - Failure to Provide Safe Place to Work

(Approved July 13, 2015; Effective January 1, 2016)

Your verdict must be for plaintiff if you believe:

First, plaintiff was an employee of defendant[1], and

Second, a part of plaintiff's employment in some way closely and substantially affected interstate commerce,[2] and

Third[3], conditions for work were not reasonably safe and defendant knew or by using ordinary care[4] could have known of such conditions and that they were not reasonably safe, and

Fourth, with respect to such conditions for work, defendant either failed to provide:
reasonably safe conditions for work, or
reasonably safe [appliances][5], or
reasonably safe methods of work, or
reasonably adequate help, and

Fifth, defendant in any one or more of the respects submitted in Paragraph Fourth was negligent,[4] and[6]

Sixth, such negligence[4] resulted in whole or in part in [injury to plaintiff] [the death of *(decedent's name)*].[7]

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

Notes on Use (2016 Revision)

(Approved July 13, 2015; Effective January 1, 2016)

1. Paragraph First will seldom be in issue. Omit the entire paragraph First if not in dispute.

2. Paragraph Second will seldom be in issue. Omit the entire paragraph Second if not in dispute.

3. MAI 24.01(B) is to be used in cases in which constructive knowledge of the railroad is disputed. *Qualls v. St. Louis Southwestern Ry. Co.*, 799 S.W.2d 84 (Mo. banc 1990), cert. denied 499 U.S. 961, 111 S.Ct. 1585, 113 L.Ed.2d 650 (1991). This instruction should not be used "if the judge decides the plaintiff has shown defendant had actual knowledge of the negligently produced condition." *Qualls*, 799 S.W.2d at 87.

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

5. The term "equipment" or any other statutory term used in 45 U.S.C. § 51 may be substituted for the word "appliances."

6. In the event that there is only a single submission of negligence under paragraph Fourth, then paragraph Fifth must be modified to read as follows:

"Fifth, defendant was thereby negligent, and"

7. Select the appropriate phrase.

* Add if a complete affirmative defense is submitted. Do not use this bracketed phrase to submit contributory negligence or failure to mitigate damages in an F.E.L.A. case, which are partial defenses. See MAI 24.04(A) and (B).

Committee Comment (2016 Revision)

(Approved July 13, 2015; Effective January 1, 2016)

A. In F.E.L.A. cases, common law negligence rules are controlling *except* that these rules have been modified by F.E.L.A. Because of the "in whole or in part" language of the statute (Title 45, U.S.C.A., Section 51), the traditional doctrine of proximate (direct) cause is not applicable. A railroad is liable if its negligence is only the *slightest* cause of the employee's injury. *Rogers v. Missouri Pac. Ry.*, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957).

B. In the traditional negligence case, it is mandatory for the plaintiff to include the word "direct" or "directly" in the verdict directing instruction because of the proximate (direct) cause requirements. This prevents the jury from awarding damages or finding for plaintiff because of some indirectly contributing causative factors. This is not so with F.E.L.A. The F.E.L.A. "was enacted because the Congress was dissatisfied with the common law duty of the master to his servant. The statute supplants that duty with the far more drastic duty of paying damages for injury or death at work due in whole or in part to the employer's negligence." *Rogers v. Missouri Pac. Ry.*, 352 U.S. 500, 507, 77 S.Ct. 443, 1 L.Ed.2d 493. The test of a jury case under F.E.L.A. is simply "whether the proofs justify within reason the conclusion that employer's negligence played *any part, even the slightest,* in producing injury or death for which damages are sought." (Emphasis added.) *Rogers v. Mo. Pac. Ry.*, 352 U.S. at 506, 77 S.Ct. 443, 1 L.Ed.2d 493. The fact that there may have been a number of causes of the injury is, therefore, irrelevant as long as one cause may be attributable to the railroad's negligence. *Heater v. Chesapeake & O. Ry. Co.*, 497 F.2d 1243, 1246 (7th Cir.1974).

C. As the United States Supreme Court has stated in *Rogers v. Missouri Pac. Ry.*, in an F.E.L.A. case, the employer railroad is stripped of its common law defenses. The statute is an avowed departure from the rules of common law. Our state Supreme Court has consistently held that the federal interpretation of F.E.L.A. is binding on the Missouri state courts. *Headrick v. Kansas City Southern Ry. Co.*, 305 S.W.2d 478 (Mo. 1957); *Adams v. Atchison, T. & S.F. Ry.*, 280 S.W.2d 84 (Mo. 1955).

D. In *Cluck v. Union Pacific R.R. Co.*, 367 S.W.3d 25 (Mo. banc 2012), the Court considered the applicability of the doctrine of respondeat superior liability in F.E.L.A. actions. The Court rejected plaintiff's contention that respondeat superior liability does not apply in

F.E.L.A. cases. In so doing, the Court rejected plaintiff's further argument that the test for liability was merely a temporal test of whether the employee causing the injury was generally acting within the course and scope of employment at the time of the incident.

E. If *respondeat superior* liability is an issue, refer to Chapter 13 generally and specifically the definition at MAI 13.05.

F. These instructions may also be considered for use in cases brought under the Jones Act, 46 U.S.C. Appx. § 688(a). *See, e.g.*, *Futrell v. Luhr Bros., Inc.*, 916 S.W.2d 348 (Mo. App. 1996).

24.02 [2016 Revision] Verdict Directing - Locomotive Inspection Act Violation

(Approved July 13, 2015; Effective January 1, 2016)

Your verdict must be for plaintiff if you believe:

First, plaintiff was an employee of defendant,[1] and

Second, a part of plaintiff's employment in some way closely and substantially affected interstate commerce,[2] and

Third, defendant [used on its line] [permitted use on its line of][3] a locomotive, and

Fourth, the locomotive was not in proper condition and not safe to operate without unnecessary danger of personal injury, and

Fifth, this condition resulted in whole or in part in [injury to plaintiff] [the death of *(decedent's name)*].[3]

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

Notes on Use (2016 Revision)

(Approved July 13, 2015; Effective January 1, 2016)

1..Paragraph First will seldom be in issue. Omit the entire paragraph First if not in dispute.

2. Paragraph Second will seldom be in issue. Omit the entire paragraph Second if not in dispute.

3. Select the appropriate phrase.

* Add if a complete affirmative defense is submitted. This bracketed material should not be used to submit contributory negligence or failure to mitigate damages. Further, contributory negligence is not available for this statutory violation. F.E.L.A. provides, in part, that "no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." 45 U.S.C. § 53.

Committee Comment (2016 New)

(Approved July 13, 2015; Effective January 1, 2016)

A. The Locomotive Inspection Act, 49 U.S.C. §§ 20102, 20107 (1994) was formerly known as The Boiler Inspection Act, 45 U.S.C § 23.

B. Regulations promulgated pursuant to this authority are found in Title 49 of the Code of Federal Regulations under the Federal Railroad Administration (F.R.A.) regulations.

24.03 [2016 Revision] Verdict Directing - Safety Appliance Act Violation

(Approved July 13, 2015; Effective January 1, 2016)

Your verdict must be for plaintiff if you believe:

First, plaintiff was an employee of defendant,[1] and

Second, a part of plaintiff's employment in some way closely and substantially affected interstate commerce,[2] and

Third, defendant [used on its line] [permitted use on its line of][3] a [car] [train] [engine][3] that (here set out the Safety Appliance Act violation), and

Fourth, this use resulted in whole or in part in [injury to plaintiff] [the death of *(decedent's name)*].[3]

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

Notes on Use (2016 Revision)

(Approved July 13, 2015; Effective January 1, 2016)

1. Paragraph First will seldom be in issue. Omit the entire paragraph First if not in dispute.

2. Paragraph Second will seldom be in issue. Omit the entire paragraph Second if not in dispute.

3. Select the appropriate phrase or term.

* Add if a complete affirmative defense is submitted. This bracketed material should not be used to submit contributory negligence or failure to mitigate damages. Further, contributory negligence is not available for this statutory violation. F.E.L.A. provides, in part, that "no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." 45 U.S.C. § 53.

Committee Comment (2016 New)

(Approved July 13, 2015; Effective January 1, 2016)

The Safety Appliance Act, 49 U.S.C. §§ 20301-20304, 21302, 21304 (1994), was recodified from 45 U.S.C. §§ 1-16.

24.04(B) [2012 Revision] Affirmative Defenses - Contributory Negligence

Committee Comment (2016 Revision)

(Approved July 13, 2015; Effective January 1, 2016)

A. This instruction is revised to comply with *Norfolk Southern Railway Co. v. Sorrell*, 549 U.S. 158, 127 S.Ct. 799 (2007).

B. Unlike "contributory negligence" as it was applied in non-F.E.L.A. cases prior to the adoption of comparative fault principles, contributory negligence under the F.E.L.A. did not bar plaintiff's recovery, but required a pro rata reduction. *See* 45 U.S.C. § 53, which provides: "the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee . . . ."

C. Section 53 goes on to state: "Provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." The Boiler Inspection Act (now the Locomotive Inspection Act) and the Federal Safety Appliance Acts have been held to be such enactments; thus, the defense is not available in cases arising thereunder.

Historical Note

(MAI 24.04(B) replaces the prior MAI 32.07(B) from the 6th Edition).

24.06 [2012 Revision] Damages - Death of Employee

Committee Comment (2016 Revision)

(Approved July 13, 2015; Effective January 1, 2016)

A. This instruction is used only in F.E.L.A. cases wherein the employee was fatally injured. The reference to present value is used in F.E.L.A. cases in compliance with *St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409, 105 S.Ct. 1347, 84 L.Ed.2d 303 (1985). *Dickerson* clearly requires inclusion of the sentence relating to present value if requested. It is not clear under *Dickerson* whether it is error to omit the present value sentence if inclusion is not requested.

B. The submission of comparative fault in F.E.L.A. cases differs from the method in Chapter 37.00 for use in cases based on Missouri law. F.E.L.A. cases are governed by federal law. Under 45 U.S.C.A. § 53, the *jury* diminishes damages in proportion to the employee's negligence. Under Chapter 37.00, the jury determines *total damages* and plaintiff's percentage of fault but the *judge* makes the actual computation diminishing total damages to the amount recoverable by plaintiff.

C. During the instruction conference, the parties and the court should discuss, on the record, what damages are supported by the evidence and can properly be argued to the jury. In F.E.L.A. wrongful death cases, recovery is limited to pecuniary losses. See *American Railroad Co. of Porto Rico v. Didricksen*, 227 U.S. 145 (1912); *Michigan Central R. Co. v. Vreeland*, 227 U.S. 59 (1913); *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990). In this way, jury arguments can proceed without undue interruptions.

Historical Note

(MAI 24.06 replaces the prior MAI 8.01 from the 6th Edition).

31.07(A) [2016 New] Admission of Liability – Amount of Damages Only Issue

(Approved July 13, 2015; Effective January 1, 2016)

As a result of defendant's admission of liability, the only issue for you to decide is the amount of damages. Therefore, in your verdict you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe plaintiff sustained [and is reasonably certain to sustain in the future][1] that defendant's conduct directly caused or directly contributed to cause.

Notes on Use (2016 New)

(Approved July 13, 2015; Effective January 1, 2016)

1. This may be added if supported by the evidence.

This instruction is a combination of a verdict directing instruction and a damage instruction in a negligence case. There is no need for a separate damage instruction. This instruction should be used only in those cases where defendant admits liability (which concedes negligence and the existence of resulting damage) and the only issue is the amount of damages. This instruction is not applicable where defendant claims there was no damage.

The applicable verdict form is as follows:

VERDICT

We, the undersigned jurors, assess the damages of plaintiff *(state the name)* at $_____ *(stating the amount).*

Note: All jurors who agree to the above must legibly sign or print their names below.

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

If property damage is involved, modify appropriately. See MAI 36.02.

Where a defendant concedes only negligence, as opposed to admitting liability, see MAI 31.07(B).

Committee Comment (2016 New)

(Approved July 13, 2015; Effective January 1, 2016)

A. A party is not required to accept a judicial admission of liability of an adversary, but may insist on presenting evidence to prove liability. *Cogdill v. Flanagan*, 410 S.W.3d 714 (Mo. App. 2013); *Ruppel v. Clayes*, 72 S.W.2d 833 (Mo. App. 1934); *Ingram v. Rinehart*, 108 S.W.3d 783 (Mo. App. 2003).

B. This format can be used for other types of cases where liability is admitted. Modifications may be necessary depending upon the applicable damage instruction. The concepts employed for this simple negligence example may be adapted for other causes of action.

31.07(B) [2016 New] Admission of Negligence Only – Causation and Damage Still at Issue

(Approved July 13, 2015; Effective January 1, 2016)

Your verdict must be for plaintiff if you believe the defendant's conduct directly caused or directly contributed to cause damage to plaintiff.

Notes on Use (2016 New)

(Approved July 13, 2015; Effective January 1, 2016)

In a case where defendant admits negligence, but disputes causation and/or damage, use this instruction. Where a defendant admits liability, as opposed to conceding only negligence, see MAI 31.07(A).

A separate damage instruction must be given. See MAI 4.01.

Select the appropriate verdict form from Chapter 36.

See Copeland v. Compton, 914 S.W.2d 378 (Mo. App. 1996), for a discussion of the difference between an admission of negligence and an admission of liability. *See also, Lauber v. Buck*, 615 S.W.2d 89 (Mo. App. 1981).

Committee Comment (2016 New)

(Approved July 13, 2015; Effective January 1, 2016)

A party is not required to accept a judicial admission of liability of an adversary, but may insist on presenting evidence to prove liability. *Cogdill v. Flanagan*, 410 S.W.3d 714 (Mo. App. 2013); *Ruppel v. Clayes*, 72 S.W.2d 833 (Mo. App. 1934); *Ingram v. Rinehart*, 108 S.W.3d 783 (Mo. App. 2003).

31.07 [2016 Withdrawn] Amount of Damages Only Issue

(Approved July 13, 2015; Effective January 1, 2016)

MAI 31.07 and its related Notes on Use have been withdrawn**.**

Historical Note

(MAI 31.07 (A) and MAI 31.07 (B) replace the prior MAI 31.07.)

38.01(A) [2013 Revision] Verdict Directing - Missouri Human Rights Act

Committee Comment (2016 Revision)

(Approved July 13, 2015; Effective January 1, 2016)

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

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

D. In *Hervey v. Mo. 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).

E. 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.

F. *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."

G. Where suit involves multiple causes of damage, see MAI 19.01 and *Hurst v. Kansas City Mo. School Dist.*, 437 S.W.3d 327 (Mo. App. 2014).

Historical Note

(MAI 38.01(A) replaces the prior 31.24 (2005 New)).

38.01(B) [2013 New] Verdict Directing--Missouri Human Rights Act--Employment Discrimination by Reason of Disability--Existence of Disability Disputed

Committee Comment (2016 Revision)

(Approved July 13, 2015; Effective January 1, 2016)

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

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

D. This instruction is based on *Hervey v. Mo. 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).

E**.** "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.

F. *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. *Thomas*, 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."

G. Where suit involves multiple causes of damage, see MAI 19.01 and *Hurst v. Kansas City Mo. School Dist.*, 437 S.W.3d 327 (Mo. App. 2014).

38.03 [2012 Revision] Verdict Directing - Wrongful Discharge in Violation of Public Policy

Committee Comment (2016 Revision)

(Approved July 13, 2015; Effective January 1, 2016)

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.

I. Where suit involves multiple causes of damage, see MAI 19.01 and *Hurst v. Kansas City Mo. School Dist.*, 437 S.W.3d 327 (Mo. App. 2014).

Historical Note

(MAI 38.03 replaces the prior MAI 31.27 (2011 New)).

39.01 [2013 New] Verdict Directing - Violation of Missouri Merchandising Practices Act

Committee Comment (2016 Revision)

(Approved July 13, 2015; Effective January 1, 2016)

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).

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. 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. 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*, ___ S.W.3d ___ (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.").