Model Civil Jury Instructions

Contents

Rule 2.512 Instructions to the Jury 27

Chapter 1: Preliminary Instructions Before Jury Selection Instructions 29

M Civ JI 1.01 Introductory Comments 30

M Civ JI 1.02 Defining Legal Names of Parties and Counsel 31

M Civ JI 1.03 Explanation of Jury Selection and Voir Dire 32

M Civ JI 1.04 Juror Oath Before Voir Dire 33

M Civ JI 1.05 Prospective Jurors—Health and Other Problems 34

M Civ JI 1.10 Juror Oath Following Selection 35

Chapter 2: Preliminary Instructions After Jury Is Sworn Instructions 36

M Civ JI 2.01 Responsibilities of Judge and Jury 37

M Civ JI 2.02 Description of Trial Procedure 38

M Civ JI 2.02A Cameras in the Courtroom 40

M Civ JI 2.03 Jury Deliberation; Jurors as Triers of Fact 41

M Civ JI 2.04 Jury Must Only Consider Evidence; What Evidence Is / Prohibited Actions by Jurors 42

M Civ JI 2.05 Jurors to Keep Open Minds [*Instruction Deleted*] 45

M Civ JI 2.06 Prohibited Actions by Jurors 46

M Civ JI 2.07 Jurors Not to Consider Information Received outside Presence of Court [*Instruction Deleted*] 48

M Civ JI 2.08 Objections; Out-of-Presence Hearings 49

M Civ JI 2.09 Court to Instruct on Law 50

M Civ JI 2.10 Inability to Hear Witness or See Exhibit 51

M Civ JI 2.11 Questions by Jurors Allowed 52

M Civ JI 2.12 Caution about Publicity in Cases of Public Interest [*Instruction Deleted*] 53

M Civ JI 2.13 Note Taking by Jurors Allowed / Not Allowed 54

M Civ JI 2.14 Reference Documents 55

Chapter 3: Cautionary Instructions 56

M Civ JI 3.01 Faithful Performance of Duties; Jury to Follow Instructions 57

M Civ JI 3.02 Facts to Be Determined from Evidence 58

M Civ JI 3.03 Admission of Evidence 59

M Civ JI 3.04 Attorneys' Statements Not Evidence; Admission by Attorney [*Instruction Deleted*] 60

M Civ JI 3.05 Corporations Entitled to Unprejudiced Treatment 61

M Civ JI 3.06 Whether Party Is Insured Is Irrelevant 62

M Civ JI 3.07 Evidence Introduced for a Limited Purpose 63
M Civ JI 3.08 Judge's Opinion as to Facts Is to Be Disregarded [*Instruction Deleted*] 64
M Civ JI 3.09 Jury to Consider All the Evidence 65
M Civ JI 3.10 Circumstantial Evidence 66
M Civ JI 3.11 Jurors May Take into Account Ordinary Experience and Observations 67
M Civ JI 3.12 Jury View of Premises / Scene / Object 68
M Civ JI 3.13 Fact Judicially Noticed 69
M Civ JI 3.15 Prior Inconsistent Statement of Witness 70
M Civ JI 3.16 Interim Commentary by Attorneys 72
M Civ JI 3.17 Summary of Evidence by Judge 73
Chapter 4: Credibility and Weight 74
M Civ JI 4.01 Credibility of Witnesses 75
M Civ JI 4.02 Witness Need Not Be Believed [*Recommend No Instruction*] 76
M Civ JI 4.03 Inherently Improbable Testimony [*Recommend No Instruction*] 77
M Civ JI 4.04 Witness Willfully False [*Recommend No Instruction*] 78
M Civ JI 4.05 Party Competent as a Witness [*Recommend No Instruction*] 79
M Civ JI 4.06 Witness Who Has Been Interviewed by an Attorney 80
M Civ JI 4.07 Weighing Conflicting Evidence—Number of Witnesses 81
M Civ JI 4.08 One Witness against a Number [*Recommend No Instruction*] 82
M Civ JI 4.10 Weighing Expert Testimony [*Recommend No Instruction*] 83
M Civ JI 4.11 Consideration of Deposition Evidence 84
M Civ JI 4.09 Credibility of Special Categories of Witnesses and Weight of Evidence [*Recommend No Instruction*] 85
M Civ JI 4.12 Hospital and Business Records [*Recommend No Instruction*] 86
M Crim JI 4.13 Special Venue Instruction—Felony Consisting of More Than One Act 87
Chapter 5: Impeachment 88
M Civ JI 5.01 Prior Inconsistent Statement of Witness [*Renumbered to M Civ JI 3.15*] 89
M Civ JI 5.02 Impeachment of a Party by Prior Inconsistent Statement [*Instruction Deleted*] 90
M Civ JI 5.03 Impeachment by Proof of Conviction of Crime 91
Chapter 6: Failure to Produce 92
M Civ JI 6.01 Failure to Produce Evidence or a Witness 93
M Civ JI 6.02 Failure of Opposite Party to Testify in Case Involving "Dead Man's Statute" [*Recommend No Instruction*] 95

Chapter 7: Theories 96

M Civ JI 7.01 Theories of the Parties 97

Chapter 8: Definition of Burden of Proof 99

M Civ JI 8.01 Definition of Burden of Proof 100

Chapter 10: Negligence: General Instructions 102

M Civ JI 10.01 Definitions Introduced 103

M Civ JI 10.02 Negligence of Adult—Definition 104

M Civ JI 10.03 Ordinary Care—Adult—Definition [*Instruction Deleted*] 106

M Civ JI 10.04 Duty to Use Ordinary Care— Adult—Plaintiff 107

M Civ JI 10.05 Duty to Use Ordinary Care—Adult—Defendant 108

M Civ JI 10.06 Ordinary Care—Minor—Definition 109

M Civ JI 10.07 Conduct Required for Safety of Child 110

M Civ JI 10.08 Presumption of Ordinary Care— Death Case 111

M Civ JI 10.09 Presumption of Ordinary Care— Loss of Memory Case 113

Chapter 11: Comparative Negligence 114

M Civ JI 11.01 Comparative Negligence— Definition 115

M Civ JI 11.02 Negligence—Not an Issue as to One or More Plaintiffs 116

Chapter 12: Statutes and Ordinances Affecting Negligence 117

M Civ JI 12.01 Violation of Statute—Negligence 118

M Civ JI 12.02 Excused Violation of Statute 119

M Civ JI 12.03 Violation of Ordinance by Defendant 120

M Civ JI 12.04 Violation of Ordinance by Plaintiff 122

M Civ JI 12.05 Violation by Defendant of Rules or Regulations Promulgated Pursuant to Statutory Authority 123

M Civ JI 12.06 Violation by Plaintiff of Rules or Regulations Promulgated Pursuant to Statutory Authority 124

M Civ JI 12.07 Violation of Statute or Ordinance by Minor [*No Instruction Prepared*] 125

Chapter 13: Other Special Factors Affecting Negligence 126

M Civ JI 13.01 Physical Disability 127

M Civ JI 13.02 Intoxication as Affecting Negligence 128

M Civ JI 13.03 Mental Illness—Adult 129

M Civ JI 13.04 Duty of One in Imminent Peril and Responsibility of the Person Causing the Perilous Situation [*Recommend No Instruction*] 130

M Civ JI 13.05 Unavoidable Accident [*Recommend No Instruction*] 131

M Civ JI 13.06 Assumption of Risk [*No Instruction Prepared*]..... 132

M Civ JI 13.07 Attempted Rescue of One in Imminent Peril by a Person Who Did Not Cause Such Peril [*Instruction Deleted*] 133

M Civ JI 13.08 Presumption That Child Under Seven Years Is Incapable of Negligence 134

M Civ JI 13.09 Effect of Parent's Negligence on Claim of Child 135

Chapter 14: Subsequent Negligence—Intentional Misconduct 137

M Civ JI 14.01 Subsequent Negligence (Last Clear Chance)—Helpless or Inattentive Plaintiff [*Instruction Deleted*] 138

M Civ JI 14.02 Willful and Wanton Misconduct—Common Law [*Instruction Deleted*] 139

M Civ JI 14.10 Gross Negligence—Definition..... 140

M Civ JI 14.11 Wanton Misconduct—Definition..... 143

M Civ JI 14.12 Willful Misconduct—Definition..... 144

M Civ JI 14.20 Emergency Medical Services Act—Explanation..... 145

M Civ JI 14.21 Emergency Medical Services Act—Burden of Proof 146

Chapter 15: Proximate Cause (NEGLIGENCE)..... 147

M Civ JI 15.01 Definition of Proximate Cause..... 148

M Civ JI 15.02 Definition of Proximately Contributed [*Instruction Deleted*]..... 149

M Civ JI 15.03 More Than One Proximate Cause..... 150

M Civ JI 15.04 Causation by Multiple Defendants..... 151

M Civ JI 15.05 Intervening Negligence or Conduct of Person Not a Party [*Instruction deleted*] 152

M Civ JI 15.06 Intervening Outside Force (Other Than Person)..... 153

Chapter 16: Burden of Proof (NEGLIGENCE) 154

M Civ JI 16.01 Meaning of Burden of Proof [*Renumbered to M Civ JI 8.01*] 155

M Civ JI 16.02 Burden of Proof in Negligence Cases on the Issues and Legal Effect Thereof 156

M Civ JI 16.03 Burden of Proof in Negligence Cases on the Issues and Legal Effect Thereof, Including the Issues of Contributory Negligence and Subsequent Negligence (Last Clear Chance) or Intentional Misconduct [*Instruction Deleted*] 158

M Civ JI 16.04 Burden of Proof in Negligence Cases on Affirmative Defenses Other Than Contributory Negligence..... 159

M Civ JI 16.05 Burden of Proof and Legal Effect Thereof in Negligence Cases—Complaint and Counterclaim..... 160

M Civ JI 16.06 Burden of Proof and Legal Effect Thereof in Negligence Cases—Third-Party Complaint—Contribution Only 163

M Civ JI 16.07 Evenly Balanced Evidence [*Recommend No Instruction*] 165

M Civ JI 16.08 Burden of Proof in Negligence Cases (To Be Used in Cases Filed on or After March 28, 1996) 166

Chapter 17: Admitted Liability (NEGLIGENCE) 168

M Civ JI 17.01 Admitted Liability 169

Chapter 19: Premises Liability (NEGLIGENCE) 170

M Civ JI 19.01 Invitee, Licensee, Trespasser—Definitions (Relationship Disputed) 171

M Civ JI 19.02 Possessor of Land—Definition 173

M Civ JI 19.03 Duty of Possessor of Land, Premises, or Place of Business to Invitee; Known Risk or Open and Obvious Condition 174

M Civ JI 19.04 Duty of Plaintiff to Use Ordinary Care in Self-Service Store or Store Displaying Goods [*Instruction Deleted*] 176

M Civ JI 19.05 Duty of Possessor of Land, Premises, or Place of Business to a Business Invitee Regarding the Natural Accumulation of Ice and Snow [*Instruction Deleted*] 177

M Civ JI 19.06 Duty of Possessor of Land, Premises, or Place of Business to Licensee 178

M Civ JI 19.07 Duty of Possessor of Land, Premises, or Place of Business to Trespasser 179

M Civ JI 19.07A Duty of Possessor of Land, Premises, or Place of Business to Child Trespasser for Artificial Conditions 181

M Civ JI 19.08 Duty of Possessor of Land, Premises, or Place of Business to Trespasser Whose Presence Is Known or Should Have Been Known to Possessor [*Instruction Deleted*] 182

M Civ JI 19.09 Duty of Possessor of Land, Premises, or Place of Business to Persons Traveling along Adjacent Street or Way 183

M Civ JI 19.10 Nondelegable Duty of Possessor or Occupier of Land, Premises, or Place of Business 184

M Civ JI 19.11 Landlord's Nondelegable Duty for Negligent Repairs Made by an Independent Contractor 185

Chapter 25: Products Liability 186

M Civ JI 25.01 Definition of Proximate Cause—Warranty 187

M Civ JI 25.02 More Than One Proximate Cause—Warranty 188

M Civ JI 25.03 Causation—Multiple Defendants with Warranty and Negligence Counts 189

M Civ JI 25.04 Causation—Multiple Defendants with Warranty Counts Only 190

M Civ JI 25.11 Express Warranty—Definition 191

M Civ JI 25.12 Express Warranty—Burden of Proof 192

M Civ JI 25.21 Implied Warranty—Definition 193

M Civ JI 25.22 Implied Warranty—Burden of Proof 195

M Civ JI 25.31 Negligent Production—Definition 196

M Civ JI 25.32 Negligent Production—Burden of Proof 197

M Civ JI 25.41 Comparative Negligence—Burden of Proof [*Instruction Deleted*] 199

M Civ JI 25.45 Breach of Warranty: Comparative Fault—Burden of Proof (To Be Used in Cases Filed on or After March 28, 1996) 200

Chapter 30: Malpractice 202

M Civ JI 30.01 Professional Negligence and/or Malpractice 203

M Civ JI 30.02 Informed Consent 204

M Civ JI 30.03 Burden of Proof 205

M Civ JI 30.04 Medical Malpractice: Cautionary Instruction on Medical Uncertainties 206

M Civ JI 30.05 Medical Malpractice: Permissible Inference of Malpractice from Circumstantial Evidence (Res Ipsa Loquitur) 207

M Civ JI 30.10 Medical Malpractice: Exceptions to Cap 208

M Civ JI 30.20 Medical Malpractice: Loss of Opportunity to Survive or Achieve a Better Result [*Instruction Deleted*] 209

M Civ JI 30.30 Medical Malpractice: Vicarious Tort Liability Based on Ostensible Agency 211

Chapter 35: First-Party Benefits Action 213

Introductory Directions to the Court 214

M Civ JI 35.01 No-Fault First-Party Benefits Action: Explanation of Statute 217

M Civ JI 35.02 No-Fault First-Party Benefits Action: Burden of Proof 221

M Civ JI 35.03 No-Fault: Benefits from First-Party Actions 224

M Civ JI 35.04 No-Fault First-Party Benefits Action: Statutory Interest 227

M Civ JI 35.05 No-Fault First-Party Benefits Action: Damages—Setoff for Governmental Benefits [*Instruction Deleted*] 228

M Civ JI 35.06 No-Fault First-Party Benefits Action: Damages—Setoff; Coordinated Benefits [*Instruction Deleted*] 229

Chapter 36: Third-Party Tort Action 230

Introductory Directions to the Court 231

M Civ JI 36.01 No-Fault Auto Negligence: Serious Impairment (To Be Used in Cases in Which 1995 PA 222 Does Not Apply) 233

M Civ JI 36.01A No-Fault Auto Negligence: Noneconomic Loss Damages for Non-Continuing Serious Impairment Threshold Injury 235

M Civ JI 36.02 No-Fault Auto Negligence: Mental or Emotional Injury 236

M Civ JI 36.03 No-Fault Auto Negligence: Permanent Serious Disfigurement 237

M Civ JI 36.04 No-Fault Auto Negligence: Elements of Proof—Explanation of Noneconomic-Economic Distinction 238

M Civ JI 36.05 No-Fault Auto Negligence: Burden of Proof—Noneconomic Loss (To Be Used in Cases in Which 1995 PA 222 Does Not Apply) 240

M Civ JI 36.06 No-Fault Auto Negligence: Burden of Proof—Economic Loss 242

M Civ JI 36.11 No-Fault Auto Negligence: Serious Impairment of Body Function—Definition (To Be Used in Cases in Which 1995 PA 222 Applies) 244

M Civ JI 36.15 No-Fault Auto Negligence: Burden of Proof—Economic and/or Noneconomic Loss (To Be Used in Cases in Which 1995 PA 222 Applies)* 247

Chapter 38: Agency 250

M Civ JI 38.01 Agency Relationship: Definitions of Agent and Principal 251

M Civ JI 38.10 Agency: Apparent Agency Relationship 252

M Civ JI 38.20 Vicarious Tort Liability Based on Ostensible Agency (For Cases Other Than Medical Malpractice) 253

Chapter 40: Multiple Plaintiffs 254

M Civ JI 40.01 Two or More Plaintiffs— Separate Consideration—Repeating Instructions 255

M Civ JI 40.02 Assessment of Damages 256

Chapter 41: Multiple Defendants 257

M Civ JI 41.01 Two or More Defendants—Separate Consideration—Repeating Instructions 258

M Civ JI 41.02 Damages Where There Is No Allocation of Fault Between Defendants 259

M Civ JI 41.03 Multiple Parties and Pleadings Where Jury May Not Be Able to Apportion Damages [*Instruction Deleted*] 260

M Civ JI 41.04 Damages Not to Be Allocated Among Joint Tort-Feasors [*Instruction Deleted*] 261

Chapter 42: Allocation of Fault (Personal Injury Action) 262

M Civ JI 42.01 Allocation of Fault of Parties 263

M Civ JI 42.05 Allocation of Fault of Parties and Identified Nonparties 264

Chapter 43: Contribution Among Tort-Feasors 266

M Civ JI 43.01A Contribution Among Tort-Feasors by Relative Fault [*Instruction Deleted*] 267

M Civ JI 43.01B Contribution Among Tort-Feasors by Relative Fault (Bifurcation) [*Instruction Deleted*] 268

Chapter 45: Wrongful Death 269

M Civ JI 45.01 Wrongful Death—Explanation of Statute 270

M Civ JI 45.02 Wrongful Death—Damages 271

Chapter 50: Basic Instructions—Person and Property 274

Damages Introduction 275

M Civ JI 50.01 Measure of Damages—Personal and Property 276

M Civ JI 50.02 Elements of Damage — Pain and Suffering, Etc. 278

M Civ JI 50.03 Elements of Damage—Disability and Disfigurement 280

M Civ JI 50.04 Element of Damage—Aggravation of Preexisting Ailment or Condition 281

M Civ JI 50.05 Element of Damage—Medical Expenses 282

M Civ JI 50.06 Element of Damage—Loss of Earning Capacity—Past and Future—Adult Plaintiff, Emancipated Minor 283

M Civ JI 50.07 Element of Damage—Loss of Future Earning Capacity—Unemancipated Minor Plaintiff 284

M Civ JI 50.08 Element of Damage—Miscellaneous Expense 285

M Civ JI 50.09 Element of Damage—Personal Property 286

M Civ JI 50.10 Defendant Takes the Plaintiff As He/She Finds Him/Her 287

M Civ JI 50.11 Inability to Determine Extent of Aggravation of Injuries 288

M Civ JI 50.21 Personal Injury Action: Definition of Economic Loss and Noneconomic Loss Damages; Separation of Future Damages by Year 289

Chapter 51: Property Damage 290

Introduction 291

M Civ JI 51.01 Measure of Damages—Personal Property 292

M Civ JI 51.02 Measure of Damages—Damage to Personal Property—Cost of Repair Less Than Difference in Value 293

M Civ JI 51.03 Measure of Damages—Damage to Personal Property—Irreparable Damage with Salvage 294

M Civ JI 51.04 Measure of Damages—Damage to Personal Property—Irreparable Damage and No Salvage 295

M Civ JI 51.05 Measure of Damages—Damage to Personal Property—Dispute Whether Cost of Repair Is Less Than Difference in Value 296

M Civ JI 51.06 Measure of Damages—Damage to Personal Property—Cost of Repair with Loss in Value after Repair 297

M Civ JI 51.07 Measure of Damages—Damage to Personal Property—Dispute Whether Cost of Repair plus Loss in Value after Repair Is Less Than Difference in Value 298

Chapter 52: Injury to Spouse or Parent 299

M Civ JI 52.01 Measure of Damages—Injury to Spouse 300

M Civ JI 52.02 Measure of Damages for Child of Injured Parent 302

Chapter 53: Particular Factors in Computing Damages 304

M Civ JI 53.01 Statutory Mortality Table—Injury Case [*Instruction Deleted*] 305

M Civ JI 53.02 Statutory Mortality Table—Death Case [*Instruction Deleted*] 306

M Civ JI 53.03 Future Damages (Non-personal Injury Action)—Reduction to Present Cash Value... 307

M Civ JI 53.03A Future Damages (Personal Injury Action)—Reduction to Present Cash Value..... 308

M Civ JI 53.04 Interest—As Part of Damages 309

M Civ JI 53.05 Mitigation of Damages—Failure to Exercise Ordinary Care 311

M Civ JI 53.06 Effect of Inflation on Future Damages 312

Chapter 60: Jury Deliberations 313

M Civ JI 60.01 Jury Deliberations 314

M Civ JI 60.01A Cameras in the Courtroom 316

M Civ JI 60.02 Deadlocked Jury 317

Chapter 65: Forms of Verdicts: General 319

M Civ JI 65.01 Forms of Verdicts: Single Defendant without Counterclaim [*Form of Verdict Deleted*] 320

M Civ JI 65.02 Forms of Verdicts: Single Defendant with Counterclaim [*Form of Verdict Deleted*]321

M Civ JI 65.03 Forms of Verdicts: Multiple Defendants with No Counterclaims [*Form of Verdict Deleted*] 322

M Civ JI 65.04 Forms of Verdicts: Multiple Defendants with One or More Counterclaims [*Form of Verdict Deleted*] 323

Chapter 66: Forms of Verdicts: Comparative Negligence 324

M Civ JI 66.01 Form of Verdict: Comparative Negligence 325

M Civ JI 66.01A Form of Verdict: Comparative Negligence (Personal Injury Action) 327

M Civ JI 66.02 Form of Verdict: Comparative Negligence—Property Damage (To Be Used in Cases Filed on or after March 28, 1996) 332

M Civ JI 66.03 Form of Verdict: Comparative Negligence—Personal Injury Action (To Be Used in Cases Filed on or after March 28, 1996) 335

Chapter 67: Forms of Verdicts: Michigan No-Fault Automobile Insurance Law..... 341

M Civ JI 67.01 Form of Verdict: No-Fault First-Party Benefits Action 342

M Civ JI 67.02 Form of Verdict: No-Fault Auto Negligence; Noneconomic Loss [*Form of Verdict Deleted*] 346

M Civ JI 67.02A Form of Verdict: No-Fault Auto Negligence; Noneconomic Loss (and Allocation of Fault) [*Form of Verdict Deleted*] 347

M Civ JI 67.03 Form of Verdict: No-Fault Auto Negligence; Economic Loss [*Form of Verdict Deleted*] 348

M Civ JI 67.03A Form of Verdict: No-Fault Auto Negligence; Economic Loss (and Allocation of Fault) [*Form of Verdict Deleted*] 349

M Civ JI 67.04 Form of Verdict: No-Fault Auto Negligence; Economic Loss and Noneconomic Loss [*Form of Verdict Deleted*] 350

M Civ JI 67.04A Form of Verdict: No-Fault Auto Negligence; Economic Loss and Noneconomic Loss (and Allocation of Fault) [*Form of Verdict Deleted*] 351

M Civ JI 67.15 Form of Verdict: No-Fault Auto Negligence: Economic Loss and Noneconomic Loss—Comparative Negligence Not an Issue [*Form of Verdict Deleted*] 352

M Civ JI 67.16 Form of Verdict: No-Fault Auto Negligence: Economic Loss and Noneconomic Loss—and Comparative Negligence/Multiple Defendants/Allocation of Fault (To Be Used in Cases in Which 1995 PA 222 Applies) [*Form of Verdict Deleted*] 353

M Civ JI 67.17 Form of Verdict: No-Fault Auto Negligence: (As Applicable) Economic Loss and Noneconomic Loss—and Comparative Negligence/Single or Multiple Defendants/Allocation of Fault 354

Chapter 68: Forms of Verdicts: Product Liability 361

M Civ JI 68.01 Form of Verdict: Products Liability 362

M Civ JI 68.01A Form of Verdict: Products Liability (Personal Injury Action) 364

M Civ JI 68.03 Form of Verdict: Products Liability—Personal Injury Action (To Be Used in Cases Filed on or After March 28, 1996) 369

Chapter 70: Forms of Verdicts: Medical Malpractice 375

M Civ JI 70.01 Form of Verdict: Special Questions in Medical Malpractice Cases (Limitation on Noneconomic Damages) 376

Chapter 72: Forms of Verdicts: Contribution Among Tort-Feasors 378

M Civ JI 72.01A Form of Verdict: Contribution Among Tort-Feasors by Relative Fault [*Form of Verdict Deleted*] 379

M Civ JI 72.01B Form of Verdict: Contribution Among Tort-Feasors by Relative Fault (Bifurcation) [*Form of Verdict Deleted*] 380

Chapter 73: Forms of Verdicts: Damages of Spouse of Injured Plaintiff 381

M Civ JI 73.01 Form of Verdict: Damages of Spouse of Injured Plaintiff 382

Chapter 75: Dram Shop Actions 387

Dram Shop Actions—Introduction 388

M Civ JI 75.01 Dram Shop—Explanation of Statute 395

M Civ JI 75.02 Dram Shop—Definitions 396

M Civ JI 75.11 Dram Shop—Sale to Minor: Burden of Proof 398

M Civ JI 75.12 Dram Shop—Sale to Visibly Intoxicated Person: Burden of Proof 400

M Civ JI 75.13 Dram Shop—Contributing to Occurrence Not a Defense 401

Chapter 80: Dog Bite Actions 402

Introduction 403
M Civ JI 80.01 Dog Bite Statute—Explanation 404
M Civ JI 80.02 Dog Bite Statute—Burden of Proof 405
M Civ JI 80.03 Dog Bite Statute—Definition of Provocation 406
M Civ JI 80.04 Dog Bite Statute—Lawfully on Property 407
M Civ JI 80.05 Dog Bite Statute—Lawfully on Property of Dog Owner 408
Chapter 85: Emergency Vehicles 409
M Civ JI 85.01 Exemption of Emergency Vehicles from Certain Statutory Regulations 410
M Civ JI 85.02 Requirement of Due Care by Operator of an Emergency Vehicle 411
Chapter 90: Condemnation 412
Introductory Directions to the Court 413
M Civ JI 90.01 Pretrial Instruction: Nature of Condemnation Action 415
M Civ JI 90.02 Power of Eminent Domain 417
M Civ JI 90.03 Burden of Proof [*Recommend No Instruction*] 418
M Civ JI 90.04 Absence of Fault 419
M Civ JI 90.05 Just Compensation—Definition 420
M Civ JI 90.06 Market Value—Definition 421
M Civ JI 90.07 Special Purpose Property 422
M Civ JI 90.08 Assessed Value 423
M Civ JI 90.09 Highest and Best Use 424
M Civ JI 90.10 Possibility of Rezoning 425
M Civ JI 90.11 Refusal to Rezone 426
M Civ JI 90.12 Partial Taking 427
M Civ JI 90.13 Date of Valuation 428
M Civ JI 90.14 Date of Valuation: Early Date of Taking 429
M Civ JI 90.15 Effect of Proposed Public Improvement 430
M Civ JI 90.16 Comparable Market Transactions 431
M Civ JI 90.17 Easements 433
M Civ JI 90.18 Total Taking 434
M Civ JI 90.19 Benefits 435
M Civ JI 90.20 Compensation for Fixtures; Definition 436
M Civ JI 90.21 Fixtures: Election to Remove—Compensation 437
M Civ JI 90.22 Effect of View 438

M Civ JI 90.22A Valuation Witnesses 439
M Civ JI 90.23 Range of Testimony 440
M Civ JI 90.24 Mechanics of Verdict 441
M Civ JI 90.30 Going Concern 442
M Civ JI 90.31 Business Interruption 443
Chapter 97: Child Protection Proceedings 444
M Civ JI 97.01 Preliminary Instructions to Prospective Jurors 446
M Civ JI 97.02 Selection of Fair and Impartial Jury 447
M Civ JI 97.03 Challenges 448
M Civ JI 97.04 Brief Description 449
M Civ JI 97.05 Introduction to Parties, Counsel, and Witnesses 450
M Civ JI 97.06 Reading of Petition 451
M Civ JI 97.07 Juror Oath Before Voir Dire 452
M Civ JI 97.08 Seating of Jurors 453
M Civ JI 97.09 Juror Oath Following Selection 454
M Civ JI 97.10 Description of Trial Procedure 455
M Civ JI 97.11 Function of Judge and Jury 456
M Civ JI 97.12 Jury Must Only Consider Evidence; What Evidence Is; Prohibited Actions by Jurors457
M Civ JI 97.13 Judging Credibility and Weight of Evidence 460
M Civ JI 97.14 Questions Not Evidence 461
M Civ JI 97.15 Court's Questioning Not Reflective of Opinion 462
M Civ JI 97.16 Questions by Jurors Allowed 463
M Civ JI 97.17 Objections 464
M Civ JI 97.18 Disregard Out-of-Presence Hearings 465
M Civ JI 97.19 Jurors Not to Discuss Case 466
M Civ JI 97.20 Recesses 467
M Civ JI 97.21 Caution about Publicity in Cases of Public Interest 468
M Civ JI 97.22 Visiting Scene/Conducting Experiments 469
M Civ JI 97.23 Notetaking by Jurors Allowed 470
M Civ JI 97.24 Notetaking Not Allowed 471
M Civ JI 97.25 Inability to Hear Witness or See Exhibit 472
M Civ JI 97.26 Defining Legal Names of Parties and Counsel 473
M Civ JI 97.27 Number of Jurors 474

M Civ JI 97.28 Instructions to be Taken as a Whole 475
M Civ JI 97.29 Deliberations and Verdict 476
M Civ JI 97.30 Maintaining an Open Mind 477
M Civ JI 97.31 Duties of Judge and Jury 478
M Civ JI 97.32 Evidence 479
M Civ JI 97.33 Witnesses-Credibility 481
M Civ JI 97.34 Circumstantial Evidence 483
M Civ JI 97.35 Statutory Grounds 484
M Civ JI 97.36 Definitions 486
M Civ JI 97.37 Standard of Proof 488
M Civ JI 97.38 No Duty to Present Evidence 489
M Civ JI 97.39 Treatment of One Child as Evidence of Treatment of Another Child 490
M Civ JI 97.40 Improvement in Circumstances Not Controlling 491
M Civ JI 97.41 Not Necessary to Prove Each Fact Alleged 492
M Civ JI 97.42 Unfit Home by Reason of Neglect or Cruelty—Res Ipsa Loquitur 493
M Civ JI 97.43 Findings Re: Statutory Grounds 494
M Civ JI 97.44 Court to Determine Disposition 496
M Civ JI 97.45 Not a Criminal Proceeding 497
M Civ JI 97.46 Deliberations and Verdict 498
M Civ JI 97.47 Communications with the Court 500
M Civ JI 97.48 Exhibits 501
M Civ JI 97.49 Verdict 502
M Civ JI 97.50 Dismissal of Extra Juror 503
M Civ JI 97.51 Bailiff's Oath 504
M Civ JI 97.52 Begin Deliberations 505
M Civ JI 97.60 Form of Verdict: Statutory Grounds Alleged 506
M Civ JI 97.61 Form of Verdict: One Statutory Ground Alleged [*Instruction Deleted*] 508

Chapter 100: Rent Action—Residential Property 509

Introduction 510
M Civ JI 100.01 Rent Action: Explanation of Statutes; Defense of Failure to Keep Premises Fit for Use Intended / Failure to Repair / Noncompliance with Health or Safety Laws / Retaliatory Rent Increase 515
M Civ JI 100.02 Rent Action: Burden of Proof 517

Chapter 101: Termination Action—Residential Property 519

Introduction 520

M Civ JI 101.01 Termination Action: Explanation of Statutes 525

M Civ JI 101.02 Termination Action: Retaliatory Termination—Explanation of Statute 526

M Civ JI 101.03 Termination Action: Issues—Notice of Termination / Retaliatory Termination 527

M Civ JI 101.04 Termination Action: Retaliatory Termination—Tenant Burden of Proof 528

M Civ JI 101.05 Termination Action: Retaliatory Termination—Landlord Burden of Proof 529

M Civ JI 101.06 Termination Action: Retaliatory Termination—Tenant Burden of Proof on Complaint within Ninety Days 531

Chapter 105: Employment Discrimination 533

Introduction 534

M Civ JI 105.01 Employment Discrimination Statute (Disparate Treatment)—Explanation 535

M Civ JI 105.02 Employment Discrimination (Disparate Treatment)—Definition 536

M Civ JI 105.03 Employment Discrimination (Disparate Treatment)—Cautionary Instruction as to Business Judgment 537

M Civ JI 105.04 Employment Discrimination (Disparate Treatment)—Burden of Proof 538

M Civ JI 105.04A Employment Discrimination—Burden of Proof—Retaliation 539

M Civ JI 105.05 Employment Discrimination (Constructive Discharge)—Definition 540

M Civ JI 105.10 Employment Discrimination—Sexual Harassment—Explanation 541

M Civ JI 105.12 Employment Discrimination—Quid Pro Quo Harassment—Burden of Proof 542

M Civ JI 105.14 Employment Discrimination—Hostile Environment Sexual Harassment—Burden of Proof—Employer Defendant 543

M Civ JI 105.18 Employment Discrimination—Hostile Environment Sexual Harassment—Burden of Proof—Unwelcome Sexual Conduct or Communication 544

M Civ JI 105.20 Employment Discrimination—Hostile Environment Sexual Harassment—Sexually Hostile Work Environment 545

M Civ JI 105.24 Employment Discrimination—Hostile Environment Sexual Harassment—Employer Liability 546

M Civ JI 105.26 Employment Discrimination—Hostile Environment Sexual Harassment—Notice 547

M Civ JI 105.28 Employment Discrimination—Hostile Environment Sexual Harassment—Prompt Remedial Action 548

M Civ JI 105.30 Employment Discrimination—Hostile Environment Sexual Harassment—Damages—Tangible Employment Act Not Required 549

M Civ JI 105.32 Employment Discrimination—Hostile Environment Sexual Harassment—Burden of Proof—Employee Defendant 550

M Civ JI 105.41 Employment Discrimination—Mitigation of Damages for Loss of Compensation .. 551

M Civ JI 105.42 Employment Discrimination—Mitigation of Damages for Loss of Compensation: Conditional and Unconditional Offers by Defendant 553

Chapter 106: Persons With Disabilities Civil Rights Act 555

M Civ JI 106.01 Employment Discrimination Statute—Explanation..... 556

M Civ JI 106.05 Employment Discrimination—Disability—Definition..... 557

M Civ JI 106.07A Employment Discrimination—Burden of Proof—Disability 559

M Civ JI 106.07C Employment Discrimination—Burden of Proof—Physical or Mental Examinations 560

M Civ JI 106.07D Employment Discrimination—Burden of Proof—Accommodation..... 561

M Civ JI 106.07E Employment Discrimination—Burden of Proof—Retaliation 563

M Civ JI 106.09 Employment Discrimination Statute—Accommodation—Duty of Employer 564

M Civ JI 106.11A Employment Discrimination Statute—Accommodation—Undue Hardship—Equipment or Device 565

M Civ JI 106.11B Employment Discrimination Statute—Accommodation—Undue Hardship—Equipment or Device 566

M Civ JI 106.11C Employment Discrimination Statute—Accommodation—Undue Hardship—Equipment or Device 567

M Civ JI 106.11D Employment Discrimination Statute—Accommodation—Undue Hardship—Readers or Interpreters..... 568

M Civ JI 106.11E Employment Discrimination Statute—Accommodation—Undue Hardship—Reader or Interpreter 569

M Civ JI 106.21 Public Accommodation Statute—Explanation—Accommodation..... 570

M Civ JI 106.23 Public Accommodation—Disability—Definition..... 571

M Civ JI 106.25 Public Accommodation—Definition 572

M Civ JI 106.27 Public Service—Definition..... 573

M Civ JI 106.29 Public Accommodation—Burden of Proof..... 574

M Civ JI 106.29A Public Accommodation—Burden of Proof—Retaliation 575

M Civ JI 106.30 Educational Institution Statute—Explanation..... 576

M Civ JI 106.31 Accommodation—Educational Institution—Definition 578

M Civ JI 106.33 Accommodation—Educational Institution—Disability—Definition 579

M Civ JI 106.35 Accommodation—Educational Institution—Burden of Proof..... 580

M Civ JI 106.36 Educational Institution—Burden of Proof—Retaliation..... 581

Chapter 107: Whistleblowers' Protection Act 582

Introduction..... 583

M Civ JI 107.01 Whistleblowers' Protection Act: Explanation 584

M Civ JI 107.02 Whistleblowers' Protection Act: Protected Activity—Definition 585

M Civ JI 107.03 Whistleblowers' Protection Act: Causation 587

M Civ JI 107.04 Whistleblowers' Protection Act: Good Faith Belief 588

M Civ JI 107.11 Whistleblowers' Protection Act: Distinction in Standard of Proof Between "Report" and "About to Report" 589

M Civ JI 107.15 Whistleblowers' Protection Act: Burden of Proof 590

Chapter 108: Public Accommodations 591

M Civ JI 108.01 Public Accommodation or Services; Prohibited Practices—Explanation 592

M Civ JI 108.02 Public Accommodation—Definition 593

M Civ JI 108.03 Public Service—Definition 594

M Civ JI 108.04 Public Accommodation/Public Service Discrimination—Disparate Treatment—Definition 595

M Civ JI 108.06 Public Accommodation/Public Service Discrimination—Burden Of Proof 596

M Civ JI 108.06A Public Accommodation/Public Service Discrimination-Burden of Proof-Retaliation 597

M Civ JI 108.07 Public Accommodation/Public Service Discrimination—Sexual Harassment—Explanation 598

M Civ JI 108.09 Public Accommodation/Public Service Discrimination—Quid Pro Quo Harassment—Burden of Proof 599

M Civ JI 108.11 Public Accommodation/Public Service Discrimination—Hostile Environment Harassment—Burden of Proof 600

M Civ JI 108.12 Public Accommodation/Public Service Discrimination—Hostile Environment Harassment—Unwelcome Sexual Conduct or Communication—Definition 601

M Civ JI 108.13 Public Accommodation/Public Service Discrimination—Hostile Environment Harassment— Sexually Hostile Environment—Definition 602

Chapter 110: Wrongful Discharge 603

Introduction 604

M Civ JI 110.01 Introductory Instruction Where Wrongful Discharge Is Combined with Other Claims 605

M Civ JI 110.05 Wrongful Discharge: Employment Relationship Terminable at Will Unless Terms or Conditions to the Contrary 606

M Civ JI 110.06 Wrongful Discharge: Employment Policies or Terms or Conditions of the Employment Contract 607

M Civ JI 110.07 Wrongful Discharge: Employment Policies or Terms or Conditions of the Employment Contract—Express or Implied 609

M Civ JI 110.10 Wrongful Discharge: Good or Just Cause Contract or Policy—Burden of Proof 610

M Civ JI 110.11 Wrongful Discharge: Satisfaction Contract or Policy—Burden of Proof..... 612

M Civ JI 110.12 Wrongful Discharge: Special Conditions or Performance Standards—Burden of Proof 614

M Civ JI 110.13 Wrongful Discharge: Procedural Terms or Conditions—Burden of Proof..... 615

M Civ JI 110.20 Wrongful Discharge: Mitigation of Damages [*No Instruction Prepared*]..... 616

Chapter 113: Consumer Protection Act 617

M Civ JI 113.01 Trade or Commerce; Prohibited Practices-Explanation..... 618

M Civ JI 113.02 Unfair, Unconscionable, or Deceptive Methods, Acts, or Practices 619

M Civ JI 113.03 Trade or Commerce-Definition..... 620

M Civ JI 113.04 Loss—Definition 621

Chapter 114: Invasion of Privacy Act 622

M Civ JI 114.01 Invasion of Privacy—Intrusion into Another's Private Affairs—Elements 623

M Civ JI 114.02 Invasion of Privacy—Intrusion Into Another's Private Affairs—Burden of Proof ... 624

M Civ JI 114.03 Invasion of Privacy—Public Disclosure of Private Facts—Elements 625

M Civ JI 114.04 Invasion of Privacy—Public Disclosure of Private Facts—Burden of Proof 626

M Civ JI 114.05 Invasion of Privacy—Publicity Which Places Plaintiff in a False Light—Elements 627

M Civ JI 114.06 Invasion of Privacy—Publicity Which Places Plaintiff in a False Light—Burden of Proof..... 628

Chapters 115: Assault and Battery 629

M Civ JI 115.01 Assault—Definition 630

M Civ JI 115.02 Battery—Definition 631

M Civ JI 115.05 Assault and Battery—Defense of Self-Defense 632

M Civ JI 115.06 Assault and Battery—Defense of Consent by Voluntarily Entering a Mutual Affray 633

M Civ JI 115.07 Assault and Battery—Provocation by Mere Words Not a Defense 634

M Civ JI 115.08 Assault and Battery—Defense— Right to Resist an Unlawful Arrest 635

M Civ JI 115.09 Battery—Defense—Use of Force by Law Enforcement Officer in Lawful Arrest ... 636

M Civ JI 115.20 Assault—Burden of Proof..... 637

M Civ JI 115.21 Battery—Burden of Proof..... 638

M Civ JI 115.30 Partial Privilege of Merchant as to Exemplary Damages and Damages for Mental Anguish—False Arrest, False Imprisonment, Assault, Battery, Libel, Slander..... 639

Chapter 116: False Arrest and Imprisonment 640

M Civ JI 116.01 False Arrest—Definition..... 641

M Civ JI 116.02 False Imprisonment—Definition 642

M Civ JI 116.05 False Arrest—Law Enforcement Officer—Probable Cause to Arrest for Felony without Warrant 643

M Civ JI 116.06 False Arrest—Defense—Right of Private Citizen to Arrest 644

M Civ JI 116.07 False Arrest—Arrest with Warrant 645

M Civ JI 116.20 False Arrest—Burden of Proof 646

M Civ JI 116.21 False Imprisonment—Burden of Proof 647

Chapter 117: Malicious Prosecution 648

M Civ JI 117.01 Malicious Prosecution—Criminal Proceeding 649

M Civ JI 117.02 Malicious Prosecution—Criminal Proceeding: Burden of Proof 650

M Civ JI 117.03 Malicious Prosecution—Criminal Proceeding: Termination in Favor of Accused 652

M Civ JI 117.04 Malicious Prosecution—Criminal Proceeding: Probable Cause 653

M Civ JI 117.20 Malicious Prosecution—Civil Proceeding 655

M Civ JI 117.21 Malicious Prosecution—Civil Proceeding—Burden of Proof 656

Chapter 118: Libel and Slander 657

M Civ JI 118.01 Libel—Definition 658

M Civ JI 118.02 Slander—Definition 659

M Civ JI 118.03 Libel, Slander—Statement of and Concerning the Plaintiff 660

M Civ JI 118.04 Libel, Slander—Meaning of a Statement 661

M Civ JI 118.05 Libel, Slander—Burden of Proof 662

M Civ JI 118.06 Libel or Slander of Public Figure or Public Person (Actual Malice) 664

M Civ JI 118.07 Libel, Slander—Common-Law Qualified Privilege (Actual Malice) 665

M Civ JI 118.08 Libel or Slander of Private Person—Nonprivileged Communication 666

M Civ JI 118.19 Libel-Actual Damages (Public Figure or Public Person) 667

M Civ JI 118.20 Libel—Economic Damages (Private Individual) 668

M Civ JI 118.21 Libel—Exemplary Damages 669

Chapter 119: Intentional Infliction of Emotional Distress 671

M Civ JI 119.01 Intentional Infliction of Emotional Distress—Burden of Proof 672

Chapter 125: Tortious Interference With Contract 673

M Civ JI 125.01 Tortious Interference with Contract: Elements 674

M Civ JI 125.02 Tortious Interference with Contract: Contract/Consideration—Definitions 675

M Civ JI 125.03 Tortious Interference with Contract: Intent—Definition 676

M Civ JI 125.04 Tortious Interference with Contract: Improper—Definition 677

M Civ JI 125.05 Tortious Interference with Contract: Breach—Definition 678

Chapter 126: Tortious Interference with Business Relationship or Expectancy 679

M Civ JI 126.01 Tortious Interference with Business Relationship or Expectancy: Elements 680

M Civ JI 126.02 Tortious Interference with Business Relationship or Expectancy: Business Relationship or Expectancy—Definition 681

M Civ JI 126.03 Tortious Interference with Business Relationship or Expectancy: Intent—Definition 682

M Civ JI 126.04 Tortious Interference with Business Relationship or Expectancy: Improper—Definition 683

Chapter 128: Fraud and Misrepresentation 684

M Civ JI 128.01 Fraud Based on False Representation 685

M Civ JI 128.02 Fraud Based on Failure to Disclose Facts (Silent Fraud) 687

M Civ JI 128.03 Fraud Based on Bad-Faith Promise 689

M Civ JI 128.04 Innocent Misrepresentation 691

M Civ JI 128.10 Material Fact—Definition 692

M Civ JI 128.11 Reliance—Definition 693

Chapter 130: Promissory Estoppel 694

M Civ JI 130.01 Promissory Estoppel 695

M Civ JI 130.05 Promissory Estoppel: Promise—Definition 697

Chapter 140: Contract Action—UCC 698

M Civ JI 140.01 Contract Action—UCC: Explanation and Burden of Proof 699

M Civ JI 140.02 Contract Action—UCC: Offer and Acceptance 700

M Civ JI 140.03 Contract Action—UCC: Acceptance with Different or Additional Terms 701

M Civ JI 140.04 Contract Action—UCC: Enforceability of Contract: Statute of Frauds 702

M Civ JI 140.05 Contract Action—UCC: Contract Terms—Written Acceptance or Confirmation with Different or Additional Terms 703

M Civ JI 140.11 Contract Action—UCC: Buyer's Acceptance of Nonconforming Goods 705

M Civ JI 140.12 Contract Action—UCC: Buyer's Revocation of Acceptance 707

M Civ JI 140.13 Contract Action—UCC: Buyer's Rejection of Goods—Installment Contract 709

M Civ JI 140.14 Contract Action—UCC: Buyer's Rejection of Goods or Part of the Goods 711

M Civ JI 140.15 Contract Action—UCC: Anticipatory Repudiation—Definition 713

M Civ JI 140.21 Contract Action—UCC: Lost or Damaged Goods (Risk of Loss—Absence of Breach) 714

M Civ JI 140.22 Contract Action—UCC: Lost or Damaged Goods (Risk of Loss—Seller's Breach) 715

M Civ JI 140.23 Contract Action—UCC: Lost or Damaged Goods (Risk of Loss—Buyer's Breach) 716

M Civ JI 140.31 Contract Action—UCC: Resale by Seller—Private Sale 717

M Civ JI 140.32 Contract Action—UCC: Resale by Seller—Public Sale..... 718

M Civ JI 140.41 Contract Action—UCC: Express Warranty—Definition..... 719

M Civ JI 140.42 Contract Action—UCC: Express Warranty—Burden of Proof 720

M Civ JI 140.43 Contract Action—UCC: Implied Warranty of Merchantability—Definition 721

M Civ JI 140.44 Contract Action—UCC: Implied Warrranty of Merchantability—Elimination or Modification..... 722

M Civ JI 140.45 Contract Action—UCC: Implied Warranty of Merchantability—Burden of Proof .. 724

M Civ JI 140.51 Contract Action—UCC: Warranty of Title (Ownership)..... 726

M Civ JI 140.52 Contract Action—UCC: Warranty of Title (Encumbrances)..... 727

M Civ JI 140.53 Contract Action—UCC: Warranty of Title (Ownership and Encumbrances—Burden of Proof) 728

Chapter 141: Contract Damages—UCC 730

Introduction..... 731

M Civ JI 141.01 Contract Damages—UCC: Seller's Breach by Delivery of Nonconforming Goods Which the Buyer Accepts—Buyer's Damages 732

M Civ JI 141.02 Contract Damages—UCC: Seller's Breach by Failure to Deliver/Repudiation/Delivery of Nonconforming Goods Rejected/Acceptance Rightfully Revoked—Buyer's Damages..... 734

M Civ JI 141.11 Contract Damages—UCC: Buyer's Breach by Nonpayment after Acceptance—Seller's Action for Price..... 736

M Civ JI 141.12 Contract Damages—UCC: Buyer's Breach by Nonpayment—Goods Identified to the Contract—No Resale— Seller's Action for Price..... 737

M Civ JI 141.13 Contract Damages—UCC: Buyer's Breach by Nonpayment—Lost or Damaged Goods—Seller's Action for Price 738

M Civ JI 141.14 Contract Damages—UCC: Buyer's Breach by Nonacceptance or Repudiation—Seller Resells— Seller's Damages 739

M Civ JI 141.15 Contract Damages—UCC: Buyer's Breach by Nonacceptance or Repudiation—Seller's Damages..... 740

Chapter 142: Contracts 742

M Civ JI 142.01 Introduction and Burden of Proof 743

M Civ JI 142.10 Offer—Defined..... 745

M Civ JI 142.11 Duration of Offer 746

M Civ JI 142.12 Revocation of Offer 747

M Civ JI 142.13 Acceptance..... 748

M Civ JI 142.14 Time of Acceptance 749
M Civ JI 142.15 Counteroffer 750
M Civ JI 142.16 Consideration 751
M Civ JI 142.17 Adequacy of Consideration 752
M Civ JI 142.18 Need Not Be in Writing 753
M Civ JI 142.19 Modification 754
M Civ JI 142.20 Breach of Contract/Substantial Performance 756
M Civ JI 142.21 Time of Performance 757
M Civ JI 142.22 Conditions Precedent 758
M Civ JI 142.30 Introduction to Damages 759
M Civ JI 142.31 Contract Damages: Benefit of Bargain 760
M Civ JI 142.32 Lost Profits 761
M Civ JI 142.33 Reliance Damages 762
M Civ JI 142.34 Consequential Damages 763
M Civ JI 142.35 Mitigation 764
M Civ JI 142.40 Duress 765
M Civ JI 142.41 Waiver 766
M Civ JI 142.42 Impracticability 767
M Civ JI 142.43 Frustration of Purpose 768
M Civ JI 142.50 Introduction 769
M Civ JI 142.51 Must Consider All Parts of Contract 770
M Civ JI 142.52 Effect of Incorporated Documents 771
M Civ JI 142.53 Words Given Ordinary Meaning 772
M Civ JI 142.54 Custom and Usage of Trade 773
M Civ JI 142.55 Conduct of Parties 774

Chapters 170–180: Probate 775

Introduction 775

Chapter 170: Will Contests 776

M Civ JI 170.01 Will Contests: Defining Legal Names of Parties and Counsel 778
M Civ JI 170.02 Will Contests: Will/Codicil—Definition 779
M Civ JI 170.03 Will Contests: Holographic Will—Definition 780
M Civ JI 170.04 Will Contests: Cautionary Instruction as to Decedent's Right to Leave Property by a Will 781

M Civ JI 170.05 Will Contests: Letter, Deed, Bill of Sale, Contract as a Will 782

M Civ JI 170.08 Will Contests: Will—Writings Intended as Wills 784

M Civ JI 170.11 Will Contests: Will Signed by Another for Decedent 786

M Civ JI 170.12 Will Contests: Decedent Signing Will by Mark 787

M Civ JI 170.13 Will Contests: Requirements for Witnessing Will 788

M Civ JI 170.15A Will Contests: Proving Execution of Self-Proved Wills 789

M Civ JI 170.15B Will Contests: Proving Execution of Will That Is Not Self-Proved 790

M Civ JI 170.16 Will Contests: Proving Execution of Will Where Witnesses Cannot Be Found [*Instruction Deleted*] 791

M Civ JI 170.17A Will Contests: Execution—Witness Not Remembering or Denying Contents of Witnessing Clause (Self-Proved Will) 792

M Civ JI 170.17B Will Contests: Execution—Witness Not Remembering or Denying Contents of Witnessing Clause (Will That Is Not Self-Proved) 793

M Civ JI 170.21 Will Contests: Lost, Destroyed or Otherwise Unavailable Will 794

M Civ JI 170.31 Will Contests: Revocation of Will by Physical Means 795

M Civ JI 170.32 Will Contests: Revocation—Presumption from Failure to Produce Original Will Retained by Decedent 797

M Civ JI 170.33 Will Contests: Revocation—Presumption from Failure to Produce Executed Duplicate Will Retained by Decedent 798

M Civ JI 170.34 Will Contests: Conditional Revocation of Will (Dependent Relative Revocation) ... 799

M Civ JI 170.41 Will Contests: Mental Capacity—Definition 800

M Civ JI 170.42 Will Contests: Mental Capacity—Will Made before or after Adjudication of Incompetency, after Commitment or While under Guardianship or Conservatorship 801

M Civ JI 170.43 Will Contests: Insane Delusion—Definition 802

M Civ JI 170.44 Will Contests: Undue Influence—Definition; Burden of Proof 803

M Civ JI 170.45 Will Contests: Existence of Presumption of Undue Influence—Burden of Proof [*Instruction Deleted*] 805

M Civ JI 170.46 Will Contests: Fraud in Procurement of Will 807

M Civ JI 170.51 Will Contests: Burden of Proof 808

Chapter 171: Mental Illness 811

M Civ JI 171.01 Mental Illness: Involuntary Treatment—Defining Legal Names of Parties and Counsel 812

M Civ JI 171.02 Mental Illness: Involuntary Treatment—Elements and Burden of Proof 813

Chapter 172: Guardians and Conservators 816

M Civ JI 172.01 Appointment of Guardian or Conservator or Termination of Guardianship or Conservatorship: Defining Legal Names of Parties and Counsel 817

M Civ JI 172.02 Appointment of Guardian of an Adult 818

M Civ JI 172.03 Termination of Guardianship of an Adult 819

M Civ JI 172.11 Appointment of Conservator of an Adult 820

M Civ JI 172.12 Termination of Conservatorship of an Adult 821

Chapter 173: Bank Accounts 822

M Civ JI 173.01 Determination of Title to Bank Accounts—Defining Legal Names of Parties and Counsel 823

M Civ JI 173.02 Determination of Title to Bank Account 824

Chapter 174: Felonious and Intentional Killing 826

M Civ JI 174.01 Felonious and Intentional Killing—Defining Legal Names of Parties and Counsel 827

M Civ JI 174.02 Felonious and Intentional Killing—Definition 829

M Civ JI 174.03 Felonious and Intentional Killing: Aiding and Abetting—Definition 831

M Civ JI 174.11 Felonious and Intentional Killing: Self-Defense—Definition 833

M Civ JI 174.12 Felonious and Intentional Killing: Defense of Others—Definition 835

M Civ JI 174.13 Felonious and Intentional Killing: Legal Insanity—Definition 836

M Civ JI 174.14 Felonious and Intentional Killing: Accident—Definition 837

Chapter 175: Pretermitted Heirs 838

M Civ JI 175.01 Pretermitted Heirs—Defining Legal Names of Parties and Counsel 839

M Civ JI 175.02 Omission of Child or Issue of Deceased Child in Will As a Result of Mistake or Accident 840

M Civ JI 175.11 Omission of Spouse in Will As a Result of Oversight or Mistake 841

M Civ JI 175.12 Omission of Spouse in Will Made Prior to Marriage Where There Are Transfers Made in Lieu of Will Provision 842

Chapter 176: Claims for Services Rendered 843

M Civ JI 176.01 Claim for Services Rendered—Defining Legal Names of Parties and Counsel 844

M Civ JI 176.02 Claim for Services Rendered 845

Chapter 178: Pretermitted Heirs (EPIC) 847

Introduction 848

M Civ JI 178.01 Pretermitted Heirs: Defining Legal Names of Parties and Counsel (EPIC) 850

M Civ JI 178.02 Pretermitted Child: Will Executed Prior to Birth or Adoption of Child Omitted from Will (EPIC) 851

M Civ JI 178.03 Pretermitted Child: Omission of Living Child from Will Because of Mistaken Belief Child Is Dead (EPIC) 854

M Civ JI 178.12 Pretermitted Spouse: Will Executed Prior to Marriage (EPIC) 856

Chapter 179: Trust Contests 859

Introduction 860

M Civ JI 179.01 Trust Contests: Defining Legal Names of Parties and Counsel 861

M Civ JI 179.02 Trust Contests: Definitions 862

M Civ JI 179.03 Trust Contests: Creation of a Trust 863

M Civ JI 179.04 Trust Contests: Sufficient Mental Capacity—Definition 864

M Civ JI 179.05 Trust Contests: Intention to Create a Trust 865

M Civ JI 179.06 Trust Contests: Trust Need Not Be in Writing 866

M Civ JI 179.07 Trust Contests: Cautionary Instruction as to Settlor's Right to Leave Property by a Trust 867

M Civ JI 179.10 Trust Contests: Undue Influence—Definition—Burden of Proof 868

M Civ JI 179.12 Trust Contests: Fraud in Procurement of Trust 870

M Civ JI 179.15 Trust Contests: Revocation or amendment of Trust 871

M Civ JI 179.20 Trust Contests: Burden of Proof 872

M Civ JI 179.25 Trust Contests: Existence of Presumption of Undue Influence—Burden of Proof [*Instruction Deleted*] 873

Chapter 180: Attorney Fees 875

M Civ JI 180.01 Attorney Fees—Defining Legal Names of Parties and Counsel 876

M Civ JI 180.02 Attorney Fees—Explanation of Statute 877

M Civ JI 180.03 Attorney Fees—Reasonable Value of Legal Services 878

Chapters 190–241: Forms of Verdicts, Volume 2 880

M Civ JI 190.01 Form of Verdict: Dram Shop—Sale to Minor 882

M Civ JI 190.02 Form of Verdict: Dram Shop—Sale to Visibly Intoxicated Person 888

M Civ JI 195.01 Form of Verdict: Paternity [*Form of Verdict Deleted*] 893

M Civ JI 196.01 Form of Verdict: Landlord-Tenant—Rent Action 894

M Civ JI 196.02 Form of Verdict: Landlord-Tenant--Termination Action 895

M Civ JI 197.01 Form of Verdict: Child Protection Proceeding [*Form of Verdict Deleted*] 896

M Civ JI 208.01 Form of Verdict: Libel 897

M Civ JI 220.01 Form of Verdict: Will Contests 900

M Civ JI 220.05 Form of Verdict: Will Contests—Lost, Destroyed or Otherwise Unavailable Will 902

M Civ JI 221.01 Form of Verdict: Mental Illness--Involuntary Treatment 903

M Civ JI 222.01 Form of Verdict: Appointment of Guardian of Adult 904

M Civ JI 222.02 Form of Verdict: Termination of Guardianship of Adult 905

M Civ JI 222.11 form of Verdict: Appointment of Conservator of Adult 906

M Civ JI 222.12 Form of Verdict: Termination of Conservatorship of Adult 907

M Civ JI 223.01 Form of Verdict: Determination of Title to Bank Accounts 908

M Civ JI 224.01 Form of Verdict: Felonious and Intentional Killing 909

M Civ JI 225.02 Form of Verdict: Omission of Child or Issue of Deceased Child in Will As a Result of Mistake or Accident 910

M Civ JI 225.11 Form of Verdict: Omission of Spouse in Will As a Result of Oversight or Mistake. 911

M Civ JI 225.12 Form of Verdict: Omission of Spouse in Will Made Prior to Marriage Where There Are Transfers Made in Lieu of Will Provision 912

M Civ JI 226.01 Form of Verdict: Claim for Services Rendered 913

M Civ JI 228.02 Form of Verdict: Pretermitted Child: Will Executed Prior to Birth or Adoption of Child Omitted from Will (EPIC) 915

M Civ JI 228.03 Form of Verdict: Pretermitted Child: Omission of Living Child from Will Because of Mistaken Belief Child is Dead (EPIC) 916

M Civ JI 228.12 Form of Verdict: Pretermitted Spouse: Will Executed Prior to Marriage (EPIC) 917

M Civ JI 230.01 Form of Verdict: Attorney Fees 918

M Civ JI 241.01 Form of Verdict: Contract Damages—UCC: Seller's Breach by Delivery of Nonconforming Goods Which the Buyer Accepts 919

M Civ JI 241.02 Form of Verdict: Contract Damages—UCC: Seller's Breach by Failure to Deliver/Repudiation/Delivery of Nonconforming Goods Rejected 921

M Civ JI 241.14 Form of Verdict: Contract Damages—UCC: Buyer's Breach by Nonacceptance or Repudiation—Seller Resells—Seller's Damages 923

M Civ JI 241.15 Form of Verdict: Contract Damages--UCC: Buyer's Breach by Nonacceptance or Repudiation--Seller's Damages 925

Rule 2.512 Instructions to the Jury

(A) Request for Instructions.

(1) At a time the court reasonably directs, the parties must file written requests that the court instruct the jury on the law as stated in the requests. In the absence of a direction from the court, a party may file a written request for jury instructions at or before the close of the evidence.

(2) In addition to requests for instructions submitted under subrule (A)(1), after the close of the evidence, each party shall submit in writing to the court a statement of the issues and may submit the party's theory of the case regarding each issue. The statement must be concise, be narrative in form, and set forth as issues only those disputed propositions of fact that are supported by the evidence. The theory may include those claims supported by the evidence or admitted.

(3) A copy of the requested instructions must be served on the adverse parties in accordance with MCR 2.107.

(4) The court shall inform the attorneys of its proposed action on the requests before their arguments to the jury.

(5) The court need not give the statements of issues or theories of the case in the form submitted if the court presents to the jury the material substance of the issues and theories of each party.

(B) Instructing the Jury.

(1) At any time during the trial, the court may, with or without request, instruct the jury on a point of law if the instruction will materially aid the jury in understanding the proceedings and arriving at a just verdict.

(2) Before or after arguments or at both times, as the court elects, the court shall instruct the jury on the applicable law, the issues presented by the case, and, if a party requests as provided in subrule (A)(2), that party's theory of the case.

(C) Objections. A party may assign as error the giving of or the failure to give an instruction only if the party objects on the record before the jury retires to consider the verdict (or, in the case of instructions given after deliberations have begun, before the jury resumes deliberations), stating specifically the matter to which the party objects and the grounds for the objection. Opportunity must be given to make the objection out of the hearing of the jury.

(D) Model Civil Jury Instructions.

(1) The Committee on Model Civil Jury Instructions appointed by the Supreme Court has the authority to adopt model civil jury instructions (M Civ JI) and to amend or repeal those instructions approved by the predecessor committee. Before adopting, amending, or repealing an instruction, the committee shall publish notice of the committee's intent, together with the text of the instruction to be adopted, or the amendment to be made, or a reference to the instruction to be repealed, in the manner provided in MCR 1.201. The notice shall specify the time and manner for commenting on the proposal.

The committee shall thereafter publish notice of its final action on the proposed change, including, if appropriate, the effective date of the adoption, amendment, or repeal. A model civil jury instruction does not have the force and effect of a court rule.

(2) Pertinent portions of the instructions approved by the Committee on Model Civil Jury Instructions or its predecessor committee must be given in each action in which jury instructions are given if

(a) they are applicable,

(b) they accurately state the applicable law, and

(c) they are requested by a party.

(3) Whenever the committee recommends that no instruction be given on a particular matter, the court shall not give an instruction unless it specifically finds for reasons stated on the record that

(a) the instruction is necessary to state the applicable law accurately, and

(b) the matter is not adequately covered by other pertinent model civil jury instructions.

(4) This subrule does not limit the power of the court to give additional instructions on applicable law not covered by the model instructions. Additional instructions, when given, must be patterned as nearly as practicable after the style of the model instructions and must be concise, understandable, conversational, unslanted, and nonargumentative."

Chapter 1: Preliminary Instructions Before Jury Selection Instructions

M Civ JI 1.01 Introductory Comments 30
M Civ JI 1.02 Defining Legal Names of Parties and Counsel 31
M Civ JI 1.03 Explanation of Jury Selection and Voir Dire 32
M Civ JI 1.04 Juror Oath Before Voir Dire 33
M Civ JI 1.05 Prospective Jurors—Health and Other Problems 34
M Civ JI 1.10 Juror Oath Following Selection 35

M Civ JI 1.01 Introductory Comments

Ladies and gentlemen, I am Judge _____, and it is my pleasure to welcome you to the _____ Court.

You have been called here today for possible selection as a juror in a civil case. The remarks which I am about to make are intended as an outline of the trial of this case so that you may be generally aware of what occurs during a trial and some of the legal principles that control the conduct of civil cases.

I know that jury duty may be a new experience for some of you. Jury duty is one of the most serious duties that members of a free society are asked to perform. Our system of self-government could not exist without it.

The jury is an important part of this court. The right to a jury trial is an ancient tradition and part of our heritage. The parties have a right to a jury that is selected fairly, that comes to the case without bias, and that will attempt to reach a verdict based on the evidence presented. Therefore, jurors must be as free as humanly possible from bias, prejudice, or sympathy for either side. Each side in a trial is entitled to jurors who keep open minds until the time comes to decide the case.

History

Amended January 1993, October 1993, September 2007.

M Civ JI 1.02 Defining Legal Names of Parties and Counsel

This is a civil case involving [*describe case briefly]*, which I will explain more fully later.

The person bringing this case is called the plaintiff. The plaintiff is [*state plaintiff's name and indicate where seated]*. The lawyer for the plaintiff is [*state lawyer's name and indicate where seated]*. The person defending the case brought by the plaintiff is called the defendant. The defendant is [*state defendant's name and indicate where seated]*. The lawyer for the defendant is [*state lawyer's name and indicate where seated]*. [*Describe the function of other persons seated at the counsel table*].

History

Amended January 1993, October 1993, September 2007.

M Civ JI 1.03 Explanation of Jury Selection and Voir Dire

A trial begins with jury selection. The purpose of this process is to obtain information about you that will help us choose a fair and impartial jury to hear this case.

During jury selection [the lawyers and] I will ask you questions. The questions are meant to find out if you know anything about the case. Also, we need to find out if you have any opinions or personal experiences that might influence you for or against a party or witness. One of these could cause you to be excused, even though you may be otherwise qualified to be a juror.

The questions may probe deeply into your attitudes, beliefs, and experiences. The law requires that we get this information so that an impartial jury can be chosen. They are not meant to be an unreasonable prying into your private life.

If you do not hear or understand a question, you should say so. If you do understand it, you should answer it truthfully and completely. Please do not hesitate to speak freely about anything you believe we should know.

During jury selection you may be excused from serving on the jury in one of two ways. First, I may excuse you for cause; that is, I may decide that there is a valid reason why you cannot or should not serve in this case. The second way to be excused is by one of the lawyers. The law gives the lawyers for each side the right to excuse a limited number of jurors without giving any reason for doing so. If you are excused, don't feel bad or take it personally.

During the course of the jury selection process, if there is any matter you wish to discuss in private, please raise your hand or write a note to the bailiff.

History

M Civ JI 1.03 was added September 1980. Amended October 1993, March 1996, September 2007.

M Civ JI 1.04 Juror Oath Before Voir Dire

I will now ask you to swear or affirm to answer truthfully, fully, and honestly all the questions that you will be asked about your qualifications to serve as a juror in this case. Please stand and raise your right hand.

"Do you solemnly swear or affirm that you will truthfully and completely answer all questions about your qualifications to serve as jurors in this case?"

History

M Civ JI 1.04 was added October 1993. Amended September 2007.

M Civ JI 1.05 Prospective Jurors—Health and Other Problems

(a) The witnesses who may be called in this case are: [read list of witnesses without designation of party who will call them]. Does anyone know the [defendant / defendants], the [plaintiff / plaintiffs], or any of the lawyers or witnesses?

(b) We think this trial will last for [number of days / number of weeks]. If you believe that the length of the trial will be a real hardship for you, please let me know now.

(c) Some of you may have health problems that would prevent you from serving on a jury. Does anyone have a physical, mental, or other problem that may prevent you from serving on the jury? For example, does anyone have a medical problem that makes you unable to sit for two or three hours at a time? Does anyone have a sight or hearing problem?

(d) Under guidelines established by the Michigan Supreme Court, I have approved a media request for cameras to be used during trial. I'll discuss this more later, but one of the rules is that you cannot be filmed or photographed. However, if you believe that the presence of the cameras will interfere with your ability to concentrate and render a fair and impartial verdict, raise your hand.

Note on Use

Subsection (d) would only be read if the trial judge has allowed cameras in the courtroom as permitted by Michigan Supreme Court Administrative Order 1989-1. The subsection contemplates follow-up questions if a juror indicates his or her ability to concentrate or render a fair verdict would be impaired.

History

M Civ JI 1.05 was added October 1993. Amended March 1996, September 2007, October 2013.

M Civ JI 1.10 Juror Oath Following Selection

I will now ask you to swear or affirm to perform your duty to try the case justly and to reach a true verdict. Please stand and raise your right hand.

"Do you solemnly swear or affirm that, in this case now before the court, you will justly decide the questions submitted to you, that, unless you are discharged by the court from further deliberation, you will render a true verdict, and that you will render your verdict only on the evidence introduced and in accordance with the instructions of the court, so help you God?"

History

M Civ JI 1.10 was added October 1993. Amended September 2007.

Chapter 2: Preliminary Instructions After Jury Is Sworn Instructions

M Civ JI 2.01 Responsibilities of Judge and Jury 37
M Civ JI 2.02 Description of Trial Procedure 38
M Civ JI 2.02A Cameras in the Courtroom 40
M Civ JI 2.03 Jury Deliberation; Jurors as Triers of Fact 41
M Civ JI 2.04 Jury Must Only Consider Evidence; What Evidence Is / Prohibited Actions by Jurors 42
M Civ JI 2.05 Jurors to Keep Open Minds [*Instruction Deleted*] 45
M Civ JI 2.06 Prohibited Actions by Jurors 46
M Civ JI 2.07 Jurors Not to Consider Information Received outside Presence of Court [*Instruction Deleted*] 48
M Civ JI 2.08 Objections; Out-of-Presence Hearings 49
M Civ JI 2.09 Court to Instruct on Law 50
M Civ JI 2.10 Inability to Hear Witness or See Exhibit 51
M Civ JI 2.11 Questions by Jurors Allowed 52
M Civ JI 2.12 Caution about Publicity in Cases of Public Interest [*Instruction Deleted*] 53
M Civ JI 2.13 Note Taking by Jurors Allowed / Not Allowed 54
M Civ JI 2.14 Reference Documents 55

M Civ JI 2.01 Responsibilities of Judge and Jury

Now I am going to briefly explain to you my responsibilities as judge and your responsibility as jurors.

My responsibilities as the judge in this trial are to make sure that the trial is run fairly and efficiently, to make decisions about evidence, and to instruct you about the law that applies to this case. You must take the law as I give it to you. Nothing I say is meant to reflect my own opinions about the facts of the case.

Your responsibility as jurors is to decide what the facts of the case are. This is your job, and no one else's. You must think about all the evidence and all the testimony and then decide what each piece of evidence means and how important you think it is.

History

Amended January 1993, September 2007.

M Civ JI 2.02 Description of Trial Procedure

Now I will briefly explain the general order of procedure in the trial from this point forward. First, the lawyer for the plaintiff makes an opening statement in which [he / she] outlines [his / her] theory of the case. The lawyer for the defendant can then make an opening statement, or [he / she] can wait until later. These opening statements are not evidence. They are only intended to assist you in understanding the viewpoints and claims of the parties.

After the opening statements, we will begin the taking of evidence. Plaintiff's lawyer will present evidence first. [He / she] may call witnesses to testify and may also offer exhibits such as documents or physical objects. Defendant's lawyer has a right to cross-examine the witnesses called by the plaintiff. Following the plaintiff's presentation, the defendant has the opportunity to present evidence. Plaintiff's lawyer has a right to cross-examine the witnesses called by the defendant. [During the taking of evidence the lawyers may be allowed to present interim commentary regarding evidence that has been submitted. This commentary is not evidence. Like the opening statements, it is only intended to assist you in understanding the viewpoints and claims of the parties.]

After all the evidence has been presented, the lawyers for each side will make their closing arguments to you in support of their cases. You are again reminded that the statements of the lawyers are not evidence but are only intended to help you in understanding the evidence and the way each side sees the case. You must base your decision only on the evidence.

In this case, the Plaintiff has brought [a claim / claims] involving [state nature of claims]. [Insert instructions regarding the elements of all civil claims (including definitions of legal terms), legal presumptions, and burdens of proof.]

Because no one can predict the course of a trial, these instructions may change at the end of the trial; if so, you should follow the instructions given at the conclusion of the trial. You will be given a written copy of the instructions I have just read for your use during the trial.

Note on Use

The words "plaintiff" and "defendant" may be replaced by "petitioner" and "respondent" in cases in which the latter terms are used to describe the parties.

Because the elements of civil claims may include legal terms, e.g. proximate cause, ordinary care, invitee, licensee, and allowable expenses, definitions of those legal terms should also be given.

The bracketed language should not be given if the court has determined before trial that interim commentary will not be permitted. If interim commentary is permitted, M Civ JI 3.16 should be given immediately before the commentary.

Comment

The 2011 amendments reflect the amendments to MCR 2.513(A) and (D) ordered by the Michigan Supreme Court on June 29, 2011, which became effective September 1, 2011. These amendments require the court to include in its preliminary instructions the elements of all civil claims, as well as legal presumptions and burdens of proof. Additionally, the court is given discretion to permit the parties to present interim commentary.

History

Amended January 1993, September 2007, October 2011.

M Civ JI 2.02A Cameras in the Courtroom

In order to increase public knowledge of court proceedings and to make the courts as open as possible, the Michigan Supreme Court allows cameras in courtrooms as long as certain guidelines are followed. One of those guidelines is that no one is allowed to film or photograph you, so you will not end up on television or in the newspaper.

The presence of cameras does not make this case more important than any other. All trials are equally important to the parties. You should not draw any inferences or conclusions from the fact that cameras are present at this particular trial. Also, since the news media is generally able to decide what portions of the trial they wish to attend, their attendance may be periodic from day to day. You are not to concern yourself with why certain witnesses are filmed and/or photographed and others are not. Whether a particular witness is filmed and/or photographed is not any indication as to the value of, or weight to be given to, that witness's testimony.

Your complete attention must be focused on the trial. You should ignore the presence of the cameras. If you find at any time that you are unable to concentrate because of the cameras, please notify me immediately through the bailiff so that I can take any necessary corrective action.

Note on Use

This instruction would only be given if the trial judge has allowed cameras in the courtroom as permitted by Michigan Supreme Court Administrative Order 1989-1. M Civ JI 60.01A would also be given before the jury deliberates.

History

M Civ JI 2.02A was added October 2013.

M Civ JI 2.03 Jury Deliberation; Jurors as Triers of Fact

After all of the evidence has been presented and the lawyers have given their arguments, I will give you detailed instructions about the rules of law that apply to this case. Then you will go to the jury room to decide on your verdict.

The responsibility of the jury is to determine the facts. You are the judges of the facts. You determine the weight, effect, and value of the evidence, as well as the credibility of the witnesses. You must consider and weigh the testimony of all witnesses who appear before you, and you determine whether to believe any witnesses and the extent to which any witness should be believed. It is your responsibility to consider any conflicts in testimony which may arise during the course of the trial. Your decision as to any fact in the case is final. On the other hand, it is your duty to accept the law as I instruct you.

History

Amended January 1993, September 2007.

M Civ JI 2.04 Jury Must Only Consider Evidence; What Evidence Is / Prohibited Actions by Jurors

(1) Your determination of the facts in this case must be based only upon the evidence admitted during the trial. Evidence consists of the sworn testimony of the witnesses. It also includes exhibits, which are documents or other things introduced into evidence.

*(It may also include some things which I specifically tell you to consider as evidence.)

(2) There are some things presented in the trial that are not evidence, and I will now explain what is not evidence:

(a) The lawyers' statements, commentaries, and arguments are not evidence. They are only meant to help you understand the evidence and each side's legal theories. You should only accept things the lawyers say that are supported by the evidence or by your own common sense and general knowledge. However, an admission of a fact by a lawyer is binding on [his / her] client.

(b) Questions by the lawyers, you or me to the witnesses are not evidence. You should consider these questions only as they give meaning to the witnesses' answers.

(c) My comments, rulings, [summary of the evidence,] and instructions are also not evidence. It is my duty to see that the trial is conducted according to the law, and to tell you the law that applies to this case. However, when I make a comment or give an instruction, I am not trying to influence your vote or express a personal opinion about the case. If you believe that I have an opinion about how you should decide this case, you must pay no attention to that opinion. You are the only judges of the facts, and you should decide this case from the evidence.

(3) In addition, you are not to consider anything about the case from outside of the courtroom as it is not evidence admitted during the trial. Under the law, the evidence you consider to decide the case must meet certain standards. For example, witnesses must swear to tell the truth, and the lawyers must be able to cross-examine them. Because information obtained outside of the courtroom does not have to meet these standards, it could give you incorrect or misleading information that might unfairly favor one side, or you may begin to improperly form an opinion on information that has not been admitted. This would compromise the parties' right to have a verdict rendered only by the jurors and based only on the evidence you hear and see in the courtroom. So, to be fair to both sides, you must follow these instructions. I will now describe some of the things you may not consider from outside of the courtroom:

(a) Newspaper, television, radio and other news reports, emails, blogs and social media posts and commentary about this case are not evidence. Until I discharge

you as jurors, do not search for, read, listen to, or watch any such information about this case from any source, in any form whatsoever.

(b) Opinions of people outside of the trial are not evidence. You are not to discuss or share information, or answer questions, about this case at all in any manner with anyone—this includes family, friends or even strangers—until you have been discharged as a juror. Don't allow anyone to say anything to you or say anything about this case in your presence. If anyone does, advise them that you are on the jury hearing the case, ask them to stop, and let me know immediately.

(c) Research, investigations and experiments not admitted in the courtroom are not evidence. You must not do any investigations on your own or conduct any research or experiments of any kind. You may not research or investigate through the Internet or otherwise any evidence, testimony, or information related to this case, including about a party, a witness, an attorney, a court officer, or any topics raised in the case.

(d) Except as otherwise admitted in trial, the scene is not evidence. You must not visit the scene of the occurrence that is the subject of this trial. If it should become necessary that you view or visit the scene, you will be taken as a group. You must not consider as evidence any personal knowledge you have of the scene.

(4) To avoid even the appearance of unfairness or improper conduct on your part, you must follow the following rules of conduct:

(a) While you are in the courtroom and while you are deliberating, you are prohibited altogether from using a computer, cellular telephone or any other electronic device capable of making communications. You may use these devices during recesses so long as your use does not otherwise violate my instructions.

(b) Until I have discharged you as a juror, you must not talk to any party, lawyer, or witness even if your conversation has nothing to do with this case. This is to avoid even the appearance of impropriety.

(5) If you discover that any juror has violated any of my instructions about prohibited conduct, you must report it to me.

(6) After you are discharged as a juror, you may talk to anyone you wish about the case. Until that time, you must control your natural desire to discuss the case outside of what I've said is permitted.

Note on Use

*Use the sentence in parentheses if it is applicable.

If a fact is admitted by a lawyer, this shall be explained to the jury as binding on his or her client to the extent of the admission, regardless of evidence to the contrary.

If a specific admission, such as negligence or contributory negligence, is made, then the court should explain that particular admission to the jury when giving the instructions on that subject.

Comment

Occasionally lawyers argue on matters that are within their personal knowledge but are not of record, or in the heat of forensic attack will make statements not based on the evidence. Ordinarily this is objected to and a request is made to instruct the jury to disregard the statement, but it is impossible or impractical to object to every such statement. It is therefore proper to inform the jury that arguments and statements of counsel not based on the evidence should be disregarded. *Dalm v Bryant Paper Co*, 157 Mich 550; 122 NW 257 (1909).

For admissions on the pleadings, see MCR 2.111(E); for admissions by a lawyer in the course of trial, see *Ortega v Lenderink*, 382 Mich 218; 169 NW2d 470 (1969).

Subsection (2)(c) is so worded to inform the jury that comments the judge might make on the evidence are not binding on them. *Cook v Vineyard*, 291 Mich 375; 289 NW 181 (1939).

Since the remarks and rulings of the trial judge may erroneously be interpreted by the jury as comments on the evidence, this instruction is proper. *Mawich v Elsey*, 47 Mich 10; 10 NW 57 (1881).

The bracketed language reflects the amendment to MCR 2.513(M) effective September 1, 2011. This amendment permits the court to sum up the evidence under certain conditions. Any summary of the evidence by the court should be immediately preceded by M Civ JI 3.17.

History

Amended January 1993, September 2007, January 2014.

M Civ JI 2.05 Jurors to Keep Open Minds [*Instruction Deleted*]

Comment

This instruction was deleted by the Committee in October 2011. The instruction was deleted because its provisions were consolidated with M Civ JI 2.06 in response to the amendment of MCR 2.513. The new consolidated instruction has been designated M Civ JI 2.06.

History

Amended February 1991, January 1993, September 2007. Deleted October 2011.

M Civ JI 2.06 Prohibited Actions by Jurors

(1) Because the law requires that cases be decided only on the evidence presented during the trial and only by the deliberating jurors, you must keep an open mind and not make a decision about anything in the case until after you have (a) heard all of the evidence, (b) heard the closing arguments of counsel, (c) received all of my instructions on the law and the verdict form, and (d) any alternate jurors have been excused. At that time, you will be sent to the jury room to decide the case. Sympathy must not influence your decision. Nor should your decision be influenced by prejudice regarding race, sex, religion, national origin, age, handicap, or any other factor irrelevant to the rights of the parties.

(2) [Alternative A] (Before you are sent to the jury room to decide the case, you may discuss the case among yourselves during recesses in the trial, but there are strict rules that must be followed.

First, you may only discuss the case when (a) all of you are together, (b) you are all in the jury room, and (c) no one else is present in the jury room. You must not discuss the case under any other circumstances. The reason you may not discuss the case with other jurors while some of you are not present is that all of you are entitled to participate in all of the discussions about the case.

Second, as I stated before, you must keep an open mind until I send you to the jury room to decide the case. Your discussions before then are only tentative.

Third, you do not have to discuss the case during the trial. But if you choose to do so, you must follow the rules I have given you.)

[Alternative B] (Before you are sent to the jury room to decide the case, you are not to discuss the case even with the other members of the jury. This is to ensure that all of you are able to participate in all of the discussions about the case, and so that you do not begin to express opinions about the case until it has been submitted to you for deliberation.)

Note on Use

The court will choose between Alternative A or B in paragraph 2 based on the court's decision whether to permit the jurors to discuss the evidence among themselves during trial recesses.

Comment

M Civ JI 2.05 and 2.06 were deleted in October 2011 and combined into a new instruction that was designated M Civ JI 2.06. This action reflected the September 2011 amendment to MCR 2.513(K), which granted the court discretion to permit juror discussion of the evidence during trial recesses. In January 2014, a large portion of M Civ JI 2.06 was transferred to M Civ JI 2.04.

History

Adopted October 2011. Amended January 2014.

M Civ JI 2.07 Jurors Not to Consider Information Received outside Presence of Court [*Instruction Deleted*]

History

This instruction was deleted by the Committee September 1, 2009. The instruction was deleted because its provisions were combined with MCJI 2.06 in response to the amendment of MCR 2.511.

M Civ JI 2.08 Objections; Out-of-Presence Hearings

A trial follows established rules of procedure and evidence. During the trial the lawyers might make objections and motions. I will rule on these objections and motions according to the law. Don't conclude from any of my rulings that I have an opinion on the case or that I favor one side or the other. If I sustain an objection to a question and do not permit the witness to answer, don't guess what the answer might have been or draw any inference from the question itself.

Sometimes the lawyers and I are required to consider objections and motions outside your hearing. We may take care of these matters at the bench or in my chambers, or I may excuse you so that we can take care of them in the courtroom. It is impossible to predict when such a conference may be required or how long it will last. I will conduct these conferences so as to use as little of your time as possible. I may also have to take care of other matters which have nothing to do with this case. Do not concern yourselves with any of these matters which must be decided out of your presence or hearing.

History

Amended January 1993, September 2007.

M Civ JI 2.09 Court to Instruct on Law

I might give you more instructions during the course of the trial, and at the end of the trial I will give you detailed instructions about the law you are to apply to the case.

History

M Civ JI 2.09 was added September 1980. Amended September 2007.

M Civ JI 2.10 Inability to Hear Witness or See Exhibit

Please let me know immediately if you cannot hear a witness or see what is being demonstrated.

Note on Use

Following this instruction, the Court may explain to the jury the anticipated schedule of recesses and adjournments as well as any expected interruptions or distractions, the availability of restaurants, restrooms, etc.

History

M Civ JI 2.10 was added September 1980. Amended October 1993.

M Civ JI 2.11 Questions by Jurors Allowed

During the testimony of a witness, you might think of an important question that you believe will help you better understand the facts in this case. Please wait to ask the question until after the witness has finished testifying and both sides have finished their questioning. If your question is still unanswered, write the question down, raise your hand, and pass the question to the bailiff. The bailiff will give it to me. Do not ask the witness the question yourself, show the question to the other jurors, or announce what the question is.

There are rules of evidence that a trial must follow. If your question is allowed under those rules, I will ask the witness your question. If your question is not allowed, I will either rephrase it or I will not ask it at all.

Note on Use

If questions from jurors are allowed, this instruction may be used. The questioning of, and the method of such questioning of, witnesses by jurors is within the discretion of the trial judge. The court does not have to allow such questioning, but must recognize that it has discretion to do so. *People v Heard*, 388 Mich 182 (1972).

MCR 2.513(I), as amended by the Michigan Supreme Court effective September 1, 2011, requires, among other things, the court to employ a procedure that ensures that the parties have an opportunity outside the hearing of the jury to object to the questions.

Comment

MCR 2.513(I).

History

M Civ JI 2.11 was added October 1993. Amended October 1994, September 2007, October 2011.

M Civ JI 2.12 Caution about Publicity in Cases of Public Interest [*Instruction Deleted*]

History

This instruction was deleted by the Committee September 1, 2009. The instruction was deleted because its provisions were combined with MCJI 2.06 in response to the amendment of MCR 2.511.

M Civ JI 2.13 Note Taking by Jurors Allowed / Not Allowed

(a) *(You may take notes during the trial if you wish, but of course you don't have to. If you do take notes, you should be careful that it does not distract you from paying attention to all the evidence. When you go to the jury room to decide your verdict, you may use your notes to help you remember what happened in the courtroom. If you take notes, do not let anyone see them. After you have begun your deliberations, it is then permissible to allow other jurors to see your notes. [You must turn your notes over to the bailiff during recesses.] The notes will be destroyed at the end of the trial.)

(b) *(I do not believe that it is helpful for you to take notes because you might not be able to give your full attention to the evidence. So please do not take any notes while you are in the courtroom.)

Note on Use

*The court may use paragraph (a) or paragraph (b), depending on whether the jurors are allowed to take notes.

If paragraph (a) is given, the bracketed sentence in that paragraph may be read if the court wants to assure that notes are not seen by anyone except the jurors.

Paragraph (b) should be given only when a juror requests to take notes and the court decides not to allow note taking.

Comment

The 2011 amendment reflects the amendment to MCR 2.513(H) ordered by the Michigan Supreme Court on June 29, 2011, which became effective September 1, 2011. This amendment requires the court to ensure that all juror notes are collected and destroyed at the conclusion of trial. The amended instruction informs the jurors of that fact.

History

M Civ JI 2.13 was added October 1993. Amended December 1994, October 2011.

M Civ JI 2.14 Reference Documents

You will now be given [a reference document / reference documents / a notebook] including [*describe contents, including list of witnesses, relevant statutory provisions, documents*]. [The parties have stipulated that the contents of the (document / documents / notebook) are admitted as exhibits.] [In the event (one / one or more of) the (document / documents / contents of the notebook) (is / are) not admitted, you must disregard (it / them) at the end of the trial.] You must turn your [reference document / reference documents / notebook] over to the bailiff during recesses. The [reference document / reference documents / notebook] will be destroyed at the end of the trial.

Note on Use

Jurors may be told that they can write in their notebook. Because jurors may have written in their notebook, any additions to the notebook made during trial should be made by court personnel or the jurors in order to prevent the parties from observing any writings made by the jurors.

Comment

The 2011 adoption of this instruction reflects the amendment to MCR 2.513(E) ordered by the Michigan Supreme Court on June 29, 2011, which became effective September 1, 2011. This amendment gives the court the discretion to authorize or require counsel to provide the jurors with a reference document or notebook. Informing the jurors that the reference document/notebook will be destroyed is consistent with MCR 2.513(H), which provides that the court is to ensure that all juror notes are collected and destroyed at the conclusion of trial.

History

M Civ JI 2.14 was added October 2011.

Chapter 3: Cautionary Instructions

M Civ JI 3.01 Faithful Performance of Duties; Jury to Follow Instructions 57
M Civ JI 3.02 Facts to Be Determined from Evidence 58
M Civ JI 3.03 Admission of Evidence 59
M Civ JI 3.04 Attorneys' Statements Not Evidence; Admission by Attorney [*Instruction Deleted*] ... 60
M Civ JI 3.05 Corporations Entitled to Unprejudiced Treatment 61
M Civ JI 3.06 Whether Party Is Insured Is Irrelevant 62
M Civ JI 3.07 Evidence Introduced for a Limited Purpose 63
M Civ JI 3.08 Judge's Opinion as to Facts Is to Be Disregarded [*Instruction Deleted*] 64
M Civ JI 3.09 Jury to Consider All the Evidence 65
M Civ JI 3.10 Circumstantial Evidence 66
M Civ JI 3.11 Jurors May Take into Account Ordinary Experience and Observations 67
M Civ JI 3.12 Jury View of Premises / Scene / Object 68
M Civ JI 3.13 Fact Judicially Noticed 69
M Civ JI 3.15 Prior Inconsistent Statement of Witness 70
M Civ JI 3.16 Interim Commentary by Attorneys 72
M Civ JI 3.17 Summary of Evidence by Judge 73

M Civ JI 3.01 Faithful Performance of Duties; Jury to Follow Instructions

Members of the jury, the evidence and argument in this case have been completed and I will now instruct you on the law. That is, I will explain the law that applies to this case.

Faithful performance by you of your duties is vital to the administration of justice.

The law you are to apply in this case is contained in these instructions, and it is your duty to follow them. In other words, you must take the law as I give it to you. You must consider them as a whole and not pick out one or some instructions and disregard others.

Following my instructions you will go to the jury room and deliberate and decide on your verdict.

Comment

This instruction is designed to prevent jurors from capriciously selecting one of several statements of law and using it in their deliberations out of context with the whole charge. *People v Gardner*, 143 Mich 104 (1906); *Kempsey v McGinniss*, 21 Mich 123 (1870).

History

M Civ JI 3.01 was SJI 1.01(1), (2). Amended January 1982, September 2007.

M Civ JI 3.02 Facts to Be Determined from Evidence

It is your duty to determine the facts from evidence received in open court. You are to apply the law to the facts and in this way decide the case. Sympathy must not influence your decision. Nor should your decision be influenced by prejudice regarding race, sex, religion, national origin, age, handicap, or any other factor irrelevant to the rights of the parties.

Comment

The subject matter of this instruction is often covered in greater detail by a number of separate instructions outlining the duties of the jury and admonishing them as to what should not enter into their deliberations. To inform the jury that they are to find the facts from the evidence, and to then apply the law to those facts, is the rule set forth in the Michigan cases. *Souvais v Leavitt*, 50 Mich 108; 15 NW 37 (1883); *Wisner v Davenport*, 5 Mich 501 (1858); *Erickson v Sovars*, 356 Mich 64; 45 NW2d 844 (1959).

The prohibition against sympathy or prejudice is equally applicable to both parties. Moreover, it is sufficient to caution the jury once against allowing sympathy and prejudice to enter into their consideration of the case. *Doyle v Dobson*, 74 Mich 562; 42 NW 137 (1989).

History

M Civ JI 3.02 was SJI 1.01(3). Amended February 1991.

M Civ JI 3.03 Admission of Evidence

The evidence you are to consider consists of testimony of witnesses *(and exhibits offered and received) **(and your view of the [premises / scene / object]). The admission of evidence in court is governed by rules of law. From time to time it has been my duty as judge to rule on the admissibility of evidence. You must not concern yourselves with the reasons for these rulings, and you must not consider *(any exhibit to which an objection was sustained or) any testimony *(or exhibit) which was ordered stricken.

Note on Use

*Omit the references to exhibits if there are no exhibits.

**The phrase in parentheses should be read to the jury if the court has permitted a jury view and has determined that the view constitutes evidence. Appropriate designation of the kind of view may be selected instead of the bracketed words. If the court determines that the view is not evidence, this phrase in parentheses should not be read, and in lieu of it M Civ JI 3.12 should be given.

Michigan cases are in conflict on whether a jury view constitutes evidence. Generally the jury can consider information obtained by them from the view only to assist them in understanding evidence presented in open court, *Valenti v Mayer*, 301 Mich 551; 4 NW2d 5 (1942); but in some cases, the view itself may be evidence. *Sunday v Wolverine Service Stations*, 265 Mich 19; 251 NW 402 (1933).

Comment

Although some rulings on evidence are made out of the jury's hearing, the great bulk of such rulings are made in the presence of the jury, who hear not only the reasons for objections but often the reasons for rulings as well. Whether offered evidence is admitted or excluded, the jury may be influenced by what it hears, and, consequently, it is proper to tell them of the Court's duty in these matters and admonish them to ignore stricken or excluded evidence and the reasons for the rulings.

History

M Civ JI 3.03 was SJI 1.01(4). Amended January 1992.

M Civ JI 3.04 Attorneys' Statements Not Evidence; Admission by Attorney [*Instruction Deleted*]

Comment

This instruction was deleted by the Committee in January 2014. The instruction was deleted because its provisions were consolidated with M Civ JI 2.04 in order to streamline the instructions and make them more understandable and logical for the jurors.

History

M Civ JI 3.04 was SJI 1.01(5). Amended September 2007, October 2011. Deleted January 2014.

M Civ JI 3.05 Corporations Entitled to Unprejudiced Treatment

The corporation [plaintiff / defendant] in this case is entitled to the same fair and unprejudiced treatment as an individual would be under like circumstances, and it is your duty to decide the case with the same impartiality you would use in deciding a case between individuals.

Note on Use

This instruction should be given only in those cases where there are both corporate and individual parties.

Comment

The subject matter of this instruction is an exception to the general rule prohibiting the singling out of evidence or a particular party or witness. In view of the possibility that some jurors might have various attitudes prejudicial to corporations, a jury should be informed that a corporation is to be treated no differently from an individual. *Cornell v Manistee & N R Co*, 117 Mich 238; 75 NW 472 (1898).

History

M Civ JI 3.05 was SJI 1.01(6).

M Civ JI 3.06 Whether Party Is Insured Is Irrelevant

Whether a party is insured has no bearing whatever on any issue that you must decide. Don't even discuss or speculate about insurance.

Note on Use

This instruction is to be used only where the subject of liability insurance has been brought out during the trial and has no bearing on any of the issues. It has no application, for example, in an action on an insurance policy.

Comment

Rule 411 of the Michigan Rules of Evidence provides that "[e]vidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully." See also MCL 500.3030. MRE 411 further provides that evidence of insurance need not be excluded if offered "for another purpose, such as proof of agency, ownership or control, if controverted, or bias or prejudice of a witness." See also *Gegan v Kemp*, 302 Mich 218 (1942) (insurance adjuster's statements used for impeachment).

Where insurance coverage of a party has been improperly disclosed, an instruction that it has no bearing on the case is proper. *Ehlers v Barbeau*, 291 Mich 528 (1939); see also *Cassidy v McGovern*, 86 Mich App 321 (1978) (tort action under Michigan no-fault act).

History

M Civ JI 3.06 was SJI 1.01(7). Amended September 2007.

M Civ JI 3.07 Evidence Introduced for a Limited Purpose

Whenever evidence was received for a limited purpose or limited to [one party / certain parties], you must not consider it for any other purpose or as to any other [party / parties].

Note on Use

This instruction should be used only when evidence has been limited to a specific purpose or to specific parties. When used, the particular evidentiary limitation as to purpose or party shall be explained, either here or under another more appropriate instruction. (An example of such use would be where evidence was introduced on negligence of one plaintiff but it was not applicable to another of the parties plaintiff. In the section on negligence, the Court should specifically point out that the particular evidence that was admitted as to party A is not binding on party B.)

Comment

This instruction should be used when evidence has been restricted to a given purpose, or admitted against one or more but not all of the parties. An example of the first limitation occurs when prior inconsistent statements are admitted solely for impeachment purposes and not as substantive evidence. See MRE 801. Similarly, evidence may be admissible against one party while inadmissible as to another.

Rule 105 of the Michigan Rules of Evidence is consistent with this instruction. It requires that on request the Court instruct the jury as to the restriction on the evidence.

History

M Civ JI 3.07 was SJI 1.01(8).

M Civ JI 3.08 Judge's Opinion as to Facts Is to Be Disregarded [*Instruction Deleted*]

Comment

This instruction was deleted by the Committee in January 2014. The instruction was deleted because its provisions were consolidated with M Civ JI 2.04 in order to streamline the instructions and make them more understandable and logical for the jurors.

History

Amended October 2011. Deleted January 2014.

M Civ JI 3.09 Jury to Consider All the Evidence

In determining whether any fact has been proved, you shall consider all of the evidence bearing on that fact without regard to which party produced the evidence.

Note on Use

If evidence has been received for a limited purpose or is limited to a particular party or parties, M Civ JI 3.07 must also be given.

Comment

This instruction states the familiar principle that once evidence is admitted, it is in the case for all purposes and every party is entitled to the benefit of the evidence whether he or she or the adversary produced it.

History

M Civ JI 3.09 was SJI 1.02.

M Civ JI 3.10 Circumstantial Evidence

Facts can be proved by direct evidence from a witness or an exhibit. Direct evidence is evidence about what we actually see or hear. For example, if you look outside and see rain falling, that is direct evidence that it is raining.

Facts can also be proved by indirect or circumstantial evidence. Circumstantial evidence is evidence that normally or reasonably leads to other facts. So, for example, if you see a person come in from outside wearing a raincoat covered with small drops of water, that would be circumstantial evidence that it is raining.

Circumstantial evidence by itself, or a combination of circumstantial evidence and direct evidence, can be used to prove or disprove a proposition. You must consider all the evidence, both direct and circumstantial.

History

M Civ JI 3.10 is a revision of SJI 1.03. Amended February 1981, September 2007.

M Civ JI 3.11 Jurors May Take into Account Ordinary Experience and Observations

You have a right to consider all the evidence in the light of your own general knowledge and experience in the affairs of life, and to take into account whether any particular evidence seems reasonable and probable. However, if you have personal knowledge of any particular fact in this case, that knowledge may not be used as evidence.

Comment

Because jurors have been told it is their duty to determine the facts from evidence produced in open court, M Civ JI 3.02, it is proper also to inform them that they may rely on their general intelligence and knowledge of affairs. *Rajnowski v Detroit*, BC & A R Co, 74 Mich 15 (1889).

History

M Civ JI 3.11 was SJI 1.04. Amended September 2007.

M Civ JI 3.12 Jury View of Premises / Scene / Object

Your view of the [premises / scene / object] was intended to help you understand the evidence. You are not to consider as evidence anything you may have learned from the view which was not covered by the testimony *(and exhibits) received in evidence.

Note on Use

This instruction should be used only when the Court has permitted a view of something other than an exhibit and has determined that the view does not constitute evidence. Appropriate designation of the kind of view may be selected instead of the bracketed words. This instruction may be given even though the court convenes at the scene and takes testimony, because the jury still might have seen or heard things not covered by the testimony. The instruction may be given before or at the time of the view.

If the court has determined that a jury view does constitute evidence, this instruction should not be given. See Note on Use to M Civ JI 3.03.

*The words in parentheses may be used if appropriate.

In condemnation cases, M Civ JI 90.22 should be given in lieu of this instruction.

Comment

The authority to have the jury view the scene comes from MCR 2.513(J).

Generally the jury can consider information obtained by them from the view only to assist them in understanding evidence presented in open court, *Valenti v Mayer*, 301 Mich 551; 4 NW2d 5 (1942); but in some cases, the view itself may be evidence. S*unday v Wolverine Service Stations*, 265 Mich 19; 251 NW 402 (1933).

The jury view is appropriate in all civil actions, but is completely discretionary with the trial judge. MCR 2.513(J).

History

M Civ JI 3.12 was SJI 1.04(A).

M Civ JI 3.13 Fact Judicially Noticed

In this case, you must accept it as a fact that [*identify fact judicially noticed]*.

Note on Use

This instruction should be used only in cases in which a fact has been judicially noticed. The instruction conforms with Rule 201(f) of the Michigan Rules of Evidence. Rule 201(f) provides: "In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed."

History

M Civ JI 3.13 was added February 1, 1981.

M Civ JI 3.15 Prior Inconsistent Statement of Witness

If you decide that a witness said something earlier that is not consistent with what the witness said at this trial, you may consider the earlier statement in deciding whether to believe the witness, but you may not consider it as proof of the facts in this case.

However, there [is an exception / are exceptions]. You may consider an earlier statement as proof of the facts in this case if:

(a) the statement was made by the plaintiff, the defendant, or an agent or employee of either party; or

(b) the statement was given under oath subject to the penalty of perjury at a trial, hearing, [*describe other proceeding*], or in a deposition; or

(c) the witness testified during the trial that the earlier statement was true.

Note on Use

This instruction should not be given if all prior inconsistent statements of witnesses are admissible as substantive evidence.

If all prior inconsistent statements are admissible only for credibility, only the first paragraph of this instruction should be given.

If some prior inconsistent statements of witnesses are admissible for credibility and some as substantive evidence, both paragraphs of this instruction should be given, but the trial judge should select only the subsections of paragraph two that are applicable.

Comment

A witness may be impeached through a showing of prior statements inconsistent with his or her testimony. *Gilchrist v Gilchrist*, 333 Mich 275 (1952); *Michigan Pipe Co v North British & Mercantile Insurance Co*, 97 Mich 493 (1893); *Geerds v Ann Arbor R Co*, 181 Mich 12 (1914). A prior inconsistent statement given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, may also be considered as substantive evidence. MRE 801(d)(1)(A). If the witness adopts by admission the truth of the prior inconsistent statement, that may also become substantive evidence. *Schratt v Fila*, 371 Mich 238 (1963).

Prior inconsistent conduct that is not intended as an assertion is admissible as competent proof but conduct intended as an assertion is subject to the hearsay objection. MRE 801(a), (c).

A statement offered against a party that is his or her own statement is admissible as substantive evidence. MRE 801(d)(2). The same is true if the statement is a statement by a person authorized by a party to make a statement concerning the subject (MRE 801(d)(2)(C)), or a statement by an agent or

employee concerning a matter within the scope of the agency or employment and made during the existence of the relationship (MRE 801(d)(2)(D)).

History

M Civ JI 3.15 (former M Civ JI 5.01) was SJI 3.01. Amended December 1982, November 1983, August 1991, October 1993, February 1998. Renumbered from M Civ JI 5.01 to M Civ JI 3.15 January 1999. Amended September 2007.

M Civ JI 3.16 Interim Commentary by Attorneys

At this juncture in the trial, the court finds it appropriate to allow each party to provide interim commentary. The lawyers' commentaries are not evidence. They are only meant to help you understand the evidence and each side's legal theories. You should only accept things that the lawyers say that are supported by the evidence or by your own common sense and general knowledge. All of my earlier instructions regarding basing your decision on the evidence and law continue to apply.

Note on Use

The court may place reasonable time limits on the interim commentary.

Comment

The 2011 adoption of this instruction reflects the amendment to MCR 2.513(D) ordered by the Michigan Supreme Court on June 29, 2011, which became effective September 1, 2011. This amendment gives the court discretion to permit the parties to present interim commentary.

History

M Civ JI 3.16 was added October 2011.

M Civ JI 3.17 Summary of Evidence by Judge

I will now summarize the evidence for you. It is intended only as a summary and you should consider all of the evidence when deciding this case, even if I do not mention all of the evidence in this summary. Remember that it is your job to decide what the facts of this case are. This is your job and nobody else's. It is for you to determine the weight of the evidence and the credit to be given to the witnesses, and you are free to decide that something I have not mentioned, but which has been admitted into evidence, is significant to your decision. You are not bound by my summary of the evidence. [Summary is then given.]

Again, it is for you to determine for yourself the weight of the evidence and the credit to be given to the witnesses. You are not bound by my summation.

Comment

The 2011 adoption of this instruction reflects the amendment to MCR 2.513(M) ordered by the Michigan Supreme Court on June 29, 2011, which became effective September 1, 2011. This amendment permits the court to sum up the evidence under certain conditions.

History

M Civ JI 3.17 was added October 2011.

Chapter 4: Credibility and Weight

M Civ JI 4.01 Credibility of Witnesses 75
M Civ JI 4.02 Witness Need Not Be Believed [*Recommend No Instruction*] 76
M Civ JI 4.03 Inherently Improbable Testimony [*Recommend No Instruction*] 77
M Civ JI 4.04 Witness Willfully False [*Recommend No Instruction*] 78
M Civ JI 4.05 Party Competent as a Witness [*Recommend No Instruction*] 79
M Civ JI 4.06 Witness Who Has Been Interviewed by an Attorney 80
M Civ JI 4.07 Weighing Conflicting Evidence—Number of Witnesses 81
M Civ JI 4.08 One Witness against a Number [*Recommend No Instruction*] 82
M Civ JI 4.09 Credibility of Special Categories of Witnesses and Weight of Evidence [*Recommend No Instruction*] 85
M Civ JI 4.10 Weighing Expert Testimony [*Recommend No Instruction*] 83
M Civ JI 4.11 Consideration of Deposition Evidence 84
M Civ JI 4.12 Hospital and Business Records [*Recommend No Instruction*] 85
M Crim JI 4.13 Special Venue Instruction—Felony Consisting of More Than One Act 87

M Civ JI 4.01 Credibility of Witnesses

You are the judges of the facts in this case, and you must determine which witnesses to believe and what weight to give to their testimony. In doing so you may consider each witness's ability and opportunity to observe, his or her memory, manner while testifying, any interest, bias or prejudice, and the reasonableness of the testimony considered in the light of all the evidence.

Comment

Instructions including the credibility factors in this instruction have been approved in numerous cases by the Michigan Supreme Court. See, e.g., *Hitchcock v Davis*, 87 Mich 629; 49 NW 912 (1891); *Lovely v Grand Rapids & I R Co*, 137 Mich 653; 100 NW 894 (1904); *Foley v Detroit & M R Co*, 193 Mich 233; 159 NW 500 (1916); *Vinton v Plainfield Twp*, 208 Mich 179; 175 NW 403 (1919).

History

M Civ JI 4.01 was SJI 2.01. Amended January 1993.

M Civ JI 4.02 Witness Need Not Be Believed [*Recommend No Instruction*]

Comment

The committee recommends that no instruction that the "witness need not be believed" be given. An instruction of this type is not necessary where M Civ JI 4.01 is given, as that instruction adequately covers credibility factors.

The Michigan Supreme Court has held that it is for the jury to determine whether to believe the testimony of a witness, even though it is uncontradicted, where other circumstances or parts of his or her testimony are inconsistent with his or her story. *Preuschoff v B Stroh Brewing Co*, 132 Mich 107; 92 NW 945 (1903); *Michigan Pipe Co v Michigan Fire & Marine Insurance Co*, 92 Mich 482; 52 NW 1070 (1892). Counsel can adequately cover the subject in argument.

History

M Civ JI 4.02 was SJI 2.02.

M Civ JI 4.03 Inherently Improbable Testimony [*Recommend No Instruction*]

Comment

The committee recommends that no "inherently improbable testimony" instruction be given. An instruction of this type is not necessary where M Civ JI 4.01 is given, as that instruction adequately covers credibility factors.

The trial judge may point out inherently improbable testimony if he or she chooses to comment upon the evidence. *Cook v Vineyard*, 291 Mich 375; 289 NW 181 (1939). Whether or not this is done is, of course, within the discretion of the trial judge.

However, a specific instruction on this point is argumentative and invades the province of the jury. Counsel can adequately cover the subject in argument.

History

M Civ JI 4.03 was SJI 2.03.

M Civ JI 4.04 Witness Willfully False [*Recommend No Instruction*]

Comment

The committee recommends that no instruction on the "willfully false witness" be given. An instruction of this type is not necessary where M Civ JI 4.01 is given, as that instruction adequately covers credibility factors.

The Michigan Supreme Court has approved an instruction that if the jury finds that a witness has willfully sworn falsely as to a material fact, and the jury should be of the opinion that such false swearing rendered the witness incredible as a whole, they have a right to disregard his or her entire testimony. *O'Rourke v O'Rourke*, 43 Mich 58; 4 NW 531 (1880). One case held it is error to refuse such an instruction where the evidence supports it. *Ketchum v Fillingham*, 162 Mich 704; 127 NW 702 (1910).

The instruction, however, has been criticized on the basis that questions concerning credibility of witnesses are the sole province of the jury; if the instruction is given, the jury should also be instructed that no rule of law prevents their giving credit to parts of a witness's testimony they believe to be true. *Hillman v Schwenk*, 68 Mich 293; 36 NW 77 (1888); see also *Jewell v Kelley*, 155 Mich 301; 118 NW 987 (1909).

History

M Civ JI 4.04 was SJI 2.04.

M Civ JI 4.05 Party Competent as a Witness [*Recommend No Instruction*]

Comment

The committee recommends that no instruction on the "party competent as a witness" be given.

M Civ JI 4.01 informs the jury that they may consider any interest or bias a witness has in determining his or her credibility. It will cover the interest of a party witness, and the committee recommends that no separate instruction on this subject be given. A separate instruction may place undue emphasis upon particular aspects of the evidence.

An instruction which mentioned the interest of an individual party by name or otherwise was disapproved in *Seitz v Starks*, 144 Mich 448; 108 NW 354 (1906).

History

M Civ JI 4.05 was SJI 2.05.

M Civ JI 4.06 Witness Who Has Been Interviewed by an Attorney

It has been brought out that a lawyer *(or a representative of a lawyer) has talked with a witness. There is nothing wrong with a lawyer *(or a representative of a lawyer) talking with a witness for the purpose of learning what the witness knows about the case and what testimony the witness will give.

Note on Use

*The words in parentheses should be used if appropriate.

Comment

This instruction is unnecessary unless the fact of an interview has been mentioned during the trial. The Court may wish to give this instruction at the time this fact is brought out.

This instruction was approved in *Socha v Passino*, 405 Mich 458 (1979).

History

M Civ JI 4.06 was SJI 2.06. Amended January 1993, September 2007.

M Civ JI 4.07 Weighing Conflicting Evidence—Number of Witnesses

Although you may consider the number of witnesses testifying on one side or the other when you weigh the evidence as to a particular fact, the number of witnesses alone should not persuade you if the testimony of the lesser number of witnesses is more convincing.

Comment

An instruction that weight of the evidence does not mean the number of witnesses was approved in *Strand v Chicago & W M R Co*, 67 Mich 380; 34 NW 712 (1887), and *American Seed Co v Cole*, 174 Mich 42; 140 NW 622 (1913). However, any instruction on this subject should make it clear that the ultimate decision is for the jury. *King v Ann Arbor R Co*, 137 Mich 487; 100 NW 783 (1904); *Spalding v Lowe*, 56 Mich 366; 23 NW 46 (1885). Therefore, this instruction should be given in conjunction with M Civ JI 4.01.

History

M Civ JI 4.07 is a revision of SJI 2.07. Amended April 1981.

M Civ JI 4.08 One Witness against a Number [*Recommend No Instruction*]

Comment

The committee recommends that no "one witness against a number" instruction be given.

The Michigan Supreme Court has held that it is error to point out cases where one witness was to be believed against many. *Butler v Detroit*, Y & AA R Co, 138 Mich 206; 101 NW 232 (1904); *Harrison v Green*, 157 Mich 690; 122 NW 205 (1909); *Lendberg v Brotherton Iron Mining Co*, 75 Mich 84; 42 NW 675 (1889). Such instructions have been criticized as suggesting that the trial Court believed one side's witnesses over the other.

This type of charge is unwarranted where M Civ JI 4.01 and 4.07 are given.

History

M Civ JI 4.08 was SJI 2.08.

M Civ JI 4.10 Weighing Expert Testimony [*Recommend No Instruction*]

Comment

The committee recommends that no instruction on "weighing expert testimony" be given.

To the extent that matters affecting the weighing of expert testimony are not covered by M Civ JI 4.01, the matter can be left to argument of counsel.

History

M Civ JI 4.10 was SJI 2.10.

M Civ JI 4.11 Consideration of Deposition Evidence

[Ladies and gentlemen, you are now going to hear a summary of a deposition that was taken. A deposition is the sworn testimony of a party or witness taken before trial. All parties and their lawyers had the right to be present and to ask questions. The summary was prepared to more efficiently present this evidence. You are also being given a copy of the summary so you can follow along as it is being read. You are to give this evidence the same consideration as you would have given it had the witness testified in open court.]

During the trial, [you heard testimony from a deposition / you were read the summary of a deposition]. A deposition is the sworn testimony of a party or witness taken before trial. All parties and their lawyers had the right to be present and to ask questions. [The summary was prepared to more efficiently present this evidence.]

You are to give this evidence the same consideration as you would have given it had the [witness / witnesses] testified in open court.

Note on Use

The bracketed language in the first paragraph should be given if a deposition summary is read to the jury as contemplated by MCR 2.513(F).

Comment

The Court may wish to give this instruction at the time a deposition is read or shown to the jury, see MCR 2.512(B)(1), and to explain why the deposition is admissible, see MCR 2.308(A).

Instructions that deposition evidence should be given the same fair consideration as testimony produced in open court have been approved. *Coburn v Moline, EM & W R Co*, 243 Ill 448; 90 NE 741 (1909); *Pyle v McNealy*, 227 Mo App 1035; 62 SW2d 921 (1933); see also 3 Callaghan's Michigan Pleading & Practice (2d ed) § 35.104.

The 2011 amendment reflects the amendment to MCR 2.513(F) ordered by the Michigan Supreme Court on June 29, 2011, which became effective September 1, 2011. This amendment calls for the court to encourage the use of written deposition summaries in lieu of full depositions.

History

M Civ JI 4.11 was SJI 2.11. Amended January 1988, September 2007, October 2011.

M Civ JI 4.09 Credibility of Special Categories of Witnesses and Weight of Evidence [*Recommend No Instruction*]

Comment

The committee recommends that no instructions on the credibility of special categories of witnesses be given. Such a charge has not been the usual practice and it would seem that these special categories of witnesses, e.g., eyewitnesses, employees, etc., would be adequately covered under M Civ JI 4.01. Counsel can cover such matters more properly in argument.

History

M Civ JI 4.09 was SJI 2.09.

M Civ JI 4.12 Hospital and Business Records [*Recommend No Instruction*]

Comment

The committee recommends that no instruction be given concerning hospital and business records. An instruction on this subject is not necessary and would place undue emphasis upon particular portions of the evidence.

In *Siirila v Barrios*, 398 Mich 576; 248 NW2d 171 (1976), the Michigan Supreme Court, quoting with approval SJI 2.12 (now M Civ JI 4.12), held that the trial judge properly refused to give a requested instruction that the jury may consider as evidence matter contained in a hospital record and absence of an entry in that record.

History

M Civ JI 4.12 was SJI 2.12.

M Crim JI 4.13 Special Venue Instruction—Felony Consisting of More Than One Act

The alleged crime in this case is made up of several acts. The prosecutor only has to prove that one of these acts took place in _____ County; [he / she] does not have to prove that all of them took place there. When applicable, this instruction is to be given after the general time and place instruction, M Crim JI 3.10.

Note on Use

This is a cautionary instruction based on MCL 762.8:

Whenever a felony consists or is the culmination of 2 or more acts done in the perpetration of that felony, the felony may be prosecuted in any county where any of those acts were committed or in any county that the defendant intended the felony or acts done in perpetration of the felony to have an effect.

History

M Crim JI 4.13 was CJI 4:13:01; amended January, 1991; December, 2013.

Chapter 5: Impeachment

M Civ JI 5.01 Prior Inconsistent Statement of Witness [*Renumbered to M Civ JI 3.15*] 89
M Civ JI 5.02 Impeachment of a Party by Prior Inconsistent Statement [*Instruction Deleted*]..... 90
M Civ JI 5.03 Impeachment by Proof of Conviction of Crime..... 91

M Civ JI 5.01 Prior Inconsistent Statement of Witness [*Renumbered to M Civ JI 3.15*]

History

M Civ JI 5.01 was SJI 3.01. Amended December 1982, November 1983, August 1991, October 1993, February 1998. Renumbered to M Civ JI 3.15 January 1999.

M Civ JI 5.02 Impeachment of a Party by Prior Inconsistent Statement [*Instruction Deleted*]

History

M Civ JI 5.02 was SJI 3.01(A). Amended November 1983. Deleted October 1993.

M Civ JI 5.03 Impeachment by Proof of Conviction of Crime

In deciding whether you should believe a witness you may take into account the fact that [he / or / she] has been convicted of a crime and give that fact such weight as you believe it deserves under the circumstances.

Note on Use

This instruction applies to both a nonparty witness and a witness who is a party.

Comment

Evidence of conviction of a crime may be used for the purpose of drawing in question a witness's credibility. Such evidence is admissible if elicited from the witness or established by public record during cross-examination. MRE 609(a). The conviction must be of a crime punishable by death or imprisonment in excess of one year or must involve theft, dishonesty or false statement, and the Court must determine that the probative value outweighs its prejudicial effect and articulate on the record the factors considered. MRE 609(a)(1), (2).

History

M Civ JI 5.03 is a revision of SJI 3.02. Amended April 1981.

Chapter 6: Failure to Produce

M Civ JI 6.01 Failure to Produce Evidence or a Witness 93

M Civ JI 6.02 Failure of Opposite Party to Testify in Case Involving "Dead Man's Statute" [*Recommend No Instruction*] 95

M Civ JI 6.01 Failure to Produce Evidence or a Witness

(a) *(The [plaintiff / defendant] in this case has not offered [the testimony of [*name*] / [*identify exhibit*]]. As this evidence was under the control of the [plaintiff / defendant] and could have been produced by [him / her], and no reasonable excuse for the [plaintiff's / defendant's] failure to produce the evidence was given, you may infer that the evidence would have been adverse to the [plaintiff / defendant].)

(b) †(The [plaintiff / defendant] in this case has not offered [the testimony of [*name*] / [*identify exhibit*]]. As no reasonable excuse for the [plaintiff's / defendant's] failure to produce this evidence was given, you may infer that the evidence would have been adverse to the [plaintiff / defendant], if you believe that the evidence was under the control of the [plaintiff / defendant] and could have been produced by [him / her].)

(c) **(The [plaintiff / defendant] in this case has not offered [the testimony of [*name*] / [*identify exhibit*]]. As this evidence was under the control of the [plaintiff / defendant] and could have been produced by [him / her], you may infer that the evidence would have been adverse to the [plaintiff / defendant], if you believe that no reasonable excuse for [plaintiff's / defendant's] failure to produce the evidence has been shown.)

(d) ††(The [plaintiff / defendant] in this case has not offered [the testimony of [*name*] / [*identify exhibit*]]. You may infer that this evidence would have been adverse to the [plaintiff / defendant] if you believe that the evidence was under the control of the [plaintiff / defendant] and could have been produced by [him / her], and no reasonable excuse for [plaintiff's / defendant's] failure to produce the evidence has been shown.)

Note on Use

The words "plaintiff" and "defendant" may be replaced by "petitioner" and "respondent" in cases in which the latter terms are used to describe the parties.

If requested, the appropriate one of the above instructions should be given under the following circumstances:

*Instruction a should be given when the Court finds that—

1. the evidence was under the control of the (plaintiff) (defendant) and could have been produced by him or her;

2. no reasonable excuse for (plaintiff's) (defendant's) failure to produce the evidence has been shown; and

3. the evidence would have been material, not merely cumulative, and not equally available to the opposite party.

†Instruction b should be given when a question of fact arises in regard to "control" in subparagraph 1 above, and the Court finds in the affirmative in regard to subparagraphs 2 and 3 above.

**Instruction c should be given when a question of fact arises in regard to "reasonable excuse" in subparagraph 2 above, and the Court finds in the affirmative in regard to subparagraphs 1 and 3 above.

††Instruction d should be given when a question of fact arises in regard to both "control" and "reasonable excuse" in subparagraphs 1 and 2 above, and the Court finds in the affirmative in regard to subparagraph 3 above.

Comment

For general authority on the above instructions, see *Vergin v Saginaw*, 125 Mich 499; 84 NW 1075 (1901); *Dowagiac Manufacturing Co v Schneider*, 181 Mich 538; 148 NW 173 (1914); *Fontana v Ford Motor Co*, 278 Mich 199; 270 NW 266 (1936); *Ward v Consolidated Rail Corp*, 472 Mich 77 (2005).

For authority on the limitation in regard to "control," see *Prudential Insurance Co v Cusick*, 369 Mich 269; 120 NW2d 1 (1963); *Barringer v Arnold*, 358 Mich 594; 101 NW2d 365 (1960); *Brandt v C F Smith & Co*, 242 Mich 217; 218 NW 803 (1928); in regard to "reasonable excuse," see *Cole v Lake Shore & M S R Co*, 81 Mich 156; 45 NW 983 (1890); *Leeds v Masha*, 328 Mich 137; 43 NW2d 92 (1950); in regard to "material," see *Dowagiac Manufacturing Co*; in regard to "merely cumulative," see *Barringer*; in regard to "equally available," see *Urben v Public Bank*, 365 Mich 279; 112 NW2d 444 (1961); *Barringer; DeGroff v Clark*, 358 Mich 274; 100 NW2d 214 (1960); *Macklem v Warren Construction Co*, 343 Mich 334; 72 NW2d 60 (1955); *Holmes v Jones*, 41 Mich App 63; 199 NW2d 538 (1972); *Kaniewski v Emmerson*, 44 Mich App 737; 205 NW2d 812 (1973). See also *United States v Beekman*, 155 F2d 580, 584 (CA 2, 1946); *Prudential Insurance Co.*

History

M Civ JI 6.01 was SJI 5.01.

M Civ JI 6.02 Failure of Opposite Party to Testify in Case Involving "Dead Man's Statute" [*Recommend No Instruction*]

Comment

The committee recommends that no instruction be given on the failure of the opposite party to testify in a case involving the "dead man's statute."

If heirs, assigns, devisees, legatees, or personal representatives were parties to a suit, the former dead man's statute, MCL 600.2160, 617.64, prevented testimony by an adverse party as to matters which, if true, must have been equally within the knowledge of the deceased person. The prohibition was absolute if the statutory conditions were met.

The present statute, MCL 600.2166, represents an effort to loosen the strictures of the prior law. It applied originally only to actions against the person "incapable of testifying," but 1969 PA 63 and GCR 1963, 608 extended it to actions "by" as well as "against." Under the statute and rule the opposite party's testimony was admissible if "some material portion of his testimony is supported by some other material evidence tending to corroborate his claim."

In 1978, GCR 1963, 608 was abolished and MRE 601 was adopted. It provides generally that any person is competent to be a witness. The committee commentary to rule 601 indicates that it changes present law by not requiring exclusion of testimony on grounds covered by the Michigan dead man's statute. In *James v Dixon*, 95 Mich App 527; 291 NW2d 106 (1980), the court of appeals held that the dead man's statute was impliedly abrogated by the adoption of MRE 601.

History

M Civ JI 6.02 was SJI 5.02.

Chapter 7: Theories

M Civ JI 7.01 Theories of the Parties 97

M Civ JI 7.01 Theories of the Parties

These are the theories of the parties. I express no preference as to which, if any, you will accept.

[*State the parties' theories of the case*].

Comment

The present provision concerning the Court's charge to the jury on issues in the case and theories of the parties is found in MCR 2.512(A)(2), (B)(2):

Rule 2.512 Instructions to Jury

(A) Request for Instructions.

* * *

(2) In addition to requests for instructions submitted under subrule (A)(1), after the close of the evidence, each party shall submit in writing to the court a statement of the issues and may submit the party's theory of the case regarding each issue. The statement must be concise, be narrative in form, and set forth as issues only those disputed propositions of fact that are supported by the evidence. The theory may include those claims supported by the evidence or admitted.

* * *

(B) Instructing the Jury.

* * *

(2) Before or after arguments or at both times, as the court elects, the court shall instruct the jury on the applicable law, the issues presented by the case, and, if a party requests as provided in subrule (A)(2), that party's theory of the case.

It is the duty of the trial Court to present to the jury the material issues of the case, whether requested to or not. *Barton v Gray*, 57 Mich 662; 24 NW 638 (1885); *Daigle v Berkowitz*, 273 Mich 140; 262 NW 652 (1935); *De Forest v Soules*, 278 Mich 557; 270 NW 785 (1936); *Tinkler v Richter*, 295 Mich 396; 295 NW 201 (1940); *Jorgenson v Howland*, 325 Mich 440; 38 NW2d 906 (1949); *Brown v Nichols*, 337 Mich 684; 60 NW2d 907 (1953); *Martiniano v Booth*, 359 Mich 680; 103 NW2d 502 (1960); *Sakorraphos v Eastman Kodak Stores, Inc*, 367 Mich 96; 116 NW2d 227 (1962).

The jury should not be instructed on issues that are not found in the pleadings, *Pettibone v Smith*, 37 Mich 579 (1877); *Denman v Johnston*, 85 Mich 387; 48 NW 565 (1891); *Curth v New York Life Insurance Co*, 274 Mich 513; 265 NW 749 (1936), unless supported by the evidence in accordance with MCR 2.118(C). There should not be submitted as issues those propositions of fact that are admitted or

have not been disputed. *Richardson v Coddington*, 45 Mich 338; 7 NW 903 (1881); *Lange v Perley*, 47 Mich 352; 11 NW 193 (1882); *Vitaioli v Berklund*, 296 Mich 56; 295 NW 557 (1941); *Houck v Snyder*, 375 Mich 392; 134 NW2d 689 (1965). The same is true with issues raised but not supported by the evidence. *Litvin v Joyce*, 329 Mich 56; 44 NW2d 867 (1950); *White v Grismore*, 333 Mich 568; 53 NW2d 499 (1952).

The trial judge need not give the charge in the form submitted by counsel, so long as the substance of such requested charge, if proper, is covered. *Ferries v Copco Steel & Engineering Co*, 344 Mich 345; 73 NW2d 850 (1955); *Schattilly v Yonker*, 347 Mich 660; 81 NW2d 343 (1957); *Horst v Tikkanen*, 370 Mich 65; 120 NW2d 808 (1963).

History

M Civ JI 7.01 was added April 1981 and replaced SJI 20.01, 25.12, 25.22 and 27.03. Amended January 1988, February 1989.

Chapter 8: Definition of Burden of Proof

M Civ JI 8.01 Definition of Burden of Proof 100

M Civ JI 8.01 Definition of Burden of Proof

(a) I have just listed for you the propositions on which the [plaintiff / defendant] has the burden of proof. For the [plaintiff / defendant] to satisfy this burden, the evidence must persuade you that it is more likely than not that the proposition is true.

You must consider all the evidence regardless of which party produced it.

(b) I have just listed for you the propositions on which the [plaintiff / defendant] has the burden of proof. In this case the [plaintiff / defendant] must prove those propositions by clear and convincing evidence. This means that [plaintiff / defendant] must do more than merely persuade you that the proposition is probably true. To be clear and convincing, the evidence must be strong enough to cause you to have a clear and firm belief that the proposition is true.

You must consider all the evidence regardless of which party produced it.

(c) Because of the issues presented in this case, the [plaintiff / defendant] must meet different burdens of proof on the claims [he / she / it / they] make[s].

On the following propositions, [*list the propositions*], [plaintiff / defendant] has the burden of proof. For the [plaintiff / defendant] to satisfy this burden, the evidence must persuade you that it is more likely than not that the proposition is true.

On the following propositions, [*list the propositions*], the [plaintiff / defendant] has an additional burden of proof. On these listed propositions, the [plaintiff / defendant] must prove those propositions by clear and convincing evidence. This means that [plaintiff / defendant] must do more than merely persuade you that the proposition is probably true. To be clear and convincing, the evidence must be strong enough to cause you to have a clear and firm belief that the proposition is true.

You must consider all the evidence regardless of which party produced it.

Note on Use

This instruction should be given directly after M Civ JI 14.21, 16.02, 16.04, 16.05, 16.06, 16.08, 25.12, 25.22, 25.32, 25.45, 30.03, 35.02, 36.05, 36.06, 36.15, 75.11, 75.12, 80.02, 100.02, 101.04, 101.05, 101.06, 105.04, 105.012, 105.14, 105.32, 106.07A, 106.07C, 106.07D, 106.29, 106.35, 107.15, 110.10, 110.11, 110.12, 110.13, 115.20, 115.21, 116.20, 116.21, 117.02, 117.21, 118.05, 140.01, 140.42, 140.45, 140.53, 142.01, 170.45, 170.51, and 171.02.

Only the paragraph that applies should be read. For example, paragraph (c) is to be used where there is a mixed burden of proof because of the nature of the claims brought.

Comment

The revised instruction makes clearer that the evidence in support of a proposition must have a qualitative as well as a quantitative character. In other words, the evidence must do more than simply outweigh that against it. A jury may disbelieve the evidence proffered in support of a proposition even when that evidence is unopposed. In that situation, although the evidence quantitatively outweighs that opposed to it, qualitatively it does not meet the burden of proof because the jury must still be persuaded that the evidence supports a finding that the proposition is true. *Strand v Chicago & W M R Co*, 67 Mich 380 (1887); *Four States Coal Co v Ohio & Michigan Coal Co*, 228 Mich 360 (1924); *Hanna v McClave*, 273 Mich 571 (1935); *Cook v Vineyard*, 291 Mich 375 (1939); *Kelly v Builders Square, Inc*, 465 Mich 29 (2001).

In re Martin, 450 Mich 204 (1995); *In re Chmura*, 464 Mich 58 (2001).

History

M Civ JI 8.01 (former M Civ JI 16.01) was SJI 21.01. Amended October 1984. Renumbered from M Civ JI 16.01 to M Civ JI 8.01 November 1998. Amended September 2007.

Chapter 10: Negligence: General Instructions

M Civ JI 10.01 Definitions Introduced 103
M Civ JI 10.02 Negligence of Adult—Definition 104
M Civ JI 10.03 Ordinary Care—Adult—Definition [*Instruction Deleted*] 106
M Civ JI 10.04 Duty to Use Ordinary Care— Adult—Plaintiff 107
M Civ JI 10.05 Duty to Use Ordinary Care—Adult—Defendant 108
M Civ JI 10.06 Ordinary Care—Minor—Definition 109
M Civ JI 10.07 Conduct Required for Safety of Child 110
M Civ JI 10.08 Presumption of Ordinary Care— Death Case 111
M Civ JI 10.09 Presumption of Ordinary Care— Loss of Memory Case 113

M Civ JI 10.01 Definitions Introduced

I shall now give you the definitions of some important legal terms. Please listen carefully to these definitions so that you will understand the terms when they are used later.

Note on Use

This instruction may be given as a transition from the General Instructions to the applicable definitions.

History

M Civ JI 10.01 is a revision of SJI 10.00.

M Civ JI 10.02 Negligence of Adult—Definition

Negligence is the failure to use ordinary care. Ordinary care means the care a reasonably careful *person would use. Therefore, by "negligence," I mean the failure to do something that a reasonably careful *person would do, or the doing of something that a reasonably careful *person would not do, under the circumstances that you find existed in this case.

The law does not say what a reasonably careful *person using ordinary care would or would not do under such circumstances. That is for you to decide.

Note on Use

*Use of the word "person" may be inappropriate depending on the nature of the defendant's activity. *Laney v Consumers Power Co*, 418 Mich 180; 341 NW2d 106 (1983).

This instruction is not intended to apply to the defendant in a malpractice case. See M Civ JI 30.01 and 30.02.

This instruction should not be used in a case involving co-participants in a recreational activity. *Ritchie-Gamester v City of Berkley*, 461 Mich 73; 597 NW2d 517 (1999) (co-participants owe each other a duty not to act recklessly).

Comment

Authority for this instruction appears in numerous cases, some of which are *Detroit & M R Co v Van Steinburg*, 17 Mich 99, 118 (1868); *Knarian v South Haven Sand Co*, 361 Mich 631, 643; 106 NW2d 151, 157 (1960); *Muth v W P Lahey's, Inc*, 338 Mich 513, 523; 61 NW2d 619, 623 (1953); *Reedy v Goodin*, 285 Mich 614, 620; 281 NW 377, 379 (1938); and *Frederick v Detroit*, 370 Mich 425, 435; 121 NW2d 918, 922 (1963); *Case v Consumers Power Co*, 463 Mich 1; 615 NW2d 17 (2000).

Under Michigan law, the standard of conduct required may differ depending on the activity, trade, occupation, or profession, but the degree of care does not change. It is always what a reasonably careful person engaged in a particular activity, trade, occupation, or profession would do or would refrain from doing under the circumstances then existing. *Frederick*; *Laney*. It is ordinarily error to instruct a jury on the specific standard of conduct. Case (in this stray-voltage case, the court held it was reversible error to instruct the jury that defendant had a duty to inspect and repair electrical wires); but see *Schultz v Consumers Power*, 443 Mich 445; 506 NW2d 175 (1993), which approved that standard of conduct in a case involving dangers from high-voltage electricity.

The general rule for a child as set forth in Restatement (Second) of Torts §283A, is that "the standard of conduct to which he must conform to avoid being negligent is that of a reasonable person of like age, intelligence, and experience under like circumstances." However, there is an exception to this rule where the child is engaging in an adult activity. The exception is set forth in comment c to §283A, which states as follows:

> An exception to the rule stated in this Section may arise where the child engages in an activity which is normally undertaken only by adults, and for which adult qualifications are required. As in the case of one entering upon a professional activity which requires special skill (see §299A), he may be held to the standard of adult skill, knowledge, and competence, and no allowance may be made for his immaturity. Thus, for example, if a boy of fourteen were to attempt to fly an airplane, his age and inexperience would not excuse him from liability for flying it in a negligent manner. The same may be true where the child drives an automobile. In this connection licensing statutes, and the examinations given to drivers, may be important in determining the qualifications required; but even if the child succeeds in obtaining a license he may thereafter be required to meet the standard established primarily for adults.

It is not clear whether the court or jury decides whether the activity is one normally undertaken only by adults.

The Michigan Supreme Court considered this exception in *Constantino v Wolverine Insurance Co*, 407 Mich 896; 284 NW2d 463 (1979). Reversing an unpublished court of appeals opinion, the supreme court said that "the instruction that the appellee driver was not held to the same standard of conduct as an adult was erroneous. When a minor engages in a dangerous and adult activity, e.g., driving an automobile, he is charged with the same standard of conduct as an adult." See also *Osner v Boughner*, 180 Mich App 248; 446 NW2d 873 (1989). The adult standard of care applies even if the minor is a student driver. *Stevens v Veenstra*, 226 Mich App 441; 573 NW2d 341 (1997).

History

M Civ JI 10.02 is a revision of SJI 10.01 and SJI 10.02. Amended February 1, 1981, June 1998.

M Civ JI 10.03 Ordinary Care—Adult—Definition [*Instruction Deleted*]

Comment

This instruction was deleted by the committee June 1998. The subject matter of this instruction is now part of M Civ JI 10.02.

History

M Civ JI 10.03 was SJI 10.02. Deleted June 1998.

M Civ JI 10.04 Duty to Use Ordinary Care— Adult—Plaintiff

It was the duty of the plaintiff, in connection with this occurrence, to use ordinary care for [[his / her] own safety / and / the safety of [his / her] property].

Note on Use

If the plaintiff is age 18 or over, this instruction should be used with M Civ JI 10.02, Negligence of Adult—Definition. If the plaintiff is under age 18, refer to the Comment following M Civ JI 10.02.

If the conduct of a person other than plaintiff was involved in the occurrence, substitute name or other descriptive term in the instruction.

This instruction should not be used if the injury results from participation in a recreational activity; coparticipants in such activity owe each other a duty not to act recklessly. *Ritchie-Gamester v City of Berkley*, 461 Mich 73; 597 NW2d 517 (1999)

Comment

This instruction is supported by *Detroit & M R Co v Van Steinburg*, 17 Mich 99 (1868), and *Mack v Precast Industries, Inc*, 369 Mich 439; 120 NW2d 225 (1963).

History

M Civ JI 10.04 was SJI 10.03.

M Civ JI 10.05 Duty to Use Ordinary Care—Adult—Defendant

It was the duty of the defendant, in connection with this occurrence, to use ordinary care for the safety of [the plaintiff / and / plaintiff's property].

Note on Use

If the defendant or other person whose conduct was involved in the occurrence is age 18 or over, this instruction should be used with M Civ JI 10.02, Negligence of Adult—Definition. If the plaintiff is under age 18, refer to the Comment following M Civ JI 10.02.

If the conduct of a person other than defendant was involved in the occurrence, substitute name or other descriptive term in the instruction.

This instruction should not be used if the injury results from participation in a recreational activity; coparticipants in such activity owe each other a duty not to act recklessly. *Ritchie-Gamester v City of Berkley*, 461 Mich 73; 597 NW2d 517 (1999)

Comment

This instruction is supported by *Detroit & M R Co v Van Steinburg*, 17 Mich 99 (1868); *Knarian v South Haven Sand Co*, 361 Mich 631, 643; 106 NW2d 151, 157 (1960); and *Ryder v Murphy*, 371 Mich 474, 478; 124 NW2d 238, 240 (1963).

History

M Civ JI 10.05 was SJI 10.04.

M Civ JI 10.06 Ordinary Care—Minor—Definition

A minor is not held to the same standard of conduct as an adult. When I use the words "ordinary care" with respect to [the minor / [*name of minor*]], I mean that degree of care which a reasonably careful minor of the age, mental capacity and experience of [the minor / [*name of minor*]] would use under the circumstances which you find existed in this case. It is for you to decide what a reasonably careful minor would do or would not do under such circumstances.

Note on Use

This instruction should not be used if the minor is engaged in an adult activity that is dangerous, such as driving an automobile. *Constantino v Wolverine Ins Co*, 407 Mich 896; 284 NW2d 463 (1979). See also the Comment following M Civ JI 10.02. In such cases, M Civ JI 10.04 or M Civ JI 10.05 should be used.

When a plaintiff is under age seven, use M Civ JI 13.08. No instruction is needed if defendant is under age seven.

Substitute name or other descriptive term for "the minor" when appropriate.

Comment

The degree of care to be exercised by a minor over age seven is that which a reasonably careful person of the same age, capacity and experience would exercise under the same or similar circumstances. *Baker v Alt*, 374 Mich 492; 132 NW2d 614 (1965); *Tyler v Weed*, 285 Mich 460; 280 NW 827 (1938); *Easton v Medema*, 246 Mich 130; 224 NW 636 (1929); *Trudell v Grand Trunk R Co*, 126 Mich 73, 78; 85 NW 250, 252 (1901); *Baker v Flint & P M R Co*, 68 Mich 90; 35 NW 836 (1888); *Cooper v Lake Shore & M S R Co*, 66 Mich 261; 33 NW 306 (1887); *Daniels v Clegg*, 28 Mich 32 (1873); *East Saginaw City R Co v Bohn*, 27 Mich 503 (1873); *Hargreaves v Deacon*, 25 Mich 1, 2 (1872).

If the child is under age seven, he or she cannot be guilty of contributory negligence. *Baker*.

If the child is under age seven, he or she cannot be guilty of negligence or intentional tort and the suit must be dismissed. *Queen Insurance Co v Hammond*, 374 Mich 655; 132 NW2d 792 (1965).

History

M Civ JI 10.06 was SJI 10.05.

M Civ JI 10.07 Conduct Required for Safety of Child

The law recognizes that children act upon childish instincts and impulses. If you find the defendant knew or should have known that a child or children were or were likely to be in the vicinity, then the defendant is required to exercise greater vigilance and this is a circumstance to be considered by you in determining whether reasonable care was used by the defendant.

Note on Use

This instruction is to be used in appropriate cases where the plaintiff seeks damages for injury to a minor. If the conduct of a person, e.g., agent, driver, etc., other than defendant was involved in the occurrence, substitute name or other descriptive term in the instruction. This instruction should be given immediately after M Civ JI 10.03.

See *Bolser v Davis*, 62 Mich App 731; 233 NW2d 845 (1975), where defendant's knowledge that there were homes along the road on which she was driving was a fact from which a jury could infer that she knew or should have known that a child or children were or were likely to be in the vicinity, and therefore the evidence was sufficient to make this instruction appropriate.

Comment

The law recognizes that children, wherever they go, must be expected to act upon childish instincts and impulses. *Powers v Harlow*, 53 Mich 507, 515; 19 NW 257, 260 (1884); *Edgerton v Lynch*, 255 Mich 456, 460; 238 NW 322, 323–324 (1931). Michigan law requires greater vigilance toward children than toward adults, although the degree of care does not change. See Comment, M Civ JI 10.02.

M Civ JI 10.08 Presumption of Ordinary Care— Death Case

> Because [*name of decedent*] has died and cannot testify, you may infer that [he / she] exercised ordinary care for [his / her] safety *(and for the safety of others) at and before the time of the occurrence. However, you should weigh all the evidence in determining whether the decedent exercised due care.

Note on Use

This instruction can be given only in a case involving negligence or a willful and wanton action, when one or both of the parties (or a person acting for one of the parties) is deceased.

*The phrase in parentheses should be used if appropriate.

In certain circumstances, it may not be appropriate to use this instruction. Where there is clear, positive and credible evidence showing negligence by the deceased, this instruction should not be given. *Potts v Shepard Marine Construction Co*, 151 Mich App 19; 391 NW2d 357 (1986); see also *Gillett v Michigan United Traction Co*, 205 Mich 410; 171 NW 536 (1919). Also, MCL 600.5805(11) limits the use of presumptions in certain products liability actions: "in the case of a product which has been in use for not less than 10 years, the plaintiff, in proving a prima facie case, shall be required to do so without benefit of any presumption." In *Johnson v White*, 430 Mich 47, 49 n1; 420 NW2d 87, 88 n1 (1988), the Michigan Supreme Court addressed the issue of the trial court's refusal to give an instruction on the presumption of due care and concluded:

> Because the error was harmless, if error at all, we do not address the question whether the instruction on the presumption of due care, M Civ JI 10.08, remains viable where principles of comparative negligence are applied.

Comment

The presumption of ordinary care originally appeared in *Teipel v Hilsendegen*, 44 Mich 461, 462; 7 NW 82, 82 (1880).

Other cases dealing with this presumption include: *Weller v Mancha*, 351 Mich 50; 87 NW2d 134 (1957); *Weller v Mancha (On Rehearing)*, 353 Mich 189; 91 NW2d 352 (1958); *Hill v Harbor Steel & Supply Corp*, 374 Mich 194; 132 NW2d 54 (1965); *Bolser v Davis*, 62 Mich App 731; 233 NW2d 845 (1975).

If plaintiff and defendant are deceased, then both are entitled to the presumption. *Detroit Automobile Inter-Insurance Exchange v Powe*, 348 Mich 548; 83 NW2d 292 (1957); *Booth v Bond*, 354 Mich 561; 93 NW2d 161 (1958).

This is a proper instruction even though the burden of proving contributory negligence is now on the defendant. *Mack v Precast Industries, Inc*, 369 Mich 439, 454; 120 NW2d 225, 232 (1963).

History

Amended December 1987.

M Civ JI 10.09 Presumption of Ordinary Care— Loss of Memory Case

[If you find that / Since] [plaintiff / defendant] has a loss of memory concerning the facts of this case and it was caused by the occurrence, you may infer that the [plaintiff / defendant] was not negligent. However, you should weigh all the evidence in determining whether the [plaintiff / defendant] was or was not negligent.

Note on Use

This instruction can be given only in a case involving negligence or a willful and wanton action, when one or both of the parties (or a person acting for one of the parties) is suffering from loss of memory related to injuries received in the accident.

In certain products liability actions, this instruction should not be used: "in the case of a product which has been in use for not less than 10 years, the plaintiff, in proving a prima facie case, shall be required to do so without benefit of any presumption." MCL 600.5805(11). For other circumstances in which this instruction may not be appropriate, see Note on Use to M Civ JI 10.08 and Comment below.

Comment

The above instruction is to be given in cases where either of the parties is suffering from loss of memory. *Knickerbocker v Samson*, 364 Mich 439, 448; 111 NW2d 113, 117–118 (1961), see also *Shaw v Bashore*, 353 Mich 31; 90 NW2d 688 (1958). The loss of memory must be related to injuries received in the accident. *Thompson v Southern Michigan Transportation Co*, 261 Mich 440, 446; 246 NW 174, 176 (1933). However, medical evidence does not necessarily have to be presented to prove the injury caused the amnesia. *Knickerbocker*.

In two cases involving claims of traumatic amnesia, the trial court's refusal to give a presumption of due care instruction was upheld as a proper exercise of discretion. *Tien v Barkel*, 351 Mich 276; 88 NW2d 552 (1958); *Holloway v Cronk*, 76 Mich App 577; 257 NW2d 175 (1977).

History

Amended December 1987.

Chapter 11: Comparative Negligence

M Civ JI 11.01 Comparative Negligence—Definition 115
M Civ JI 11.02 Negligence—Not an Issue as to One or More Plaintiffs 116

M Civ JI 11.01 Comparative Negligence—Definition

The total amount of damages that the plaintiff would otherwise be entitled to recover shall be reduced by the percentage of plaintiff's negligence that contributed as a proximate cause to [his / her] [injury / property damage].

This is known as comparative negligence.

*(The plaintiff, however, is not entitled to noneconomic damages if [he / she] is more than 50 percent at fault for [his / her] injury.)

Note on Use

This instruction should be given where there is a question for the jury as to the negligence of one or more of the plaintiffs. If there is no such question, see M Civ JI 11.02 Negligence—Not an Issue as to One or More Plaintiffs.

*This paragraph should be deleted if the case was filed before March 28, 1996. See 1995 PA 161, §3.

Comment

See *Placek v Sterling Heights*, 405 Mich 638; 275 NW2d 511 (1979), and MCL 600.2959, added by 1995 PA 161.

History

M Civ JI 11.01 was added September 1980. Amended June 1997.

M Civ JI 11.02 Negligence—Not an Issue as to One or More Plaintiffs

You must not consider whether there was negligence on the part of the [plaintiff, [*name of plaintiff*] / plaintiffs, [*names of plaintiffs*]], *(because [*explain briefly*]).

Note on Use

If there is a question for the jury as to the negligence of one or more plaintiffs, but not as to other plaintiffs, both M Civ JI 11.01 and M Civ JI 11.02 should be given.

*The words in parentheses may be added if appropriate.

History

M Civ JI 11.02 is a revision of SJI 11.02. Amended September 1980.

Chapter 12: Statutes and Ordinances Affecting Negligence

M Civ JI 12.01 Violation of Statute—Negligence 118

M Civ JI 12.02 Excused Violation of Statute 119

M Civ JI 12.03 Violation of Ordinance by Defendant 120

M Civ JI 12.04 Violation of Ordinance by Plaintiff 122

M Civ JI 12.05 Violation by Defendant of Rules or Regulations Promulgated Pursuant to Statutory Authority 123

M Civ JI 12.06 Violation by Plaintiff of Rules or Regulations Promulgated Pursuant to Statutory Authority 124

M Civ JI 12.07 Violation of Statute or Ordinance by Minor [*No Instruction Prepared*] 125

M Civ JI 12.01 Violation of Statute—Negligence

We have a state statute which provides that [*here quote or paraphrase the applicable part of the statute as construed by the courts*].

If you find that the [defendant / plaintiff] violated this statute before or at the time of the occurrence, you may infer that the [defendant / plaintiff] was negligent. *(You must then decide whether such negligence was a proximate cause of the occurrence.)

Note on Use

*If a sudden emergency or other excuse for the violation of the statute is an issue in the case, omit the last sentence of this instruction and add M Civ JI 12.02.

This instruction should be given only if defendant or plaintiff has alleged a statutory violation as a ground for negligence, and only if—

the statute is intended to protect against the result of the violation;

the plaintiff is within the class intended to be protected by the statute; and

the evidence will support a finding that the violation was a proximate contributing cause of the occurrence.

If applicable, this instruction should be given in close association with the applicable instructions defining proximate cause. See M Civ JI 15.01–15.06.

If there is no dispute or question that the statute was violated, and if there is no claim of excuse for the violation, then the jury may be instructed that the plaintiff or defendant was negligent as a matter of law, and only the remaining issues should be submitted to the jury.

Comment

Zeni v Anderson, 397 Mich 117; 243 NW2d 270 (1976); *Klanseck v Anderson Sales & Service, Inc*, 426 Mich 78; 393 NW2d 356 (1986).

History

M Civ JI 12.01 and 12.02 were added September 1980. They replace SJI 12.01 through 12.04.

M Civ JI 12.02 Excused Violation of Statute

However, if you find that [defendant / plaintiff] used ordinary care and was still unable to avoid the violation because of [*state here the excuse claimed*], then [his / her] violation is excused.

If you find that [defendant / plaintiff] violated this statute and that the violation was not excused, then you must decide whether such violation was a proximate cause of the occurrence.

Note on Use

This instruction should be given immediately following M Civ JI 12.01 and only where the evidence would support a finding that a legal excuse existed.

Comment

See MRE 301 and cases collected in *Zeni v Anderson*, 397 Mich 117; 243 NW2d 270 (1976). See also *Klanseck v Anderson Sales & Service, Inc*, 426 Mich 78; 393 NW2d 356 (1986).

Five categories of excused violations are indicated by Restatement (Second) of Torts §288 A, at 32–33:

(a) the violation is reasonable because of the actor's incapacity;

(b) he neither knows nor should know of the occasion for compliance;

(c) he is unable after reasonable diligence or care to comply;

(d) he is confronted by an emergency not due to his own misconduct;

(e) compliance would involve a greater risk of harm to the actor or to others.

History

M Civ JI 12.01 and 12.02 were added September 1980. They replace SJI 12.01 through 12.04.

M Civ JI 12.03 Violation of Ordinance by Defendant

The [city / township / village / [other political subdivision]] of _____ has an ordinance which provides that [*here quote or paraphrase the applicable part of the ordinance as construed by the courts*].

If you find that defendant violated this ordinance before or at the time of the occurrence, such violation is evidence of negligence which you should consider, together with all the other evidence, in deciding whether defendant was negligent. If you find that defendant was negligent, you must then decide whether such negligence was a proximate cause of the [injury / damage] to plaintiff.

Note on Use

This instruction should be given only if—

the ordinance is intended to protect against the injury involved;

the plaintiff is within the class intended to be protected by the ordinance; and

the evidence will support a finding that the violation was a proximate cause of the injury involved.

If applicable, it should be given in close association with the applicable instructions defining proximate cause. See M Civ JI 15.01–15.06. If there is no dispute or question as to a violation of the ordinance, then the jury should be so instructed, leaving, however, the question as to whether such violation constituted negligence, under the facts and circumstances of the case, to the jury. A suggested alternative is as follows:

[It is conceded / There is no question] that defendant violated this ordinance at the time of the occurrence. You should consider this fact, together with all the other evidence, in deciding whether defendant was negligent. If you find that defendant was negligent, you must then decide whether such negligence was a proximate cause of the [injury / damage] to plaintiff.

Where both statute and ordinance violations are involved, the instructions should not attempt to analyze the difference in treatment, this being more appropriately left to argument of counsel.

Comment

In Michigan, violation of an ordinance is only evidence of negligence, *Stinson v Payne*, 231 Mich 158; 203 NW 831 (1925); *Smith v Grand Rapids R Co*, 240 Mich 637; 216 NW 439 (1927); *Baker v Saginaw City Lines, Inc*, 366 Mich 180; 113 NW2d 912 (1962), which is to be considered, in connection with other evidence, in determining whether a party was negligent.

History

M Civ JI 12.03 was SJI 12.05.

M Civ JI 12.04 Violation of Ordinance by Plaintiff

The [city / township / village / [other political subdivision]] of _____ has an ordinance which provides that [*here quote or paraphrase the applicable part of the ordinance as construed by the courts*].

If you find that plaintiff violated this ordinance before or at the time of the occurrence, such violation is evidence of negligence which you should consider, together with all the other evidence, in deciding whether plaintiff was negligent. If you find that plaintiff was negligent, you must then decide whether such negligence was a proximate contributing cause of the [injury / damage] to plaintiff.

Note on Use

This instruction should be given only if—

the ordinance is intended to protect against the result of the violation;

the plaintiff is within the class intended to be protected by the ordinance; and

the evidence will support a finding that the violation was a proximate contributing cause of the injury involved.

If applicable, it should be given in close association with the applicable instructions defining proximate cause. See M Civ JI 15.01–15.06. If there is no dispute or question as to a violation of the ordinance, then the jury should be so instructed, leaving, however, the question as to whether such violation constituted negligence, under the facts and circumstances of the case, to the jury. A suggested alternative is as follows:

[It is conceded / There is no question] that plaintiff violated this ordinance at the time of the occurrence. You should consider this fact, together with all the other evidence, in deciding whether plaintiff was negligent. If you find that plaintiff was negligent, you must then decide whether such negligence was a proximate contributing cause of the [injury / damage] to plaintiff.

Where both statute and ordinance violations are involved, the instructions should not attempt to analyze the difference in treatment, this being more appropriately left to argument of counsel.

Comment

See Comment to M Civ JI 12.03.

History

M Civ JI 12.04 was SJI 12.06.

M Civ JI 12.05 Violation by Defendant of Rules or Regulations Promulgated Pursuant to Statutory Authority

The [*name of state agency*] in Michigan has adopted certain regulations pursuant to authority given to it by a state statute. [Rule / Rules] _____ of [*name of state agency*] [provides / provide] that [*here quote or paraphrase applicable parts of regulation(s) as construed by the courts*].

If you find that defendant violated [this regulation / one or more of these regulations] before or at the time of the occurrence, such [violation / violations] [is / are] evidence of negligence which you should consider, together with all the other evidence, in deciding whether defendant was negligent. If you find that defendant was negligent, you must then decide whether such negligence was a proximate cause of the [injury / damage] to plaintiff.

Note on Use

See Note on Use to M Civ JI 12.03.

Comment

Violations of regulations promulgated pursuant to statutory authority are only evidence of negligence in Michigan. *Douglas v Edgewater Park Co*, 369 Mich 320; 119 NW2d 567 (1963); *Juidici v Forsyth Twp*, 373 Mich 81; 127 NW2d 853 (1964).

History

M Civ JI 12.05 was SJI 12.07.

M Civ JI 12.06 Violation by Plaintiff of Rules or Regulations Promulgated Pursuant to Statutory Authority

The [*name of state agency*] in Michigan has adopted certain regulations pursuant to authority given to it by a state statute. [Rule / Rules] _____ of [*name of state agency*] [provides / provide] that [*here quote or paraphrase applicable parts of regulation(s) as construed by the courts*].

If you find that plaintiff violated [this regulation / one or more of these regulations] before or at the time of the occurrence, such [violation / violations] [is / are] evidence of negligence which you should consider, together with all the other evidence, in deciding whether plaintiff was negligent. If you find that plaintiff was negligent, you must then decide whether such negligence was a proximate contributing cause of the [injury / damage] to plaintiff.

Note on Use

See Note on Use to M Civ JI 12.04.

Comment

See Comment to M Civ JI 12.05.

History

M Civ JI 12.06 was SJI 12.08.

M Civ JI 12.07 Violation of Statute or Ordinance by Minor [*No Instruction Prepared*]

Comment

No instruction on the violation of a statute or ordinance by a minor has been prepared by the committee because the Michigan cases have not distinguished between minors' and adults' violations of statutes, ordinances, rules and regulations. Ertzbischoff v Smith, 286 Mich 306; 282 NW 159 (1938); Strong v Kittenger, 300 Mich 126; 1 NW2d 479 (1942); Brown v Tanner, 281 Mich 150; 274 NW 744 (1937); Rotter v Detroit United R Co, 205 Mich 212; 171 NW 514 (1919). Where a minor is engaged in an activity for which adult qualifications are required, such as driving an automobile, the general rule is that the standard to be applied is the same as for an adult. Restatement (Second) of Torts §283 A, at 14. The Michigan Supreme Court dealt with this in Constantino v Wolverine Insurance Co, 407 Mich 896; 284 NW2d 463 (1979). Reversing an unpublished Court of Appeals opinion, the Supreme Court said that "the instruction that the appellee driver was not held to the same standard of conduct as an adult was erroneous. When a minor engages in a dangerous and adult activity, e.g., driving an automobile, he is charged with the same standard of conduct as an adult."

No cases have been found in Michigan which discuss the question of the effect of an actor's minority on the issue of his or her statutory or ordinance violation where primary negligence is involved. In other jurisdictions, apparently the situation is the same. Anno: Child's violation of statute or ordinance as affecting question of his negligence or contributory negligence, 174 ALR 1170, at 1198–1200.

The majority of jurisdictions considering the effect of a statutory or ordinance violation by a minor upon the question of his or her contributory negligence have held that the minor's age, mental capacity and experience must be considered in determining whether the violation of a statute or ordinance constitutes contributory negligence. That is, if the minor's conduct is reasonable for persons of like age, mental capacity and experience, then the jury should be instructed that, in determining whether the minor violated the statute or ordinance, they should consider whether he or she had the mental and physical capacity to comply with it. 174 ALR 1170, at 1174–1178; 7A Am Jur 2d, Automobiles & Highway Traffic, §498, at 725.

Restatement (Second) of Torts takes the view that minority is to be considered in determining whether a particular violation will be excused. §288 A (2)(a), at 32–33.

Where a child is under the age of seven, the issue of negligence or contributory negligence should not be submitted to the jury, as he or she cannot be guilty of negligence, Queen Insurance Co v Hammond, 374 Mich 655; 132 NW2d 792 (1965), or contributory negligence, Baker v Alt, 374 Mich 492; 132 NW2d 614 (1965).

History

M Civ JI 12.07 was SJI 12.09.

Chapter 13: Other Special Factors Affecting Negligence

M Civ JI 13.01 Physical Disability 127

M Civ JI 13.02 Intoxication as Affecting Negligence 128

M Civ JI 13.03 Mental Illness—Adult 129

M Civ JI 13.04 Duty of One in Imminent Peril and Responsibility of the Person Causing the Perilous Situation [*Recommend No Instruction*] 130

M Civ JI 13.05 Unavoidable Accident [*Recommend No Instruction*] 131

M Civ JI 13.06 Assumption of Risk [*No Instruction Prepared*] 132

M Civ JI 13.07 Attempted Rescue of One in Imminent Peril by a Person Who Did Not Cause Such Peril [*Instruction Deleted*] 133

M Civ JI 13.08 Presumption That Child Under Seven Years Is Incapable of Negligence 134

M Civ JI 13.09 Effect of Parent's Negligence on Claim of Child 135

M Civ JI 13.01 Physical Disability

One who is ill or otherwise physically disabled is required to use the same degree of care that a reasonably careful person who has the same illness or physical disability would use.

Note on Use

This instruction does not apply where voluntary intoxication or mental illness is involved. For the appropriate instructions in those cases see M Civ JI 13.02 and M Civ JI 13.03.

Comment

Physical handicaps and infirmities, such as blindness, deafness, short stature, a clubfoot, or the weakness of age or sex, are treated as part of the circumstances under which a reasonable person must act. Thus the standard of conduct for a blind person becomes that of a reasonable person who is blind. Restatement (Second) of Torts §283 C, at 18.

The same allowance is made for physical illness. Thus a heart attack or a temporary dizziness due to a fever or nausea or other similar illnesses is regarded merely as circumstances to be taken into account in determining what the reasonable person would do. *Id.*

This rule has been recognized in Michigan. See *Daniels v Clegg*, 28 Mich 32, 41 (1873); *Clemens v Sault Ste Marie*, 289 Mich 254, 256; 286 NW 232, 233–234 (1939).

The rule has been applied in the following Michigan cases: *Armstrong v Cook*, 250 Mich 180; 229 NW 433 (1930) (fainting); *Covert v Randall*, 298 Mich 38, 42; 298 NW 396, 397 (1941) (deaf mute); and *Jakubiec v Hasty*, 337 Mich 205, 212; 59 NW2d 385, 388 (1953) (deaf mute).

M Civ JI 13.02 Intoxication as Affecting Negligence

It has been claimed that [*name*] had been drinking [*alcoholic beverage*]. According to the law, one who voluntarily impairs his or her abilities by drinking is held to the same standard of care as a person whose abilities have not been impaired by drinking. It is for you to decide whether [*name*]'s conduct was, in fact, affected by drinking and whether, as a result, [he / she] failed to exercise the care of a reasonably careful person under the circumstances which you find existed in this case.

Note on Use

If it is claimed that a statute or ordinance was violated, give appropriate instructions from M Civ JI 12.01, 12.03 and 12.04.

This instruction may be inappropriate where a person is suffering from delirium tremors rather than intoxication. *Thornton v City of Flint*, 39 Mich App 260; 197 NW2d 485 (1972).

Comment

Michigan recognizes that intoxication is a factor the jury may consider in deciding whether a person is negligent or contributorily negligent. *Devlin v Morse*, 254 Mich 113; 235 NW 812 (1931). One who voluntarily disables himself or herself through the consumption of alcoholic beverages is nevertheless held to the same standard of conduct as a reasonably careful person who is sober. See *Strand v Chicago & W M R Co*, 67 Mich 380; 34 NW 712 (1887). It is for the jury to decide whether an intoxicated person exercised reasonable care. *Fors v LaFreniere*, 284 Mich 5, 11; 278 NW 743, 745 (1938).

M Civ JI 13.03 Mental Illness—Adult

An adult who is disabled by reason of mental illness must still observe the same standard of care which a normal and reasonably careful person would exercise under the circumstances which existed in this case.

Comment

No Michigan cases have been found on this subject.

However, the general rule outside of Michigan is that unless the actor is a child, mental illness does not relieve him or her from liability for conduct which does not conform to the standards of a reasonable person under like circumstances. Restatement (Second) of Torts §283 B, at 16–17.

History

M Civ JI 13.03 is a revision of SJI 13.03. Amended February 1, 1981.

M Civ JI 13.04 Duty of One in Imminent Peril and Responsibility of the Person Causing the Perilous Situation [*Recommend No Instruction*]

Comment

The committee recommends that no instruction be given on either the duty of one in imminent peril or the responsibility of the person causing the perilous situation.

The degree of care required of one confronted with imminent peril does not vary merely because of the unusual circumstances. The standard is neither higher nor lower, the inquiry remaining the same as to whether the one sought to be charged with negligence or contributory negligence acted as a reasonably careful person would act under the same or similar circumstances. *Triestram v Way*, 286 Mich 13, 17; 281 NW 420, 421 (1938).

The liability of one causing a perilous situation is governed by the general principles of negligence law.

The committee recommends that no special instruction be given concerning this matter. The principles suggested are treated in part by instructions on negligence (M Civ JI 10.02 and 11.01) and sudden emergency (M Civ JI 12.02). Any additional instructions may be misleading and argumentative and the matter should be left for argument by counsel.

M Civ JI 13.05 Unavoidable Accident [*Recommend No Instruction*]

Comment

The committee recommends that no instruction be given on "unavoidable accident."

The Michigan Supreme Court has stated that in most cases an instruction that the "accident" was "unavoidable" constitutes a false and immaterial issue. *Lober v Sklar*, 357 Mich 166, 170; 97 NW2d 617, 619 (1959); see also *McClarren v Buck*, 343 Mich 300, 303; 72 NW2d 31, 32 (1955).

M Civ JI 13.06 Assumption of Risk [*No Instruction Prepared*]

Comment

The committee has prepared no instruction on "assumption of risk."

Since *Felgner v Anderson*, 375 Mich 23; 133 NW2d 136 (1965), was decided, the doctrine of assumption of risk has applied only in cases between employee and employer for injuries incurred in the course of employment where the statutory bar of the Worker's Disability Compensation Act is not applicable, and in cases where it is claimed there has been an express contractual assumption of risk.

These situations arise infrequently and the principles involved have not been sufficiently defined to permit the drafting of appropriate instructions.

M Civ JI 13.07 Attempted Rescue of One in Imminent Peril by a Person Who Did Not Cause Such Peril [*Instruction Deleted*]

Comment

Former M Civ JI 13.07 was deleted because the subject matter of that instruction is covered by the general negligence instructions. See *Solomon v Shuell*, 435 Mich 104; 457 NW2d 669 (1990).

History

M Civ JI 13.07 was added September 1980. Deleted February 1991."

M Civ JI 13.08 Presumption That Child Under Seven Years Is Incapable of Negligence

You must not consider whether there was negligence on the part of [*name of child*], because, under the law, a child of [his / her] age cannot be charged with negligence.

Note on Use

This instruction may be used only when the plaintiff was under seven at the time of the occurrence. If there is a jury issue as to the child's age, this instruction must be modified.

Comment

Before Michigan's adoption of comparative negligence in *Placek v Sterling Heights*, 405 Mich 638; 275 NW2d 511 (1979), it was held that a child under seven cannot be guilty of contributory negligence. *Baker v Alt*, 374 Mich 492; 132 NW2d 614 (1965).

History

M Civ JI 13.08 is a revision of SJI 11.03. Amended September 1980.

M Civ JI 13.09 Effect of Parent's Negligence on Claim of Child

You must not consider whether there was negligence on the part of [*name of child*]'s parents, because, under the law, any negligence on the part of the parents cannot affect a claim on behalf of the child.

Note on Use

There are no reported decisions on the impact, if any, of MCL 600.2957 in a case involving a claim for a child's injury. If the court determines that a parent can be named as a nonparty under MCL 600.2957, then this instruction should not be given. The cases discussed in this use note and the comment were all decided prior to the enactment of MCL 600.2957.

This is a cautionary instruction that is to be used only in a case involving a claim on behalf of an injured child in which the parent's negligence is not a defense to the child's claim but the parent's negligence has been improperly injected into the lawsuit in the evidence or in argument of counsel. *Conners v Benjamin I Magid, Inc*, 353 Mich 628; 91 NW2d 875 (1958); *Elbert v Saginaw*, 363 Mich 463; 109 NW2d 879 (1961). However at least one Michigan case has held that a cautionary instruction will not cure the error of injecting parental negligence in a lawsuit in which it is not a defense. *Lapasinskas v Quick*, 17 Mich App 733; 170 NW2d 318 (1969).

See the comment below for Michigan case law on the legal effect of a parent's negligence in cases involving the injury or death of a child.

Comment

Prior to the adoption of comparative negligence in *Placek v Sterling Heights*, 405 Mich 638; 275 NW2d 511 (1979), Michigan cases held that a parent's negligence may not be imputed to a child so as to bar the child's cause of action for his or her injuries. *Conners*; *Elbert*; *Nielsen v Henry H Stevens, Inc*, 359 Mich 130; 101 NW2d 284 (1960).

In a case involving a claim on behalf of a child for the child's injuries that was consolidated for trial with the parent's claim for consequential damages due to injury to the child, the court distinguished between the child's case in which the parent's negligence is not a defense and the parent's cause of action for which the parent's own negligence is a defense. *Nielsen*, 359 Mich at 133–137; 101 NW2d at 287–289 (concurring opinion of Justice Black). (Because of this distinction and the possibility of prejudicing the child's case, Justice Black cautioned against the dangers of consolidation.)

The distinction in the treatment of parental negligence between the child's cause of action and the parent's cause of action has been applied in cases involving the death of a child. In a case in which the child did not die instantly, where the cause of action was for the child's own damages prior to death (case brought under the former Survival Act), the court held that the mother's negligence is not a defense even though the parents were the sole heirs and distributees of the child's estate. *Love v Detroit J & C R Co*, 170 Mich 1; 135 NW 963 (1912). But where the cause of action was brought under the former Death Act for a parent's consequential damages due to the death of a child, courts have held that a parent's

negligence is a defense, at least to the extent of his or her own recovery. *Feldman v Detroit United R Co*, 162 Mich 486; 127 NW 687 (1910); *McCann v Detroit*, 234 Mich 268; 207 NW 923 (1926); *Flintoff v Muskegon Traction & Lighting Co*, 208 Mich 527; 175 NW 438 (1919). See *McCann* for a discussion of the distinction between Death and Survival Act cases.

This distinction in the treatment of parental negligence in cases involving the death of a child survived both the consolidation of the former Death and Survival Acts into the Wrongful Death Act and the adoption of comparative negligence. In *Byrne v Schneider's Iron & Metal, Inc*, 190 Mich App 176; 475 NW2d 854 (1991), the court held that the parent's negligence cannot reduce an award to the estate for the conscious pain and suffering of the child (even though such award will inure to the benefit of the parents), but the parent's negligence can reduce a parent's recovery for the loss of the deceased child's services and society and companionship:

We conclude that the reasoning set forth in *Feldman*, *McCann*, and *Nielsen* is still persuasive; it remains in keeping with the objective of a fair apportionment of damages under the doctrine of comparative negligence. See *Placek v Sterling Heights*, 405 Mich 638; 275 NW2d 511 (1979). The parent's comparative negligence is relevant under the wrongful death statute where recovery is sought for damages sustained by the parent because of the wrongful death of the child. However, the comparative negligence of the parent may not be imputed to the recovery attributable to the child's damages.

Byrne, 190 Mich App at 189; 475 NW2d at 860.

History

M Civ JI 13.09 was SJI 11.04.

Chapter 14: Subsequent Negligence—Intentional Misconduct

M Civ JI 14.01 Subsequent Negligence (Last Clear Chance)—Helpless or Inattentive Plaintiff [*Instruction Deleted*] 138

M Civ JI 14.02 Willful and Wanton Misconduct—Common Law [*Instruction Deleted*] 139

M Civ JI 14.10 Gross Negligence—Definition 140

M Civ JI 14.11 Wanton Misconduct—Definition 143

M Civ JI 14.12 Willful Misconduct—Definition 144

M Civ JI 14.20 Emergency Medical Services Act—Explanation 145

M Civ JI 14.21 Emergency Medical Services Act—Burden of Proof 146

M Civ JI 14.01 Subsequent Negligence (Last Clear Chance)—Helpless or Inattentive Plaintiff [*Instruction Deleted*]

Comment

The doctrine of last clear chance as a separate defense to contributory negligence has been superseded by the adoption of pure comparative negligence. *Petrove v Grand Trunk W R Co (On Remand)*, 437 Mich 31; 464 NW2d 711 (1991). In addition, the doctrine of last clear chance as a formulation of gross negligence has been discarded. *Jennings v Southwood*, 446 Mich 125; 521 NW2d 230 (1994).

History

M Civ JI 14.01 was a revision of SJI 14.01. Deleted August 1991.

M Civ JI 14.02 Willful and Wanton Misconduct—Common Law [*Instruction Deleted*]

Comment

Comparative fault should be applied in all actions filed on or after March 28, 1996, that are based on tort or another legal theory and seek damages for personal injury, property damage, or wrongful death. 1995 PA 249 (MCL 600.2957). Fault is defined to include "an act, an omission, conduct, including intentional conduct, a breach of warranty, or a breach of a legal duty, or any conduct that could give rise to the imposition of strict liability, that is a proximate cause of damage sustained by a party." 1995 PA 249 (MCL 600.6304(8)).

Prior law held that comparative negligence should be applied in all common-law tort actions sounding in negligence where defendant's misconduct falls short of being intentional. *Vining v Detroit*, 162 Mich App 720; 413 NW2d 486 (1987); lv denied, 430 Mich 892 (1988).

History

Deleted July 1988.

M Civ JI 14.10 Gross Negligence—Definition

Gross negligence means conduct or a failure to act that is so reckless that it demonstrates a substantial lack of concern for whether an injury will result.

Note on Use

This instruction may be used in cases arising under the government tort liability act, MCL 691.1407(2)(c), if gross negligence is an issue for the jury in the case. *Tallman v Markstrom*, 180 Mich App 141; 446 NW2d 618 (1989); *Vermilya v Dunham*, 195 Mich App 79; 489 NW2d 496 (1992).

This instruction may also be used in cases arising under the statutes limiting the liability of certain governmental units to gross negligence in regard to off-road recreational vehicles, MCL 324.81131, and snowmobiles, MCL 324.82124, and the statutes making the insurance commissioner and his or her representatives immune from civil liability for conduct not amounting to gross negligence, MCL 500.214. All of these statutes contain the definition of gross negligence from the government tort liability act.

This instruction may be combined with the definitions of wanton, M Civ JI 14.11, and willful, M Civ JI 14.12, misconduct, if appropriate. M Civ JI 14.20, Emergency Medical Services Act—Explanation, and M Civ JI 14.21, Emergency Medical Services Act—Burden of Proof, provide a model for such instructions.

The committee takes no position on the application of this instruction in a context other than the statutes discussed in this use note and comment.

Comment

The definition of gross negligence in M Civ JI 14.10 comes from the government tort liability act. MCL 691.1407(2)(c). *Jennings v Southwood*, 446 Mich 125; 521 NW2d 230 (1994), adopted this definition as the standard for gross negligence under the Emergency Medical Services Act. In adopting this definition, Jennings discarded the common-law definition of gross negligence (also called last clear chance, subsequent negligence, etc.) as both outdated in a comparative negligence system and inconsistent with the legislative intent to shield emergency medical services workers from liability for ordinary negligence. The "last clear chance" formulation of gross negligence had been applied in cases involving both the Emergency Medical Services Act and the recreational use statute. *Burnett v City of Adrian*, 414 Mich 448; 326 NW2d 810 (1982).

The committee notes that the term gross negligence is used but not defined in other statutes that share the purpose of immunizing against liability for ordinary negligence. The threshold for liability in most of these statutes is gross negligence, but many add willful and wanton misconduct, bad faith conduct, or other terms without defining them.

The following statutes dealing with health and medical assistance uniformly limit liability to "gross negligence or willful and wanton misconduct" (sometimes adding "good faith conduct"):

- doctors or nurses who render medical care at the scene of an emergency or perform physical examinations or emergency care in competitive sports situations, MCL 691.1501
- doctors, nurses, and other medical personnel who are not under a duty to respond but do respond to life-threatening emergencies in hospitals or medical care facilities, MCL 691.1502
- block parent volunteers who aid minors in emergencies, MCL 691.1505
- registered members of national ski patrol systems who provide emergency care, MCL 691.1507
- municipal or private ambulance drivers or attendants, or police officers or firefighters who provide first aid at the scene of emergencies, MCL 41.711a
- school administrators, teachers, or other designated school employees who administer medication to pupils with written permission, MCL 380.1178
- health personnel who participate in free immunization programs, MCL 333.9203
- persons who voluntarily render cardiopulmonary resuscitation, MCL 691.1504
- peace officers who are involved in mental illness admissions, MCL 330.1427b
- persons who file petitions to have others treated or committed for mental illness, MCL 330.1439
- law enforcement officers, staff of approved service programs, and certain others who deal with apparently incapacitated substance abusers, MCL 333.6508 (MCL 330.1282, effective December 28, 2012).

There is also a statute that protects members of the state health planning council or employees of that office from criminal or civil liability except for "wanton and willful misconduct." MCL 325.2021.

Several statutes provide partial immunity in disaster relief or other emergency situations. The emergency management act limits the liability of various disaster relief workers as well as of landowners who provide shelter, MCL 30.411, and allows for a directive limiting the liability of suppliers of voluntary or private assistance, MCL 30.407. Similar statutes provide partial immunity for volunteers in hazardous spill remedial actions. MCL 324.20302. The environmental response act sets limitations on costs and damages resulting from the release or the threat of release of hazardous substances, MCL 324.20131, and limits liability in response activities MCL 324.20126. Another statute limits liability for civil damages for those who provide emergency telephone services, MCL 484.1604 (repealed effective December 31, 2006, see 1999 PA 79).

Three statutes give landowners, lessees, and tenants partial immunity; all set the threshold at "gross negligence or willful and wanton misconduct." The recreational use act limits the liability of landowners, tenants, or lessees for injury to persons (usually gratuitous users) on the property for outdoor recreation or agricultural, fishing, or hunting purposes. MCL 324.73301. The recreational trespass act limits the liability of owners, tenants, or lessees for injury to persons on the land with consent for

recreational or trapping use who have not paid valuable consideration. MCL 324.73107. Another statute protects landowners who lease their land for habitat development and hunter access. MCL 324.43556.

Finally, two sections of the Insurance Code protect various persons from liability for statements made concerning insureds or applicants for insurance, MCL 500.2124, or acts or omissions relating to the exchange of claim information, MCL 500.2130, unless there is gross negligence or bad faith with malice in fact.

History

M Civ JI 14.10 was added September 1995.

M Civ JI 14.11 Wanton Misconduct—Definition

Wanton misconduct means conduct or a failure to act that shows such indifference to whether harm will result as to be equal to a willingness that harm will result.

Note on Use

This instruction may be used in combination with M Civ JI 14.10 and 14.12 in cases arising under the recreational use statute, *Burnett v City of Adrian*, 414 Mich 448; 326 NW2d 810 (1982); and the good samaritan act, *Higgins v Detroit Osteopathic Hospital Corp*, 154 Mich App 752; 398 NW2d 520 (1986). It should also be applicable to most other limited tort liability statutes that employ the terms willful and wanton without defining them. See comment to M Civ JI 14.10. M Civ JI 14.20, Emergency Medical Services Act—Explanation, and M Civ JI 14.21, Emergency Medical Services Act—Burden of Proof, provide a model for instructions combining one or more of the definitions in M Civ JI 14.10, 14.11, and 14.12.

The committee takes no position on the application of this instruction in a context other than the statutes discussed in this comment and the comment to M Civ JI 14.10.

Comment

In *Burnett*, the Michigan Supreme Court defined willful and wanton: "[W]illful and wanton misconduct is made out only if the conduct alleged shows an intent to harm or, if not that, such indifference to whether harm will result as to be the equivalent of a willingness that it does." Burnett, at 455. In *Jennings v Southwood*, 446 Mich 125; 521 NW2d 230 (1994), which construed willful as used in the Emergency Medical Services Act, the court approved the Burnett definition with a refinement. The court said that willful and wanton are distinct and logically inconsistent, so "willful and wanton" is to be read as "willful or wanton." Willful, as Burnett said, requires intent to harm while wanton means the equivalent, reckless conduct without intent to harm but with indifference as to the result.

History

M Civ JI 14.11 was added September 1995.

M Civ JI 14.12 Willful Misconduct—Definition

Willful misconduct means conduct or a failure to act that was intended to harm the plaintiff.

Note on Use

This instruction may be used in combination with M Civ JI 14.10 and 14.11 in cases arising under the recreational use statute, *Burnett v City of Adrian*, 414 Mich 448; 326 NW2d 810 (1982); and the good samaritan act, *Higgins v Detroit Osteopathic Hospital Corp*, 154 Mich App 752; 398 NW2d 520 (1986). It should also be applicable to most other limited tort liability statutes that employ the terms willful and wanton without defining them. See comment to M Civ JI 14.10. M Civ JI 14.20, Emergency Medical Services Act—Explanation, and M Civ JI 14.21, Emergency Medical Services Act—Burden of Proof, provide a model for instructions combining one or more of the definitions in M Civ JI 14.10, 14.11, and 14.12.

The committee takes no position on the application of this instruction in a context other than the statutes discussed in this comment and the comment to M Civ JI 14.10.

Comment

In *Burnett*, the Michigan Supreme Court defined willful and wanton: "[W]illful and wanton misconduct is made out only if the conduct alleged shows an intent to harm or, if not that, such indifference to whether harm will result as to be the equivalent of a willingness that it does." *Burnett*, at 455. In *Jennings v Southwood*, 446 Mich 125; 521 NW2d 230 (1994), which construed willful as used in the Emergency Medical Services Act, the court approved the Burnett definition with a refinement. The court said that willful and wanton are distinct and logically inconsistent, so "willful and wanton" is to be read as "willful or wanton." Willful, as Burnett said, requires intent to harm while wanton means the equivalent, reckless conduct without intent to harm but with indifference as to the result.

History

M Civ JI 14.12 was added September 1995.

M Civ JI 14.20 Emergency Medical Services Act—Explanation

An emergency medical services worker acting in an emergency situation is liable for injuries to a patient caused by the worker's conduct or failure to act only if the conduct or failure to act constitutes gross negligence or willful misconduct.

[*Insert M Civ JI 14.10 Gross Negligence—Definition*]

[*Insert M Civ JI 14.12 Willful Misconduct—Definition*]

Note on Use

The Emergency Medical Services Act applies only to emergencies. *Knight v Limbert*, 170 Mich App 410; 427 NW2d 637 (1988); *Pavlov v Community Emergency Medical Services, Inc*, 195 Mich App 711; 491 NW2d 874 (1992).

On the question of whether the Emergency Medical Services Act applies to governmental units and their employees, see *Malcolm v East Detroit*, 437 Mich 132, 141 fn 9; 468 NW2d 479 (1991), and subsection (2) of MCL 333.20965.

Comment

MCL 333.20965. *Jennings v Southwood*, 446 Mich 125; 521 NW2d 230 (1994).

History

M Civ JI 14.20 was added January 1996.

M Civ JI 14.21 Emergency Medical Services Act—Burden of Proof

The plaintiff has the burden of proof on each of the following:

that [he / she] was injured

that defendant's conduct or failure to act constituted gross negligence or willful misconduct

that the gross negligence or willful misconduct of the defendant was a proximate cause of the injury to the plaintiff.

*(Your verdict will be for the plaintiff if you find that all of these have been proved.)

*(Your verdict will be for the defendant if you find that any one of these has not been proved.)

Note on Use

The Emergency Medical Services Act applies only to emergencies. *Knight v Limbert*, 170 Mich App 410; 427 NW2d 637 (1988); *Pavlov v Community Emergency Medical Services, Inc*, 195 Mich App 711; 491 NW2d 874 (1992). If there are fact issues, such as the existence of an emergency or whether defendant is one of the persons enumerated in the statute, additional instructions on the alternative of ordinary negligence will have to be given.

*These paragraphs are not necessary if a special verdict form is used. These paragraphs should not be used if comparative negligence is an issue in the case. If comparative negligence is an issue, the court should use M Civ JI 11.01, Comparative Negligence—Definition, and should incorporate the comparative negligence issue in this burden of proof instruction. For guidance, see M Civ JI 16.02, Burden of Proof in Negligence Cases on the Issues and Legal Effect Thereof.

Comment

MCL 333.20965. *Jennings v Southwood*, 446 Mich 125; 521 NW2d 230 (1994).

History

M Civ JI 14.21 was added January 1996.

Chapter 15: Proximate Cause (NEGLIGENCE)

M Civ JI 15.01 Definition of Proximate Cause 148
M Civ JI 15.02 Definition of Proximately Contributed [*Instruction Deleted*] 149
M Civ JI 15.03 More Than One Proximate Cause 150
M Civ JI 15.04 Causation by Multiple Defendants 151
M Civ JI 15.05 Intervening Negligence or Conduct of Person Not a Party [*Instruction deleted*] 152
M Civ JI 15.06 Intervening Outside Force (Other Than Person) 153

M Civ JI 15.01 Definition of Proximate Cause

When I use the words "proximate cause" I mean first, that the negligent conduct must have been a cause of plaintiff's injury, and second, that the plaintiff's injury must have been of a type that is a natural and probable result of the negligent conduct.

Note on Use

This definition should accompany instructions which use the term "proximate cause."

When a defendant presents evidence that the conduct of a person other than the plaintiff or force was a proximate cause, M Civ JI 15.03 and the appropriate instruction from M Civ JI 15.04, 15.05 and 15.06 should be given in addition to this instruction.

Comment

Proximate cause, at the minimum, means a cause in fact relationship. *Glinski v Szylling*, 358 Mich 182; 99 NW2d 637 (1959). In addition, the causal connection between the defendant's conduct and the occurrence which produced the injury must have some practical limitation, variously expressed in terms such as "natural," "probable," "direct," or "reasonably anticipated." See *Van Keulen & Winchester Lumber Co v Manistee & N R Co*, 222 Mich 682; 193 NW 289 (1923); *Woodyard v Barnett*, 335 Mich 352; 56 NW2d 214 (1953); and *Fisk v Powell*, 349 Mich 604; 84 NW2d 736 (1957), all approved in *Sutter v Biggs*, 377 Mich 80; 139 NW2d 684 (1966). The exact damages need not have been foreseen so long as the results are a natural and probable consequence of the defendant's conduct. It is sufficient that the ordinary prudent person ought to have foreseen or anticipated that damage might possibly occur. *Luck v Gregory*, 257 Mich 562; 241 NW 862 (1932); *Clumfoot v St Clair Tunnel Co*, 221 Mich 113; 190 NW 759 (1922). Proximate cause "normally involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences." *Skinner v Square D Co*, 445 Mich 153, 163 (1994).

History

M Civ JI 15.01 is a revision of SJI 15.01. Amended September 1980, October 1988, June 2010.

M Civ JI 15.02 Definition of Proximately Contributed [*Instruction Deleted*]

History

Deleted September 1988.

M Civ JI 15.03 More Than One Proximate Cause

There may be more than one proximate cause. To be a proximate cause, the claimed negligence need not be the only cause nor the last cause. A cause may be proximate although it and another cause act at the same time or in combination to produce the occurrence.

Note on Use

This instruction should be given as an introduction to M Civ JI 15.04, 15.05, or 15.06. The instruction may also be given where the only possible additional proximate cause is the conduct of the plaintiff.

The use note to the predecessor version of this instruction included the admonition that it was not to be used if the only possible additional proximate cause was the conduct of the plaintiff. The reason for that admonition was that there was a separate instruction on the plaintiff's conduct as a "proximate contributing cause," M Civ JI 15.02 Definition of Proximately Contributed. Several cases repeated this admonition. E.g., *Stephens v Spiwak*, 61 Mich App 647; 233 NW2d 124 (1975). In 1988, the Committee deleted M Civ JI 15.02 and made the instruction that defines proximate cause, M Civ JI 15.01, party-neutral by eliminating the reference to the defendant's negligent conduct. These changes make the Stephens case obsolete and make the current version of M Civ JI 15.03 applicable even if the only other possible additional proximate cause is the plaintiff's conduct.

This instruction should not be given in a case against a government employee under the employee exception to the governmental immunity act. *Robinson v City of Detroit*, 462 Mich 439; 613 NW2d 307 (2000) (overruling *Dedes v Asch*, 446 Mich 99; 521 NW2d 488 (1994)). See the Comment below.

Comment

There may be more than one proximate cause contributing to an injury; the defendant's negligence need not be the sole cause. *Brisboy v Fibreboard Corp*, 429 Mich 540; 418 NW2d 650 (1988); *Barringer v Arnold*, 358 Mich 594; 101 NW2d 365 (1960); *Gleason v Hanafin*, 308 Mich 31; 13 NW2d 196 (1944). It is prejudicially erroneous for instructions on proximate cause to refer to "the proximate cause" instead of "a proximate cause" in cases in which it is an issue whether there was more than one proximate cause. *Kirby v Larson*, 400 Mich 585, 600–607; 256 NW2d 400, 408–411 (1977).

Governmental employees are not individually liable under the motor vehicle exception (MCL 691.1405) to the governmental immunity act unless their conduct constitutes the proximate cause, that is, the one most immediate, efficient, and direct cause of the plaintiff's injury. *Robinson* (construing the employee provision of the act, MCL 691.1407(2)).

History

Amended December 1988.

M Civ JI 15.04 Causation by Multiple Defendants

You may decide that the conduct of [neither / none], one or [both / more] of the defendants was a proximate cause. If you decide that [one / one or more] of the defendants was negligent and that such negligence was a proximate cause of the occurrence, it is not a defense that the conduct of [the / any] other [defendant / defendants] also may have been a cause of the occurrence. Each defendant is entitled to separate consideration as to whether [his / or / her] conduct was a proximate cause of the occurrence.

Note on Use

This instruction should be preceded by M Civ JI 15.03 and should be given when there is an issue whether the conduct of each defendant was a proximate cause. The bracketed alternatives should be selected according to whether there are two or more than two defendants.

Comment

See *Banzhof v Roche*, 228 Mich 36; 199 NW 607 (1924); *Camp v Wilson*, 258 Mich 38; 241 NW 844 (1932).

M Civ JI 15.05 Intervening Negligence or Conduct of Person Not a Party [*Instruction deleted*]

Note on Use

This instruction was deleted by the Committee June 1, 2003. The instruction was deleted because the effect of nonparty fault is addressed in MCivJI 15.03 More Than One Proximate Cause and 42.05 Allocation of Fault of Parties and Identified Nonparties.

History

M Civ JI 15.05 is a revision of SJI2d 15.05. Amended September 1980. Deleted June 1, 2003.

M Civ JI 15.06 Intervening Outside Force (Other Than Person)

If you decide that [the defendant / one or more of the defendants] [was / were] negligent and that such negligence was a proximate cause of the occurrence, it is not a defense that [description of force] also was a cause of this occurrence.

*(However, if you decide that the only proximate cause of the occurrence was [*description of force*], then your verdict should be for the [defendant / defendants].)

Note on Use

M Civ JI 15.03 is the proper preface to this instruction.

*The paragraph in parentheses should be given only if there is evidence that the outside force may have been the sole proximate cause.

In the blanks, insert a description of the force, as for example flood, fire or wind.

Comment

As to the possibility of more than one proximate cause and the liability of a single defendant when more than one such cause existed, see authorities in Comments to M Civ JI 15.03 and 15.04. Defendant is relieved from liability if the outside force was the sole proximate cause of the injury. See *Tobin v Lake Shore & M S R Co*, 192 Mich 549; 159 NW 389 (1916). However, defendant is not relieved from liability where the outside force aggravates the damage resulting from defendant's negligent conduct. *Lillibridge v McCann*, 117 Mich 84; 75 NW 288 (1898).

Chapter 16: Burden of Proof (NEGLIGENCE)

M Civ JI 16.01 Meaning of Burden of Proof [*Renumbered to M Civ JI 8.01*] 155

M Civ JI 16.02 Burden of Proof in Negligence Cases on the Issues and Legal Effect Thereof 156

M Civ JI 16.03 Burden of Proof in Negligence Cases on the Issues and Legal Effect Thereof, Including the Issues of Contributory Negligence and Subsequent Negligence (Last Clear Chance) or Intentional Misconduct [*Instruction Deleted*]..... 158

M Civ JI 16.04 Burden of Proof in Negligence Cases on Affirmative Defenses Other Than Contributory Negligence..... 159

M Civ JI 16.05 Burden of Proof and Legal Effect Thereof in Negligence Cases—Complaint and Counterclaim..... 160

M Civ JI 16.06 Burden of Proof and Legal Effect Thereof in Negligence Cases—Third-Party Complaint—Contribution Only 163

M Civ JI 16.07 Evenly Balanced Evidence [*Recommend No Instruction*] 165

M Civ JI 16.08 Burden of Proof in Negligence Cases (To Be Used in Cases Filed on or After March 28, 1996)..... 166

M Civ JI 16.01 Meaning of Burden of Proof [*Renumbered to M Civ JI 8.01*]

History

M Civ JI 16.01 was SJI 21.01. Amended October 1984. Renumbered to M Civ JI 8.01 November 1998.

M Civ JI 16.02 Burden of Proof in Negligence Cases on the Issues and Legal Effect Thereof

The plaintiff has the burden of proof on each of the following propositions:

(a) that the plaintiff [was injured / sustained damage]

(b) that the defendant was negligent in one or more of the ways claimed by the plaintiff, as stated to you in these instructions

(c) that the negligence of the defendant was a proximate cause of the [injuries / damages] to the plaintiff

*(The defendant has the burden of proof on [his / her] claim that the plaintiff was negligent in one or more of the ways claimed by the defendant as stated to you in these instructions; and that such negligence was a proximate contributing cause of the [injuries / damages] to the plaintiff.)

†(Your verdict will be for the plaintiff, if [he / she] was [injured / damaged], and defendant was negligent, and such negligence was a proximate cause of [his / her] [injuries / damages].)

†(Your verdict will be for the defendant, if plaintiff was not [injured / damaged]; or the defendant was not negligent; or if negligent, such negligence was not a proximate cause of the [injuries / damages].)

*(If you find that each party was negligent and that the negligence of each party was a proximate cause of the plaintiff's [injuries / damages], then you must determine the degree of such negligence, expressed as a percentage, attributable to the plaintiff. Negligence on the part of the plaintiff does not bar recovery by the plaintiff against the defendant. However, the percentage of negligence attributable to the plaintiff will be used by the Court to reduce the amount of damages which you find to have been sustained by the plaintiff.)

*(The Court will furnish a Special Verdict Form to assist you in your duties. Your answers to the questions in the Special Verdict Form will provide the basis on which this case will be resolved.)

Note on Use

M Civ JI 16.08 should be used for cases filed on or after March 28, 1996, that are based on tort or another legal theory and seek damages for personal injury, property damage, or death. See 1995 PA 161and 249 .

*These three paragraphs should not be read to the jury if comparative negligence is not an issue in the case.

†The two paragraphs beginning with the words "Your verdict" are not necessary if a Special Verdict Form is used.

Comment

Comparative negligence should be applied in all common-law tort actions sounding in negligence where defendant's misconduct falls short of being intentional. *Vining v Detroit*, 162 Mich App 720; 413 NW2d 486 (1987); lv denied, 430 Mich 892 (1988).

History

M Civ JI 16.02 is a revision of SJI 21.02. Amended September 1980.

M Civ JI 16.03 Burden of Proof in Negligence Cases on the Issues and Legal Effect Thereof, Including the Issues of Contributory Negligence and Subsequent Negligence (Last Clear Chance) or Intentional Misconduct [*Instruction Deleted*]

Comment

The doctrine of last clear chance as a separate defense to contributory negligence has been superseded by the adoption of pure comparative negligence. *Petrove v Grand Trunk W R Co (On Remand)*, 437 Mich 31; 464 NW2d 711 (1991). The remainder of the instruction is no longer necessary.

History

M Civ JI 16.03 was a revision of SJI 21.02(A). Amended October 1988. Deleted August 1991.

M Civ JI 16.04 Burden of Proof in Negligence Cases on Affirmative Defenses Other Than Contributory Negligence

In this case the defendant has asserted [the affirmative defense that / certain affirmative defenses that] [*concisely state affirmative defense(s)*].

The defendant has the burden of proving [this defense / these defenses].

Your verdict will be for the defendant if any of these affirmative defenses has been proved.

Note on Use

This instruction is to be given if accord and satisfaction, release, and/or statute of limitations that act as a complete bar to recovery are at issue. It may be used in conjunction with M Civ JI 16.08 Burden of Proof in Negligence Cases (To Be Used in Cases Filed on or after March 28, 1996) or, if applicable, M Civ JI 16.02 Burden of Proof in Negligence Cases on the Issues and Legal Effect Thereof.

History

M Civ JI 16.04 replaced SJI 21.03. Added September 1980.

M Civ JI 16.05 Burden of Proof and Legal Effect Thereof in Negligence Cases—Complaint and Counterclaim

In this action there is not only the claim of the plaintiff against the defendant, but also a claim by the defendant against the plaintiff. This is known as a counterclaim.

Because there is a counterclaim in this case, you may reach one of four results.

First, your verdict may be for the plaintiff on [his / her] claim and against the defendant on [his / her] counterclaim.

Second, your verdict may be for the defendant on [his / her] counterclaim and against the plaintiff on [his / her] claim.

Third, your verdict may be against both the plaintiff on [his / her] claim and the defendant on [his / her] counterclaim.

Fourth, your verdict may be for the plaintiff on [his / her] claim and for the defendant on [his / her] counterclaim.

As to plaintiff's claim, [he / she] has the burden of proof on each of the following propositions:

(a) that the plaintiff [was injured / sustained damages]

(b) that the defendant was negligent in one or more of the ways claimed by the plaintiff as stated to you in these instructions

(c) that the negligence of the defendant was a proximate cause of the [injuries / damages] to the plaintiff

The defendant has the burden of proof on [his / her] defense that the plaintiff was negligent in one or more of the ways claimed by the defendant as stated to you in these instructions; and that such negligence was a proximate cause of the injury to the plaintiff.

Your verdict will be for the plaintiff on [his / her] claim, if [he / she] was [injured / damaged], and defendant was negligent, and such negligence was a proximate cause of plaintiff's [injuries / damages].

Your verdict will be for the defendant on plaintiff's claim, if plaintiff was not [injured / damaged], or if defendant was not negligent, or if negligent, such negligence was not a proximate cause of the [injuries / damages].

If you find that each party was negligent and that the negligence of each party was a proximate cause of the plaintiff's injuries or damages, then you must determine the degree of such negligence, expressed as a percentage, attributable to the plaintiff. Negligence on the part of the plaintiff does not bar recovery by the plaintiff against the defendant. However, the percentage of negligence attributable to the plaintiff will be

used by the Court to reduce the amount of damages which you find to have been sustained by the plaintiff.

As to the defendant's counterclaim, [he / she] has the burden of proof on each of the following propositions:

(a) that the defendant [was injured / sustained damages]

(b) that the plaintiff was negligent in one or more of the ways claimed by the defendant as stated to you in these instructions

(c) that the negligence of the plaintiff was a proximate cause of the [injuries / damages] to the defendant

The plaintiff has the burden of proof on [his / her] defense that the defendant was negligent in one or more of the ways claimed by the plaintiff as stated to you in these instructions; and that such negligence was a proximate cause of the [injuries / damages] to the defendant.

Your verdict will be for the defendant on [his / her] counterclaim if [he / she] was [injured / damaged], and plaintiff was negligent, and such negligence was a proximate cause of defendant's [injuries / damages].

Your verdict will be for the plaintiff on defendant's counterclaim if defendant was not [injured / damaged], or if the plaintiff was not negligent, or if negligent, such negligence was not a proximate cause of the [injuries / damages].

If you find that each party was negligent and that the negligence of each party was a proximate cause of the defendant's injuries or damages, then you must determine the degree of such negligence, expressed as a percentage, attributable to the defendant. Negligence on the part of the defendant does not bar recovery by the defendant against the plaintiff. However, the percentage of negligence attributable to the defendant will be used by the Court to reduce the amount of damages which you find to have been sustained by the defendant.

Note on Use

This instruction is for the negligence case in which either the plaintiff or the defendant or both may recover.

It should be given with M Civ JI 8.01, which defines burden of proof.

If the case involves an affirmative defense, or a third-party complaint, use M Civ JI 16.04 or 16.06 together with this instruction.

To make this instruction more understandable the Court may refer to the parties by name.

Comment

The 2013 amendment changed "proximate contributing cause" to "proximate cause" in two places.

History

M Civ JI 16.05 is a revision of SJI 21.04. Amended September 1980. Amended May 2013.

M Civ JI 16.06 Burden of Proof and Legal Effect Thereof in Negligence Cases—Third-Party Complaint—Contribution Only

In addition to the claim of the plaintiff, [*name of plaintiff*], there is also a claim by the defendant, [*name of defendant*]. This is called a third-party complaint and the defendant, [*name of defendant*], is called the third-party plaintiff and [*name*] is called the third-party defendant.

[*Give the applicable paragraphs from M Civ JI 16.02*]

[*Name of third-party plaintiff*] has the burden of proof on each of the following propositions:

that [*name of third-party defendant*] was negligent in one or more of the ways claimed by [*name of third-party plaintiff*] as stated to you in these instructions

that the negligence of [*name of third-party defendant*] was a proximate cause of the [injuries / damages] to the plaintiff, [*name of plaintiff*]

[*Name of third-party defendant*] has the burden of proof on [his / her] claim that the plaintiff, [*name of plaintiff*], was negligent in one or more of the ways claimed by [*name of third-party defendant*] as stated to you in these instructions; and that such negligence was a proximate contributing cause of the [injuries / damages] to the plaintiff, [*name of plaintiff*].

If your verdict is for the plaintiff, [*name of plaintiff*], against the defendant, *[name of defendant*], then your verdict will be for [*name of third-party plaintiff*] if [*name of third-party defendant*] was negligent, and such negligence was a proximate cause of plaintiff [*name of plaintiff*]'s [injuries / damages].

If your verdict is for the defendant, [*name of defendant*], then your verdict must also be for [*name of third-party defendant*].

Even if your verdict is against the defendant, [*name of defendant*], your verdict will be for [*name of third-party defendant*] if [he / she] was not negligent, or, if negligent, such negligence was not a proximate cause of plaintiff [*name of plaintiff*]'s [injuries / damages].

Comment

For rights to contribution among persons jointly liable in tort, see MCL 600.2925a–.2925d.

In late 1995, the Michigan legislature abrogated joint liability in most cases and thereby eliminated most actions for contribution among tort-feasors:

Except as provided in section 6304, in an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each defendant for damages is several only and is not joint. However, this section does not abolish an employer's vicarious liability for an act or omission of the employer's employee. MCL 600.2956.

Section 6304 created two exceptions to the abolishment of joint liability. MCL 600.6304(4). The first exception applies to medical malpractice actions. In medical malpractice actions in which the plaintiff is determined to be without fault, liability of defendants is joint and several. MCL 600.6304(6)(a). In medical malpractice actions in which the plaintiff is determined to have fault, a mechanism for allocating uncollectable amounts to certain defendants is provided. MCL 600.6304(6)(b), 6304(7). The second exception to the abrogation of joint liability is for defendants who have been found liable for an act or omission that also constitutes one of the enumerated crimes for which the defendant was convicted. MCL 600.6312.

History

M Civ JI 16.06 was SJI 21.05.

M Civ JI 16.07 Evenly Balanced Evidence [*Recommend No Instruction*]

Comment

The committee recommends that no instruction on "evenly balanced evidence" be given. An "evenly balanced evidence" instruction is unnecessary, since the jury will be instructed on the burden of proof. See M Civ JI 8.01 Meaning of Burden of Proof. Not only is such an instruction unnecessary, but it may be prejudicial error in certain circumstances. See *Krisher v Duff*, 331 Mich 699; 50 NW2d 332 (1951); cf. *Hale v Knapp*, 134 Mich 622; 96 NW 1060 (1903).

History

M Civ JI 16.07 was SJI 21.06.

M Civ JI 16.08 Burden of Proof in Negligence Cases (To Be Used in Cases Filed on or After March 28, 1996)

The plaintiff has the burden of proof on the following propositions:

that the defendant was negligent in one or more of the ways claimed by the plaintiff *(as stated to you in these instructions)

that the plaintiff [was injured / sustained damage]

that the negligence of the defendant was a proximate cause of the [injuries / damages] to the plaintiff.

**Your verdict will be for the plaintiff if you decide that all of these have been proved.

**Your verdict will be for the defendant if you decide that any one of these has not been proved.

†(The defendant has the burden of proof on [his / her] claim that the plaintiff was negligent in one or more of the ways claimed by the defendant *(as stated to you in these instructions), and that such negligence was a proximate cause of the [injuries / damages] to the plaintiff.)

‡(The defendant has the burden of proof on [his / her] claim that [*name of nonparty*] was negligent, and that the negligence of [*name of nonparty*] was a proximate cause of the [injuries / damages] to the plaintiff.)

†(If your verdict is for the plaintiff, then you must determine the percentage of fault for each party or nonparty whose negligence was a proximate cause of plaintiff's [injuries / damages]. In determining the percentage of fault, you should consider the nature of the conduct, and the extent to which each person's conduct caused or contributed to plaintiff's [injuries / damages].

†(The Court will furnish a Special Verdict Form to assist you in your duties. Your answers to the questions in the Special Verdict Form will provide the basis on which this case will be resolved.)

Note on Use

*If the parties waive the court's reading of the theories of the parties (see M Civ JI 7.01, Theories of the Parties), the court should delete the phrase in parentheses.

**The two paragraphs beginning with the words "Your verdict" are not necessary if a Special Verdict Form is used.

†These three paragraphs should not be read to the jury if comparative negligence is not an issue in the case.

‡This paragraph should only be used if defendant has identified a nonparty pursuant to MCL 600.2957.

This instruction may have to be modified or other instructions given if fault, such as intentional conduct, is an issue in the case. By statutory definition, "fault" "includes an act, an omission, conduct, including intentional conduct, a breach of warranty, or a breach of a legal duty, or any conduct that could give rise to the imposition of strict liability, that is a proximate cause of damage sustained by a party." MCL 600.6304(8).

Comment

Comparative negligence should be applied in all common-law tort actions sounding in negligence where defendant's misconduct falls short of being intentional. *Vining v Detroit*, 162 Mich App 720; 413 NW2d 486 (1987), lv denied, 430 Mich 892 (1988).

When allocating fault in an action based on tort or another legal theory, the jury must consider evidence of intentional conduct. MCL 600.6304.

History

M Civ JI 16.08 was added June 1997. Amended March 1999.

Chapter 17: Admitted Liability (NEGLIGENCE)

M Civ JI 17.01 Admitted Liability 169

M Civ JI 17.01 Admitted Liability

The defendant has admitted that [he / she] is liable to the plaintiff for any [injury / damages] which [he / she] caused. You are to decide only *(what [injuries / damages] were caused by defendant and) the amount to be awarded to the plaintiff for such [injury / damages].

Note on Use

*The phrase in parentheses should be used only if there is an issue whether some or all of the damages were caused by the defendant. The wording of the instruction should be modified when defendant's liability is vicarious.

Comment

The jury should not be permitted to consider the question of liability where it has been admitted. It is reversible error to submit any issue to the jury which has not been questioned or has been admitted. *Richardson v Coddington*, 45 Mich 338; 7 NW 903 (1881); *Holbert v Staniak*, 359 Mich 283; 102 NW2d 186 (1960).

History

M Civ JI 17.01 was SJI 23.01.

Chapter 19: Premises Liability (NEGLIGENCE)

M Civ JI 19.01 Invitee, Licensee, Trespasser—Definitions (Relationship Disputed) 171

M Civ JI 19.02 Possessor of Land—Definition 173

M Civ JI 19.03 Duty of Possessor of Land, Premises, or Place of Business to Invitee; Known Risk or Open and Obvious Condition 174

M Civ JI 19.04 Duty of Plaintiff to Use Ordinary Care in Self-Service Store or Store Displaying Goods [*Instruction Deleted*] 176

M Civ JI 19.05 Duty of Possessor of Land, Premises, or Place of Business to a Business Invitee Regarding the Natural Accumulation of Ice and Snow [*Instruction Deleted*] 177

M Civ JI 19.06 Duty of Possessor of Land, Premises, or Place of Business to Licensee 178

M Civ JI 19.07 Duty of Possessor of Land, Premises, or Place of Business to Trespasser 179

M Civ JI 19.07A Duty of Possessor of Land, Premises, or Place of Business to Child Trespasser for Artificial Conditions 181

M Civ JI 19.08 Duty of Possessor of Land, Premises, or Place of Business to Trespasser Whose Presence Is Known or Should Have Been Known to Possessor [*Instruction Deleted*] 182

M Civ JI 19.09 Duty of Possessor of Land, Premises, or Place of Business to Persons Traveling along Adjacent Street or Way 183

M Civ JI 19.10 Nondelegable Duty of Possessor or Occupier of Land, Premises, or Place of Business 184

M Civ JI 19.11 Landlord's Nondelegable Duty for Negligent Repairs Made by an Independent Contractor 185

M Civ JI 19.01 Invitee, Licensee, Trespasser—Definitions (Relationship Disputed)

To determine the duty owed to plaintiff, you must first determine whether plaintiff was an [invitee / or / licensee / or / trespasser].

*(An invitee is a person who is invited to enter or remain on [land / premises / a place of business] for a commercial benefit to the possessor of the [land / premises / place of business] or for a purpose directly or indirectly connected with business dealings with the possessor. An invitation may be either express or implied.)

*(A licensee is a person who is invited to enter or remain on [land / premises / a place of business] for any purpose other than a business or commercial one with the express or implied permission of the owner or person in control of the [land / premises / place of business]. A social guest is a licensee, not an invitee.)

*(A trespasser is a person who goes upon the [land / premises / place of business] of another without an express or implied invitation, for his or her own purposes, and not in the performance of any duty to the owner. It is not necessary that in making such an entry the trespasser have an unlawful intent.)

Note on Use

*These definitions should be given only if there is a factual issue as to the legal status of the plaintiff as invitee, licensee, or trespasser. If the factual issue pertains to two, but not all three, of the categories, only the applicable two paragraphs of this instruction should be given. The jury should then be instructed that once it decides on the legal status of the plaintiff, according to this instruction, it should apply the corresponding instruction on duty.

This instruction and the other instructions in this chapter are not intended for use in cases in which liability is limited by statute. See MCL 324.73301, which provides that an owner, tenant or lessee of land is liable only for gross negligence or willful and wanton misconduct that causes injuries to a person who is on the land for outdoor recreational purposes without having paid a valuable consideration. The predecessor statute, MCL 300.201, was held to apply to large tracts of undeveloped land suitable for outdoor recreational uses, but not to urban, suburban, and subdivided lands. *Wymer v Holmes*, 429 Mich 66; 412 NW2d 213 (1987).

Comment

See *Wymer*; *Preston v Sleziak*, 383 Mich 442; 175 NW2d 759 (1970); *Perl v Cohodas, Peterson, Paoli, Nast Co*, 295 Mich 325; 294 NW 697 (1940); *Cox v Hayes*, 34 Mich App 527; 192 NW2d 68 (1971). Social guests are licensees. *Preston*.

Persons who are on church premises for religious activities and not a commercial purpose are licensees. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591; 614 NW2d 88 (2000). *Stitt* overruled

Preston insofar as *Preston* might be read as adopting the public invitee portion of the definition of "invitee" in Restatement (Second) of Torts §332, at 176.

History

M Civ JI 19.01 was added January 1982. Amended September 1982, October 2001.

M Civ JI 19.02 Possessor of Land—Definition

A "possessor" is defined as—

(a) a person who is in occupation of the land with intent to control it; or

(b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it; or

(c) a person who is entitled to immediate occupation of the land, if no other person is in possession as I have just explained.

Note on Use

This instruction should be given if there is a dispute as to who had possession of the land. *Orel v Uni-Rak Sales Co*, 454 Mich 564; 563 NW2d 241 (1997). If it is not an issue, this instruction should not be given. *Orel*.

Comment

See *Merritt v Nickelson*, 407 Mich 544; 287 NW2d 178 (1980).

A mortgagee not in actual possession and control of the premises during the mortgage foreclosure redemption period is not considered a possessor. *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653; 575 NW2d 745 (1998).

History

M Civ JI 19.02 was added January 1982.

M Civ JI 19.03 Duty of Possessor of Land, Premises, or Place of Business to Invitee; Known Risk or Open and Obvious Condition

A possessor has a duty to use ordinary care to protect an invitee from risks of harm from a condition on the possessor's [land / premises / place of business] if:

(a) the risk of harm is unreasonable, and

(b) the possessor knows or in the exercise of ordinary care should know of the condition, and should realize that it involves an unreasonable risk of harm to an invitee.

*(In determining whether the possessor should know of the condition, you should consider the character of the condition and whether the condition existed for a sufficient length of time that a possessor exercising ordinary care would discover the condition.)

**(Here the defendant claims that the condition was [open and obvious / known to the invitee]. If the condition was [open and obvious / known to the invitee], then defendant did not have a duty to protect the invitee from the risks presented, unless there were special features of the condition that made it unreasonably dangerous. This is for you to decide. The following will help you in making these decisions.)

(A condition is open and obvious if the invitee knew of it or if a reasonably careful [person / (minor plaintiff's age)] under the circumstances that you find existed in this case would have discovered it upon casual inspection.)

(If you decide that the condition was [open and obvious/known to the invitee], then you are to decide whether there were special features of the condition that made it unreasonably dangerous. These would be features that made the condition effectively unavoidable or features that gave rise to an unreasonably high risk of severe harm.)

(If you decide there existed at least one of those types of special features, it is for you to decide whether defendant took reasonable precautions to avoid the risk that was presented.)

Note on Use

*This paragraph should be used only if there is an issue of constructive notice or inspection.

** The remaining paragraphs should be used if there is a question about whether an open and obvious condition existed. The "open and obvious danger" doctrine encompasses conditions on a landowner's property that are either objectively open and obvious or that the plaintiff was subjectively aware of before suffering an injury. *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 92 (1992). The material in parentheses will allow the trial court to instruct appropriately depending on whether it is claimed that the dangerous condition was open and obvious or, alternatively, on the ground that the

invitee knew of the condition prior to being injured. In some cases, both the open and obvious character of the condition and the invitee's subjective awareness of that condition may be at issue. In that circumstance, the jury should be instructed on both open and obvious and on plaintiff's prior knowledge of the condition. If the trial court decides as a matter of law that the condition was not open and obvious or if it determines as a matter of law that there are "special aspects" concerning that condition, this portion of the instruction should be omitted.

The third paragraph in parentheses should be used in any case in which there remains an issue of fact on whether the condition was open and obvious or where there remains an issue of fact on the question of whether the plaintiff knew of the condition. However, if the trial judge has granted summary disposition to the defendant on the issue of whether the condition was open and obvious or known to the plaintiff, the third paragraph in parentheses will need to be modified to reflect that ruling.

The third and fourth paragraphs in parentheses should be used if there remains an issue of fact on the question of whether there are "special aspects" of the open and obvious or known condition that made the risk of harm unreasonable. If the trial judge has granted summary disposition to the defendant on the "special aspect" issue, the third and fourth paragraphs in parentheses should not be used.

Comment

See *Riddle v McLouth Steel Products Corp*, 440 Mich 85 (1992); *Kroll v Katz*, 374 Mich 364 (1965). See also *Singerman v Municipal Service Bureau*, 455 Mich 135 (1997); *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490 (1999). *Mann v Shusteric Enterprises, Inc*, 470 Mich 320 (2004); *Lugo v Ameritech Corp*, 464 Mich 512 (2001); *Bertrand v Alan Ford, Inc*, 449 Mich 606 (1995).

On the subject of constructive notice and inspection, see *Clark v Kmart Corp*, 465 Mich 416, 419 (2001); *James v Alberts*, 464 Mich 12, 19-20 (2001).

On the subject of liability to invitees injured by the criminal acts of third parties, see *MacDonald v PKT, Inc*, 464 Mich 322 (2001).

On special aspects that make a risk of harm from an open and obvious or known condition unreasonable, see *Lugo*. For cases involving a minor, see *Bragan v Symanzik*, 263 Mich App 324 (2004). Whether the condition is open and obvious depends on whether the condition, as presented, was noticeable to the ordinary user. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470 (1993); *Hughes v PMG Building, Inc*., 227 Mich App 1 (1997); *Joyce v Rubin*, 249 Mich App 231 (2002).

History

M Civ JI 19.03 was added January 1982. Amended January 1994. Amended June 2003. Amended March 2005. Amended December 2005.

M Civ JI 19.04 Duty of Plaintiff to Use Ordinary Care in Self-Service Store or Store Displaying Goods [*Instruction Deleted*]

History

M Civ JI 19.04 was added January 1982.

This instruction was deleted by the Committee April 1, 2004. The instruction was deleted because the Committee believes it did not accurately state the law.

M Civ JI 19.05 Duty of Possessor of Land, Premises, or Place of Business to a Business Invitee Regarding the Natural Accumulation of Ice and Snow [*Instruction Deleted*]

History

This instruction was deleted by the Committee September 11, 2004. The instruction was deleted because it was found to be inaccurate by the Michigan Supreme Court in *Mann v Shusteric Enterprises, Inc*, 470 Mich 320 (2004).

M Civ JI 19.06 Duty of Possessor of Land, Premises, or Place of Business to Licensee

A possessor of [land / premises / a place of business] is liable for physical harm caused to a licensee by a condition on the [land / premises / place of business] if, but only if —

(a) the possessor knew or should have known of the condition and should have realized that it involved an unreasonable risk of harm to the licensee, and should have expected that [he / she] would not discover or realize the danger; and

(b) the possessor failed to warn the licensee of the danger; and

(c) the licensee did not know or have reason to know of the danger.

Note on Use

If there is no dispute as to the legal status of the plaintiff as a licensee, the plaintiff's name should be substituted for the term "licensee" in this instruction.

If there is a factual question as to the legal status of the plaintiff as invitee, licensee, or trespasser, M Civ JI 19.01 should be given.

Comment

See *Preston v Sleziak*, 383 Mich 442; 175 NW2d 759 (1970). *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591; 614 NW2d 88 (2000), overruled *Preston* only insofar as *Preston* might be read as adopting the public invitee portion of the definition of "invitee" in the Restatement Torts, 2d, § 332, p 176.

While a possessor owes no duty to pedestrians regarding the natural accumulations of ice and snow on public sidewalks abutting the possessor's land, this rule does not change the duty owed by a possessor to a licensee on the possessor's private premises. *Altairi v Alhaj*, 235 Mich App 626; 599 NW2d 537 (1999), lv den, 461 Mich 1021; 611 NW2d 797 (2000).

In *Burnett v Bruner*, 247 Mich App 365 (2001), the Court of Appeals held that it was reversible error for the trial court to give an instruction to the jury modeled after an earlier version of M Civ JI 19.06. The Court held that a landowner only owes his or her licensees a duty to warn and does not owe a duty to inspect or repair the premises. The amendment deletes the offending provision from subpart (b). Therefore, it is not necessary to include the supplemental instruction sought by the defendant in Burnett.

History

M Civ JI 19.06 was added January 1982. Amended June 2006.

M Civ JI 19.07 Duty of Possessor of Land, Premises, or Place of Business to Trespasser

[Because plaintiff was a trespasser on defendant's (land / premises / place of business)] / If you find that plaintiff was a trespasser on defendant's [land / premises / place of business], then defendant had a duty to plaintiff only if you find that one or more of the following circumstances existed:

(1) Defendant injured the plaintiff by willful and wanton misconduct, or

(2) Defendant was aware or in the exercise of ordinary care should have known, of plaintiff's presence on the [land / premises / place of business], but [he / she / it] failed to use ordinary care to prevent injury to plaintiff arising from defendant's active negligence, or

(3) Defendant knew, or should have known from facts within [his / her / its] knowledge, that trespassers constantly intrude on a limited area of [his / her / its] [land / premises / place of business] and plaintiff was harmed because:

(a) Defendant carried on an activity in that limited area,

(b) that involved a risk of death or serious bodily harm, and

(c) [he / she / it] failed to use reasonable care for the trespasser's safety.

If you find that one or more of these circumstances existed, then defendant had a duty to exercise reasonable care to put the land in a condition reasonably safe for plaintiff or to carry on activities on the land so as not to endanger trespassers.

Note on Use

If there is a factual question as to the legal status of the plaintiff as invitee, licensee, or trespasser, M Civ JI 19.01 should be given.

M Civ JI 19.01 defines "trespasser"; M Civ JI 14.11 defines "wanton misconduct"; 14.12 defines "willful misconduct."

"Active negligence" is not yet defined in MCL 554.583(2)(b) and since this statute has not yet been subject to judicial interpretation, the committee is not providing a definition.

This instruction may apply to a child trespasser who claims injury due to a non-artificial condition. See M Civ JI 19.07A.

This instruction does not affect the applicability of any instructions for immunities or defenses to which the defendant-possessor is otherwise entitled under statute or common law. See MCL 554.583(3).

Comment

See Blakeley v White Star Line, 154 Mich 635; 118 NW 482 (1908); MCL 554.583

History

M Civ JI 19.07 was added January 1982. Amended November 2015.

M Civ JI 19.07A Duty of Possessor of Land, Premises, or Place of Business to Child Trespasser for Artificial Conditions

[Because plaintiff was a child trespasser / If you find that plaintiff was a child trespasser], defendant had a duty to plaintiff only if you find that all of the following circumstances exist:

(1) Plaintiff was injured by an artificial condition on defendant's [land / premises / place of business],

(2) Defendant knew or had reason to know that a child would be likely to trespass on the place where the condition existed,

(3) Defendant knew or had reason to know about the condition and realized or should have realized that it would involve an unreasonable risk of death or serious bodily harm to a child,

(4) Plaintiff, because of [his / her] youth, did not discover the condition or realize the risk involved in meddling with it or coming within the area made dangerous by it,

(5) The usefulness to defendant of maintaining the condition and the burden of eliminating the danger were slight as compared with the risk to the child, and

(6) Defendant failed to exercise reasonable care to eliminate the danger or otherwise protect the child.

If you find that all of these circumstances existed, then defendant had a duty to exercise reasonable care to put the land in a condition reasonably safe for plaintiff or to carry on activities on the land so as not to endanger child trespassers.

Note on Use

If a child trespasser does not claim injury due to an artificial condition, then M Civ JI 19.07A is inapplicable. In such a case, M Civ JI 19.07 may be given.

This instruction does not affect the applicability of any instructions for immunities or defenses to which the defendant-possessor is otherwise entitled under statute or common law. *See* MCL 554.583(3).

M Civ JI 19.01 defines "trespasser."

History

Added November 2015.

M Civ JI 19.08 Duty of Possessor of Land, Premises, or Place of Business to Trespasser Whose Presence Is Known or Should Have Been Known to Possessor [*Instruction Deleted*]

This instruction was deleted because it was subsumed in the amended M Civ JI 19.07.

History

M Civ JI 19.08 was added January 1982. Deleted November 2015.

M Civ JI 19.09 Duty of Possessor of Land, Premises, or Place of Business to Persons Traveling along Adjacent Street or Way

A possessor of [land / premises / a place of business] has a duty to exercise ordinary care in maintaining [his / her] premises in a reasonably safe condition in order to prevent injury to persons traveling along an adjacent [street / or / sidewalk / or other / public way].

Comment

See *Parsons v E I Du Pont De Nemours Powder Co*, 198 Mich 409; 164 NW 413 (1917); *Grimes v King*, 311 Mich 399; 18 NW2d 870 (1945).

Generally, the law imposes no duty on a possessor of land to maintain or improve the condition of an adjacent street, sidewalk, or other public way. *Mendyk v Michigan Employment Security Commission*, 94 Mich App 425; 288 NW2d 643 (1979). This instruction pertains only to the duty of the possessor to maintain his or her own land so as not to injure users of the abutting street, sidewalk, or public way.

History

M Civ JI 19.09 was added January 1982.

M Civ JI 19.10 Nondelegable Duty of Possessor or Occupier of Land, Premises, or Place of Business

A possessor or occupier of [land / premises / a place of business] who owes a duty to [*name of plaintiff*] may not delegate that responsibility to another and thus avoid liability.

Note on Use

This instruction should be given if an issue is raised at the trial that the occupier or possessor of property has attempted to delegate the duty regarding the premises by either a lease arrangement, a contract, or the employment of an independent contractor.

Comment

See *McCord v United States Gypsum Co*, 5 Mich App 126; 145 NW2d 841 (1966), lv den, 379 Mich 759 (1967), citing with approval Prosser, Handbook of the Law of Torts (2d ed), § 61, p 404, and *Bradley v Burdick Hotel Co*, 306 Mich 600; 11 NW2d 257 (1943). See also *Quinlivan v Great Atlantic & Pacific Tea Co*, 395 Mich 244; 235 NW2d 732 (1975); *Misiulis v Milbrand Maintenance Corp*, 52 Mich App 494; 218 NW2d 68 (1974).

History

M Civ JI 19.10 was added January 1982.

M Civ JI 19.11 Landlord's Nondelegable Duty for Negligent Repairs Made by an Independent Contractor

A landlord, [*name of landlord*], undertaking to make repairs on the leased premises may not delegate his or her duty to another and avoid liability for injuries occurring on the leased premises, but remains responsible to the [tenant / tenant's invitees], [*name of tenant / names of tenant's invitees*], for negligence of the independent contractor in undertaking or making the repairs.

Note on Use

This instruction should be given if a dangerous condition is brought about as the result of a negligent act of an independent contractor making repairs on the premises. It does not matter whether the repairs are being undertaken pursuant to a lease or other agreement, or gratuitously.

Comment

This instruction is supported by *Misiulis v Milbrand Maintenance Corp*, 52 Mich App 494; 218 NW2d 68 (1974).

History

M Civ JI 19.11 was added January 1982.

Chapter 25: Products Liability

M Civ JI 25.01 Definition of Proximate Cause—Warranty 187
M Civ JI 25.02 More Than One Proximate Cause—Warranty 188
M Civ JI 25.03 Causation—Multiple Defendants with Warranty and Negligence Counts 189
M Civ JI 25.04 Causation—Multiple Defendants with Warranty Counts Only 190
M Civ JI 25.11 Express Warranty—Definition 191
M Civ JI 25.12 Express Warranty—Burden of Proof 192
M Civ JI 25.21 Implied Warranty—Definition 193
M Civ JI 25.22 Implied Warranty—Burden of Proof 195
M Civ JI 25.31 Negligent Production—Definition 196
M Civ JI 25.32 Negligent Production—Burden of Proof 197
M Civ JI 25.41 Comparative Negligence—Burden of Proof [*Instruction Deleted*] 199
M Civ JI 25.45 Breach of Warranty: Comparative Fault—Burden of Proof (To Be Used in Cases Filed on or After March 28, 1996) 200

M Civ JI 25.01 Definition of Proximate Cause—Warranty

When I use the words "proximate cause" I mean first, that the failure of the product to conform to the warranty must have been a cause of plaintiff's injury, and second, that the occurrence which is claimed to have produced plaintiff's injury must have been of a type that is a natural and probable result of the failure of the product to conform to the warranty.

Note on Use

This definition should accompany the warranty instruction(s) concerning burden of proof (M Civ JI 25.12 for express warranty and M Civ JI 25.22 for implied warranty).

In a products liability case where a negligence count is also included, the negligence instruction should be given separately as explained in the Introduction to this Section.

When a defendant presents evidence that the conduct of another person (other than the plaintiff) or another force was a proximate cause, M Civ JI 25.02 and the appropriate instruction from M Civ JI 25.03 and M Civ JI 25.04 should be given in addition to this instruction.

Comment

See Comment under M Civ JI 15.01.

There must be a causal connection between the breach of warranty and the injury or damages. In order to describe the required causal relationship (and to state the outer limits of liability based on simple causation), it is proper to use the term and concept of proximate cause. See *Heckel v American Coupling Corp*, 384 Mich 19; 179 NW2d 381 (1970).

The October 2011 amendment made the instruction consistent with MCJI 15.01.

History

Amended December 1988, October 2011.

M Civ JI 25.02 More Than One Proximate Cause—Warranty

There may be more than one proximate cause. A cause may be proximate although it and another cause act at the same time or in combination to produce the occurrence. To be a proximate cause, the claimed [failure / failures] of the [product / products] to meet the warranty need not be the only cause nor the last cause.

Note on Use

This instruction should be given as an introduction to M Civ JI 25.03 or M Civ JI 25.04, as appropriate, when there is an issue whether the breach of warranty by each defendant was a proximate cause or where there is evidence that acts of a person not a party or an outside force constituted a proximate cause of the injury or damages suffered by plaintiff.

M Civ JI 25.03 Causation—Multiple Defendants with Warranty and Negligence Counts

Each defendant is entitled to separate consideration as to whether [[his / her] conduct / or / the failure of [his / her] product to meet the warranty] was a proximate cause of the occurrence. If you decide that a defendant [was negligent / or / failed to meet the warranty] and that such [negligence / or / failure] was a proximate cause of the occurrence, it is not a defense that another [defendant / or / defendant's product] also may have been a cause of the occurrence.

Note on Use

M Civ JI 25.03 or M Civ JI 25.04, as appropriate, should be given when there is an issue whether each defendant's breach of warranty or conduct was a proximate cause. The appropriate bracketed alternatives must be selected.

This instruction should be preceded by M Civ JI 25.02.

M Civ JI 25.04 Causation—Multiple Defendants with Warranty Counts Only

If you decide that [one / one or more] of the products failed to meet the warranty and that such failure was a proximate cause of the occurrence, it is not a defense that [the other / another] defendant's product also may have been a cause of the occurrence.

Note on Use

See Note on Use to M Civ JI 25.03.

History

M Civ JI 25.04 is a revision of SJI 25.03(A).

M Civ JI 25.11 Express Warranty—Definition

An express warranty is a representation or statement, made in writing, orally or by any other means, by a [manufacturer / seller], that his or her product has certain characteristics or will meet certain standards.

*(An expression of opinion which cannot reasonably be believed or relied upon is sales talk or trade puffing and is not a representation or statement of an express warranty.)

Note on Use

The description of the warrantor can be adapted to describe him or her accurately under the facts of the case; e.g., "contractor" or "lessor" may be more appropriate than "manufacturer" or "seller."

*The paragraph in parentheses should be used only when there is a dispute whether a statement is an express warranty or mere sales talk.

Comment

Some Michigan decisions involving express warranties are *Bahlman v Hudson Motor Car Co*, 290 Mich 683; 288 NW 309 (1939); *Curby v Mastenbrook*, 288 Mich 676; 286 NW 123 (1939); *Dvoracek v Goldstein*, 311 Mich 680; 19 NW2d 333 (1945); *Worden v Peck*, 245 Mich 237; 222 NW 101 (1928); and *Hansen v Firestone Tire & Rubber Co*, 276 F2d 254 (CA 6, 1960). The Uniform Commercial Code definition of an express warranty is found in MCL 440.2313.

The distinction between an express warranty and trade puffing has not been articulated clearly by Michigan courts. It has been said, however, that statements which are not reasonable to believe are trade puffing and sales talk. *Hayes Construction Co v Silverthorn*, 343 Mich 421; 72 NW2d 190 (1955). If there is a dispute on this point, the existence of an express warranty normally will be a jury issue. Nevertheless, the Court in some cases may be required to decide that question as a matter of law. See *Worth v McConnell*, 42 Mich 473; 4 NW 198 (1880); *Goodspeed v MacNaughton, Greenawalt & Co*, 288 Mich 1; 284 NW 621 (1939).

A question about reliance also may arise in defining an express warranty. Several cases suggest that Michigan follows the traditional rule and requires reliance by the injured party for recovery on an express warranty. See *Kepling v Schleuter Manufacturing Co*, 378 F2d 5 (CA 6, 1967); *Curby v Mastenbrook*, 288 Mich 676; 286 NW 123 (1939); *May v Otto*, 236 Mich 540; 211 NW 64 (1926); *Barron v Probert*, 230 Mich 313; 202 NW 941 (1925). Although the Uniform Sales Act, in effect at the time of these decisions, has been repealed, not all of these cases fell under that act. The Uniform Commercial Code, MCL 440.2318, indicates that an express warranty extends to any natural person in the family or household or to a guest of the purchaser under certain circumstances. The extent to which reliance is still required in cases under and outside of the Uniform Commercial Code is not known.

M Civ JI 25.12 Express Warranty—Burden of Proof

The plaintiff has the burden of proving each of the following:

(a) that the defendant expressly warranted the product in one or more of the ways claimed by the plaintiff

(b) that the [plaintiff / plaintiff's decedent] [relied upon / or / was protected by] the warranty

(c) that the product [*description of alleged failure to meet express warranty*]

(d) that the product [*description of alleged failure to meet express warranty*] at the time it left defendant's control

(e) that the [plaintiff / plaintiff's decedent] [was injured / sustained damage]

(f) that the [*description of alleged failure to meet express warranty*] was a proximate cause of the [injuries / damages] to [plaintiff / plaintiff's decedent].

Your verdict will be for the plaintiff if you decide that all of these have been proved.

Your verdict will be for the defendant if you decide that any one of these has not been proved.

Note on Use

In choosing between the alternatives of b, the Court shall be guided by MCL 440.2318.

For cases filed on or after March 28, 1996, if comparative fault or comparative negligence are at issue, M Civ JI 25.45 should be used. MCL 600.6304.

Comment

Under prior law, there was an issue as to the applicability of comparative negligence in cases involving breach of express warranty. See *In re Certified Questions (Karl v Bryant Air Conditioning Co)*, 416 Mich 558; 331 NW2d 456 (1982). 1995 PA 249 makes comparative fault the standard for all cases based on tort or another legal theory filed on or after March 28, 1996, which would include cases involving breach of express warranty. MCL 600.2957.

History

M Civ JI 25.12 was SJI 25.13. Amended October 1993.

M Civ JI 25.21 Implied Warranty—Definition

When I use the words "implied warranty," I mean a duty imposed by law which requires that the manufacturer's product be reasonably fit for the [purpose / purposes] and [use / uses] intended or reasonably foreseeable by the manufacturer.

Note on Use

This instruction should not be used in an action against a manufacturer for an alleged defect in the design of its product. *Prentis v Yale Manufacturing Co*, 421 Mich 670; 365 NW2d 176 (1984). Additionally, because breach of implied warranty is not a separate theory upon which to bring a products liability action against a non-manufacturing seller, a separate negligence or express warranty instruction will be needed to address such a claim. *Curry v Meijer, Inc*., 286 Mich App 586 (2009).

Another term may be substituted for "manufacturer" when more appropriate to the facts of the case. In addition, the term "product" may be replaced by a more descriptive word.

Since an implied warranty is a duty imposed by law, the Court, not the jury, determines whether a warranty is implied under the circumstances. Nevertheless, if there is a dispute over one of the factual requirements for imposing an implied warranty, that issue must be given to the jury with appropriate instructions.

Cases involving the implied warranty of merchantability or fitness for a particular purpose arising out of a commercial transaction may dictate modification of this instruction to accurately reflect the statutory description of those warranties.

Comment

Michigan cases defining an implied warranty and discussing its existence are *Piercefield v Remington Arms Co*, 375 Mich 85; 133 NW2d 129 (1965); *Spence v Three Rivers Builders & Masonry Supply Inc*, 353 Mich 120; 90 NW2d 873 (1958); *Manzoni v Detroit Coca-Cola Bottling Co*, 363 Mich 235; 109 NW2d 918 (1961); and *Hill v Harbor Steel & Supply Corp*, 374 Mich 194; 132 NW2d 54 (1965).

There are statutory implied warranties. See, e.g., MCL 440.2314. A warranty also may be implied under the common law. The dimensions of the common law implied warranty and the circumstances under which it exists are not necessarily the same as statutory implied warranties.

Whether the sale of secondhand goods carries an implied warranty is not clear in Michigan. See *Hysko v Morawski*, 230 Mich 221; 202 NW 923 (1925); *Bayer v Winton Motor Car Co*, 194 Mich 222; 160 NW 642 (1916); *Kaufman v Katz*, 356 Mich 354; 97 NW2d 56 (1959). Comment 3 to MCL 440.2314 (by the American Law Institute and the National Conference of Commissioners on Uniform State Laws) states that "the sale of second-hand goods, however, involves only such obligation as is appropriate to such goods…."

The parties to a transaction may negate an implied warranty with proper language showing that intention. See *Richardson v Messina*, 361 Mich 364; 105 NW2d 153 (1960); and *Parsonson v Construction Equipment Co*, 18 Mich App 87; 170 NW2d 479 (1969), the latter case being a sale of equipment in an "as is" condition. See also MCL 440.2316 for exclusion or modification of warranties in commercial transactions.

History

Amended June 2011.

M Civ JI 25.22 Implied Warranty—Burden of Proof

The plaintiff has the burden of proof on each of the following:

(a) that the [*name of product]* was not reasonably fit for the [use / uses] or [purpose / purposes] anticipated or reasonably foreseeable by the defendant, in one or more of the ways claimed by the plaintiff

(b) that the [*name of product*] was not reasonably fit for the [use / uses] or [purpose / purposes] anticipated or reasonably foreseeable by the defendant at the time it left the defendant's control

(c) that [plaintiff / plaintiff's decedent] [was injured / sustained damage]

(d) that the [*description of claimed defect]* was a proximate cause of the [injuries / damages] to [plaintiff / plaintiff's decedent].

*(Your verdict will be for the plaintiff if you decide that all of these have been proved.)

*(Your verdict will be for the defendant if you decide that any one of these has not been proved.)

Note on Use

This instruction should not be used in an action against a manufacturer for an alleged defect in the design of its product. *Prentis v Yale Manufacturing Co*, 421 Mich 670; 365 NW2d 176 (1984). Additionally, this instruction should not be used in an action against a non-manufacturing seller because breach of implied warranty is not a separate theory upon which to bring such an action. *Curry v Meijer, Inc*., 286 Mich App 586 (2009).

*These paragraphs are not necessary if a Special Verdict Form is used.

For cases filed on or after March 28, 1996, if comparative fault or comparative negligence are at issue, M Civ JI 25.45 should be used. MCL 600.6304.

Comment

For the quantum of proof required to demonstrate a defect see *Bronson v J L Hudson Co*, 376 Mich 98; 135 NW2d 388 (1966); *Hertzler v Manshum*, 228 Mich 416; 200 NW 155 (1924); *Accetola v Hood*, 7 Mich App 83; 151 NW2d 210 (1967); *Martel v Duffy-Mott Corp*, 15 Mich App 67; 166 NW2d 541 (1968); and *Shirley v Drackett Products Co*, 26 Mich App 644; 182 NW2d 726 (1970).

History

M Civ JI 25.22 was SJI 25.23. Amended November 1983, October 1984, June 2011.

M Civ JI 25.31 Negligent Production—Definition

The defendant had a duty to use reasonable care at the time of [production*] of the [product / [*name of product*]] so as to eliminate unreasonable risks of harm or injury that were reasonably foreseeable.

Reasonable care means that degree of care that a reasonably prudent manufacturer would exercise under the circumstances that you find existed in this case. It is for you to decide, based on the evidence, what a reasonably prudent manufacturer would do or would not do under those circumstances.

A failure to fulfill the duty to use reasonable care is negligence.

However, the defendant had no duty to _____* a [product / [*name of product*]] to eliminate reasonable risks of harm or injury or risks that were not reasonably foreseeable.

Note on Use

*Select the appropriate word or words from the statutory definition of production, which is: "'Production' means manufacture, construction, design, formulation, development of standards, preparation, processing, assembly, inspection, testing, listing, certifying, warning, instructing, marketing, selling, advertising, packaging, or labeling." MCL 600.2945(i).

M Civ JI 10.02 should not be used with this instruction.

Comment

MCL 600.2947.

See *Owens v Allis-Chambers Corp*, 414 Mich 413; 326 NW2d 372 (1982).

The test for assessing a manufacturer's liability to persons injured by its product is whether the risk to the plaintiff is unreasonable and foreseeable by the manufacturer, not whether the risk is patent or obvious to the plaintiff. *Owens*. For this reason, the instruction does not refer to obviousness.

History

M Civ JI 25.31 was added February 1981. Amended January 1990, March 2001.

M Civ JI 25.32 Negligent Production—Burden of Proof

The plaintiff has the burden of proof on the following propositions:

(a) that the defendant was negligent in one or more of the ways claimed by the plaintiff *(as stated to you in these instructions);

(b) that the plaintiff [was injured / sustained damage];

(c) that the negligence of the defendant was a proximate cause of the [injuries / damages] to the plaintiff;

(d) that the product was not reasonably safe at the time it left the defendant's control;

**(e) that, according to generally accepted production practices at the time the specific unit of the product left the control of the defendant, a practical and technically feasible alternative production practice was available that would have prevented the harm without significantly impairing the usefulness or desirability of the product to users and without creating equal or greater risk of harm to others. An alternative production practice is practical and feasible only if the technical, medical, or scientific knowledge relating to production of the product, at the time the specific unit of the product left the control of the defendant, was developed, available, and capable of use in the production of the product and was economically feasible for use by the manufacturer. Technical, medical, or scientific knowledge is not economically feasible for use by the manufacturer if use of that knowledge in production of the product would significantly compromise the product's usefulness or desirability.

***Your verdict will be for the plaintiff if you decide that all of these have been proved.

***Your verdict will be for the defendant if you decide that any one of these has not been proved.

†(The defendant has the burden of proof on [his / her] claim that the plaintiff was negligent in one or more of the ways claimed by the defendant *(as stated to you in these instructions), and that such negligence was a proximate cause of the [injuries / damages] to the plaintiff.)

‡(The defendant has the burden of proof on [his / her] claim that [*name of nonparty*] was negligent and that the negligence of [*name of nonparty*] was a proximate cause of the [injuries / damages] to the plaintiff.)

†(If your verdict is for the plaintiff, then you must determine the percentage of fault for each party or nonparty whose negligence was a proximate cause of the plaintiff's [injuries / damages]. In determining the percentage of fault, you should consider the

nature of the conduct and the extent to which each person's conduct caused or contributed to the plaintiff's [injuries / damages].)

†(The Court will furnish a Special Verdict Form to assist you in your duties. Your answers to the questions in the Special Verdict Form will provide the basis on which this case will be resolved.)

Note on Use

*If the parties waive the court's reading of the theories of the parties (see M Civ JI 7.01 Theories of the Parties), the court should delete the phrase in parentheses.

**In certain cases, there may be an issue as to whether the language in paragraph e. applies.

***The two paragraphs beginning with the words "Your verdict" are not necessary if a Special Verdict Form is used.

†These three paragraphs should not be read to the jury if comparative negligence is not an issue in the case.

‡This paragraph should be used only if the defendant has identified a nonparty pursuant to MCL 600.2957.

This instruction may have to be modified or other instructions given if fault, such as intentional conduct, is an issue in the case, by statutory definition, "fault" "includes an act, an omission, conduct, including intentional conduct, a breach of warranty, or a breach of a legal duty, or any conduct that could give rise to the imposition of strict liability, that is proximate cause of damage sustained by a party." MCL 600.6304(8).

Comment

MCL 600.2946, .2947.

See *Owens v Allis-Chalmers Corp*, 414 Mich 413; 326 NW2d 372 (1982).

The test for assessing a manufacturer's liability to persons injured by its product is whether the risk to the plaintiff is unreasonable and foreseeable by the manufacturer, not whether the risk is patent or obvious to the plaintiff. Owens. For this reason, the instruction does not refer to obviousness.

History

Current M Civ JI 25.32 was added March 2001. Former M Civ JI 25.32 was deleted October 1989.

M Civ JI 25.41 Comparative Negligence—Burden of Proof [*Instruction Deleted*]

History

This instruction was deleted by the Committee March 13, 2009. The instruction was deleted because its provisions were combined with MCJI 25.45. Previously the jury was given separate instructions about its responsibility to allocate comparative negligence of the plaintiff and its responsibility to allocate comparative fault of nonparties. Because the jury is performing one allocation task, the Committee believed it would be less confusing to have only one instruction.

M Civ JI 25.45 Breach of Warranty: Comparative Fault—Burden of Proof (To Be Used in Cases Filed on or After March 28, 1996)

The defendant has the burden of proof on [his / her / its] claim that the plaintiff was negligent, and that such negligence was a proximate cause of the [injuries / damages] to the plaintiff.

*Likewise, the defendant has the burden of proof on [his / her / its] claim that [name of nonparty] was negligent, and that the negligence of [*name of nonparty*] was a proximate cause of the [injuries / damages] to the plaintiff.

Negligence on the part of the plaintiff or a nonparty does not bar recovery by the plaintiff against the defendant. However, the percentage of negligence attributable to the plaintiff or the nonparty will be used by the Court to reduce the amount of recoverable damages.

If your verdict is for the plaintiff, then using 100 percent as the total fault of all persons that contributed to the plaintiff's [injuries / damages], you must determine the percentage of fault for each party or nonparty whose fault was a proximate cause of plaintiff's [injuries / damages], including the plaintiff.

The Court will furnish a Special Verdict Form to assist you in your duties. Your answers to the questions in the Special Verdict Form will provide the basis on which this case will be resolved.

Note on Use

This instruction should not be used in an action against a manufacturer for an alleged defect in the design of its product. *Prentis v Yale Manufacturing Co*, 421 Mich 670; 365 NW2d 176 (1984).

This instruction should only be used in products liability cases that involve issues of negligence on the part of plaintiff or a nonparty.

*This paragraph should be used only if defendant has identified a nonparty pursuant to MCL 600.2957.

Comment

MCL 600.6304. Fault is defined in MCL 600.6304(8): "As used in this section, 'fault' includes an act, an omission, conduct, including intentional conduct, a breach of warranty, or a breach of a legal duty, or any conduct that could give rise to the imposition of strict liability, that is a proximate cause of damage sustained by a party."

The provisions of MCJI 25.41 and MCJI 25.45 were combined. Previously the jury was given separate instructions about its responsibility to allocate comparative negligence of the plaintiff and its

responsibility to allocate comparative fault of nonparties. Because the jury is performing one allocation task, it is less confusing to have only one instruction.

History

M Civ JI 25.45 was added June 1997. Amended March 2009.

Chapter 30: Malpractice

M Civ JI 30.01 Professional Negligence and/or Malpractice 203

M Civ JI 30.02 Informed Consent..... 204

M Civ JI 30.03 Burden of Proof 205

M Civ JI 30.04 Medical Malpractice: Cautionary Instruction on Medical Uncertainties 206

M Civ JI 30.05 Medical Malpractice: Permissible Inference of Malpractice from Circumstantial Evidence (Res Ipsa Loquitur) 207

M Civ JI 30.10 Medical Malpractice: Exceptions to Cap 208

M Civ JI 30.20 Medical Malpractice: Loss of Opportunity to Survive or Achieve a Better Result [*Instruction Deleted*] 209

M Civ JI 30.30 Medical Malpractice: Vicarious Tort Liability Based on Ostensible Agency 211

M Civ JI 30.01 Professional Negligence and/or Malpractice

When I use the words "professional negligence" or "malpractice" with respect to the defendant's conduct, I mean the failure to do something which a [*name profession*] of ordinary learning, judgment or skill in [this community or a similar one / [*name particular specialty*]] would do, or the doing of something which a [*name profession / name particular specialty]* of ordinary learning, judgment or skill would not do, under the same or similar circumstances you find to exist in this case.

It is for you to decide, based upon the evidence, what the ordinary [*name profession / name particular specialty*] of ordinary learning, judgment or skill would do or would not do under the same or similar circumstances.

Note on Use

There is case law support for the applicability of the malpractice instructions to the professionals noted: *Siirila v Barrios*, 398 Mich 576; 248 NW2d 171 (1976) (doctor); *Roberts v Young*, 369 Mich 133; 119 NW2d 627 (1963) (doctor); *Babbitt v Bumpus*, 73 Mich 331; 41 NW 417 (1889) (attorney); *Eggleston v Boardman*, 37 Mich 14 (1877) (attorney); *Tasse v Kaufman*, 54 Mich App 595; 221 NW2d 470 (1974) (dentist); *Ambassador Baptist Church v Seabreeze Heating & Cooling Co*, 28 Mich App 424; 184 NW2d 568 (1970) (architect); *Tschirhart v Pethtel*, 61 Mich App 581; 233 NW2d 93 (1975) (chiropractor).

Standards for liability of a certified public accountant are set forth in MCL 600.2962, added by 1995 PA 249.

If the defendant is a specialist, the name of that specialty should be stated where that option is given instead of the name of the defendant's profession.

Comment

The language in the instruction is supported by numerous cases, including *Roberts*; *Johnson v Borland*, 317 Mich 225; 26 NW2d 755 (1947); *Siirila*; *Fortner v Koch*, 272 Mich 273; 261 NW 762 (1935); *Tasse*. MCL 600.2912a.

History

M Civ JI 30.01 was added February 1, 1981. Amended May 2013.

M Civ JI 30.02 Informed Consent

Negligence may consist of the failure on the part of the [*name profession*] to reasonably inform [*name of plaintiff*] of risks or hazards which may follow the [treatment / services] contemplated by the [*name profession*]. By "reasonably inform" I mean that the information must have been given timely and in accordance with the accepted standard of practice among members of the profession with similar training and experience in [this community or a similar one / [*name particular specialty*]].

Comment

This instruction is supported by *Roberts v Young*, 369 Mich 133; 119 NW2d 627 (1963).

History

M Civ JI 30.02 was added February 1, 1981.

M Civ JI 30.03 Burden of Proof

The plaintiff has the burden of proof on each of the following:

(a) that the defendant was professionally negligent in one or more of the ways claimed by the plaintiff as stated in these instructions

(b) that the plaintiff sustained injury and damages

(c) that the professional negligence or malpractice of the defendant was a proximate cause of the injury and damages to the plaintiff

Your verdict will be for the plaintiff if the defendant was negligent, and such negligence was a proximate cause of the plaintiff's injuries, and if there were damages.

Your verdict will be for the defendant if the defendant was not professionally negligent or did not commit malpractice, or if the defendant was professionally negligent or did commit malpractice but such professional negligence or malpractice was not a proximate cause of the plaintiff's injuries or damages, or if the plaintiff was not injured or damaged.

History

M Civ JI 30.03 was added February 1, 1981.

M Civ JI 30.04 Medical Malpractice: Cautionary Instruction on Medical Uncertainties

There are risks inherent in medical treatment that are not within a doctor's control. A doctor is not liable merely because of an adverse result. However, a doctor is liable if the doctor is negligent and that negligence is a proximate cause of an adverse result.

Note on Use

For guidance on cases in which this is an appropriate instruction, see *Jones v Porretta*, 428 Mich 132; 405 NW2d 863 (1987).

History

M Civ JI 30.04 was added December 1987.

M Civ JI 30.05 Medical Malpractice: Permissible Inference of Malpractice from Circumstantial Evidence (Res Ipsa Loquitur)

If you find that the defendant had control over the [body of the plaintiff / instrumentality which caused the plaintiff's injury], and that the plaintiff's injury is of a kind which does not ordinarily occur without someone's negligence, then you may infer that the defendant was negligent.

However, you should weigh all of the evidence in this case in determining whether the defendant was negligent and whether that negligence was a proximate cause of plaintiff's injury.

Note on Use

This instruction should be given only if there is expert testimony that the injury does not ordinarily occur without negligence, or if the court finds that such a determination could be made by the jury as a matter of common knowledge.

This instruction should be followed by M Civ JI 30.03 Burden of Proof.

As to whether this instruction is appropriate in a case involving an issue of contributory negligence, see *Jones v Porretta*, 428 Mich 132, 151, fn 5; 405 NW2d 863 (1987).

History

M Civ JI 30.05 was added December 1987.

M Civ JI 30.10 Medical Malpractice: Exceptions to Cap

On the special verdict form that will be furnished to you by the court, you will be asked to answer certain questions, such as whether:

(a) *(there has been a [*specify intentional tort, e.g., battery]*)

(b) (a foreign object was left in the body of the plaintiff)

(c) (the injury involves the reproductive system of the plaintiff)

(d) (the discovery of the existence of this claim was prevented by the fraudulent conduct of [*name of health care provider*])

(e) (a limb or organ of the plaintiff was wrongfully removed)

(f) (the plaintiff has lost a vital body function).

Your answer to [this question / these questions] will assist the court in entering a judgment after you have returned your verdict.

Note on Use

*The court must instruct on the elements of the intentional tort and defenses.

This instruction should be used only if the cause of action arose before April 1, 1994. 1993 PA 78.

The limitations on noneconomic loss damages and criteria for recovering noneconomic loss damages have been established by 1993 PA 78, §1483. Neither the trial judge nor counsel of either party shall advise the jury of any provision set forth in §1483. 1993 PA 78, §6306.

Comment

MCL 600.1483(1).

History

M Civ JI 30.10 was added June 1987.

M Civ JI 30.20 Medical Malpractice: Loss of Opportunity to Survive or Achieve a Better Result [*Instruction Deleted*]

The Committee deleted MCJI 30.20 based on the decisions in *Stone v Williamson*, 482 Mich 144 (2008) and *O'Neal v St. John Hospital*, 487 Mich 485 (2010). While the Committee believed the former instruction accurately reflected the decision in *Fulton v William Beaumont Hosp*, 253 Mich App 70 (2002), a majority of justices have stated, albeit in dicta, that *Fulton* was wrongly decided. Given the uncertainty of *Fulton's* status and because there is a lack of consensus among the courts on how to apply the second sentence of MCL 600.2912a, the Committee believed that it should no longer offer the instruction.

~~Plaintiff cannot recover for loss of an opportunity to [survive / achieve a better result] unless the plaintiff proves that the [decedent's chance of survival / chance of receiving a better result] fell more than 50 percentage points as a result of the professional negligence.~~

Note on Use

~~Use this instruction only if there is a claim involving a loss of opportunity to survive or achieve a better result and limit its application to those defendants against whom plaintiff has such a claim.~~

Comment

~~Prior to the enactment of 1993 PA 78, recovery was allowed for loss of a substantial opportunity for a decedent to survive, with damages being allowed in proportion to the lost chances of survival. See *Falcon v Memorial Hosp*, 436 Mich 443; 462 NW2d 44 (1990). M Civ JI 30.20 prior to revision was based on *Falcon*.~~

~~By recognizing loss of a substantial opportunity to survive as an injury, *Falcon* solved the problem that a plaintiff (if plaintiff's decedent had a 50 percent or less chance of survival) would be unable to show that defendant's negligence was a proximate cause of the death, applying the "more probable than not" proximate cause standard which was equated with a more than 50 percent chance.~~

~~In 1993, the Michigan legislature rejected Falcon, adding a new subsection (2) to MCL 600.2912a:~~

~~In an action alleging medical malpractice, the plaintiff has the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants. In an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%.~~

~~MCL 600.2912a(2) was construed to preclude a medical malpractice action for a reduced chance of survival of a living plaintiff. *Wickens v Oakwood Healthcare System*, 465 Mich 53; 631 NW2d 686 (2001).~~

~~The 1993 amendment of MCL 600.2912a precludes recovery for an opportunity to achieve a better result unless the opportunity was greater than 50 percent. In a case involving alleged medical~~

~~malpractice occurring in 1990 and not covered by the 1993 amendment, the Michigan Supreme Court refused to extend *Falcon* to a cause of action for loss of a 50 percent or less opportunity to avoid physical harm less than death. *Weymers v Khera*, 454 Mich 639; 563 NW2d 647 (1997).~~

~~In *Fulton v William Beaumont Hosp*, 253 Mich App 70 (2002), the Court of Appeals held that "MCL 600.2912a(2) requires a plaintiff to show that the loss of opportunity to survive or achieve a better result exceeds fifty percent." Leave to appeal was granted in Fulton but that order was subsequently vacated and leave to appeal was denied. This occurred after legislation was introduced that would have substantially altered MCL 600.2912a. The proposed legislation was not enacted and the Supreme Court has since denied leave to appeal in two cases raising the issue first raised in Fulton. *Ensink v Mecosta County Gen Hosp*, 262 Mich App 518 (2004) and *Klein v Kik*, 264 Mich App 682 (2005).~~

History

M Civ JI 30.20 was added October 1991. Amended September 2006. Deleted June 2011.

M Civ JI 30.30 Medical Malpractice: Vicarious Tort Liability Based on Ostensible Agency

A hospital is not generally responsible for the professional negligence of a [physician / health care provider] who has staff privileges at the hospital but is not an agent or employee of the hospital. However, a hospital may be liable for the professional negligence of a [physician / health care provider] if the hospital through its words, conduct, or omissions caused the plaintiff to reasonably believe that the [physician / health care provider] was an employee or agent of the hospital.

In order to establish the liability of the hospital under this theory, the plaintiff has the burden of proof on each of the following:

(a) that [*name of physician or health care provider*] committed professional negligence in one or more of the ways claimed by the plaintiff;

(b) that the plaintiff sustained injury and damages;

(c) that the professional negligence of [*name of physician or health care provider*] was a proximate cause of the plaintiff's injuries and damages;

(d) that the plaintiff reasonably believed that the [physician / health care provider] was acting as an agent or employee of the hospital;

(e) that the plaintiff's belief that the [physician / health care provider] was an agent or employee of the hospital was created by words, conduct, or omissions of the hospital.

Your verdict will be for the plaintiff if you find that all of these elements have been proved.

Your verdict will be for the defendant if you find that any one of these elements has not been proved.

Note on Use

If there is an issue about whether the plaintiff "looked to the hospital to provide him with medical treatment" (*Grewe v Mt Clemens General Hospital*, 404 Mich 240, 250; 273 NW2d 429, 433 (1978)), then this instruction may need to be modified.

Comment

Grewe v Mt Clemens General Hospital, 404 Mich 240, 250; 273 NW2d 429, 433 (1978).

See also *Howard v Park*, 37 Mich App 496; 195 NW2d 39 (1972), lv den, 387 Mich 782 (1972); *Revitzer v Trenton Medical Center, Inc*, 118 Mich App 169; 324 NW2d 561 (1982), lv den, 417 Mich 995 (1983); *Saseen v Community Hospital Foundation*, 159 Mich App 231; 406 NW2d 193 (1986); *Strach v*

St John Hospital Corp, 160 Mich App 251; 408 NW2d 441 (1987), lv den, 429 Mich 886 (1987), reconsideration denied, 430 Mich 866 (1988); *Brackens v Detroit Osteopathic Hospital*, 174 Mich App 290; 435 NW2d 471 (1989), lv den, 433 Mich 857 (1989); *Chapa v St Mary's Hospital of Saginaw*, 192 Mich App 29; 480 NW2d 590 (1991); *Setterington v Pontiac General Hospital*, 223 Mich App 594; 568 NW2d 93 (1997).

History

M Civ JI 30.30 was added August 2000.

Chapter 35: First-Party Benefits Action

Introductory Directions to the Court 214

M Civ JI 35.01 No-Fault First-Party Benefits Action: Explanation of Statute 217

M Civ JI 35.02 No-Fault First-Party Benefits Action: Burden of Proof 221

M Civ JI 35.03 No-Fault: Benefits from First-Party Actions 224

M Civ JI 35.04 No-Fault First-Party Benefits Action: Statutory Interest 227

M Civ JI 35.05 No-Fault First-Party Benefits Action: Damages—Setoff for Governmental Benefits [*Instruction Deleted*] 228

M Civ JI 35.06 No-Fault First-Party Benefits Action: Damages—Setoff; Coordinated Benefits [*Instruction Deleted*] 229

Introductory Directions to the Court

The following instructions are designed for the average no-fault case involving an alleged breach of contract for failure to pay first-party benefits. Obviously, it is impossible to reflect on all current appellate cases or to anticipate future decisions. The ever-changing law in this area mandates vigilance for additions or deletions which aptly reflect the current status of appellate decisions.

Many facets of a no-fault benefits case are not in dispute. For instance, the applicable wage rate, if readily ascertainable, should be stipulated to and inserted into the various formulas for computation of benefits. It is recommended that the Court eliminate from jury consideration any stipulation as to fact or amount. It would certainly behoove the bench and bar to closely scrutinize all areas of potential agreement before commencing jury selection, so as to avoid unwieldy and prolonged trials.

Special Comment on Setoffs

Chapter 35 contains no instructions on setoffs from first-party benefits. In most cases, these issues will be resolved as questions of law. *Jarosz v Detroit Automobile Inter-Insurance Exchange*, 418 Mich 565; 345 NW2d 563 (1984); *Perez v State Farm Mutual Automobile Insurance Co*, 418 Mich 634; 344 NW2d 773 (1984); *Thompson v Detroit Automobile Inter-Insurance Exchange*, 418 Mich 610; 344 NW2d 764 (1984). The statutes authorizing setoffs from first party benefits are MCL 500.3109 (governmental benefits setoffs), and MCL 500.3109a (coordinated benefit setoffs).

Governmental Benefit Setoffs

Governmental benefits may only be set off against no-fault benefits if they "1) Serve the same purpose as the no-fault benefits, and 2) Are provided or required to be provided as a result of the same accident." *Jarosz*, 418 Mich at 565; 345 NW2d at 563.

Social Security disability benefits and Social Security survivors' benefits have been held to be proper setoffs, regardless of whether the insured elected or was offered coordinated benefits coverage. See *O'Donnell v State Farm Mutual Auto Insurance Co*, 404 Mich 524; 273 NW2d 829, appeal dismissed, 444 US 803; 100 S Ct 22; 62 L Ed 2d 16 (1979), and *Profit v Citizens Insurance Co of America*, 444 Mich 281; 506 NW2d 514 (1993). See also *Wolford v Travelers Insurance Co*, 92 Mich App 600; 285 NW2d 383 (1979). Also, Social Security disability payments to dependents of the injured worker are proper setoffs against work loss benefits. *Thompson*. (This may change if the injured wage earner and spouse are divorced. *Thompson*, 418 Mich at 617, fn 8; 344 NW2d at 766, fn 8).

Social Security old age benefits are not proper setoffs. *Jarosz*. Also, Social Security survivors' benefits cannot be set off against that particular component of no-fault survivors' loss benefits which represents replacement service expenses. *Swanson v Citizens Insurance Co*, 99 Mich App 52; 298 NW2d 119 (1980), vacated on other grounds 411 Mich 945; 308 NW2d 99 (1981), *Cole v Detroit Automobile Inter-Insurance Exchange*, 137 Mich App 603; 357 NW2d 898 (1984).

Worker's compensation benefits have been held a proper setoff. See *Mathis v Interstate Motor Freight System*, 408 Mich 164; 289 NW2d 708 (1980). But federal worker's compensation benefits which the insured was required to repay out of tort recovery could not be set off. *Sibley v Detroit Automobile Inter-Insurance Exchange*, 431 Mich 164; 427 NW2d 528 (1988). Also, if worker's

compensation will not be paid because the employer failed to obtain insurance coverage, there is no setoff. *Perez*. (In *Perez*, the Court in a three-Justice opinion construed the phrase "required to be provided" in MCL 500.3109 (1) to mean that an injured worker must use "reasonable efforts" to obtain governmental benefits that are available.) See also *Joiner v Michigan Mutual Insurance Co*, 137 Mich App 464; 357 NW2d 875 (1984), appeal after remand, 161 Mich App 285; 409 NW2d 807 (1987). See also *Thacker v Detroit Automobile Inter-Insurance Exchange*, 114 Mich App 374; 319 NW2d 349 (1982) (amount of setoff where employee voluntarily redeems worker's compensation claim); *Gregory v Transamerica Insurance Co*, 425 Mich 625; 391 NW2d 312 (1986) (no-fault insurer can set off the amount of a plaintiff's workers' compensation redemption of medical expenses against its obligation to pay wage loss benefits); *Luth v Detroit Automobile Inter-Insurance Exchange*, 113 Mich App 289; 317 NW2d 867 (1982) (no setoff where federal employee elected accumulated vacation and sick leave rather than federal worker's compensation). But see *Krygel v City of Detroit*, 135 Mich App 187; 353 NW2d 116 (1984) (setoff permitted where city of Detroit employee elected to receive City Charter benefits instead of worker's compensation benefits.)

Medical and disability benefits received from the Army and Veteran's Administration are proper setoffs. *Bagley v State Farm Mutual Insurance Co*, 101 Mich App 733; 300 NW2d 322 (1980). Amounts paid by the United States government for medical care for a member of the armed services may also be set off against medical no-fault benefits otherwise payable where neither the injured serviceman, his spouse, nor a relative domiciled in the same household owned an automobile insured under the no-fault act. *Crowley v Detroit Automobile Inter-Insurance Exchange*, 428 Mich 270; 407 NW2d 372 (1987). However, if the insurer does not offer the option of purchasing a coordinated benefits policy under MCL 500.3109a, then governmental medical care benefits paid to members of the armed services may not be offset under section 3109a. *Tatum v Government Employees Insurance Co*, 431 Mich 663; 431 NW2d 391 (1988).

Medical benefits provided under an out-of-state no-fault automobile insurance plan in compliance with the laws of that state may be set off as benefits under MCL 500.3109. *DeMeglio v Auto Club Ins Ass'n*, 449 Mich 33; 534 NW2d 665 (1995).

Medicare benefits are not proper setoffs under MCL 500.3109, but may be set off as a coordinated benefit under section 3109a. *LeBlanc v State Farm Mutual Automobile Insurance Co*, 410 Mich 173; 301 NW2d 775 (1981).

Coordinated Benefit Setoffs

The Michigan no-fault law authorizes the use of an insurance policy endorsement which coordinates benefits provided by the act with other health and accident insurance benefits available through Blue Cross/Blue Shield, other medical insurance, other disability insurance, or sickness and accident benefits. Coordinated benefit endorsements apply only to duplicate claims for allowable expenses and work loss. *LeBlanc*; *Nyquist v Aetna Insurance Co*, 84 Mich App 589; 269 NW2d 687 (1978), aff'd, 404 Mich 817; 280 NW2d 792 (1979); *Orr v Detroit Automobile Inter-Insurance Exchange*, 90 Mich App 687; 282 NW2d 177, lv den, 407 Mich 865 (1979); *Thomas v State Farm Mutual Automobile Insurance Co*, 159 Mich App 372; 406 NW2d 300 (1987); *Dean v Auto Club Insurance Ass'n*, 139 Mich App 266; 362 NW2d 247 (1984); *Sheeks v Farmers Insurance Exchange*, 146 Mich App 361; 379 NW2d 493 (1985).

For cases resolving priority disputes between no-fault insurers and health insurance companies where both insurers have coordinated benefits provisions in their policies, making that policy secondary to the other, see F*ederal Kemper Insurance Co v Health Insurance Administration, Inc*, 424 Mich 537; 383 NW2d 590 (1986); *Michigan Mutual Insurance Co v American Community Mutual Insurance Co*, 165 Mich App 269; 418 NW2d 455 (1987); *Northern Group Services, Inc v Auto Owners Insurance Co*, 833 F2d 85 (6th Cir 1987), cert denied, 486 US 1017; 108 S Ct 1754; 100 L Ed 2d 216 (1988); *Benike v Scarborough Insurance Trust*, 150 Mich App 710; 389 NW2d 156 (1986), lv denied, 425 Mich 882 (1986); *West Michigan Heath Care Network v Transamerica Insurance Corp of America*, 167 Mich App 218; 421 NW2d 638 (1988); *US Fidelity & Guaranty Co v Group Health Plan of Southeast Michigan*, 131 Mich App 268; 345 NW2d 683 (1983); *Auto-Owners Insurance Co v Blue Cross & Blue Shield of Michigan*, 132 Mich App 800; 349 NW2d 238 (1984). However, where the health insurer is an employee health benefit plan established under ERISA, a coordinated benefits provision in the plan making it secondary to no-fault policies is enforceable, thus making the no-fault insurer primary. *Auto Club Insurance Ass'n v Frederick & Herrud, Inc*, 443 Mich 358; 505 NW2d 820 (1993).

History

Amended January 1985, January 1988, February 1989, June 1989, February 1994, February 1999.

M Civ JI 35.01 No-Fault First-Party Benefits Action: Explanation of Statute

We have a state law known as the No-Fault Automobile Insurance Law which provides that if a person sustains accidental bodily injury or death arising out of the [ownership / or / operation / or / maintenance / or / use] of a motor vehicle as a motor vehicle, by [himself or herself / or / someone else], an insurance company may be responsible to pay the following types of benefits:

(a) *(The first type of benefit is known as "allowable expenses" and consists of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery or rehabilitation. Allowable expenses include, but are not limited to, medical expenses.)

(b) *(The second type of benefit is known as "work loss benefit" and consists of †(85 percent) of an injured person's loss of income from work the injured person would have performed during the first three years after the date of the accident if the person had not been injured. The total work loss benefit for any thirty-day period may not exceed $ [*applicable monthly maximum]*).

(c) *(The third type of benefit is known as "replacement service expenses" and consists of expenses not exceeding $20 per day reasonably incurred in obtaining ordinary and necessary services in place of those the injured person would have performed during the first three years after the date of the accident, not for income but for the benefit of [himself / herself] or of [his / her] dependents.)

(d) *(The fourth type of benefit is known as "survivors' loss benefits" and consists of two separate types of benefits:

1. A loss, after the date on which the decedent died, of contributions of tangible things of economic value, not including services, that dependents of the decedent, at the time of [his / her] death, would have received from the decedent for support during their dependency if [he / she] had not suffered the accidental bodily injury causing death; and

2. Replacement service expenses, not exceeding $20 per day, reasonably incurred by these dependents, during their dependency and after the date on which the decedent died, in obtaining ordinary and necessary services in place of those services that the decedent would have performed for their benefit if [he / she] had not suffered the injury causing death.

It should be noted, however, that the total survivors' loss benefits for any thirty-day period, that is, the combination of loss of support and replacement services, may

not exceed $ [*applicable monthly maximum*] and are not payable beyond three years from the date of the accident.)

(e) *(The last type of benefit is funeral and burial expenses. These may not exceed **$ [*policy maximum*].)

Note on Use

*The words and subparagraphs should be selected to fit the facts in the particular case.

**See MCL 500.3107(1)(a) for the statutory minimum and maximum for funeral and burial expenses.

Maximum work loss benefits have been increased each year by the Insurance Commission, according to increased cost of living. (See the table below for maximum work loss benefit amounts.) Annual adjustments for survivors' loss benefits commenced on October 1, 1978, with an amendment to MCL 500.3108. Prior to that date, the maximum survivors' loss per thirty-day period was $1,000. Since October 1, 1978, survivors' loss maximums have been the same as work loss maximums under MCL 500.3107(1)(b).

It should also be noted that no-fault insurance can be purchased which provides benefits in excess of the minimum. For those benefits in excess of the no-fault law, the Court may supply the appropriate amount in the blank captioned "applicable monthly maximum."

†This standard statutory percentage should be modified if plaintiff's income tax consequences are less than 15 percent. See MCL 500.3107(1)(b).

TABLE OF MAXIMUM WORK LOSS BENEFITS

October 1, 1973 through September 30, 1974—$1000 per single 30-day period.

October 1, 1974 through September 30, 1975—$1111 per single 30-day period.

October 1, 1975 through September 30, 1976—$1213 per single 30-day period.

October 1, 1976 through September 30, 1977—$1285 per single 30-day period.

October 1, 1977 through September 30, 1978—$1373 per single 30-day period.

October 1, 1978 through September 30, 1979—$1475 per single 30-day period.

October 1, 1979 through September 30, 1980—$1636 per single 30-day period.

October 1, 1980 through September 30, 1981—$1870 per single 30-day period.

October 1, 1981 through September 30, 1982—$2049 per single 30-day period.

October 1, 1982 through September 30, 1983—$2195 per single 30-day period.

October 1, 1983 through September 30, 1984—$2252 per single 30-day period.

October 1, 1984 through September 30, 1985—$2347 per single 30-day period.

October 1, 1985 through September 30, 1986—$2434 per single 30-day period.

October 1, 1986 through September 30, 1987—$2477 per single 30-day period.

October 1, 1987 through September 30, 1988—$2569 per single 30-day period.

October 1, 1988 through September 30, 1989—$2670 per single 30-day period.

October 1, 1989 through September 30, 1990—$2808 per single 30-day period.

October 1, 1990 through September 30, 1991—$2939 per single 30-day period.

October 1, 1991 through September 30, 1992—$3077 per single 30-day period.

October 1, 1992 through September 30, 1993—$3172 per single 30-day period.

October 1, 1993 through September 30, 1994—$3267 per single 30-day period.

October 1, 1994 through September 30, 1995—$3349 per single 30-day period.

October 1, 1995 through September 30, 1996—$3450 per single 30-day period.

October 1, 1996 through September 30, 1997—$3545 per single 30-day period.

October 1, 1997 through September 30, 1998—$3627 per single 30-day period.

October 1, 1998 through September 30, 1999—$3688 per single 30-day period.

October 1, 1999 through September 30, 2000—$3760 per single 30-day period.

October 1, 2000 through September 30, 2001—$3898 per single 30-day period.

October 1, 2001 through September 30, 2002—$4027 per single 30-day period.

October 1, 2002 through September 30, 2003—$4070 per single 30-day period.

October 1, 2003 through September 30, 2004—$4156 per single 30-day period.

October 1, 2004 through September 30, 2005—$4293 per single 30-day period.

October 1, 2005 through September 30, 2006—$4400 per single 30-day period.

October 1, 2006 through September 30, 2007—$4589 per single 30-day period.

October 1, 2007 through September 30, 2008—$4713 per single 30-day period.

October 1, 2008 through September 30, 2009—$4948 per single 30-day period.

October 1, 2009 through September 30, 2010—$4878 per single 30-day period.

October 1, 2010 through September 30, 2011—$4929 per single 30-day period.

October 1, 2011 through September 30, 2012—$5104 per single 30-day period.

October 1, 2012 through September 30, 2013—$5189 per single 30-day period.

October 1, 2013 through September 30, 2014—$5282 per single 30-day period.

October 1, 2014 through September 30, 2015—$5392 per single 30-day period.

October 1, 2015 through September 30, 2016—$5398 per single 30-day period.

History

M Civ JI 35.01 was added November 1980. Amended May 1998.

M Civ JI 35.02 No-Fault First-Party Benefits Action: Burden of Proof

In order for the plaintiff to recover no-fault benefits from the defendant, the plaintiff has the burden of proof on each of the following:

(a) *(that at the time of the accident there existed a valid contract of no-fault insurance between [*name of insured]* and defendant)

(b) †(that plaintiff's injuries arose out of the [ownership / or / operation / or / maintenance / or / use] of a motor vehicle as a motor vehicle)

(c) †(that plaintiff incurred allowable expenses which consist of reasonable charges for reasonably necessary products, services and accommodations for the plaintiff's care, recovery or rehabilitation)

(d) †(that plaintiff suffered a work loss which consists of a loss of income from work the plaintiff would have performed during the first three years after the accident had [he / she] not been injured)

(e) †(that plaintiff reasonably incurred replacement service expenses which consist of expenses during the first three years after the accident to obtain ordinary and necessary services in place of those that plaintiff would have performed for [his / her] benefit and the benefit of [his / her] dependents)

(f) †(that the death of plaintiff's decedent arose out of the [ownership / or / operation / or / maintenance / or / use] of a motor vehicle as a motor vehicle)

(g) †(that following the death of [*name of decedent]*, dependents of [*name of decedent*], during the first three years after the date of the accident, sustained a loss of contribution of tangible things of economic value, not including services, that the dependents would have received for their support during their dependency, if [*name of decedent*] had not died)

(h) †(that following the death of [*name of decedent*], dependents of [*name of decedent*], during the first three years after the date of the accident, reasonably incurred expenses during their dependency and after the date [*name of decedent*] died, in obtaining ordinary and necessary services in place of those that the decedent would have performed for the benefit of the dependents)

(i) †(that plaintiff incurred funeral and burial expenses)

(j) that the defendant failed to pay any or all of said benefits.

To the extent that plaintiff has met or has not met [his / her] burden of proof, you may grant, diminish or deny the claimed benefits according to the methods of computation which I will describe next.

Note on Use

*Delete where not an issue. If an issue, the Court should determine what contractual relationship must be proved under MCL 500.3114, .3115.

†Delete any of the subsections which are not at issue in the lawsuit.

Where the facts are not in dispute, the question whether the injury "arose out of" use of a vehicle as a motor vehicle is a legal issue for the court to decide and not for the jury. *Putkamer v Transamerica Insurance Corp of America*, 454 Mich 626; 563 NW2d 683 (1997). In such a case, subsection b should be deleted.

Comment

The term "arose out of" in subsection b has been the subject of litigation. See, e.g., *Putkamer*; *Morosini v Citizens Insurance Co of America*, 461 Mich 303; 602 NW2d 828 (1999); *McKenzie v Auto Club Insurance Ass'n*, 458 Mich 214; 580 NW2d 424 (1998); *Thornton v Allstate Insurance* Co, 425 Mich 643; 391 NW2d 320 (1986); *Williams v Citizens Mutual Insurance Co of America*, 94 Mich App 762; 290 NW2d 76 (1980); *O'Key v State Farm Mutual Automobile Insurance Co*, 89 Mich App 526; 280 NW2d 583 (1979); *Kangas v Aetna Casualty & Surety Co*, 64 Mich App 1; 235 NW2d 42 (1975); *Shinabarger v Citizens Mutual Insurance Co*, 90 Mich App 307; 282 NW2d 301 (1979); *Detroit Automobile Inter-Insurance Exchange v Higginbotham*, 95 Mich App 213; 290 NW2d 414, lv den, 409 Mich 919 (1980); *Hamka v Automobile Club of Michigan*, 89 Mich App 644; 280 NW2d 512 (1979); *Ciaramitaro v State Farm Insurance Co*, 107 Mich App 68; 308 NW2d 661 (1981), lv den, 413 Mich 861 (1982); *McClees v Kowalski*, No 44711 (Mich App, Dec 28, 1979) (unreported); *Buckeye Union Insurance Co v Johnson*, 108 Mich App 46; 310 NW2d 268 (1981); *Smith v Community Service Insurance Co*, 114 Mich App 431; 319 NW2d 358 (1982); *Mann v Detroit Automobile Inter-Insurance Exchange*, 111 Mich App 637; 314 NW2d 719 (1981); *Gajewski v Auto-Owners Insurance Co*, 112 Mich App 59; 314 NW2d 799 (1981), rev'd, 414 Mich 968; 326 NW2d 825 (1982); *Bromley v Citizens Insurance Co of America*, 113 Mich App 131; 317 NW2d 318 (1982).

These cases hold in essence that there must be causal connection between the injury and the operation, use, ownership or maintenance of a motor vehicle, which connection must be more than incidental, fortuitous or but for. The injury must be foreseeably identifiable with the normal use of the motor vehicle. The injury must be closely related to the transportational function of motor vehicles. (*McKenzie*; *Morosini*.) Proximate cause is not required; however, it is generally not sufficient that the motor vehicle is merely the site of the accident. If the motor vehicle is one of the causes, a sufficient causal connection exists even though there are other independent causes.

Plaintiff's injuries may arise out of maintenance (repairing) of a motor vehicle without regard to whether the vehicle may be considered "parked" at the time of the injury. *Miller v Auto-Owners Insurance Co*, 411 Mich 633, 309 NW2d 544 (1981); but see MCL 500.3106(2), which denies first-party benefits under certain circumstances to employees covered by worker's compensation who are injured loading, unloading, or repairing a vehicle, or entering into or alighting from a vehicle.

The motor vehicle from which the injuries arose need not be a registered or covered motor vehicle. *Lee v Detroit Automobile Inter-Insurance Exchange*, 412 Mich 505; 315 NW2d 413 (1982).

While MCL 500.3135(2) has been construed to retain tort liability of nonmotorist tort-feasors, the no-fault insurer is still obliged to pay first-party benefits. *Citizens Insurance Co of America v Tuttle*, 411 Mich 536; 309 NW2d 174 (1981).

History

M Civ JI 35.02 was added November 1980.

M Civ JI 35.03 No-Fault: Benefits from First-Party Actions

If you decide no-fault benefits are owed to the plaintiff, you are instructed to award benefits *(that have not already been paid by the defendant) as follows:

(a) **(allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for the plaintiff's care, recovery or rehabilitation arising out of the accident in question)

(b) **(work loss benefits consisting of †(85 percent) of the loss of income from work that the plaintiff would have performed during the first three years after the date of the accident if [he / she] had not been injured. Total work loss benefits for any thirty-day period cannot exceed $ [*applicable monthly maximum*])

(c) **(replacement service expenses not exceeding $20 per day reasonably incurred by plaintiff in obtaining ordinary and necessary services in place of those that, if the plaintiff had not been injured, [he / she] would have performed during the first three years after the date of the accident, not for income but for the benefit of [himself / herself] or of [his / her] dependents)

(d) **(survivors' loss benefits consisting of tangible things of economic value, not including services, that dependents of [*name of decedent*] at the time of [his / her] death would have received for support during their dependency from [*name of decedent*] if [he / she] had not suffered the accidental bodily injury causing death)

(e) **(replacement service expenses consisting of expenses not exceeding $20 per day reasonably incurred by these dependents during their dependency and after the date on which [*name of decedent*] died in obtaining ordinary and necessary services in place of those that [*name of decedent*] would have performed for their benefit if [he / she] had not suffered the injury causing death) **(You are reminded, however, that the total survivors' loss benefits for any thirty-day period, that is, the combination of loss of support and replacement services, may not exceed $ [*applicable monthly maximum*] and are not payable beyond three years from the date of the accident.)

(f) **(funeral and burial expenses not exceeding *** $ [*policy maximum*])

Note on Use

*The phrase in parentheses should be used if some benefits have already been paid by the defendant.

**Delete if not an issue.

***See MCL 500.3107(1)(a) for the statutory minimum and maximum for funeral and burial expenses.

For applicable monthly maximum, see Note on Use to M Civ JI 35.01.

†This standard statutory percentage should be modified if plaintiff's income tax consequences are less than 15 percent. See MCL 500.3107(1)(b).

The Court may wish to give additional instruction on the meaning of work loss where plaintiff's disability ceases but plaintiff claims a loss of income from work as a consequence of the injury. See Comment below.

Comment

"An attorney is entitled to a reasonable fee for advising and representing a claimant in an action for personal or property protection insurance benefits which are overdue. The attorney's fee shall be a charge against the insurer in addition to the benefits recovered, if the court finds the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment." MCL 500.3148(1). The attorney fee thus is a question not for the jury but for the Court.

Factors to be considered in determining reasonableness of attorney fees are discussed in Wood *v Detroit Automobile Inter-Insurance Exchange*, 413 Mich 573; 321 NW2d 653 (1982).

Note that work loss and survivors' loss damages are given in the alternative. There are cases, however, where both will be applicable, such as where an injured party dies sometime subsequent to the accident.

Work loss benefits are available only for actual lost income and not for loss of earning capacity. See, e.g., *Nawrocki v Hawkeye Security Insurance Co*, 83 Mich App 135; 268 NW2d 317 (1978). If the disability ends but the income is lost as a direct consequence of the injury, plaintiff may still recover. *Id.* (Plaintiff was replaced during his disability and therefore could not return to his job after the disability ended.)

Similarly, where plaintiff's disability ceases and he is able to return to work with pain medication, but the employer's rules prohibit it, plaintiff's work loss is a consequence of the injury and work loss benefits are recoverable. *Lenart v Detroit Automobile Inter-Insurance Exchange*, 156 Mich App 669; 401 NW2d 900 (1986); lv denied, 428 Mich 917 (1987); reconsideration denied, 430 Mich 860 (1988).

While fringe benefits are not ordinarily recoverable work loss, where profit-sharing payments were considered part of an employee's wages, they are recoverable as a work loss benefit. *Krawczyk v Detroit Automobile Inter-Insurance Exchange*, 418 Mich 231; 341 NW2d 110 (1983).

A person receiving work loss benefits is not entitled to continue to receive those benefits after suffering a subsequent unrelated disability which independently renders him or her physically unable to work. *MacDonald v State Farm Mutual Insurance Co*, 419 Mich 146; 350 NW2d 233 (1984).

Work loss benefits can be recovered by those temporarily unemployed at the time of the accident or during the period of disability. For factors determining "temporarily unemployed" and the computation of wage loss for such periods, see *Oikarinen v Farm Bureau Mutual Insurance Co of Michigan*, 101 Mich App 436; 300 NW2d 589 (1980); *Lewis v Detroit Automobile Inter-Insurance Exchange*, 90 Mich App 251; 282 NW2d 794 (1979); *Lowman v Reliance Insurance Co*, 413 Mich 945 (1982); *Kennedy v Auto-Owners Insurance Co*, 87 Mich App 93; 273 NW2d 599 (1978); *Szabo v Detroit Automobile Inter-Insurance Exchange*, 136 Mich App 9; 355 NW2d 619 (1983).

Tangible things of economic value that dependents of a decedent would have received are not limited to wages; they include "hospital and medical insurance benefits, disability coverage, pensions, investment income, annuity income and other benefits." *Miller v State Farm Mutual Automobile Insurance Co*, 410 Mich 538, 557; 302 NW2d 537, 541 (1981). The computation of things of economic value requires an adjustment for income taxes that decedent would have paid on the portion that was taxable, but does not require an adjustment for personal consumption. *Miller*. If one of the survivors ceases to be a dependent, an adjustment to benefits due to the remaining survivor or survivors may be required. *Miller*.

Surviving dependents of a decedent who was unemployed at the time of death are entitled to survivors' loss benefits if they can show that the decedent would have been employed had he survived the accident. *Gobler v Auto-Owners Insurance Co*, 428 Mich 51; 404 NW2d 199 (1987).

History

M Civ JI 35.03 was added November 1980. Amended May 1998.

M Civ JI 35.04 No-Fault First-Party Benefits Action: Statutory Interest

Plaintiff is entitled to 12 percent interest on any benefit you find overdue. Benefits are overdue if not paid within thirty days after reasonable proof of the fact and amount of the loss has been provided to the insurance company. Plaintiff has the burden of proof that [he / she] provided reasonable proof of loss and that the defendant failed to pay the claim within thirty days. If reasonable proof is not supplied as to the entire claim, you shall award interest as to all benefits for which reasonable proof was supplied. Your verdict will be for plaintiff as to interest on those benefits for which [he / she] has met [his / her] burden of proof. Your verdict will be for the defendant as to interest on those benefits for which plaintiff failed to meet [his / her] burden of proof.

Comment

MCL 500.3142.

An award of interest on the judgment under MCL 600.6013 and 12 percent interest on overdue benefits is proper. *Wood v Detroit Automobile Inter-Insurance Exchange*, 413 Mich 573; 321 NW2d 653 (1982). An award of interest does not require proof of unreasonable conduct or bad faith on the part of the insurer. E.g., *Cook v Detroit Automobile Inter-Insurance Exchange*, 114 Mich App 53; 318 NW2d 476 (1981); *Bach v State Farm Mutual Automobile Insurance Co*, 137 Mich App 128; 357 NW2d 325 (1984), lv denied, 421 Mich 862 (1985); *Nash v Detroit Automobile Inter-Insurance Exchange*, 120 Mich App 568; 327 NW2d 521 (1982), lv denied, 417 Mich 1088 (1983).

Exemplary damages or damages for mental or emotional distress are not recoverable from a no-fault insurer if the claim is based solely on breach of contract for nonpayment of benefits. *Liddell v Detroit Automobile Inter-Insurance Exchange*, 102 Mich App 636; 302 NW2d 260 (1981); *Jerome v Michigan Mutual Auto Insurance Co*, 100 Mich App 685; 300 NW2d 371 (1980). See also *Kewin v Massachusetts Mutual Life Insurance Co*, 409 Mich 401; 295 NW2d 50 (1980).

History

M Civ JI 35.04 was added November 1980.

M Civ JI 35.05 No-Fault First-Party Benefits Action: Damages—Setoff for Governmental Benefits [*Instruction Deleted*]

History

M Civ JI 35.05 was added November 1980. Deleted January 1985.

M Civ JI 35.06 No-Fault First-Party Benefits Action: Damages—Setoff; Coordinated Benefits [*Instruction Deleted*]

History

M Civ JI 35.06 was added November 1980. Deleted January 1985.

Chapter 36: Third-Party Tort Action

Introductory Directions to the Court 231

M Civ JI 36.01 No-Fault Auto Negligence: Serious Impairment (To Be Used in Cases in Which 1995 PA 222 Does Not Apply) 233

M Civ JI 36.01A No-Fault Auto Negligence: Noneconomic Loss Damages for Non-Continuing Serious Impairment Threshold Injury 235

M Civ JI 36.02 No-Fault Auto Negligence: Mental or Emotional Injury 236

M Civ JI 36.03 No-Fault Auto Negligence: Permanent Serious Disfigurement 237

M Civ JI 36.04 No-Fault Auto Negligence: Elements of Proof—Explanation of Noneconomic-Economic Distinction 238

M Civ JI 36.05 No-Fault Auto Negligence: Burden of Proof—Noneconomic Loss (To Be Used in Cases in Which 1995 PA 222 Does Not Apply) 240

M Civ JI 36.06 No-Fault Auto Negligence: Burden of Proof—Economic Loss 242

M Civ JI 36.11 No-Fault Auto Negligence: Serious Impairment of Body Function—Definition (To Be Used in Cases in Which 1995 PA 222 Applies) 244

M Civ JI 36.15 No-Fault Auto Negligence: Burden of Proof—Economic and/or Noneconomic Loss (To Be Used in Cases in Which 1995 PA 222 Applies)* 247

Introductory Directions to the Court

The instructions in Chapter 36 should be used with applicable instructions in the Negligence section (Section 2), e.g., M Civ JI 10.02 Negligence of Adult—Definition and 15.01 Definition of Proximate Cause, and with M Civ JI 8.01 Meaning of Burden of Proof in the General Instructions section (Section 1).

The tort liability limited by the no-fault law is only such liability as arises out of the defendant's ownership, operation, maintenance or use of a motor vehicle, not liability that arises out of other conduct. *Citizens Insurance Co of America v Tuttle*, 411 Mich 536; 309 NW2d 174 (1981) (negligent keeping of cow). See also *Schwark v Lilly*, 91 Mich App 189; 283 NW2d 684 (1979) (dram shop action); *Auto-Owners Insurance Co v Employers Insurance of Wausau*, 103 Mich App 682; 303 NW2d 867 (1981) (products liability action); *Pustay v Gentelia*, 104 Mich App 250; 304 NW2d 539 (1981) (negligent maintenance of parking lot); *State Farm Mutual Automobile Insurance Co v Soo Line R Co*, 106 Mich App 138; 307 NW2d 434 (1981) (railroad accident). In such cases, the instructions in Chapter 36 are not applicable to a nonmotorist tortfeasor defendant.

Where a tortfeasor's liability is not limited by the no-fault act, the common-law collateral-source rule has full application. *Tebo v Havlik*, 418 Mich 350; 343 NW2d 181 (1984). But see the modifications to the collateral-source rule in 1986 PA 178.

A question currently exists as to whether certain portions of 1986 PA 178 are applicable to third-party tort cases filed under the no-fault statute after October 1, 1986. Because of that uncertainty, the Committee has not drafted any changes to the no-fault instructions dealing with third-party tort cases. The Committee did change the no-fault verdict form to enable the jury to allocate fault among parties, but the Committee has taken no position as to the ramifications of that allocation. One Michigan Court of Appeals panel has agreed there seems to be some question about the applicability of certain provisions of 1986 PA 178 to no-fault third-party tort cases. However, because the panel saw no prejudice to the plaintiff in the verdict form and judgment containing the specific breakdown of past and future damages pursuant to MCL 600.6305, .6306, as amended by 1986 PA 178, the panel declined to consider the question. *Miller v Ochampaugh*, 191 Mich App 48; 477 NW2d 105 (1991).

A question also currently exists whether certain portions of 1995 PA 161 and 249 are applicable to third-party tort cases filed under the no-fault statute. Public Acts 161 and 249 were enacted during the same session the legislature enacted 1995 PA 222, which redefines the no-fault threshold. Neither 1995 PA 161 nor 1995 PA 249 makes any reference to 1995 PA 222 or to the no-fault statute, and, similarly, 1995 PA 222 makes no reference to the other two public acts. Moreover, in enacting MCL 500.3135(3), amended by 1995 PA 222, the legislature retained in the tort abrogation portion of that section prefatory language identical to that in the original no-fault statute that makes limitations on tort recovery stated in the no-fault statute applicable "[n]otwithstanding any other provision of law." For these reasons, the Committee has not drafted any changes to the no-fault instructions or verdict forms in response to 1995 PA 161 or 249.

Effective March 28, 1996, a tortfeasor is liable for damages up to $1,000 to motor vehicles to the extent the damages are not covered by insurance. MCL 500.3135(3)(e). (Before March 28, 1996, the limitation

was $400.) The tortfeasor is also liable for intentionally caused harm to persons or property. MCL 500.3135(3)(a).

1995 PA 222 introduced two limitations on the recovery of damages for noneconomic loss. First, a plaintiff who is more than 50 percent at fault may not recover noneconomic loss damages. MCL 500.3135(2)(b). Second, a plaintiff operating his or her own vehicle at the time of injury who does not have in effect for that vehicle no-fault insurance required by statute is precluded from recovering noneconomic loss damages. MCL 500.3135(2)(c). Neither of these provisions bar a plaintiff's claim for excess economic loss damages.

The no-fault threshold of serious impairment is applicable in a suit against a governmental agency pursuant to the motor vehicle exception to the governmental immunity act. *Hardy v County of Oakland*, 461 Mich 561; 607 NW2d 718 (2000).

M Civ JI 36.01 No-Fault Auto Negligence: Serious Impairment (To Be Used in Cases in Which 1995 PA 222 Does Not Apply)

The law in Michigan provides that plaintiff may recover *(noneconomic loss) damages in this case if [he / she] suffered serious impairment of a body function. Based upon the evidence in this case, you must decide:

(a) whether the injuries sustained by plaintiff in the accident impaired one or more body functions, and

(b) whether that impairment of a body function was serious.

In determining whether the impairment of a body function was serious, you should consider such factors as the extent of the impairment, the particular body function impaired, the length of time the impairment lasted, the treatment required to correct the impairment, and any other relevant factors.

An impairment need not be permanent to be serious.

The terms "serious," "impairment," and "body function" have no special or technical meaning in the law and should be considered by you in the ordinary sense of their common usage.

Note on Use

This instruction should be used only for cases in which the 1995 amendments to the no-fault statute do not apply. See 1995 PA 222. For cases in which 1995 PA 222 applies, M Civ JI 36.11 should be used. 1995 PA 222 added a new definition of serious impairment of body function and makes the issue of serious impairment a question of law in certain circumstances. For a discussion of these changes, see the use note and comment accompanying M Civ JI 36.11.

For cases in which 1995 PA 222 does not apply, the issue of serious impairment is a jury question whenever evidence would cause reasonable minds to differ, even though there is no material factual dispute as to the nature and extent of the plaintiff's injuries. *DiFranco v Pickard*, 427 Mich 32; 398 NW2d 896 (1986).

*The parenthetical phrase "noneconomic loss" should be included in the instruction if plaintiff claims economic loss in addition to noneconomic loss. Under MCL 500.3135(3)(c) (formerly MCL 500.3135(2)(c)), serious impairment need not be proven to recover economic loss damages in excess of no-fault benefits. *Cassidy v McGovern*, 415 Mich 483; 330 NW2d 22 (1982). Damages for loss of earning capacity are not recoverable in tort under the no-fault act. Loss of earnings, however, is an economic loss damage, and as such is recoverable in tort if it is in excess of no-fault benefits received for "work loss" as that term is defined in MCL 500.3107–.3110. Work loss as defined in those sections does not include loss of earning capacity. *Argenta v Shahan* (and *Ouellette v Kenealy*) 424 Mich 83; 378 NW2d 470 (1985)

If mental or emotional injury is at issue, M Civ JI 36.02 should be given in addition to this instruction.

Comment

MCL 500.3135(1).

Before the passage of 1995 PA 222, the phrase "serious impairment of body function" did not require impairment of an important body function. *DiFranco*. The new legislation defines serious impairment to require impairment of an important body function. MCL 500.3135(5).

An impairment need not be permanent to be serious. *DiFranco*.

It is error to instruct the jury that "serious impairment means impairment of more than ordinary severity." *Karas v White*, 101 Mich App 208; 300 NW2d 320 (1980); *Smith v Sutherland*, 93 Mich App 24; 285 NW2d 784 (1979).

It is also error to instruct the jury regarding death and permanent serious disfigurement if the only issue is whether the plaintiff suffered a serious impairment. *Karas*; *Argenta v Shahan*, 135 Mich App 477; 354 NW2d 796 (1984), rev'd on other grounds, 424 Mich 83; 378 NW2d 470 (1985).

The Michigan Supreme Court has made it clear that the threshold of serious impairment is not a limitation that precludes recovery of damages for noneconomic loss where a plaintiff ceases to suffer from a serious impairment. *Incarnati v Savage* (and *Byer v Smith*), 419 Mich 541; 357 NW2d 644 (1984). See M Civ JI 36.01A.

History

M Civ JI 36.01 was added November 1980. Amended January 1984, October 1987.

M Civ JI 36.01A No-Fault Auto Negligence: Noneconomic Loss Damages for Non-Continuing Serious Impairment Threshold Injury

If you find plaintiff suffered serious impairment of *[a body function 1 / body function 2], but [his / her] injury has ceased, or may in the future cease to be a serious impairment of *[a body function 1 / body function 2], that fact will not relieve defendant from liability for any of the noneconomic loss damages suffered by plaintiff as a proximate result of defendant's negligence.

Note on Use

*Use bracketed phrase number 2 for cases controlled by 1995 PA 222 and bracketed phrase number 1 for cases not controlled by this statute. The definition of serious impairment in 1995 PA 222 applies to cases filed on or after March 28, 1996. *May v Sommerfield*, 239 Mich App 197; 607 NW2d 422 (1999).

Comment

Incarnati v Savage (and *Byer v Smith*), 419 Mich 541; 357 NW2d 644 (1984); *DiFranco v Picard*, 427 Mich 32, 42 n6; 398 NW2d 896, 902 n6 (1986).

History

M Civ JI 36.01A was added September 1988. Amended February 2001.

M Civ JI 36.02 No-Fault Auto Negligence: Mental or Emotional Injury

The operation of the mind and of the nervous system are body functions. Mental or emotional injury which is caused by physical injury or mental or emotional injury not caused by physical injury but which results in physical symptoms may be a serious impairment of * [a body function 1 / body function 2].

Note on Use

*Use bracketed phrase number 2 for cases controlled by 1995 PA 222 and bracketed phrase number 1 for cases not controlled by this statute. The definition of serious impairment in 1995 PA 222 applies to cases filed on or after March 28, 1996. *May v Sommerfield*, 239 Mich App 197; 607 NW2d 422 (1999).

Comment

See *Luce v Gerow*, 89 Mich App 546; 280 NW2d 592 (1979).

History

M Civ JI 36.02 was added November 1980. Amended February 2001.

M Civ JI 36.03 No-Fault Auto Negligence: Permanent Serious Disfigurement

The law in Michigan provides that plaintiff may recover *(noneconomic loss) damages in this case if [he / she] suffered permanent serious disfigurement. The term "permanent serious disfigurement" should be considered to have its ordinary meaning as those words are commonly used. Based upon the evidence in this case, you must decide whether plaintiff suffered disfigurement and, if so, whether that disfigurement is both serious and permanent.

Note on Use

*The parenthetical phrase "noneconomic loss" should be included in the instruction if plaintiff claims economic loss in addition to noneconomic loss. Under MCL 500.3135(3)(c) (formerly MCL 500.3135(2)(c)), the plaintiff need not prove permanent serious disfigurement to recover economic loss damages in excess of no-fault benefits.

1995 PA 222 amended the no-fault statute to provide that the issue of permanent serious disfigurement is a question of law if the trial judge finds either that (1) there is no factual dispute concerning the nature and extent of the person's injuries, or (2) there is a factual dispute concerning the nature and extent of the person's injuries, but the dispute is not material to the determination of whether the person has suffered permanent serious disfigurement. MCL 500.3135(2)(a). (This provision applies to cases filed on or after July 26, 1996.) If 1995 PA 222 applies to the case, but the case does not fall into either of these categories, then permanent serious disfigurement is a jury question and this instruction should be given.

For cases in which 1995 PA 222 does not apply, the issue of permanent serious disfigurement is a jury question whenever evidence would cause reasonable minds to differ, even though there is no material factual dispute as to the nature and extent of the plaintiff's injuries. *Morse v Loomis*, 158 Mich App 519; 405 NW2d 404 (1987); *Owens v Detroit*, 163 Mich App 134; 413 NW2d 679 (1987). See also *Earls v Herrick*, 107 Mich App 657; 309 NW2d 694 (1981).

History

M Civ JI 36.03 was added November 1980.

M Civ JI 36.04 No-Fault Auto Negligence: Elements of Proof—Explanation of Noneconomic-Economic Distinction

The plaintiff claims two different types or classes of damages in this case. The elements which the plaintiff has the burden of proving with respect to each type of damages are somewhat different. The first type or class of damages is generally referred to as "noneconomic" loss damages and consists of such things as [*insert those applicable noneconomic loss damages for which the plaintiff seeks recovery in this case*].

The second type or class of damages sought by plaintiff is generally referred to as "economic" loss damages and consists of *[for insured defendants, insert those applicable economic loss damages suffered by the plaintiff in excess of compensable no-fault benefits for which plaintiff seeks recovery: for the first three years, amounts in excess of no-fault benefits for work loss, allowable expenses, and survivors' loss, and, for the period after three years, all work loss, allowable expenses, and survivors' loss. For uninsured defendants, insert any economic loss damages*].

As I indicated, what the plaintiff must prove differs somewhat depending on which type of damages claim is being considered—economic or noneconomic loss damages. I will now instruct you regarding the elements which the plaintiff must prove.

Note on Use

Both insured and uninsured motorist tortfeasors have immunity from tort liability for noneconomic loss damages, except where the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement. *Auto Club Insurance Ass'n v Hill*, 431 Mich 449; 430 NW2d 636 (1988). However, the uninsured motorist tortfeasor (unlike the insured motorist tortfeasor) has no tort immunity for economic loss damages. *Hill*.

Under MCL 500.3135(3)(c) (formerly MCL 500.3135(2)(c)), serious impairment need not be proven to recover economic loss damages in excess of no-fault benefits. *Cassidy v McGovern*, 415 Mich 483; 330 NW2d 22 (1982); *Cochran v Myers*, 146 Mich App 729; 381 NW2d 800 (1985); lv denied, 426 Mich 867; 387 NW2d 387 (1986). Damages for loss of earning capacity are not recoverable in tort under the no-fault act. Loss of earnings, however, is an economic loss damage, and as such is recoverable in tort if it is in excess of no-fault benefits received for "work loss" as that term is defined in MCL 500.3107–.3110. "Work loss" as defined in those sections does not include loss of earning capacity. *Argenta v Shahan* (and *Ouellette v Kenealy*), 424 Mich 83; 378 NW2d 470 (1985).

MCL 500.3135(3) abolishes tort liability of drivers and owners of insured vehicles with exceptions listed in that subsection. MCL 500.3135(3)(c) identifies recoverable economic damages but does not include replacement services. *Johnson v Recca*, 492 Mich 169, 821 NW2d 520 (2012).

This instruction should be given in those cases where the plaintiff is seeking to recover for both economic and noneconomic losses. It should be read immediately before the burden of proof instructions with regard to noneconomic and economic loss damages.

History

M Civ JI 36.04 was added November 1980. Amended September 1989, October 2013.

M Civ JI 36.05 No-Fault Auto Negligence: Burden of Proof—Noneconomic Loss (To Be Used in Cases in Which 1995 PA 222 Does Not Apply)

*(As to plaintiff's claim for noneconomic loss damages,) the plaintiff has the burden of proof on each of the following:

(a) that the defendant was negligent in one or more of the ways claimed by the plaintiff as stated to you in these instructions;

(b) that the plaintiff was injured;

(c) that the negligence of the defendant was a proximate cause of plaintiff's injury;

(d) that plaintiff's injury resulted in [death / serious impairment of a body function / or / permanent serious disfigurement].

†(The defendant has the burden of proof on [his / her] claim that the plaintiff was negligent in one or more of the ways claimed by the defendant as stated to you in these instructions, and that such negligence was a proximate cause of plaintiff's [injury / death].)

‡(Your verdict will be for the plaintiff if defendant was negligent, and plaintiff was injured, and defendant's negligence was a proximate cause of plaintiff's injury, and plaintiff's injury resulted in [death / serious impairment of a body function / or / permanent serious disfigurement].)

‡(Your verdict will be for the defendant if defendant was not negligent, or, if negligent, plaintiff was not injured, or if defendant's negligence was not a proximate cause of plaintiff's injury, or if plaintiff's injury did not result in [death / serious impairment of a body function / or / permanent serious disfigurement].)

†(If you find that both parties were negligent, and that plaintiff was injured and that the negligence of both parties was a proximate cause of plaintiff's injury, and that plaintiff's injury resulted in [death / serious impairment of a body function / or / permanent serious disfigurement], then you must determine the degree of such negligence, expressed as a percentage, attributable to the plaintiff. Negligence on the part of the plaintiff does not bar recovery by the plaintiff against the defendant. However, the percentage of negligence attributable to the plaintiff will be used by the Court to reduce the amount of damages which you find to have been sustained by the plaintiff.)

The Court will furnish you with a Special Verdict Form that will list the questions you must answer. Your answers to the questions in the Special Verdict Form will constitute your verdict.

Note on Use

This instruction should only be used for cases in which the 1995 amendments to the no-fault statute do not apply. See M Civ JI 36.15 for a discussion as to when 1995 PA 222 applies.

If the injury resulted in death, the words "plaintiff's decedent" should be substituted where appropriate.

Both insured and uninsured motorist tortfeasors have immunity from tort liability for noneconomic loss damages, except where the injured person has suffered death, serious impairment of a body function, or permanent serious disfigurement. *Auto Club Insurance Ass'n v Hill*, 431 Mich 449; 430 NW2d 636 (1988). However, the uninsured motorist tortfeasor (unlike the insured motorist tortfeasor) has no tort immunity for economic loss damages. *Hill*.

*The phrase in parentheses should only be given if the case includes both economic and noneconomic loss damages.

†If comparative negligence is not an issue in the case, the paragraph concerning defendant's burden of proof and the next-to-last paragraph of this instruction should not be read to the jury.

‡The two parenthetical paragraphs beginning with the words "Your verdict" are not necessary if a special verdict form is used.

Comment

The no-fault law has not abolished the common law action for loss of consortium by the spouse of a person who receives above-threshold injuries. *Rusinek v Schultz, Snyder & Steele Lumber Co*, 411 Mich 502; 309 NW2d 163 (1981).

History

M Civ JI 36.05 was added November 1980. Amended January 1984, November 1995.

M Civ JI 36.06 No-Fault Auto Negligence: Burden of Proof—Economic Loss

*(As to plaintiff's claim for economic loss damages,) the plaintiff has the burden of proof on each of the following:

(a) that the defendant was negligent in one or more of the ways claimed by the plaintiff as stated to you in these instructions.

(b) that the plaintiff sustained damages consisting of [*for insured defendants, insert those applicable economic loss damages suffered by the plaintiff in excess of compensable no-fault benefits for which plaintiff seeks recovery: for the first three years, amounts in excess of no-fault benefits for work loss, allowable expenses, and survivors' loss, and, for the period after three years, all work loss, allowable expenses, and survivors' loss. For uninsured defendants, insert any economic loss damages*.]

(c) that the negligence of the defendant was a proximate cause of plaintiff's damages.

†(The defendant has the burden of proof on [his / her] claim that the plaintiff was negligent in one or more of the ways claimed by the defendant as stated to you in these instructions, and that such negligence was a proximate contributing cause of plaintiff's damages.)

‡(Your verdict will be for the plaintiff if [he / she] sustained damages consisting of [*description of allowable economic losses sought by plaintiff*] and defendant was negligent, and such negligence was a proximate cause of plaintiff's damages.)

‡(Your verdict will be for the defendant if plaintiff did not sustain damages consisting of [*description of allowable economic losses sought by plaintiff*], or if the defendant was not negligent, or, if negligent, such negligence was not a proximate cause of plaintiff's damages.)

†(If you find that each party was negligent and that the negligence of each party was a proximate cause of plaintiff's damages, then you must determine the degree of such negligence, expressed as a percentage, attributable to the plaintiff. Negligence on the part of the plaintiff does not bar recovery by the plaintiff against the defendant. However, the percentage of negligence attributable to the plaintiff will be used by the Court to reduce the amount of damages which you find to have been sustained by the plaintiff.)

The Court will furnish you with a Special Verdict Form that will list the questions you must answer. Your answers to the questions will constitute your verdict.

Note on Use

If the injury resulted in death, the words, "plaintiff's decedent" should be substituted where appropriate.

Both insured and uninsured motorist tortfeasors have immunity from tort liability for noneconomic loss damages, except where the injured person has suffered death, serious impairment of a body function, or permanent serious disfigurement. *Auto Club Insurance Ass'n v Hill*, 431 Mich 449; 430 NW2d 636 (1988). However, the uninsured motorist tortfeasor (unlike the insured motorist tortfeasor) has no tort immunity for economic loss damages. *Hill*.

MCL 500.3135(3) abolishes tort liability of drivers and owners of insured vehicles with exceptions listed in that subsection. MCL 500.3135(3)(c) identifies recoverable economic damages but does not include replacement services. *Johnson v Recca*, 492 Mich 169, 821 NW2d 520 (2012). See MCL 500.3135(3)(c) (formerly MCL 500.3135(2)(c)) for allowable economic loss damages.

*The phrase in parentheses should only be given if the case includes both economic and noneconomic loss damages.

†If comparative negligence is not an issue in the case, the paragraph concerning defendant's burden of proof and the next-to-last paragraph of this instruction should not be read to the jury.

‡The two parenthetical paragraphs beginning with the words "Your verdict" are not necessary if a special verdict form is used.

History

M Civ JI 36.06 was added November 1980. Amended September 1989, November 1995, October 2013.

M Civ JI 36.11 No-Fault Auto Negligence: Serious Impairment of Body Function—Definition (To Be Used in Cases in Which 1995 PA 222 Applies)

One of the elements plaintiff must prove in order to recover noneconomic loss damages in this case is that [he / she] sustained a serious impairment of body function.

Serious impairment of body function means an objectively manifested impairment of an important body function that affects the plaintiff's general ability to lead [his / her] normal life. An impairment does not have to be permanent in order to be a serious impairment of body function.

Note on Use

1995 PA 222 amended the no-fault statute to provide that the issue of serious impairment of body function is a question of law if the trial judge finds either that (1) there is no factual dispute concerning the nature and extent of the person's injuries, or (2) there is a factual dispute concerning the nature and extent of the person's injuries, but the dispute is not material to the determination of whether the person suffered serious impairment of body function. MCL 500.3135(2)(a). In cases which do not fall into either of these categories, serious impairment of body function is a jury question and this instruction should be given. The amended statute specifically provides that for a closed-head injury, a question of fact is created if a licensed allopathic or osteopathic physician who regularly diagnoses or treats closed-head injuries testifies under oath that there may be a serious neurological injury. MCL 500.3135(2).

*The definition of serious impairment in 1995 PA 222 applies to cases filed on or after July 26, 1996. MCL 500.3135(2).

If the claim involves economic and noneconomic damages, M Civ JI 36.04 No-Fault Auto Negligence: Elements of Proof—Explanation of Noneconomic-Economic Distinction should be given before this instruction.

If the trial courts makes any preliminary rulings as a matter of law in the plaintiff's favor, e.g., that a body function is "important," this instruction must be modified accordingly.

If mental or emotional injury is an issue, M Civ JI 36.02 should be given in addition to this instruction.

Comment

Prior to the enactment of 1995 PA 222, the statutory threshold requirement of "serious impairment of body function" had not been defined by the Michigan Legislature. However, it had been the subject of frequent appellate court decisions. In two Supreme Court decisions, *Cassidy v McGovern*, 415 Mich 483 (1982), and *DiFranco v Pickard*, 427 Mich 32 (1986), the Michigan Supreme Court defined "serious impairment of body function" in substantially different ways. Presumably 1995 PA 222 was a legislative response to those conflicting opinions, which, among other things, adopted the first legislative definition of "serious impairment of body function." MCL 500.3135(7) states: "As used in this

section, 'serious impairment of body function' means an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life."

Following the enactment of 1995 PA 222, the Supreme Court decided *Kreiner v Fischer*, 471 Mich 109 (2004), and numerous Court of Appeals' decisions were issued implementing that decision.

In *McCormick v Carrier*, 487 Mich 180 (2010), the Supreme Court reversed *Kreiner*. Both *Kreiner* and *McCormick* are summary disposition cases that address when and under what circumstances a trial judge can decide the issue of serious impairment of body function as a matter of law. Neither addressed the issue of jury instructions. Therefore, caution should be exercised in extracting language from *McCormick* and converting it to jury instructions.

In *McCormick*, the Supreme Court held that the statutory definition of serious impairment of body function sets forth three requirements: first, there must be an objectively manifested impairment; second, the impairment must be of an important body function; and third, the impairment must be one that affects the injured person's general ability to lead his or her normal life.

The Committee determined it was necessary to delete the last paragraph of the instruction, which formerly stated, "In order for an impairment to be objectively manifested, there must be a medically identifiable injury or condition that has a physical basis." This definitional language came from *DiFranco*, supra, which predated 1995 PA 222. It was also affirmed in *Jackson v Nelson*, 252 Mich App 643 (2002), which was decided after 1995 PA 222. However, there is language in *McCormick* suggesting that this definition, although arguably still relevant, does not present a complete definition of the objectively manifested element of the threshold. In this regard, *McCormick* stated, "The common meaning of 'objectively manifested' in MCL 500.3135(5) is an impairment that is evidenced by actual symptoms or conditions that someone other than the injured person would observe or perceive as impairing a body function. In other words, an 'objectively manifested' impairment is commonly understood as one observable or perceivable from actual symptoms or conditions." However, the Court goes on to cite *Cassidy* and *DiFranco*, *supra* and states, "Further, the preexisting judicial interpretation of 'objectively manifested' is consistent with the plain language of the later adopted statute." The Committee determined that the most appropriate course was to delete any definitional language of the objectively manifested element from this instruction. In doing so, however, the Committee did not mean to imply that a court cannot give an appropriate special instruction on this issue or on the other two threshold elements dealing with important body function and general ability to lead plaintiff's normal life.

It is error to instruct the jury that "serious impairment means impairment of more than ordinary severity." *Karas v White*, 101 Mich App 208; 300 NW2d 320 (1980); *Smith v Sutherland*, 93 Mich App 24; 285 NW2d 784 (1979).

It is also error to instruct the jury regarding death and permanent serious disfigurement if the only issue is whether the plaintiff suffered a serious impairment. *Karas*; *Argenta v Shahan*, 135 Mich App 477; 354 NW2d 796 (1984), rev'd on other grounds, 424 Mich 83; 378 NW2d 470 (1985).

The Michigan Supreme Court has made it clear that the threshold of serious impairment is not a limitation that precludes recovery of damages for noneconomic loss where a plaintiff ceases to suffer from a serious

impairment. *Incarnati v Savage* (and *Byer v Smith*), 419 Mich 541; 357 NW2d 644 (1984). See M Civ JI 36.01A.

History

M Civ JI 36.11 was added June 1997. Amended December 1999, February 2001, June 2011.

M Civ JI 36.15 No-Fault Auto Negligence: Burden of Proof—Economic and/or Noneconomic Loss (To Be Used in Cases in Which 1995 PA 222 Applies)*

In order to recover damages for either economic or noneconomic loss, plaintiff has the burden of proof on each of the following three elements:

(a) that the defendant was negligent;

(b) that the plaintiff was injured;

(c) that the negligence of the defendant was a proximate cause of injury to the plaintiff.

ECONOMIC LOSS

If you decide that all of these have been proved, then (subject to the rule of comparative negligence, which I will explain) plaintiff is entitled to recover damages for economic loss resulting from that injury, including: [*For insured defendants, insert those applicable economic loss damages suffered by the plaintiff in excess of compensable no-fault benefits for which plaintiff seeks recovery: for the first three years, amounts in excess of no-fault benefits for work loss, allowable expenses, and survivors' loss, and, for the period after three years, all work loss, allowable expenses, and survivors' loss. For uninsured defendants, insert any economic loss damages*], that you determine the plaintiff has incurred.

[*Read only if applicable]* If you find that plaintiff is entitled to recover for work loss beyond what is recoverable in no-fault benefits, you must reduce that by the taxes that would have been payable on account of income plaintiff would have received if he or she had not been injured.

NONECONOMIC LOSS

As to plaintiff's claim for damages for noneconomic loss, plaintiff has the burden of proving a fourth element:

(d) that plaintiff's injury resulted in [death / serious impairment of body function / or / permanent serious disfigurement].

If you decide that all four elements have been proved, then (subject to the rule of comparative negligence, which I will explain) plaintiff is entitled to recover damages for noneconomic loss that you determine the plaintiff has sustained as a result of that [death / injury].

COMPARATIVE NEGLIGENCE

The defendant has the burden of proof on [his / her] claim that the plaintiff was negligent and that such negligence was a proximate cause of plaintiff's [injury / death].

If your verdict is for the plaintiff and you find that the negligence of both parties was a proximate cause of plaintiff's [injury / death], then you must determine the degree of such negligence, expressed as a percentage, attributable to each party.

Negligence on the part of the plaintiff does not bar recovery by plaintiff against the defendant for damages for economic loss. However, the percentage of negligence attributable to the plaintiff will be used by the court to reduce the amount of damages for economic loss that you find were sustained by plaintiff.

Negligence on the part of the plaintiff does not bar recovery by plaintiff against the defendant for damages for noneconomic loss unless plaintiff's negligence is more than 50 percent. If the plaintiff's negligence is more than 50 percent, your verdict will be for the defendant as to plaintiff's claim for damages for noneconomic loss. Where the plaintiff's negligence is 50 percent or less, the percentage of negligence attributable to plaintiff will be used by the court to reduce the amount of damages for noneconomic loss that you find were sustained by the plaintiff.

The Court will furnish a Special Verdict Form that will list the questions you must answer. Your answers to the questions in the verdict form will constitute your verdict.

Note on Use

*1995 PA 222 contains a definition of "serious impairment of body function" that applies to all cases filed on or after March 28, 1996. See *May v Sommerfield*, 239 Mich App 197; 607 NW2d 422 (1999). 1995 PA 222 also bars recovery of damages for noneconomic loss if (1) a plaintiff is more than 50 percent at fault or (2) a plaintiff is uninsured and is operating his or her own vehicle at the time of the injury. MCL 500.3135(2)(b),(c). These two provisions are effective for cases filed on or after July 26, 1996, but they do not affect a plaintiff's right to recover excess economic loss damages.

This instruction applies to a case that includes claims for damages for both economic and noneconomic loss. If the case involves only one of these types of damages, this instruction must be modified. For example, if only noneconomic loss damages are claimed, the trial judge should read the four elements a.–d. together; delete the section titled "Economic Loss"; and delete the third-from-last paragraph of this instruction. This instruction should also be modified by deleting the first four paragraphs under the section titled "Comparative Negligence" if plaintiff's negligence is not an issue in the case.

An uninsured plaintiff operating his or her own vehicle at the time of the injury is not entitled to noneconomic loss damages, but may recover excess economic loss damages. See MCL 500.3135(2)(c), added by 1995 PA 222.

Both insured and uninsured motorist tortfeasors have immunity from tort liability for noneconomic loss damages, except where the injured person has suffered death, serious impairment of a body function, or permanent serious disfigurement. *Auto Club Insurance Ass'n v Hill*, 431 Mich 449; 430

NW2d 636 (1988). However, the uninsured motorist tortfeasor (unlike the insured motorist tortfeasor) has no tort immunity for economic loss damages. *Hill*.

See MCL 500.3135(3)(c) (formerly MCL 500.3135(2)(c)) for allowable economic loss damages. MCL 500.3135(3) abolishes tort liability of drivers and owners of insured vehicles with exceptions listed in that subsection. MCL 500.3135(3)(c) identifies recoverable economic damages but does not include replacement services. *Johnson v Recca*, 492 Mich 169, 821 NW2d 520 (2012).

In suits against an insured defendant, MCL 500.3135(3)(c) requires a reduction for the tax liability the injured person would have otherwise incurred. The "tax reduction" instruction should only be included if there is evidence to support it.

Comment

The no-fault law has not abolished the common law action for loss of consortium by the spouse of a person who receives above-threshold injuries. *Rusinek v Schultz, Snyder & Steele Lumber Co*, 411 Mich 502; 309 NW2d 163 (1981).

A plaintiff who is more than 50 percent at fault is not entitled to noneconomic loss damages. MCL 500.3135(2)(b), added by 1995 PA 222.

History

M Civ JI 36.15 was added June 1997. Amended December 1999, October 2013.

Chapter 38: Agency

M Civ JI 38.01 Agency Relationship: Definitions of Agent and Principal 251

M Civ JI 38.10 Agency: Apparent Agency Relationship 252

M Civ JI 38.20 Vicarious Tort Liability Based on Ostensible Agency (For Cases Other Than Medical Malpractice) 253

M Civ JI 38.01 Agency Relationship: Definitions of Agent and Principal

An "agent" is a person who is authorized by another to act on [his / her / its] behalf. The [person / entity] who has given the authority and has the right to control the agent is called the "principal."

*(The agent's authority may be expressed or implied.)

Note on Use

*The sentence in parentheses should be used only if applicable.

Comment

Burton v Burton, 332 Mich 326; 51 NW2d 297 (1952).

History

M Civ JI 38.01 was added May 1999.

M Civ JI 38.10 Agency: Apparent Agency Relationship

The plaintiff claims that [*name of person*] was acting as the defendant's agent. The defendant is bound by the acts of [*name of person*] as [his / her] agent if

(a) the defendant put [*name of person*] in such a situation that an ordinary person familiar with the particular type of business involved in this matter would be justified in assuming that [*name of person*] had the authority to act on behalf of the defendant,

(b) the plaintiff assumed that [*name of person*] had the authority to act on behalf of the defendant, and

(c) the plaintiff was justified in assuming that [*name of person*] had the authority to act on behalf of the defendant.

Note on Use

This instruction does not apply in tort cases. See *Grewe v Mount Clemens General Hospital*, 404 Mich 240; 273 NW2d 429 (1978); *Johnston v American Oil Co*, 51 Mich App 646; 215 NW2d 719 (1974).

Comment

Central Wholesale Co v Sefa, 351 Mich 17; 87 NW2d 94 (1957); *Faber v Eastman, Dillon & Co*, 271 Mich 142; 259 NW 880 (1935).

History

M Civ JI 38.10 was added January 1999.

M Civ JI 38.20 Vicarious Tort Liability Based on Ostensible Agency (For Cases Other Than Medical Malpractice)

Under certain circumstances, a defendant may be liable for the actions or omissions of a person who is not actually [his / her / its] agent or employee. In this case, plaintiff claims that defendant is liable based on negligence of [*name of ostensible agent or employee*].

In order to establish the liability of defendant under this theory, plaintiff has the burden of proving all of the following:

(a) Defendant intentionally or negligently made representations that [*name of ostensible agent*] was [his / her / its] employee or agent;

(b) On the basis of those representations, plaintiff reasonably believed that [*name of ostensible agent*] was acting as an employee or agent of the defendant;

(c) Plaintiff [was injured / sustained damage];

(d) Plaintiff [was injured / sustained damage] because [he / she] relied on [*name of defendant*] to provide employees or agents who would exercise reasonable skill or care;

(e) [*Name of ostensible agent*] was negligent;

(f) The negligence of [*name of ostensible agent*] was a proximate cause of plaintiff's [injury / damage].

Your verdict will be for the plaintiff if you find that all of these elements have been proved.

Your verdict will be for the defendant if you find that any one of these elements has not been proved.

Comment

Johnston v American Oil Co, 51 Mich App 646; 215 NW2d 719 (1974); *Thomas v Checker Cab Co*, 66 Mich App 152; 238 NW2d 558 (1975); *Little v Howard Johnson Co*, 183 Mich App 675; 455 NW2d 390 (1990).

History

M Civ JI 38.20 was added May 2000.

Chapter 40: Multiple Plaintiffs

M Civ JI 40.01 Two or More Plaintiffs— Separate Consideration—Repeating Instructions 255
M Civ JI 40.02 Assessment of Damages 256

M Civ JI 40.01 Two or More Plaintiffs— Separate Consideration—Repeating Instructions

There are [*number*] plaintiffs in this trial. Each plaintiff is entitled to separate consideration of [his / or / her] own case. I shall not repeat my instructions for each plaintiff. Unless I tell you otherwise, all instructions apply to each plaintiff.

Note on Use

The use of this instruction will tend to eliminate repeating instructions on behalf of two or more plaintiffs on issues and questions of law applicable to more than one plaintiff. It is recommended that this instruction be given either before or after M Civ JI 7.01 Issues for the Jury and Theories of the Parties, in the discretion of the judge. It will apply in cases consolidated for trial as well as a single suit involving multiple plaintiffs.

Comment

An instruction of this type has not been passed on by the Michigan Supreme Court. Instructions somewhat similar have been approved in *California in Fresno City Lines v Herman*, 97 Cal App 2d 366; 217 P2d 987 (1950), and *McCallum v Howe*, 110 Cal App 2d 792; 243 P2d 894 (1952).

History

M Civ JI 40.01 was SJI 41.01.

M Civ JI 40.02 Assessment of Damages

If your verdict is for one of the plaintiffs, you shall determine [his / or / her] damages and return a verdict in that amount. If your verdict is for more than one of the plaintiffs, you shall determine the amount of their damages separately, and return a verdict in that separate amount for each plaintiff.

Comment

See Forms of Verdicts under M Civ JI 65.01–65.04.

History

M Civ JI 40.02 was SJI 41.02.

Chapter 41: Multiple Defendants

M Civ JI 41.01 Two or More Defendants—Separate Consideration—Repeating Instructions 258

M Civ JI 41.02 Damages Where There Is No Allocation of Fault Between Defendants 259

M Civ JI 41.03 Multiple Parties and Pleadings Where Jury May Not Be Able to Apportion Damages [*Instruction Deleted*] 260

M Civ JI 41.04 Damages Not to Be Allocated Among Joint Tort-Feasors [*Instruction Deleted*] 261

M Civ JI 41.01 Two or More Defendants—Separate Consideration—Repeating Instructions

There are [*number*] defendants in this trial. Each defendant is entitled to separate consideration of [his / or / her] own defense. I shall not repeat my instructions for each defendant. Unless I tell you otherwise, all instructions apply to each defendant.

Note on Use

The use of this instruction will tend to eliminate repeating instructions on behalf of two or more defendants on issues and questions of law applicable to more than one defendant. It is recommended that this be given either before or after M Civ JI 7.01 Issues for the Jury and Theories of the Parties, in the discretion of the judge.

Exception: In cases of claimed vicarious liability in which the relationship of the defendants is admitted or exists as a matter of law, this instruction should not be given.

Comment

The Michigan Supreme Court has not considered the specific question of repetition of instructions due to more than one party's being present in the case. But see *Hayes v Coleman*, 338 Mich 371; 61 NW2d 634 (1953); *Mack v Precast Industries*, 369 Mich 439; 120 NW2d 225 (1963).

History

M Civ JI 41.01 was SJI 41.03.

M Civ JI 41.02 Damages Where There Is No Allocation of Fault Between Defendants

If you find one of the defendants to be liable, you shall determine the amount of damages [he / or / she] caused and return a verdict in that amount. If you find more than one of the defendants to be liable, you shall return a separate verdict for the amount of damages you determine each defendant caused.

Note on Use

This instruction should be used only if defendants caused factually separable injuries. Defendants who cause factually separable injuries are liable only for the injuries they cause and the jury should determine separate damages. *Rodgers v Canfield*, 272 Mich 562; 262 NW 409 (1935). This instruction does not apply in cases of vicarious liability or joint liability. (For discussion of the abrogation of joint liability in most cases see comment to now-deleted M Civ JI 43.01A Contribution among Tort-feasors by Relative Fault.)

Even if defendants have caused factually separable injuries, the jury may be required to allocate fault between one of the defendants and the plaintiff or a named nonparty. MCL 600.2957, .6304. If an allocation of fault is required, the jury's verdict will not be for the damages caused by that defendant, as this instruction states. Instead, the court will determine that defendant's damages based on the allocation of fault. MCL 600.6306. In such cases involving both factually separable injuries and allocation of fault, modifications of both this instruction and M Civ JI 42.01 Allocation of Fault of Parties may be given.

Where there is an issue about whether defendants caused factually separable injuries, modifications of both this instruction and M Civ JI 42.01 may be given.

History

M Civ JI 41.02 was SJI 41.04.

M Civ JI 41.03 Multiple Parties and Pleadings Where Jury May Not Be Able to Apportion Damages [*Instruction Deleted*]

Comment

This instruction was deleted because allocation of fault between defendants and others in a lawsuit based on tort or other legal theory seeking damages for personal injury, property damage, or wrongful death is required by MCL 600.6304, and the trial judge then assesses damages against defendants based on the allocation of fault (MCL 600.6306). (Prior to its amendment by 1995 PA 249, the section requiring an allocation of fault applied only to "personal injury actions.")

History

M Civ JI 41.03 was SJI 41.05. Deleted November 2000.

M Civ JI 41.04 Damages Not to Be Allocated Among Joint Tort-Feasors [*Instruction Deleted*]

Comment

This instruction was deleted because even in cases in which joint liability has not been abolished, allocation of fault between defendants and others in a lawsuit based on tort or other legal theory seeking damages for personal injury, property damage, or wrongful death is required by MCL 600.6304. (Prior to its amendment by 1995 PA 249, the allocation of fault section applied only to "personal injury actions.") Joint liability was not abolished in medical malpractice actions in which the plaintiff is determined to be without fault (MCL 600.6304(6)(a)), and cases in which the defendant is found liable for an act or omission that constitutes one of enumerated crimes (MCL 600.6312).

Also, this instruction was deleted because even in joint liability cases, it is the judge, not the jury, that is given the role of assessing damages against defendants in accordance with MCL 600.6306.

History

M Civ JI 41.04 was SJI 41.06. Deleted November 2000.

Chapter 42: Allocation of Fault (Personal Injury Action)

M Civ JI 42.01 Allocation of Fault of Parties 263
M Civ JI 42.05 Allocation of Fault of Parties and Identified Nonparties 264

M Civ JI 42.01 Allocation of Fault of Parties

If you find that multiple parties are at fault, then you must allocate the total fault among those parties.

In determining the percentage of fault of each party, you must consider the nature of the conduct of each party and the extent to which each party's conduct caused or contributed to the plaintiff's injury. The total must add up to 100 percent.

Note on Use

This instruction should be used only for personal injury actions filed on or after October 1, 1986, relating to causes of action arising on or after October 1, 1986. See 1986 PA 178, §§2 and 3. "'Personal injury' means bodily harm, sickness, disease, death, or emotional harm resulting from bodily harm." MCL 600.6301.

This instruction may also be used for actions filed on or after March 28, 1996, that are based on tort or other legal theory and seek damages for property damage only. MCL 600.6304, as amended by 1995 PA 161 and 249. See §3 of each act for the effective date.

However, this instruction should not be used in any action filed on or after March 28, 1996, that involves fault of an identified nonparty. Instead, M Civ JI 42.05 Allocation of Fault of Parties and Identified Nonparties should be used.

If the defendants caused factually separable injuries, M Civ JI 41.02 Damages Where There Is No Allocation of Fault Between Defendants should be used.

In cases of vicarious liability, this instruction may need to be modified or omitted. Fault may not be allocated between two parties, one of whom is vicariously liable for the fault of the other.

Comment

MCL 600.6304. The requirement that the jury allocate fault may be waived by agreement of all the parties. MCL 600.6304(1).

History

M Civ JI 42.01 was added February 1987. Amended August 2014.

M Civ JI 42.05 Allocation of Fault of Parties and Identified Nonparties

If you find that *(at least one) defendant and an identified nonparty are at fault, then you must allocate the total fault among all the parties and identified nonparties who are at fault.

In determining the percentage of fault of each person, you must consider the nature of the conduct of each person and the extent to which each person's conduct caused or contributed to the plaintiff's injury. The total must add up to 100 percent.

Note on Use

*This phrase should be used if there is more than one defendant in the case.

This instruction should be used only for actions filed on or after March 28, 1996, that are based on tort or another legal theory seeking damages for personal injury, property damage, and wrongful death and that involve fault of more than one person including an identified nonparty. See MCL 600.2957, .6304, as amended by 1995 PA 161 and 249. For the effective date of the 1995 amendments, see 1995 PA 161, §3; and 1995 PA 249, §3.

A party who wishes to have fault of a nonparty assessed under MCL 600.6304 must file notice designating the nonparty within 91 days after filing its first responsive pleading; any filing after that date must be made by motion with a showing that facts underlying the notice could not, with reasonable diligence, have been known earlier. MCR 2.112(K)(3)(c). The parties may not stipulate to forgo the notice provision of this rule. *Staff v Marder*, 242 Mich App 521; 619 NW2d 57 (2000). (The rule of procedure stated in MCR 2.112(K) takes precedence over the conflicting statutory provision, MCL 600.2957(2).)

If the defendants caused factually separable injuries, M Civ JI 41.02 Damages Where There Is No Allocation of Fault Between Defendants should be used.

In cases of vicarious liability, this instruction may need to be modified or omitted. Fault may not be allocated between two parties, one of whom is vicariously liable for the fault of the other.

Comment

MCL 600.2957, .6304. The requirement that the jury allocate fault may be waived by agreement of all the parties. MCL 600.6304(1).

The definition of "fault" is: "As used in this section, 'fault' includes an act, an omission, conduct, including intentional conduct, a breach of warranty, or a breach of a legal duty, or any conduct that could give rise to the imposition of strict liability, that is a proximate cause of damage sustained by a party." MCL 600.6304(8). The definition of "fault" was added by 1995 PA 249.

History

M Civ JI 42.05 was added October 2001.

Chapter 43: Contribution Among Tort-Feasors

M Civ JI 43.01A Contribution Among Tort-Feasors by Relative Fault [*Instruction Deleted*] 267

M Civ JI 43.01B Contribution Among Tort-Feasors by Relative Fault (Bifurcation) [*Instruction Deleted*] 268

M Civ JI 43.01A Contribution Among Tort-Feasors by Relative Fault [*Instruction Deleted*]

Comment

For rights to contribution among persons jointly liable in tort, see MCL 600.2925a–.2925d.

In late 1995, the Michigan legislature abrogated joint liability in most cases and thereby eliminated most actions for contribution among tort-feasors:

> Except as provided in section 6304, in an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each defendant for damages is several only and is not joint. However, this section does not abolish an employer's vicarious liability for an act or omission of the employer's employee.

MCL 600.2956.

The Michigan Court of Appeals has held that the 1995 tort legislation (1995 PA 161 and 249) eliminated most claims for contribution. *Kokx v Bylenga*, 241 Mich App 655; 617 NW2d 368 (2000). According to *Kokx*, the allocation of fault section (MCL 600.6304), which limits a party's liability for damages to his or her own percentage of fault, eliminates the possibility that a party will pay more than his or her pro rata share of common liability, which is a prerequisite to a contribution claim under MCL 600.2925a.

Section 6304 created two exceptions to the abolishment of joint liability. MCL 600.6304(4). The first exception applies to medical malpractice actions. In medical malpractice actions in which the plaintiff is determined to be without fault, liability of defendants is joint and several. MCL 600.6304(6)(a). In medical malpractice actions in which the plaintiff is determined to have fault, a mechanism for allocating uncollectable amounts to certain defendants is provided. MCL 600.6304(6)(b), (7). The second exception to the abrogation of joint liability is for defendants who have been found liable for an act or omission that also constitutes one of the enumerated crimes for which the defendant was convicted. MCL 600.6312.

In cases in which joint tort-feasor liability remains, this instruction is unnecessary because in actions based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death that involve fault of more than one person including third-party defendants and nonparties (unless otherwise agreed by all parties), the jury is required to determine the percentage of the total fault of each person that contributed to the death or injury. MCL 600.6304(1)(b).

History

M Civ JI 43.01A was added February 1983. Deleted May 1998.

M Civ JI 43.01B Contribution Among Tort-Feasors by Relative Fault (Bifurcation) [*Instruction Deleted*]

Comment

For rights to contribution among persons jointly liable in tort, see MCL 600.2925a–.2925d.

In late 1995, the Michigan legislature abrogated joint liability in most cases and thereby eliminated most actions for contribution among tort-feasors:

> Except as provided in section 6304, in an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each defendant for damages is several only and is not joint. However, this section does not abolish an employer's vicarious liability for an act or omission of the employer's employee.

MCL 600.2956.

The Michigan Court of Appeals has held that the 1995 tort legislation (1995 PA 161 and 249) eliminated most claims for contribution. *Kokx v Bylenga*, 241 Mich App 655; 617 NW2d 368 (2000). According to *Kokx*, the allocation of fault section (MCL 600.6304), which limits a party's liability for damages to his or her own percentage of fault, eliminates the possibility that a party will pay more than his or her pro rata share of common liability, which is a prerequisite to a contribution claim under MCL 600.2925a.

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In cases in which joint tort-feasor liability remains, this instruction is unnecessary because in actions based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death that involve fault of more than one person including third-party defendants and nonparties (unless otherwise agreed by all parties), the jury is required to determine the percentage of the total fault of each person that contributed to the death or injury. MCL 600.6304(1)(b).

History

M Civ JI 43.01B was added February 1983. Deleted May 1998.

Chapter 45: Wrongful Death

M Civ JI 45.01 Wrongful Death—Explanation of Statute 270
M Civ JI 45.02 Wrongful Death—Damages 271

M Civ JI 45.01 Wrongful Death—Explanation of Statute

We have a law known as the Wrongful Death Act. This law permits the personal representative of the estate of a deceased person to bring an action whenever the death of a person or injuries resulting in the death of a person have been caused by the [wrongful act / negligence] of another. In this case, [*name of plaintiff*], the personal representative of the estate of [*name of decedent*], the deceased, is suing [*name of defendant*], the defendant. [*Name of plaintiff*] is representing the [estate / surviving spouse / next of kin] of the deceased, [namely [*name of surviving spouse*] / namely [*name of next of kin*]]. They are the real parties in interest in this lawsuit and in that sense are the real plaintiffs, whose damages you are to determine if you decide for the personal representative of the estate of [*name of decedent*].

Note on Use

In *In re Ellen Combs*, ___ Mich App ___ (July 24, 2003), the Court of Appeals held the phrase "children of the deceased's spouse," in MCL 600.2922(3)(b) does not include children of a spouse who predeceases the plaintiff's decedent. Leave to appeal to the Michigan Supreme Court has been sought.

Comment

The instruction is based on MCL 600.2922.

This statute, together with MCL 600.2921, combines into one cause of action damages suffered by a decedent prior to his death and damages suffered by others as a result of such death.

Under this statute an action may be brought for the death of a viable fetus. *O'Neill v Morse*, 385 Mich 130; 188 NW2d 785 (1971). An action may be maintained for an interspousal tort resulting in death. *Mosier v Carney*, 376 Mich 532; 138 NW2d 343 (1965). Action will also lie if the tort-feasor is dead. *In re Olney's Estate*, 309 Mich 65; 14 NW2d 574 (1944).

History

M Civ JI 45.01 was SJI 32.01.

M Civ JI 45.02 Wrongful Death—Damages

If you decide the plaintiff is entitled to damages, you shall give such amount as you decide to be fair and just, under all the circumstances, to those persons represented in this case. Such damages may include the following items, to the extent you find they have been proved by the evidence:

(1) *(reasonable medical, hospital, funeral and burial expenses)

(2) *(reasonable compensation for the pain and suffering undergone by [*name of decedent*] while [he / she] was conscious during the time between [his / her] injury and [his / her] death)

(3) *(losses suffered by [*name of surviving spouse / name of next of kin*] as a result of [*name of decedent*]'s death, including:

(a) loss of financial support
(b) loss of service
(c) loss of gifts or other valuable gratuities
(d) loss of parental training and guidance
(e) loss of society and companionship
(f) [other]
(g) [other])

Which, if any, of these elements of damage has been proved is for you to decide, based upon evidence and not upon speculation, guess, or conjecture. The amount of money to be awarded for certain of these elements of damage cannot be proved in a precise dollar amount. The law leaves such amount to your sound judgment. Your verdict must be solely to compensate for the damages and not to punish the defendant.

Note on Use

*Include only such of the listed elements of damage as are properly claimed and supported by evidence. If there is proof of additional elements of damage which are appropriate under the statute, they should be added to this instruction. If any item of damage is admitted or established by undisputed evidence, the jury should be so instructed when such item is mentioned in this instruction.

In child death cases, when there is a basis for finding the amount expended by the parent on the child's support, maintenance and education, add the following language after element 3b: "which shall be at least as great as the amount spent by the parent on the child's support, maintenance and education." See *Rohm v Stroud*, 386 Mich 693; 194 NW2d 307 (1972).

If a surviving widow has remarried but continues to regularly use her prior married name, she is entitled to a protective order requiring that she not be referred to or addressed by the name of her present husband. *Wood v Detroit Edison Co*, 409 Mich 279; 294 NW2d 571 (1980). Under such circumstances, her prior married name should be used in this instruction and in M Civ JI 45.01.

In *In re Ellen Combs*, ___ Mich App ___ (July 24, 2003), the Court of Appeals held the phrase "children of the deceased's spouse," in MCL 600.2922(3)(b) does not include children of a spouse who predeceases the plaintiff's decedent. Leave to appeal to the Michigan Supreme Court has been sought.

Comment

Damages for medical, hospital, funeral and burial expenses are expressly authorized by the wrongful death statute. MCL 600.2922(6). See *Rufner v Traverse City*, 296 Mich 204; 295 NW 620 (1941), as to recovery for such expenses when the estate is not liable.

Clause 2 of the instruction covers the "survival" element of the statute. Prior to 1939, in cases where death was not instantaneous, remedy was under the "survival act," which gave to the estate the right of action which the decedent had at the time of his death, including damages for pain and suffering and for loss of past and future earnings. See *Olivier v Houghton County Street R Co*, 134 Mich 367; 96 NW 434 (1903). 1939 PA 297 changed the law so as to require all claims for injuries resulting in death to be brought under the Wrongful Death Act. Damage for conscious pain and suffering was added to the wrongful death claim, and damage for loss of earnings after death was superseded by the claim for "pecuniary injury" suffered by the surviving spouse or next of kin. See *Baker v Slack*, 319 Mich 703; 30 NW2d 403 (1948).

This leaves a possible ambiguity as to damage for loss of earnings between the time of injury and time of death. It is doubtful that the 1939 amendment was intended to eliminate such a clear-cut element of economic loss, and the "fair and just" clause of the present statute is doubtless broad enough to encompass it. But since the matter is unsettled, and since the item will be relatively unimportant in most cases, this element of damage has not been included in the above instruction.

Clause 3 of the instruction covers the "wrongful death" element of the statute, for losses inflicted upon the surviving spouse or next of kin as a result of the decedent's death. Until 1971, the statute limited this element of damage to "pecuniary injury." Historically, "pecuniary injury" was interpreted to include only injuries resulting in an actual loss of money to the surviving spouse and next of kin. For example, a surviving husband could recover for the future cost of maid service required by the death of his wife. *Strong v Kittenger*, 300 Mich 126; 1 NW2d 479 (1942). Also, parents could recover for the loss of wages which would have been earned by a deceased child, minor or adult. *Thompson v Ogemaw County Board of Road Commissioners*, 357 Mich 482; 98 NW2d 620 (1959). This includes voluntary contributions for support from a child. *Mooney v Hill*, 367 Mich 138; 116 NW2d 231 (1962).

In *Wycko v Gnodtke*, 361 Mich 331; 105 NW2d 118 (1960), a case involving the death of a fourteen-year-old child, the court upheld the jury award to his surviving parents as not being excessive. The opinion declared that the traditional child labor formula (probable wages less cost of keep) did not adequately measure the pecuniary injury to the child's parents and went on to say that loss of companionship is an element of damages for the wrongful death. However, *Breckon v Franklin Fuel Co*,

383 Mich 251, 174 NW2d 836 (1970), limited *Wycko* to its holding that the award of damages was not excessive in the particular case and repudiated *Wycko* and later cases regarding loss of companionship as an element of pecuniary injury. (*Breckon* was later overruled by *Smith v Detroit*, 388 Mich 637; 202 NW2d 300 (1972), as to cases commenced prior to the effective date of 1971 PA 65.)

The legislature responded to *Breckon* with the enactment of 1971 PA 65, which amended the statute by deleting the phrase "pecuniary injury," and by directing the jury to give such damages as it "shall deem fair and just, under all of the circumstances, … [including] recovery for the loss of the society and companionship of the deceased." In context it seems clear enough that this was not intended to eliminate any of the elements of "pecuniary injury" previously allowed, but rather to settle the troublesome question as to inclusion of damages for loss of society and companionship. Therefore, clause 3 of this instruction includes both kinds of elements.

It should be noted that the Wrongful Death Act permits a child to recover for the loss of society and companionship of a deceased parent. *Berger v Weber*, 411 Mich 1; 303 NW2d 424 (1981).

Where appropriate, elements of damages such as those listed in M Civ JI 50.02 may be inserted into this instruction. See *Taylor v Michigan Power Co*, 45 Mich App 453, 457; 206 NW2d 815, 818 (1973).

History

M Civ JI 45.02 was SJI 32.02.

Chapter 50: Basic Instructions—Person and Property

Damages Introduction 275
M Civ JI 50.01 Measure of Damages—Personal and Property 276
M Civ JI 50.02 Elements of Damage — Pain and Suffering, Etc. 278
M Civ JI 50.03 Elements of Damage—Disability and Disfigurement 280
M Civ JI 50.04 Element of Damage—Aggravation of Preexisting Ailment or Condition 281
M Civ JI 50.05 Element of Damage—Medical Expenses 282
M Civ JI 50.06 Element of Damage—Loss of Earning Capacity—Past and Future—Adult Plaintiff, Emancipated Minor 283
M Civ JI 50.07 Element of Damage—Loss of Future Earning Capacity—Unemancipated Minor Plaintiff 284
M Civ JI 50.08 Element of Damage—Miscellaneous Expense 285
M Civ JI 50.09 Element of Damage—Personal Property 286
M Civ JI 50.10 Defendant Takes the Plaintiff As He/She Finds Him/Her 287
M Civ JI 50.11 Inability to Determine Extent of Aggravation of Injuries 288
M Civ JI 50.21 Personal Injury Action: Definition of Economic Loss and Noneconomic Loss Damages; Separation of Future Damages by Year 289

Damages Introduction

M Civ JI 50.01–50.09 and M Civ JI 51.01–51.07 relate to damages or injury to person or property. Each series consists of a basic instruction stating that if the defendant is found liable the jury is to award damages as proved by the evidence. Following the basic instruction are a number of phrases setting out various elements of damages. These elements are to be inserted in the basic instruction. If there are elements which are not covered by these specific instructions but are equally appropriate, they should be inserted in the same way. By this method the instruction can be built up to include all the elements of damages which the evidence tends to prove in any given case. This building block system greatly simplifies the drafting of damage instructions.

M Civ JI 52.01 pertains to an injury to a spouse.

These instructions contemplate a case involving a single plaintiff and defendant. Adaptations may be required for multiple parties. See M Civ JI 40.01, 40.02, and 41.01.

The trial court has a duty to instruct the jury on the different elements of damage in a personal injury case. *Jageriskey v Detroit United R Co*, 163 Mich 631, 634; 128 NW 726, 727 (1910). However, the instruction on damages must not permit the jury to speculate or expand on the injuries beyond the scope of the evidence. *Sabo v New York Central R Co*, 365 Mich 231, 235; 112 NW2d 453, 455 (1961).

Chapter 53 deals with particular factors in computing damages.

M Civ JI 50.01 Measure of Damages—Personal and Property

If you decide that the plaintiff is entitled to damages, it is your duty to determine the amount of money which reasonably, fairly and adequately compensates [him / her] for each of the elements of damage which you decide has resulted from the [negligence / professional negligence or malpractice] of the defendant, taking into account the nature and extent of the injury.

You should include each of the following elements of damage which you decide has been sustained by the plaintiff to the present time:

[*Here insert the appropriate elements of damage, such as: M Civ JI 50.02 Pain and Suffering, Etc.; M Civ JI 50.03 Disability and Disfigurement; M Civ JI 50.04 Aggravation of Preexisting Ailment or Condition*]

You should also include each of the following elements of damage which you decide plaintiff is reasonably certain to sustain in the future:

[*Reinsert applicable elements of damages as specified above]*.

If any element of damage is of a continuing nature, you shall decide how long it may continue. *(If an element of damage is permanent in nature, then you shall decide how long the plaintiff is likely to live.)

Which, if any, of these elements of damage has been proved is for you to decide based upon evidence and not upon speculation, guess or conjecture. The amount of money to be awarded for certain of these elements of damage cannot be proved in a precise dollar amount. The law leaves such amount to your sound judgment. Your verdict must be solely to compensate plaintiff for [his / her] damages, and not to punish the defendant.

Note on Use

If any item of damage is admitted or established by undisputed evidence, the jury should be so instructed when such item is mentioned in the instruction.

This instruction cannot be given in the form shown. Complete the instruction by inserting the appropriate elements of damage from M Civ JI 50.02–50.09. If there are elements which are not covered by these instructions, but are equally appropriate, they should be inserted in the same way.

*The sentence in parentheses should be used if appropriate.

If evidence concerning plaintiff's susceptibility to injury has been introduced, M Civ JI 50.10 Defendant Takes the Plaintiff As He/She Finds Him/Her may be given.

Comment

The object of damages is to compensate the aggrieved party for the injury sustained. *Allison v Chandler*, 11 Mich 542 (1863), approved in *Muskegon Agency, Inc v General Telephone Co*, 350 Mich 41; 85 NW2d 170 (1957). The instructions should not lead the jury to believe that an award of damages is to punish the defendant. *Stillson v Gibbs*, 53 Mich 280; 18 NW 815 (1884).

The extent, nature and permanency of injuries suffered are elements "peculiarly appropriate for the estimation and determination of the jury according as they find the fact to be." *Griggs v Saginaw & F R Co*, 196 Mich 258, 267–268; 162 NW 960, 963 (1917), approved in *A'Enoy v Lowry*, 367 Mich 657; 116 NW2d 930 (1962); *Greinke v Yellow Cab Co*, 368 Mich 611; 118 NW2d 835 (1962).

Plaintiff is entitled to an instruction covering past, present and future injuries as covered by the proofs. See MCR 2.118(C), 2.601, and *Wilton v Flint*, 128 Mich 156; 87 NW 86 (1901). The jury should be instructed that future and permanent injuries must be "reasonably certain" to occur for damages to be so awarded. *Finkelstein v Michigan R Co*, 197 Mich 157; 163 NW 973 (1917); *Bishop v Gaudio*, 266 Mich 267; 253 NW 292 (1934); see also *Motts v Michigan Cab Co*, 274 Mich 437; 264 NW 855 (1936); but see *Routsaw v McClain*, 365 Mich 167; 112 NW2d 123 (1961), as to whether the "reasonably certain" rule has been relaxed.

History

M Civ JI 50.01 was SJI 30.01.

M Civ JI 50.02 Elements of Damage — Pain and Suffering, Etc.

… the [*insert applicable element(s)]*.

(a) *(physical pain and suffering)
(b) *(mental anguish)
(c) *(fright and shock)
(d) *(denial of social pleasure and enjoyments)
(e) *(embarrassment, humiliation or mortification)

Note on Use

*Insert the applicable element or elements of pain and suffering a–e in the blank provided. Other possible elements of pain and suffering may be inserted as appropriate.

The element or elements are then to be inserted in M Civ JI 50.01 when the evidence justifies their use. In order for material which relates to future pain and suffering to be included, there must be evidence from which it can be inferred that such pain and suffering is reasonably certain to be experienced in the future.

Comment

Pain and suffering are compensable elements of damage. *Samuelson v Olson Transportation Co*, 324 Mich 278; 36 NW2d 917 (1949); *Beattie v Detroit*, 137 Mich 319; 100 NW 574 (1904); *Draper v Switous*, 370 Mich 468; 122 NW2d 698 (1963); *Brown v Arnold*, 303 Mich 616; 6 NW2d 914 (1942).

Compensation may be allowed for future pain and suffering if reasonable certainty of such future pain and suffering is established. *McDuffie v Root*, 300 Mich 286; 1 NW2d 544 (1942); *Motts v Michigan Cab Co*, 274 Mich 437; 264 NW 855 (1936); *Prince v Lott*, 369 Mich 606; 120 NW2d 780 (1963).

If pain persists, the jury may be charged on the issue of future pain and suffering although there is no proof of permanent physical injury, *Toman v Checker Cab Co*, 306 Mich 87, 92; 10 NW2d 318, 320 (1943), and if pain persists, it is not error to charge the jury on future pain and suffering merely because there is no medical testimony that such would occur. *Shinabarger v Phillips*, 370 Mich 135, 142; 121 NW2d 693, 696 (1963).

If the facts justify it, the jury may be instructed to consider shame and mortification, mental pain, and anxiety which plaintiff suffered by reason of the injuries sustained. *Beath v Rapid R Co*, 119 Mich 512; 78 NW 537 (1899). Annoyance, discomfiture and humiliation related to the physical injury are also proper damage elements for the jury. *Grenawalt v Nyphuis*, 335 Mich 76; 55 NW2d 736 (1952); see also *Decorte v New York Central R Co*, 377 Mich 317, 330–331; 140 NW2d 479, 484 (1966); *Manie v Matson Oldsmobile-Cadillac Co*, 378 Mich 650; 148 NW2d 779 (1967); *Ross v Leggett*, 61 Mich 445; 28 NW 695 (1886). Denial of social pleasure and enjoyments are also proper damage elements if properly pleaded. See *Beath*.

Fright and shock are also proper damage elements for the jury to consider. *Geveke v Grand Rapids & I R Co*, 57 Mich 589; 24 NW 675 (1885); *Sherwood v Chicago & W M R Co*, 82 Mich 374; 46 NW 773 (1890).

History

M Civ JI 50.02 was SJI 30.02.

M Civ JI 50.03 Elements of Damage—Disability and Disfigurement

… the *(disability including the loss or impairment of [*describe]*).

*(and the)

*(disfigurement of [*describe]*).

Note on Use

*The appropriate element or elements are to be inserted in M Civ JI 50.01 where the evidence justifies their use. A brief description of the disability or disfigurement or both must be inserted to tailor the instruction to the facts of the case.

Comment

Disability and disfigurement are recognized as separate elements of compensable damages in Michigan. Where relevant, they may both be properly inserted in M Civ JI 50.01. Disfigurement and disability were both held compensable elements of damage in *Shaw v Chicago & G T R Co*, 123 Mich 629; 82 NW 618 (1900), and *Power v Harlow*, 57 Mich 107; 23 NW 606 (1885). Instructions including disfigurement as an element of compensable damage were approved in *Sherwood v Chicago & W M R Co*, 82 Mich 374; 46 NW 773 (1890), and *Gilson v Bronkhorst*, 353 Mich 148; 90 NW2d 701 (1958). Disabilities were held compensable in *Brininstool v Michigan United R Co*, 157 Mich 172; 121 NW 728 (1909); *Ott v Wilson*, 216 Mich 499; 185 NW 860 (1921); *McDuffie v Root*, 300 Mich 286; 1 NW2d 544 (1942); *Prince v Lott*, 369 Mich 606; 120 NW2d 780 (1963); and *Magda v Johns*, 374 Mich 14; 130 NW2d 902 (1964).

History

M Civ JI 50.03 was SJI 30.03.

M Civ JI 50.04 Element of Damage—Aggravation of Preexisting Ailment or Condition

… the *(increase in [*describe]* arising from aggravation of a preexisting ailment or condition)

Note on Use

*Insert this element in M Civ JI 50.01 Measure of Damages—Personal and Property if the proof justifies submitting the issue of aggravation of a preexisting ailment or condition. Insert language describing the particular aggravation, such as increased "pain in his left leg," or "disability from loss of sight."

If it appears from the evidence that the jury may have difficulty determining the damages caused by defendant as compared to those resulting from a preexisting ailment or condition, M Civ JI 50.11 Inability to Determine Extent of Aggravation of Injuries should be given.

Comment

Reasonable compensation may be awarded for the increase of pain and suffering, increased disability, and related expenses arising from aggravation of a preexisting ailment or condition. *Schwingschlegl v City of Monroe*, 113 Mich 683; 72 NW 7 (1897); *Mosley v Dati*, 363 Mich 690; 110 NW2d 637 (1961); *Rypstra v Western Union Telegraph Co*, 374 Mich 166; 132 NW 140 (1965).

History

M Civ JI 50.04 was SJI 30.04.

M Civ JI 50.05 Element of Damage—Medical Expenses

… the *(reasonable expenses of necessary medical care, treatment and services)

Note on Use

*This element is to be inserted in M Civ JI 50.01 when the evidence justifies its use.

Comment

Reasonable expenses of necessary medical care are compensable elements of damage. *Foley v Detroit & M R Co*, 193 Mich 233; 159 NW 506 (1916). These include past and prospective expenses. *Sherwood v Chicago & W M R Co*, 82 Mich 374; 46 NW 773 (1890). The reasonable value of the medical care must be established. *Herter v Detroit*, 245 Mich 425; 222 NW 774 (1929).

History

M Civ JI 50.05 was SJI 30.05.

M Civ JI 50.06 Element of Damage—Loss of Earning Capacity—Past and Future—Adult Plaintiff, Emancipated Minor

… the *(loss of earning capacity)

Note on Use

*This element is to be inserted in M Civ JI 50.01 when the evidence justifies its use.

Comment

It is the loss of earning capacity for which damages are awarded as a result of a personal injury. *Canning v Hannaford*, 373 Mich 41; 127 NW2d 851 (1964); *Prince v Lott*, 369 Mich 606; 120 NW2d 780 (1963); *Harris v Wiener*, 362 Mich 656; 107 NW2d 789 (1961). The injured party may recover for loss of earning capacity although he or she may have received salary, wages or other compensation during the time he or she was incapacitated. *Motts v Michigan Cab Co*, 274 Mich 437; 264 NW 855 (1936); Canning.

History

M Civ JI 50.06 was SJI 30.06.

M Civ JI 50.07 Element of Damage—Loss of Future Earning Capacity—Unemancipated Minor Plaintiff

… the *(loss of earning capacity after the plaintiff has reached the age of eighteen)

Note on Use

*This element is to be inserted in M Civ JI 50.01 when the evidence justifies its use and the plaintiff is an unemancipated minor.

Comment

As to use of the term "earning capacity," see Comment to M Civ JI 50.06.

In actions for damages arising out of an injury to an unemancipated minor, the loss of earning capacity during the child's minority is recoverable by the parents. *Vink v House*, 336 Mich 292; 57 NW2d 887 (1953); *Gumienny v Hess*, 285 Mich 411; 280 NW 809 (1938); Mulder *v Achterhof*, 258 Mich 190; 242 NW 215 (1932). The child's recovery, therefore, is limited to the loss of his earning capacity after he or she reaches the age of eighteen (the age of majority, as provided by 1971 PA 79, MCL 722.52 et seq), unless the parents waive their rights. See *Gumienny*, 285 Mich at 414–415; 280 NW at 810.

History

M Civ JI 50.07 is a revision of SJI 30.07. Amended February 1, 1981.

M Civ JI 50.08 Element of Damage—Miscellaneous Expense

… the *(reasonable expense for [*insert applicable items]*, which has been required as a result of the injury)

Note on Use

*This element is to be inserted in M Civ JI 50.01 when there is evidence of miscellaneous compensable expenses, such as for caretaking, substitute transportation and baby-sitting.

Comment

Michigan has long followed the general rule that a plaintiff may recover for the necessary and reasonable expenses incurred as a consequence of the injury. See, e.g., *Andries v Everitt-Metzger-Flanders Co*, 177 Mich 110; 142 NW 1067 (1913); *Foley v Detroit & M R Co*, 193 Mich 233; 159 NW 506 (1916); *Sherwood v Chicago & W M R Co*, 82 Mich 374; 46 NW 773 (1890); *Allison v Chandler*, 11 Mich 542 (1863).

History

M Civ JI 50.08 was SJI 30.08.

M Civ JI 50.09 Element of Damage—Personal Property

… *(property damage, to be measured according to the [instruction / instructions] which I shall give you later)

Note on Use

*This element is to be inserted in M Civ JI 50.01 when the evidence justifies its use. It must then be followed by instructions taken from M Civ JI 51.01–51.07, as applicable in the particular case.

History

M Civ JI 50.09 was SJI 30.09.

M Civ JI 50.10 Defendant Takes the Plaintiff As He/She Finds Him/Her

You are instructed that the defendant takes the plaintiff as [he / she] finds [him / her]. If you find that the plaintiff was unusually susceptible to injury, that fact will not relieve the defendant from liability for any and all damages resulting to plaintiff as a proximate result of defendant's negligence.

Note on Use

This instruction should not be used in negligence cases in which the action is based on emotional distress, fright, or mental shock without a contemporaneous physical impact. While recovery may be permitted in such cases, it is subject to the limitation that "Absent specific knowledge of plaintiff's unusual sensitivity, there should be no recovery for hypersensitive mental disturbance where a normal individual would not be affected under the circumstances." *Daley v LaCroix*, 384 Mich 4, 13; 179 NW2d 390, 395 (1970) (citations omitted).

Comment

See *Wilkinson v Lee*, 463 Mich 388; 617 NW2d 305 (2000); *Richman v City of Berkley*, 84 Mich App 258; 269 NW2d 555 (1978).

History

M Civ JI 50.10 was added January 1982.

M Civ JI 50.11 Inability to Determine Extent of Aggravation of Injuries

If an injury suffered by plaintiff is a combined product of both a preexisting [disease / injury / state of health] and the effects of defendant's negligent conduct, it is your duty to determine and award damages caused by defendant's conduct alone. You must separate the damages caused by defendant's conduct from the condition which was preexisting if it is possible to do so.

However, if after careful consideration, you are unable to separate the damages caused by defendant's conduct from those which were preexisting, then the entire amount of plaintiff's damages must be assessed against the defendant.

Comment

See *Schwingschlegl v City of Monroe*, 113 Mich 683; 72 NW 7 (1897); *Mason v Chesapeake & O R Co*, 110 Mich App 76; 312 NW2d 167 (1981); *Richman v City of Berkley*, 84 Mich App 258; 269 NW2d 555 (1978); *McNabb v Green Real Estate Co*, 62 Mich App 500; 233 NW2d 811 (1975). See also *Belue v Uniroyal Inc*, 114 Mich App 589; 319 NW2d 369 (1982).

History

M Civ JI 50.11 was added October 1982.

M Civ JI 50.21 Personal Injury Action: Definition of Economic Loss and Noneconomic Loss Damages; Separation of Future Damages by Year

In this case, you must determine a separate amount for each year in the future for which plaintiff will sustain damages.

You will also be required to separate the two types of damages available in this case. The first type, "economic loss" damages, consists of such things as medical expenses, loss of wages or lost earning potential, and miscellaneous expenses. The second type, "noneconomic loss" damages, means damages or loss due to pain, suffering, inconvenience, physical impairment, physical disfigurement, and [other noneconomic loss; i.e., see M Civ JI 50.02 (b)–(e)].

Comment

MCL 600.6305.

History

M Civ JI 50.21 was added June 1987.

Chapter 51: Property Damage

Introduction 291

M Civ JI 51.01 Measure of Damages—Personal Property 292

M Civ JI 51.02 Measure of Damages—Damage to Personal Property—Cost of Repair Less Than Difference in Value 293

M Civ JI 51.03 Measure of Damages—Damage to Personal Property—Irreparable Damage with Salvage 294

M Civ JI 51.04 Measure of Damages—Damage to Personal Property—Irreparable Damage and No Salvage 295

M Civ JI 51.05 Measure of Damages—Damage to Personal Property—Dispute Whether Cost of Repair Is Less Than Difference in Value 296

M Civ JI 51.06 Measure of Damages—Damage to Personal Property—Cost of Repair with Loss in Value after Repair 297

M Civ JI 51.07 Measure of Damages—Damage to Personal Property—Dispute Whether Cost of Repair plus Loss in Value after Repair Is Less Than Difference in Value 298

Introduction

The following set of instructions, M Civ JI 51.01–51.07, relates to damages for injury to personal property. These instructions follow the same building block system used for other damage elements, as described in the Introduction to this Section.

If there are claims of damage to personal property, the property element, M Civ JI 50.09, should be inserted in the basic damage instruction, M Civ JI 50.01. After M Civ JI 50.01 has been completed, M Civ JI 51.01 should follow, with the applicable elements from M Civ JI 51.02–51.07 inserted to explain the appropriate method of measuring property damages. If there are elements of property damage which are not covered by M Civ JI 51.02–51.07, but are equally appropriate, they should be inserted in the same way.

History

This Introduction was SJI 31.00.

M Civ JI 51.01 Measure of Damages—Personal Property

In this case, plaintiff claims damages to his [*description of personal property*]. If you decide that plaintiff is entitled to such damages, the amount should be measured by:

[*Here insert the appropriate elements for determining the amount of damages, such as: M Civ JI 51.02 Cost of Repair Less Than Difference in Value; M Civ JI 51.03 Irreparable Damage with Salvage*].

Note on Use

If any element of personal property damage and the amount of loss is admitted or established by undisputed evidence, the jury should be so instructed when such item is mentioned in the instruction.

This instruction cannot be given in the form shown. Complete the instruction by inserting the appropriate phrases for determining the amounts of damage from M Civ JI 51.02–51.07. If there are elements which are not covered by these instructions, but are equally appropriate, they should be inserted in the same way.

These instructions would not be appropriate to a claim for damages to a unique chattel, which should be covered by an appropriate specific instruction.

History

M Civ JI 51.01 was SJI 31.01.

M Civ JI 51.02 Measure of Damages—Damage to Personal Property—Cost of Repair Less Than Difference in Value

… the *(reasonable expense of necessary repairs to the property which was damaged)

Note on Use

*This element is to be inserted in M Civ JI 51.01 when the evidence justifies its use.

Comment

This instruction is applicable if only the reasonable expense of necessary repairs is claimed and that is less than the difference in value of the property before and after the damage.

If the difference in the value of property before and after it was damaged is less than the reasonable cost of repairs, use M Civ JI 51.03.

If the property was damaged beyond repair and has no salvage value, or if it is doubtful that the property has salvage value, use M Civ JI 51.04.

If there is no claim that the repaired property has depreciated in value and there is an issue whether the cost of repairs or the difference in value of the property before and after it was damaged is the lesser amount, use M Civ JI 51.05.

If the cost of repairs plus depreciation will be less than the difference in value between the damaged and undamaged property, use M Civ JI 51.06.

If there is an issue whether the cost of repairs plus depreciation or the difference in value between the damaged and undamaged property is the lesser amount of loss, use M Civ JI 51.07.

See also Comment to M Civ JI 51.07.

History

M Civ JI 51.02 was SJI 31.02.

M Civ JI 51.03 Measure of Damages—Damage to Personal Property—Irreparable Damage with Salvage

… the *(difference between the fair market value immediately before the occurrence and its fair market value after the occurrence)

Note on Use

*This element is to be inserted in M Civ JI 51.01 when the evidence justifies its use.

This instruction is appropriate only where the property, though destroyed or damaged beyond repair, is still in existence and has salvage value. If the property is not in existence or if it lacks salvage value, M Civ JI 51.04 is appropriate.

Comment

See Comments to M Civ JI 51.02 and 51.07.

History

M Civ JI 51.03 was SJI 31.03.

M Civ JI 51.04 Measure of Damages—Damage to Personal Property—Irreparable Damage and No Salvage

… *(the fair market value of the property immediately before the occurrence)

Note on Use

*This element is to be inserted in M Civ JI 51.01 when the evidence justifies its use.

This phrase may be used where the property is damaged beyond repair and has no salvage value and, possibly, where it is doubtful that the property has salvage value.

Comment

See Comments to M Civ JI 51.02 and 51.07.

History

M Civ JI 51.04 was SJI 31.04.

M Civ JI 51.05 Measure of Damages—Damage to Personal Property—Dispute Whether Cost of Repair Is Less Than Difference in Value

> … the *(lesser of the reasonable expense of necessary repairs to the property which was damaged, or the difference between the fair market value of the property immediately before the occurrence and its fair market value immediately after the occurrence)

Note on Use

*This element is to be inserted in M Civ JI 51.01 when the evidence justifies its use.

This element is to be used when there is an issue whether the cost of repairs or the difference in value of the property before and after it is damaged is the lesser amount. When the cost of repairs is admittedly the lesser amount, use M Civ JI 51.02; when the converse is true, use M Civ JI 51.03.

Comment

See Comments to M Civ JI 51.02 and 51.07.

History

M Civ JI 51.05 was SJI 31.05.

M Civ JI 51.06 Measure of Damages—Damage to Personal Property—Cost of Repair with Loss in Value after Repair

… the *(reasonable expense of necessary repairs to the property which was damaged plus the difference between the fair market value of the property immediately before the occurrence and its fair market value after it is repaired)

Note on Use

*This element is to be inserted in M Civ JI 51.01 when the evidence justifies its use.

Comment

See Comments to M Civ JI 51.02 and 51.07.

History

M Civ JI 51.06 was SJI 31.06.

M Civ JI 51.07 Measure of Damages—Damage to Personal Property—Dispute Whether Cost of Repair plus Loss in Value after Repair Is Less Than Difference in Value

… the *(following instructions:

First, there is evidence that the [*description of personal property*] was worth less after it was repaired than it was before it was damaged. You should determine whether this is true and, if so, by how much, and then add the expense of reasonably necessary repairs to that figure.

Second, you should determine the difference between the value of the [*description of personal property*] before it was damaged and its value immediately after it was damaged.

You should then measure plaintiff's property damage as being the lower figure computed by your use of these two methods.)

Note on Use

*This element is to be inserted in M Civ JI 51.01 when the evidence justifies its use.

See Comment to M Civ JI 51.02 as to the property damage issues applicable to M Civ JI 51.02–51.07.

Comment

When the evidence justifies it, the jury may be instructed that damages may include the amount expended for necessary reasonable repairs and the reduced value of the chattel after the repairs. *Moore v Kenockee Twp*, 75 Mich 332; 42 NW 944 (1889). If the damage is irreparable, the measure is the difference between the market value before and after the injury. If the damage is not irreparable, the measure of damages is the reasonable costs of such repairs, if such were less than the value of the property. See *O'Donnell v Oliver Iron Mining Co*, 262 Mich 470; 247 NW 720 (1933); 273 Mich 27; 262 NW 728 (1935); *Tillson v Consumers Power Co*, 269 Mich 53; 256 NW 801 (1934); *Jackson County Road Commissioners v O'Leary*, 326 Mich 570; 40 NW2d 729 (1950). No Michigan case has applied both elements of this instruction as part of one instruction. However, the rationale of the cited cases taken together supports the measure of damages as covered by this instruction.

History

M Civ JI 51.07 was SJI 31.07.

Chapter 52: Injury to Spouse or Parent

M Civ JI 52.01 Measure of Damages—Injury to Spouse 300
M Civ JI 52.02 Measure of Damages for Child of Injured Parent 302

M Civ JI 52.01 Measure of Damages—Injury to Spouse

In this case [*name of derivative plaintiff*] is claiming that [he / she] sustained damages as a result of injury to [his wife / her husband]. If you find that [*name of principal plaintiff*] [is / would be] entitled to damages, then it is your duty to determine the amount of money which will reasonably, fairly and adequately compensate [*name of derivative plaintiff*] for any of the following elements of damage [he / she] has sustained to the present time as a result of injury to [his wife / her husband].

(a) *(the reasonable expense of necessary medical care, treatment and services received by [his wife / her husband]

(b) *(the reasonable value of the services of [his wife / her husband] of which [he / she] has been deprived)

(c) *(the reasonable value of the society, companionship and sexual relationship with [his wife / her husband] of which [he / she] has been deprived)

You should also include the amount of money that will compensate [*name of derivative plaintiff*] for such of these elements of damage as you decide are reasonably certain to be sustained in the future. If any element is of a continuing nature, you shall decide how long it may continue. †(If an element of damage is permanent in nature, then you shall decide how long [*name of derivative plaintiff*] and [his wife / her husband] are each likely to live and how long the plaintiff is likely to sustain that element of damage.)

Which, if any, of these elements of damage have been proved is for you to decide based upon evidence and not upon speculation, guess or conjecture. The amount of money to be awarded for certain of these elements of damage cannot be proved in a precise dollar amount. The law leaves such amount to your sound judgment. Your verdict must be solely to compensate [*name of derivative plaintiff*] and not to punish the defendant.

Note on Use

*Complete this instruction by selecting the appropriate element or elements of damages, as shown by the evidence, from the three clauses in parentheses. The appropriate phrases in brackets should also be given as part of the instruction.

†The sentence in parentheses should be given if appropriate.

This instruction must be modified if there has been a divorce or other event which would end the right to consortium damages.

Comment

A husband may recover for necessary medical expense incurred as a result of injury to his wife. *Burns v Van Buren Twp*, 218 Mich 44; 187 NW 278 (1922); *Laskowski v People's Ice Co*, 203 Mich 186; 168 NW 940 (1918). He may also recover the reasonable value of the loss of his wife's ability to carry on her services and housework. *Leeds v Masha*, 328 Mich 137; 43 NW2d 92 (1950); *Burns*.

Both the husband and wife have a right to recover for the loss of consortium. See *Montgomery v Stephan*, 359 Mich 33; 101 NW2d 227 (1960).

The no-fault law has not abolished the common-law action for loss of consortium by the spouse of a person who receives above threshold injuries, *Rusinek v Schultz, Snyder & Steele Lumber Co*, 411 Mich 502; 309 NW2d 163 (1981); nor is a consortium action precluded by the Michigan Civil Rights Act, MCL 37.2101 et seq.; *Eide v Kelsey-Hayes Co*, 431 Mich 26; 427 NW2d 488 (1988).

See *Morse v Deschaine*, 13 Mich App 101, 107; 163 NW2d 693, 696 (1968), for a discussion of situations in which a wife may sue in her own right for her medical expenses.

History

M Civ JI 52.01 was SJI 33.00.

M Civ JI 52.02 Measure of Damages for Child of Injured Parent

In this case [*name of child*] is claiming that [he / she] sustained damages as a result of injury to [his / her] [father / mother]. If you find that [*name of parent*] [is / would be] entitled to damages, then it is your duty to determine the amount of money which will reasonably, fairly and adequately compensate [*name of child*] for any of the following elements of damage [he / she] has sustained to the present time as a result of injury to [his / her] [father / mother].

(a) *(the reasonable value of the services of [his / her] [father / mother] of which [he / she] has been deprived)

(b) *(the reasonable value of the society and companionship with [his / her] [father / mother] of which [he / she] has been deprived)

You should also include the amount of money that will compensate [him / her] for such of these elements of damage as you decide are reasonably certain to be sustained in the future. If any element is of a continuing nature, you shall decide how long it may continue.

**(If an element of damage is permanent in nature, then you shall decide how long [*name of child*] and [his / her] [father / mother] are each likely to live and how long [*name of child*] is likely to sustain that element of damage.)

Which, if any, of these elements of damage have been proved is for you to decide based upon evidence and not upon speculation, guess or conjecture. The amount of money to be awarded for certain of these elements of damage cannot be proved in a precise dollar amount. The law leaves such amount to your sound judgment. Your verdict must be solely to compensate [*name of child*] and not to punish the defendant.

Note on Use

*Complete this instruction by selecting the appropriate element or elements of damages, as shown by the evidence, from the clauses in parentheses. The appropriate phrases in brackets should also be given as part of the instruction.

**The sentence in parentheses should be given if appropriate.

Subsection a. is not intended for use in no-fault cases without modification.

Comment

A child has a cause of action for loss of parental consortium caused by tortious injury to the parent. *Berger v Weber*, 411 Mich 1; 303 NW2d 424 (1981). Consortium includes love, companionship, affection, society, comfort and solace as well as services. *Id*. at 17.

Special note on parent's cause of action

A parent has no cause of action for loss of consortium when a child is negligently injured. *Sizemore v Smock*, 430 Mich 283; 422 NW2d 666 (1988); but the parent may sue for loss of services and medical expenses, *Jakubiec v Hasty*, 337 Mich 205; 59 NW2d 385 (1953). See also *Sizemore*, 430 Mich at 288.

History

M Civ JI 52.02 was added September 1989.

Chapter 53: Particular Factors in Computing Damages

M Civ JI 53.01 Statutory Mortality Table—Injury Case [*Instruction Deleted*]..... 305
M Civ JI 53.02 Statutory Mortality Table—Death Case [*Instruction Deleted*]..... 306
M Civ JI 53.03 Future Damages (Non-personal Injury Action)—Reduction to Present Cash Value... 307
M Civ JI 53.03A Future Damages (Personal Injury Action)—Reduction to Present Cash Value..... 308
M Civ JI 53.04 Interest—As Part of Damages 309
M Civ JI 53.05 Mitigation of Damages—Failure to Exercise Ordinary Care 311
M Civ JI 53.06 Effect of Inflation on Future Damages 312

M Civ JI 53.01 Statutory Mortality Table—Injury Case [*Instruction Deleted*]

Comment

The mortality table that was part of MCL 500.834 was deleted by 1994 PA 226.

In the absence of a stipulation as to the mortality table to be used, testimony may be necessary.

Tables of life expectancy for Michigan residents are available from the Michigan Department of Community Health, Division for Vital Records and Health Statistics. The tables may be accessed electronically at http://www.michigan.gov/mdch.

Life expectancy tables for the United States and individual states are available from the United States Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics. The tables may be accessed electronically at http://www.cdc.gov/nchs/. The United States Department of Health and Human Services also publishes U.S. Decennial Life Tables containing information for the various states. Life expectancy tables can also be found in the Statistical Abstract of the United States published by the United States Department of Commerce.

There may be other sources of mortality tables.

History

M Civ JI 53.01 was SJI 34.01. Amended January 1992. Deleted October 1999.

M Civ JI 53.02 Statutory Mortality Table—Death Case [*Instruction Deleted*]

Comment

The mortality table that was part of MCL 500.834 was deleted by 1994 PA 226.

In the absence of a stipulation as to the mortality table to be used, testimony may be necessary.

Tables of life expectancy for Michigan residents are available from the Michigan Department of Community Health, Division for Vital Records and Health Statistics. The tables may be accessed electronically at http://www.michigan.gov/mdch.

Life expectancy tables for the United States and individual states are available from the United States Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics. The tables may be accessed electronically at http://www.cdc.gov/nchs/. The United States Department of Health and Human Services also publishes U.S. Decennial Life Tables containing information for the various states. Life expectancy tables can also be found in the Statistical Abstract of the United States published by the United States Department of Commerce.

There may be other sources of mortality tables.

History

M Civ JI 53.02 was SJI 34.02. Amended March 1991, January 1992. Deleted October 1999.

M Civ JI 53.03 Future Damages (Non-personal Injury Action)—Reduction to Present Cash Value

If you decide plaintiff will sustain damages in the future, you must reduce that amount to its present cash value. The amount of damages you determine [he / she] will sustain the first year is to be divided by 1.05. The amount of damages you determine [he / she] will sustain the second year is to be divided by 1.10. The amount [he / she] will sustain the third year is to be divided by 1.15. You then continue to use a similar procedure for each additional year you determine [he / she] will sustain damages. The total of your yearly computations is the present cash value of plaintiff's future damages.

Note on Use

This instruction is not for use in personal injury actions filed on or after October 1, 1986. MCL 600.6306; 1986 PA 178, §3. In personal injury actions, MCivJI 53.03A should be given.

The jury should be instructed to reduce future damages to present cash value in cases other than personal injury actions. *Nation v WDE Electric Co*, 454 Mich 489; 563 NW2d 233 (1997). In the absence of a stipulation to the contrary, the trial court is required to instruct the jury to reduce future damages to present cash value. *Freeman v Lanning Corp*, 61 Mich App 527 (1975); *Goins v Ford Motor Co*, 131 Mich App 185; 347 NW2d 184 (1983); *Lagalo v Allied Corporation (On Remand)*, 233 Mich App 514; 592 NW2d 786 (1999).

The reduction to present value called for by this instruction is based on a 5 percent simple interest calculation. This rate has been approved in numerous cases. See cases collected in *Pontiac School District v Miller, Canfield, Paddock & Stone*, 221 Mich App 602; 563 NW2d 693 (1997). In cases in which the court determines that a 5 percent simple interest rate is not appropriate, this instruction should be revised. See *Pontiac School District*.

Comment

The obligation to reduce future damages to present cash value in cases other than personal injury actions filed on or after October 1, 1986 remains with the jury. *Nation*. Non-personal injury action cases have approved the 5 percent rate in this instruction. See, e.g., *Goins; Foehr v Republic Automotive Parts*, 212 Mich App 663; 538 NW2d 420 (1995). But see, *Pontiac School District*.

History

M Civ JI 53.03 was SJI 34.03. Amended April 1, 2004.

M Civ JI 53.03A Future Damages (Personal Injury Action)—Reduction to Present Cash Value

If you decide that plaintiff is entitled to an award of future damages, you should award the full value of future damages as you determine them. You should not reduce any award of future damages to present cash value.

Note on Use

This instruction is for use in personal injury actions. MCL 600.6306; 1986 PA 178, § 3. In personal injury actions, the trial judge, rather than the jury, is required to calculate the reduction of future damages to present cash value using the statutory rate of 5 percent per year for each year in which those damages accrue. MCL 600.6306(2). The calculation must be made using simple interest. *Nation v WDE Electric Co*, 454 Mich 489; 563 NW2d 233 (1997); *Lagalo v Allied Corporation (On Remand)*, 233 Mich App 514; 592 NW2d 786 (1999). Pursuant to MCL 600.6311, future damages awarded to a plaintiff who is 60 years of age or older at the time of judgment are not reduced to present value. Pursuant to 2012 PA 608, MCL 600.6306 does not apply to medical malpractice actions where the cause of action arose after March 28, 2013. Those actions are governed by MCL 600.6306a.

History

This instruction was added April 1, 2004.

M Civ JI 53.04 Interest—As Part of Damages

If you decide plaintiff has suffered damages, you should determine when those damages began, and add interest from then to [*date complaint filed*] [at a rate of [*insert rat*e] percent per year/ at a rate per year that you decide is appropriate].

Note on Use

This instruction does not include a rate of interest, which may differ depending on the type of action. If an issue about rate of interest is raised, the judge will have to decide whether the law requires the judge to give the jury a stated interest rate, or whether it should be left to the jury to determine a reasonable interest rate. See the comment below.

In non-personal injury actions, plaintiffs' attorneys commonly agree that the trial judge not give this instruction in exchange for defense attorneys' agreement that the judge not give MCivJI 53.03 Future Damages-Reduction to Present Cash Value, sometimes with the further agreement that the judge will make these computations after the jury returns its verdict. If the trial judge is to make these computations, the jury will still have to determine when the pre-complaint damages accrued and when the future damages will be sustained. (Note that in personal injury actions, MCivJI 53.03 is not given to the jury because the trial judge reduces future damages to present cash value. See comment to MCivJI 53.03.)

Comment

In *Currie v Fiting*, 375 Mich 440, 454-455; 134 NW2d 611, 616 (1965) (a wrongful death action), the Michigan Supreme Court held that in tort actions where a claim accrues as of a certain date and can be ascertained or computed as of that date, interest is properly awarded as a part of damages from that date to the date of verdict. While the Currie case was not tried to a jury, the Court went on to comment that in a jury trial, the jury should be instructed to ascertain the date damages accrued and add interest from that date to the date of its verdict. When Currie was decided, the judgment interest statute (MCL 600.6013) made a defendant liable for interest from the date of judgment forward-to the date judgment is satisfied. Shortly after Currie was decided, the statute was amended to prescribe interest from the date of filing of the complaint. Cases decided subsequent to the statutory amendment allow interest as part of damages only to the date the complaint is filed. *Vannoy v City of Warren*, 26 Mich App 283, 288-289; 182 NW2d 65, 68-69 (1970), aff'd on other grounds, 386 Mich 686; 194 NW2d 304 (1972).

The common law rule that interest may be awarded as an element of damages to compensate for lost use of funds has early origins in Michigan jurisprudence. *Snow v Nowlin*, 43 Mich 383; 5 NW 443 (1880). While MCivJI 53.04 was adopted with personal injury/wrongful death cases in mind, juries have been instructed to include pre-complaint (formerly pre-judgment) interest in other tort cases. *Snow* (misrepresentation); *Capital Mortgage Corp v Coopers & Lybrand*, 142 Mich App 531; 369 NW2d 922 (1985) (accountant negligence; but plaintiff failed to show when the loss accrued); *Coan v Brownstown Township*, 126 Mich 626; 86 NW130 (1901) (negligence-property damage).

In *Vannoy* (a wrongful death action), the court instructed the jury to add interest as part of damages at the rate of 5 percent per year from the date each type of damages was incurred. The 5 percent rate was not in dispute, but the appellate court did comment that the judgment interest statute, MCL 600.6013 (statutory rate was then 5% for judgments not on written instruments), and interest as part of damages serve the same function to compensate for loss of use of funds. *Vannoy*, 26 Mich App 283, 288. (Interest rates in the present version of MCL 600.6013 vary depending on the nature of the action and the date the complaint was filed, and are affected by offers of settlement.) An analogy to the reduction of future damages to present worth was noted in *Currie*, but there was no indication of the rate of interest used by the trial court in awarding interest as part of damages and the Supreme Court did not discuss rate of interest. As the comment to MCivJI 53.03 Future Damages—Reduction to Present Cash Value indicates, many decisions have approved a rate of 5 percent in reducing future damages to present worth. (Under present law, in personal injury actions, the judge, not the jury reduces future damages to present worth using a 5 percent rate (compounded annually for causes of action arising after March 28, 2013). MCL 600.6306(2). In *Baxter v Woodward*, 191 Mich 379; 158 NW 137 (1916) (a conversion case), the Court approved the trial court's instruction to the jury to award the market value of the item at the date of conversion plus interest at 5 percent, but did not specifically discuss the rate used.

Pre-complaint interest in certain contract cases is covered by statute (MCL 438.7) but that does not preclude common law interest as part of damages in cases in which MCL 438.7 is not applicable. *Gordon Sel-Way, Inc v Spence Brothers, Inc*, 438 Mich 488, 499 n 9; 475 NW2d 704 (1991). The 5 percent legal rate under MCL 438.31 must be used when awarding interest under MCL 438.7. *Gordon*, 438 Mich 488, 505. But there is no indication that the 5 percent rate is mandatory in contract cases in which common law interest as part of damages is awarded. See the discussion of pre-complaint statutory and common law interest including rates in *Manley, Bennett, McDonald & Co v St Paul Fire & Marine Ins Co*, 821 F Supp 1225 (ED Mich 1993), aff'd 33 F3d 55 (6th Cir 1994). If the trial judge neglects to instruct a jury on pre-complaint interest, interest may be added after the jury returns its verdict. *Gottesman v Fay-Bea Construction Co*, 355 Mich 6; 94 NW2d 81 (1959).

For an extensive discussion of Michigan cases and statutes relating to pre-judgment interest, see Michigan Law of Damages and Other Remedies, Ch 28 (Barbara A. Patek et al, eds) (ICLE, 3rd ed 2002). "

M Civ JI 53.05 Mitigation of Damages—Failure to Exercise Ordinary Care

A person has a duty to use ordinary care to minimize his or her damages after [he or she / his or her property] has been [injured / damaged]. It is for you to decide whether plaintiff failed to use such ordinary care and, if so, whether any damage resulted from such failure. You must not compensate the plaintiff for any portion of [his / her] damages which resulted from [his / her] failure to use such care.

Note on Use

This instruction should not be given unless there is evidence creating an issue as to whether plaintiff failed to use ordinary care to minimize his or her injury or damage.

Comment

Michigan law recognizes there is a duty of ordinary care to mitigate either personal or property damage. See *Zibbell v Grand Rapids*, 129 Mich 659, 661; 89 NW 563, 564 (1902) (personal injury); *Sullivan v Pittsburgh Steamship Co*, 230 Mich 414, 422; 203 NW 126, 128 (1925) (property damage).

The duty to minimize damages may include a duty to seek and follow medical treatment, including surgery, which does not involve danger to life or extraordinary suffering. *Poikanen v Thomas Furnace Co*, 226 Mich 614; 198 NW 252 (1924); *Beauerle v Michigan Central R Co*, 152 Mich 345; 116 NW 424 (1908); *Kolbas v American Boston Mining Co*, 275 Mich 616; 267 NW 751 (1936); Anno: Duty of injured person to minimize tort damages by medical or surgical treatment, 48 ALR2d 346.

History

M Civ JI 53.05 was SJI 35.01.

M Civ JI 53.06 Effect of Inflation on Future Damages

If you decide that the plaintiff will sustain damages in the future, you may consider the effect of inflation in determining the damages to be awarded for future losses.

Comment

Kovacs v Chesapeake & Ohio Railway Co, 426 Mich 647; 397 NW2d 169 (1986). The plaintiff is not required to introduce evidence regarding inflation, because there is no expert consensus on the rate of inflation and it would unnecessarily and unduly prolong trials. *Kovacs*.

In *Bosak v Hutchinson*, 422 Mich 712; 375 NW2d 333 (1985), the Michigan Supreme Court upheld the trial court's refusal to give an instruction stating a 13 percent rate of inflation based on a rise in the Consumer Price Index.

History

M Civ JI 53.06 was added October 1987.

Chapter 60: Jury Deliberations

M Civ JI 60.01 Jury Deliberations 314
M Civ JI 60.01A Cameras in the Courtroom 316
M Civ JI 60.02 Deadlocked Jury 317

M Civ JI 60.01 Jury Deliberations

You will be given a written copy of the final jury instructions for your use in the jury room for deliberation. [I will also provide you with an electronically recorded copy of these instructions.]

When you go to the jury room, your deliberations should be conducted in a businesslike manner. You should first select a foreperson. She or he should see to it that the discussion goes forward in an orderly fashion and that each juror has full opportunity to discuss the issues.

When at least five of you agree upon a verdict, it will be received as your verdict. In your deliberations, you should weigh the evidence with an open mind and consideration for each other's opinions.

If differences of opinion arise, you should discuss them in a spirit of fairness and frankness. You should express not only your opinion but also the facts and reasons upon which you base it.

In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if you are convinced that it is wrong. However, none of you should surrender your honest conviction as to the weight and effect of the evidence or lack of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

During your deliberations, and before you reach a verdict, you must not disclose anything about your discussions to others outside the jury room, not even how your voting stands. Therefore, until you reach a verdict, do not disclose that information, even in the courtroom.

During your deliberations you may not communicate with persons outside the jury room (other than the judge), or seek information by any means, including cellular telephones or other electronic devices. In other words, you cannot talk to anyone on the phone, correspond with anyone, or electronically communicate with anyone about this case. You can only discuss the case in the jury room with your fellow jurors during deliberations. You may not use these electronic means to investigate or communicate about the case because it is important that you decide the case based solely on the evidence presented in the courtroom and my instructions on the law. Information from the Internet or available through social media might be wrong, incomplete, or inaccurate.

If you discover a juror has violated my instructions, you should report it to me right away.

That concludes my instructions on the law. If you have any questions about these instructions at this point, please write them down and give them to the bailiff. The bailiff will then give them to me, and after consulting with counsel, I will address your questions.

[There being no further questions / No questions having been asked], it is now time for you to go into the jury room and begin your deliberations.

If you wish to communicate with me or examine the exhibits while you are deliberating, please have your foreperson write a note and give it to the bailiff. If you have any questions about my instructions on the law, please place those particular questions in a sealed envelope. Any questions or communications with me must be given to the bailiff, who will then pass them to me, and I will address the questions or communications with counsel and respond as appropriate.

Note on Use

If, after reasonable deliberation, the jury reports an inability to agree or fails to return a verdict, then the court may also give M Civ JI 60.02. The court may give the jurors copies of the instructions before the instructions are read to the jury.

Comment

MCL 600.1352 and MCR 2.514(A) now provide for trial by a jury of six in civil cases, with a verdict to be received when five jurors agree. An exception is made for civil actions for commitment of a person to a mental, correctional or training institution, which require a unanimous verdict. MCR 5.740(C); MCL 600.1352.

The 2011 amendment reflects the amendment to MCR 2.513(N) ordered by the Michigan Supreme Court on June 29, 2011, which became effective September 1, 2011. This amendment requires that certain procedures be followed with respect to questions raised by the jurors and that the jurors be given a written copy of the instructions.

History

M Civ JI 60.01 was SJI 1.05. Amended January 1982, April 1986, October 1993, March 2006, October 2011, January 2014.

M Civ JI 60.01A Cameras in the Courtroom

In this case, the news media was permitted to film and photograph the proceedings pursuant to the rules of the Michigan Supreme Court.

In your deliberation, you should not draw any inferences or conclusions from the fact that cameras were present during trial. Nor should you concern yourself with why certain witnesses were filmed and photographed and others were not. Whether a particular witness was filmed or photographed is not any indication as to the value of, or weight to be given to, that witness's testimony.

Note on Use

This instruction would only be given if the trial judge allowed cameras in the courtroom as permitted by Michigan Supreme Court Administrative Order 1989-1.

History

M Civ JI 60.01A was added October 2013.

M Civ JI 60.02 Deadlocked Jury

The Court has previously instructed you that it is your duty to determine the facts from evidence received in open court and to apply the law to the facts and in this way decide the case. I am now asking you to return to the jury room for further deliberations. In your deliberations you should reexamine the questions submitted with a proper regard and consideration for each other's opinions. You should listen to each other's arguments with open minds and make every reasonable effort to reach a verdict.

[Because it appears you are (at an impasse / in need of assistance), I invite you to list the issues that (divide / confuse) you so that I can see if I can be of some assistance by clarifying or amplifying the final instructions.]

Note on Use

This instruction should be used only if the jury has reported a deadlock or the Court has determined that further deliberations are warranted, after considering such factors as the length of time the jury has been out, the hour of the day, the nature and complexity of the issues, the expense of retrial and the possibility of agreement. The following procedure is suggested:

If a message is received that the jury is deadlocked, or if the Court proposes to ascertain whether the jury is deadlocked, all counsel should be notified and given a reasonable opportunity to be present. At that time, the Court should state on the record the facts concerning any communication from the jury, or, if there has been no communication, the length of time the jury has been deliberating. Counsel should be informed that the Court proposes to give the instruction and give them an opportunity to object.

The jury should then be returned to the box and cautioned not to reveal the numerical division in the voting. The Court may then make inquiry of the foreperson regarding the jury's ability to reach a verdict and, if further deliberations appear warranted, may give the instruction and return the jury to the jury room.

The bracketed language should be used as permitted by MCR 2.513(N)(4).

Comment

See MCR 2.513(N)(1) for authority to give additional instructions. Instructions which importune the jurors to reconcile their differences and reach a verdict have been approved in Michigan. *Kelley v Emery*, 75 Mich 147; 42 NW 795 (1889); *Vinton v Plainfield Twp*, 208 Mich 179; 175 NW 403 (1919); *Pierce v Rehfuss*, 35 Mich 53 (1876); *Richardson v Detroit & M R Co*, 182 Mich 206; 148 NW 397 (1914).

However, any instruction which tends to censure jurors for not yielding to the majority is erroneous. *Stoudt v Shepard*, 73 Mich 588; 41 NW 696 (1889). Any instructions which tend to be coercive, even though unintentionally so, may be reversible error. *Yinger v Secord*, 369 Mich 364; 119

NW2d 577 (1963). The same is true of such conduct as repeatedly sending the jury back for further deliberations late at night after already lengthy deliberations produced a deadlock. *Id*.

Instructions of this type have been approved by the federal courts in both civil and criminal cases. See, e.g., *Allen v United States*, 164 US 492 (1896); *Hoagland v Chestnut Farms Dairy, Inc*, 72 F2d 729 (CA DC, 1934).

The question of the propriety of inquiring as to the numerical division of the jury in civil cases has not been directly passed upon in Michigan. In *Yinger* such an inquiry by the trial judge was noted in the opinion, but not discussed. However, both federal and Michigan criminal cases have held that inquiry into the numerical division of the jury is coercive. *Brasfield v United States*, 272 US 448; 47 S Ct 135; 71 L Ed 345 (1926); *People v Wilson*, 390 Mich 689; 213 NW2d 193 (1973).

See generally Comment: On Instructing Deadlocked Juries, 78 Yale LJ 100 (1968).

The 2011 amendment reflects the amendment to MCR 2.513(N) ordered by the Michigan Supreme Court on June 29, 2011, which became effective September 1, 2011. This amendment permits the court in certain situations to invite the jurors to list the issues that divide or confuse them in the event the court can be of assistance in clarifying or amplifying the final instructions.

History

M Civ JI 60.02 was SJI 1.06. Amended October 2011.

Chapter 65: Forms of Verdicts: General

M Civ JI 65.01 Forms of Verdicts: Single Defendant without Counterclaim [*Form of Verdict Deleted*] 320

M Civ JI 65.02 Forms of Verdicts: Single Defendant with Counterclaim [*Form of Verdict Deleted*] 321

M Civ JI 65.03 Forms of Verdicts: Multiple Defendants with No Counterclaims [*Form of Verdict Deleted*] 322

M Civ JI 65.04 Forms of Verdicts: Multiple Defendants with One or More Counterclaims [*Form of Verdict Deleted*] 323

M Civ JI 65.01 Forms of Verdicts: Single Defendant without Counterclaim [*Form of Verdict Deleted*]

Note on Use

These forms of verdict, which were intended for tort cases, were deleted because they did not comply with the current statute on jury verdicts in personal injury actions that requires a division of past and future damages, of economic and noneconomic damages, and of certain future damages by year. MCL 600.6305.

Also, these verdict forms were deleted because they were not suitable in cases in which comparative negligence is an issue or in which fault of a named nonparty is an issue. MCL 600.6304.

History

M Civ JI 65.01 was SJI 45.01. Deleted November 2000.

M Civ JI 65.02 Forms of Verdicts: Single Defendant with Counterclaim [*Form of Verdict Deleted*]

Note on Use

These forms of verdict, which were intended for tort cases, were deleted because they did not comply with the current statute on jury verdicts in personal injury actions that requires a division of past and future damages, of economic and noneconomic damages, and of certain future damages by year. MCL 600.6305.

Also, these verdict forms were deleted because they were not suitable in cases in which comparative negligence is an issue or in which fault of a named nonparty is an issue. MCL 600.6304.

History

M Civ JI 65.02 was SJI 45.02. Deleted November 2000.

M Civ JI 65.03 Forms of Verdicts: Multiple Defendants with No Counterclaims [*Form of Verdict Deleted*]

Note on Use

These verdict forms were deleted because they did not comply with current statutes concerning jury verdicts (MCL 600.6304–.6306), because they did not incorporate principles of comparative negligence or recognize the abolishment of joint liability in most cases. See the Notes on Use to M Civ JI 41.04 Damages Not to Be Allocated among Joint Tort-Feasors and M Civ JI 65.01 Forms of Verdicts: Single Defendant without Counterclaim.

History

M Civ JI 65.03 was SJI 45.03. Deleted November 2000.

M Civ JI 65.04 Forms of Verdicts: Multiple Defendants with One or More Counterclaims [*Form of Verdict Deleted*]

Note on Use

These verdict forms were deleted because they did not comply with current statutes concerning jury verdicts (MCL 600.6304–.6306), because they did not incorporate principles of comparative negligence or recognize the abolishment of joint liability in most cases. See the Notes on Use to M Civ JI 41.04 Damages Not to Be Allocated among Joint Tort-Feasors and M Civ JI 65.01 Forms of Verdicts: Single Defendant without Counterclaim.

History

M Civ JI 65.04 was SJI 45.04. Deleted November 2000.

Chapter 66: Forms of Verdicts: Comparative Negligence

M Civ JI 66.01 Form of Verdict: Comparative Negligence 325

M Civ JI 66.01A Form of Verdict: Comparative Negligence (Personal Injury Action) 327

M Civ JI 66.02 Form of Verdict: Comparative Negligence—Property Damage (To Be Used in Cases Filed on or after March 28, 1996) 332

M Civ JI 66.03 Form of Verdict: Comparative Negligence—Personal Injury Action (To Be Used in Cases Filed on or after March 28, 1996) 335

M Civ JI 66.01 Form of Verdict: Comparative Negligence

We, the jury, make the following answers to the questions submitted by the Court:

QUESTION NO. 1: Was the defendant negligent?

Answer: ____(yes or no)

If your answer is "no," do not answer any further questions.

QUESTION NO. 2: Was the defendant's negligence a proximate cause of the injury or damage to the plaintiff?

Answer: ____(yes or no)

If your answer is "no," do not answer any further questions.

QUESTION NO. 3: What is the total amount of plaintiff's damages?

Answer: $_____.____

QUESTION NO. 4: Was the plaintiff negligent?

Answer: ____(yes or no)

If your answer is "no," do not answer any further questions.

QUESTION NO. 5: Was the plaintiff's negligence a proximate cause of the injury or damage to the plaintiff?

Answer: ____(yes or no)

If your answer is "no," do not answer any further questions.

QUESTION NO. 6: Using 100 percent as the total combined negligence which proximately caused the injury or damage to the plaintiff, what percentage of such negligence is attributable to the plaintiff?

Answer: ____ percent

Please note that the Court will reduce the total amount of plaintiff's damages entered in QUESTION NO. 3 by the percentage of negligence attributable to plaintiff, if any, entered in QUESTION NO. 6. The remainder will be the amount which plaintiff is entitled to recover.

Signed,

_____ _____

Foreperson Date

Note on Use

Where there are multiple plaintiffs or defendants, the appropriate questions should be asked separately as to each one.

A separate Special Verdict sheet should be furnished to the jury for each plaintiff and each defendant.

History

M Civ JI 66.01 was added September 1980.

M Civ JI 66.01A Form of Verdict: Comparative Negligence (Personal Injury Action)

We, the jury, answer the questions submitted as follows:

QUESTION NO. 1: Was the defendant negligent?

Answer: ____(yes or no)

If your answer is "no," do not answer any further questions.

If your answer is "yes," go on to QUESTION NO. 2.

QUESTION NO. 2: Did the plaintiff sustain injury or damage?

Answer: ____(yes or no)

If your answer is "no," do not answer any further questions.

If your answer is "yes," go on to QUESTION NO. 3.

QUESTION NO. 3: Was the defendant's negligence a proximate cause of the injury or damage to the plaintiff?

Answer: ____(yes or no)

If your answer is "no," do not answer any further questions.

If your answer is "yes," go on to QUESTION NO. 4.

DAMAGES TO THE PRESENT DATE

QUESTION NO. 4: What is the total amount of plaintiff's damages to the present date for [*describe past economic damages claimed by the plaintiff such as lost wages, medical expenses, etc.*]?

Answer: $_____.____

QUESTION NO. 5: What is the total amount of plaintiff's damages to the present date *for* [*describe past noneconomic damages claimed by the plaintiff such as M Civ JI 50.02 Pain and Suffering, Etc., M Civ JI 50.03 Disability and Disfigurement, and M Civ JI 50.04 Aggravation of Preexisting Ailment or Condition*]?

Answer: $_____.____

FUTURE DAMAGES

QUESTION NO. 6: If you find that the plaintiff will incur costs for medical or other health care in the future, give the total amount for each year in which the plaintiff will incur costs.

Answer:

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

QUESTION NO. 7: If you find that the plaintiff will sustain damages for [lost wages or earnings / or / lost earning capacity / and / [*describe other economic loss claimed by plaintiff*]] in the future, give the total amount for each year in which the plaintiff will sustain damages.

Answer:

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

QUESTION NO. 8: If you find that the plaintiff will sustain damages for [*describe future noneconomic damages claimed by plaintiff*] in the future, give the total amount for each year in which the plaintiff will sustain damages.

Answer:

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

CONTRIBUTORY NEGLIGENCE/ALLOCATION OF FAULT

QUESTION NO. 9: Was the plaintiff negligent?

Answer: ____(yes or no)

If your answer is "yes," go on to QUESTION NO. 10.

If your answer is "no," go on to QUESTION NO. 12.

QUESTION NO. 10: Was the plaintiff's negligence a proximate cause of the injury or damage to plaintiff?

Answer: ____(yes or no)

If your answer is "yes," go on to QUESTION NO. 11.

If your answer is "no," go on to QUESTION NO. 12.

QUESTION NO. 11: Using 100 percent as the total, and considering the nature of the conduct and the extent to which each party's conduct caused or contributed to plaintiff's injury, enter the percentage of fault attributable to:

Answer:

Defendant [name of defendant]	____ percent
Defendant [name of defendant]	____ percent
Plaintiff [name of plaintiff]	____ percent

QUESTION NO. 12: Using 100 percent as the total, and considering the nature of the conduct and the extent to which each party's conduct caused or contributed to plaintiff's injury, enter the percentage of fault attributable to:

Answer:

Defendant [*name of defendant*]	____ percent
Defendant [*name of defendant*]	____ percent

Please note that the judge will reduce the total amount of the plaintiff's damages entered in Questions No. 4 through 8 by the percentage of fault attributable to the plaintiff, if any, entered in QUESTION NO. 11.

Signed,

_____ _____

Foreperson Date

Note on Use

For cases filed before October 1, 1986, use M Civ JI 66.01. For cases filed on or after October 1, 1986, relating to causes of action arising before October 1, 1986, use Questions No. 1 through 10 from M Civ JI 66.01A followed by QUESTION NO. 6 from M Civ JI 66.01. For cases filed on or after October 1, 1986, relating to causes of action arising after October 1, 1986, use M Civ JI 66.01A. See 1986 PA 178, §3.

Where there are multiple plaintiffs or defendants, the appropriate questions should be asked separately as to each one.

A separate Special Verdict sheet should be furnished to the jury for each plaintiff and each defendant.

Omit any questions that are not an issue, such as the question on contributory negligence or those on future damages.

This verdict form should not be used if the plaintiff is over 60 years of age.

This form of verdict is appropriate in a case in which the evidence would allow an award of damages for a 20-year period in the future. The form must be modified by the court to add or delete lines in Questions No. 6, 7, and 8 in cases where the evidence supports an award of damages for a period longer or shorter than 20 years.

Comment

See MCL 600.6304, .6305. The jury is not to determine the fault of settling tortfeasors. *Department of Transp v Thrasher*, 446 Mich 61; 521 NW2d 214 (1994).

History

M Civ JI 66.01A was added February 1987.

M Civ JI 66.02 Form of Verdict: Comparative Negligence—Property Damage (To Be Used in Cases Filed on or after March 28, 1996)

We, the jury, answer the questions submitted as follows:

QUESTION NO. 1: Was the defendant negligent?

Answer: ____(yes or no)

If your answer is "yes," go on to QUESTION NO. 2.

If your answer is "no," do not answer any further questions.

QUESTION NO. 2: Did the plaintiff sustain damage in one or more of the ways claimed?

Answer: ____(yes or no)

If your answer is "yes," go on to QUESTION NO. 3.

If your answer is "no," do not answer any further questions.

QUESTION NO. 3: Was the defendant's negligence a proximate cause of the damage claimed by the plaintiff?

Answer: ____(yes or no)

If your answer is "yes," go on to QUESTION NO. 4.

If your answer is "no," do not answer any further questions.

QUESTION NO. 4: Was [name of nonparty] negligent?

Answer: ____(yes or no)

If your answer is "yes," go on to QUESTION NO. 5.

If your answer is "no," go on to QUESTION NO. 6.

QUESTION NO. 5: Was [*name of nonparty*]'s negligence a proximate cause of the damage claimed by the plaintiff?

Answer: ____(yes or no)

If your answer is "yes," or "no," go on to QUESTION NO. 6.

QUESTION NO. 6: Was the plaintiff negligent?

Answer: ____(yes or no)

If your answer is "yes," go on to QUESTION NO. 7.

If your answer is "no," go on to QUESTION NO. 8.

QUESTION NO. 7: Was the plaintiff's negligence a proximate cause of plaintiff's damage?

Answer: ____(yes or no)

If your answer is "yes" or "no," go on to QUESTION NO. 8.

QUESTION NO. 8:

A. Using 100 percent as the total, enter the percentage of negligence attributable to the defendant:

____ percent

B. If you answered "yes" to QUESTION NO. 5, then using 100 percent as the total, enter the percentage of negligence attributable to [*name of nonparty*]:

____ percent

C. If you answered "yes" to QUESTION NO. 7, then using 100 percent as the total, enter the percentage of negligence attributable to the plaintiff:

____ percent

The total of these must equal 100 percent:

TOTAL 100 percent

QUESTION NO. 9: If you find that plaintiff has sustained damage for [*describe damages to property claimed by the plaintiff*], give the total amount of damages.

Answer: $_____.____

Signed,

_____ _____

Foreperson Date

Note on Use

This form of verdict should be used for cases involving only property damages that are filed on or after March 28, 1996. 1995 PA 161, §3; 1995 PA 249, §3. See MCL 600.6304.

Where there are multiple plaintiffs or defendants, the appropriate questions should be asked separately to each one.

A separate special verdict sheet should be furnished to the jury for each plaintiff and each defendant.

Omit any questions that are not an issue.

If this verdict form is used in a property damage case in which future damages are appropriate, the damages awarded in the answer to QUESTION NO. 9 should reflect (unless the parties stipulate

otherwise) an adjustment for inflation and a reduction of future damages to present worth as directed by M Civ JI 53.06 Effect of Inflation on Future Damages and M Civ JI 53.03 Future Damages—Reduction to Present Cash Value. The Michigan statute MCL 600.6305 that requires jury verdicts to separate past from future damages and to separate future damages by year applies to personal injury actions, not to actions for damage to property only.

This form of verdict may have to be modified if fault, such as intentional conduct, is an issue in the case. The statutory definition of fault is: "'fault' includes an act, an omission, conduct, including intentional conduct, a breach of warranty, or a breach of a legal duty, or any conduct that could give rise to the imposition of strict liability, that is a proximate cause of damage sustained by a party." MCL 600.6304(8).

Comment

See MCL 600.6304, .6306.

Before the enactment of 1995 PA 161, the jury was not to determine the fault of settling tortfeasors. *Department of Transp v Thrasher*, 446 Mich 61; 521 NW2d 214 (1994).

History

M Civ JI 66.02 was added June 1997. Amended December 2001.

M Civ JI 66.03 Form of Verdict: Comparative Negligence—Personal Injury Action (To Be Used in Cases Filed on or after March 28, 1996)

We, the jury, answer the questions submitted as follows:

QUESTION NO. 1: Was the defendant negligent?

Answer: ____(yes or no)

If your answer is "yes," go on to QUESTION NO. 2.

If your answer is "no," do not answer any further questions.

QUESTION NO. 2: Was the plaintiff injured?

Answer: ____(yes or no)

If your answer is "yes," go on to QUESTION NO. 3.

If your answer is "no," do not answer any further questions.

QUESTION NO. 3: Was the defendant's negligence a proximate cause of the injury claimed by the plaintiff?

Answer: ____(yes or no)

If your answer is "yes," go on to QUESTION NO. 4.

If your answer is "no," do not answer any further questions.

QUESTION NO. 4: Was [*name of nonparty*] negligent?

Answer: ____(yes or no)

If your answer is "yes," go on to QUESTION NO. 5.

If your answer is "no," go on to QUESTION NO. 6.

QUESTION NO. 5: Was [*name of nonparty*]'s negligence a proximate cause of the injury claimed by the plaintiff?

Answer: ____(yes or no)

If your answer is "yes" or "no," go on to QUESTION NO. 6.

QUESTION NO. 6: Was the plaintiff negligent?

Answer: ____(yes or no)

If your answer is "yes," go on to QUESTION NO. 7.

If your answer is "no," go on to QUESTION NO. 8.

QUESTION NO. 7: Was the plaintiff's negligence a proximate cause of plaintiff's injury?

Answer: ____(yes or no)

If your answer is "yes" or "no," go on to QUESTION NO. 8.

QUESTION NO. 8:

A.	Using 100 percent as the total, enter the percentage of negligence attributable to the defendant:	____ percent
B.	If you answered "yes" to QUESTION NO. 5, then using 100 percent as the total, enter the percentage of negligence attributable to [*name of nonparty*]:	____ percent
C.	If you answered "yes" to QUESTION NO. 7, then using 100 percent as the total, enter the percentage of negligence attributable to the plaintiff:	____ percent
	The total of these must equal 100 percent: TOTAL	100 percent

QUESTION NO. 9: If you find that plaintiff has sustained damages for [*describe past economic damages claimed by the plaintiff such as lost wages, medical expenses, etc.*] to the present date, give the total amount of damages to the present date.

Answer: $_____.____

QUESTION NO. 10: If you find that the plaintiff will incur costs for medical or other health care in the future, give the total amount for each year in which the plaintiff will incur costs.

Answer:

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

QUESTION NO. 11: If you find that plaintiff will sustain damages for [lost wages or earnings / or / lost earning capacity / and / [*describe other economic loss claimed by plaintiff*]] in the future, give the total amount for each year in which the plaintiff will sustain damages.

Answer:

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

NONECONOMIC DAMAGES

NOTE: If you determined in QUESTION NO. 8 that plaintiff was more than 50 percent at fault, then do not answer any further questions. If you determined in QUESTION NO. 8 that plaintiff was 50 percent or less at fault, then go on to QUESTION NO. 12.

QUESTION NO. 12: What is the total amount of plaintiff's damages to the present date for [*describe past noneconomic damages claimed by the plaintiff such as M Civ JI 50.02 Pain and Suffering, Etc., M Civ JI 50.03 Disability and Disfigurement, and M Civ JI 50.04 Aggravation of Preexisting Ailment or Condition*]?

Answer: $_____.____

QUESTION NO. 13: If you find that plaintiff will sustain damages for [*describe future noneconomic damages claimed by plaintiff*] in the future, give the total amount for each year in which the plaintiff will sustain damages.

Answer:

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

Signed,

_____ _____

Foreperson Date

Note on Use

This form of verdict should only be used for cases that are filed on or after March 28, 1996. 1995 PA 161, §3; 1995 PA 249, §3.

If the plaintiff is not the person upon whose injury or death the damages are based, this form of verdict must be modified.

Where there are multiple plaintiffs or defendants, the appropriate questions should be asked separately to each one.

A separate special verdict sheet should be furnished to the jury for each plaintiff and defendant.

Omit any questions that are not an issue.

This verdict form should not be used if the plaintiff is over 60 years of age.

This form of verdict is appropriate in a case in which the evidence would allow an award of damages for a twenty-year period in the future. This form must be modified by the trial judge to add or delete lines in Questions No. 10, 11, and 13 in cases where the evidence supports an award of damages for a period longer or shorter than twenty years.

This form of verdict may have to be modified if fault, such as intentional conduct, is an issue in the case. The statutory definition of fault is: " 'fault' includes an act, an omission, conduct, including intentional conduct, a breach of warranty, or a breach of a legal duty, or any conduct that could give rise to the imposition of strict liability, that is a proximate cause of damage sustained by a party." MCL 600.6304(8) .

Comment

See MCL 600.6304, .6305, .6306 .

Before the enactment of 1995 PA 161, the jury was not to determine the fault of settling tort feasors. *Department of Transp v Thrasher*, 446 Mich 61 (1994).

In an action based on tort or another legal theory seeking damages for personal injury or wrongful death, noneconomic damages will not be awarded if the person whose injury or death the damages are based on is more than 50 percent at fault. MCL 600.2959 .

The 2007 amendment deleted the phrase "in one or more of the ways claimed" from Question 2.

History

M Civ JI 66.03 was added June 1997. Amended September 2007.

Chapter 67: Forms of Verdicts: Michigan No-Fault Automobile Insurance Law

M Civ JI 67.01 Form of Verdict: No-Fault First-Party Benefits Action 342

M Civ JI 67.02 Form of Verdict: No-Fault Auto Negligence; Noneconomic Loss [*Form of Verdict Deleted*] 346

M Civ JI 67.02A Form of Verdict: No-Fault Auto Negligence; Noneconomic Loss (and Allocation of Fault) [*Form of Verdict Deleted*] 347

M Civ JI 67.03 Form of Verdict: No-Fault Auto Negligence; Economic Loss [*Form of Verdict Deleted*] 348

M Civ JI 67.03A Form of Verdict: No-Fault Auto Negligence; Economic Loss (and Allocation of Fault) [*Form of Verdict Deleted*] 349

M Civ JI 67.04 Form of Verdict: No-Fault Auto Negligence; Economic Loss and Noneconomic Loss [*Form of Verdict Deleted*] 350

M Civ JI 67.04A Form of Verdict: No-Fault Auto Negligence; Economic Loss and Noneconomic Loss (and Allocation of Fault) [*Form of Verdict Deleted*] 351

M Civ JI 67.15 Form of Verdict: No-Fault Auto Negligence: Economic Loss and Noneconomic Loss—Comparative Negligence Not an Issue [*Form of Verdict Deleted*] 352

M Civ JI 67.16 Form of Verdict: No-Fault Auto Negligence: Economic Loss and Noneconomic Loss—and Comparative Negligence/Multiple Defendants/Allocation of Fault (To Be Used in Cases in Which 1995 PA 222 Applies) [*Form of Verdict Deleted*] 353

M Civ JI 67.17 Form of Verdict: No-Fault Auto Negligence: (As Applicable) Economic Loss and Noneconomic Loss—and Comparative Negligence/Single or Multiple Defendants/Allocation of Fault 354

M Civ JI 67.01 Form of Verdict: No-Fault First-Party Benefits Action

We, the jury, make the following answers to the questions submitted by the Court:

QUESTION NO. 1: Did the plaintiff sustain an accidental bodily injury?

Answer: ____(yes or no)

If your answer is "no," do not answer any further questions.

QUESTION NO. 2: Did the plaintiff's accidental bodily injury arise out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle [on [*date*] / during the period of [*specify dates*]?]

Answer: ____(yes or no)

If your answer is "no," do not answer any further questions.

ALLOWABLE EXPENSES

QUESTION NO. 3: Were allowable expenses incurred by or on behalf of the plaintiff arising out of the accidental bodily injury referred to in QUESTION NO. 2?

(*Allowable expenses consist of all reasonable charges for reasonably necessary products, services, and accommodations for the plaintiff's care, recovery, or rehabilitation.*)

A. Answer: ____ (yes or no)

B. If your answer is "yes," what is the amount of allowable expenses owed to the plaintiff (include only expenses not already paid by the defendant)?

$_____

WORK LOSS

QUESTION NO. 4: Did the plaintiff sustain work loss arising out of the accidental bodily injury referred to in QUESTION NO. 2?

(*Work loss consists of loss of income from work the plaintiff would have performed during the first three years after the date of the accident if the plaintiff had not been injured. *[Work loss for an injured person who is temporarily unemployed at the time of the accident or during the period of disability shall be based on earned income for the last month employed full time preceding the accident.] Work-loss benefits are computed at 85 percent of the plaintiff's loss of gross income, but they may not exceed the sum of* [applicable monthly maximum] *per 30-day period nor may they be payable beyond three years after the date of the accidental bodily injury.*)

A. Answer: ____ (yes or no)

B. If your answer is "yes," what is the amount of work loss owed to the plaintiff (include only work loss not already paid by the defendant)?

$_____

REPLACEMENT SERVICE EXPENSES

QUESTION NO. 5: Were replacement service expenses incurred by or on behalf of the plaintiff arising out of the accidental bodily injury referred to in QUESTION NO. 2?

(Replacement service expenses consist of expenses not exceeding $20 per day reasonably incurred in obtaining ordinary and necessary services in place of those that, if the plaintiff had not been injured, the plaintiff would have performed during the first three years after the date of the accident, not for income, but for the benefit of the plaintiff or [his / her] dependent(s). Benefits for replacement service expenses may not exceed $20 per day nor may they be payable beyond three years after the date of the accidental bodily injury.)

A. Answer: ____ (yes or no)

B. If your answer is "yes," what is the amount of replacement service expenses owed to the plaintiff (include only replacement service expenses not already paid by the defendant)?

$_____

SURVIVOR'S LOSS; FUNERAL AND BURIAL EXPENSES

QUESTION NO. 6: Did [*name of decedent*]'s death result from the accidental bodily injury referred to in QUESTION NO. 2?

Answer: ____(yes or no)

If your answer is "no," do not answer QUESTION NO. 7 or QUESTION NO. 8. Answer QUESTION NO. 9.

If your answer is "yes," answer QUESTION NO. 7.

QUESTION NO. 7: Did the dependents of [*name of decedent*] incur survivor's loss?

(Survivor's loss consists of two categories of loss: (1) a loss of tangible things of economic value that the dependents would have received for their support during their dependency if [name of decedent] *had not died. This includes the after-tax income of* [name of decedent] *plus the value of [his /*

her] lost fringe benefits, and (2) replacement service expenses not exceeding $20 per day reasonably incurred by the dependents during their dependency and after the death of [name of decedent] *in obtaining ordinary and necessary services in place of those that* [name of decedent] *would have performed for their benefit if [he / she] had not died. The benefits payable for both categories of survivor's loss may not exceed the sum total of* [applicable monthly maximum] *per 30-day period nor may they be payable beyond three years after the date of the accidental bodily injury.)*

A. Answer: ____ (yes or no)

B. If your answer is "yes," what is the total amount of survivor's loss owed to the plaintiff (include only the loss not already paid by the defendant)?

$_____

QUESTION NO. 8: Were funeral and burial expenses incurred as a result of the death of [*name of decedent*]?

(Funeral and burial expenses may not exceed the lesser of the amount incurred or [insert policy maximum].*)*

A. Answer: ____ (yes or no)

B. If your answer is "yes," what is the amount of funeral and burial expenses owed to the plaintiff (include only those expenses not already paid by the defendant)?

$_____

INTEREST

QUESTION NO. 9: Was payment for any of the expenses or losses to which the plaintiff was entitled overdue?

(Payment for an expense or loss is overdue if it is not paid within 30 days after the defendant receives reasonable proof of the fact and the amount of the claim. An overdue claim bears interest at the rate of 12 percent per annum from the date the expense or loss became overdue.)

A. Answer: ____ (yes or no)

B. If your answer is "yes," what is the amount of interest owed to the plaintiff on overdue benefits (include only interest not already paid by the defendant)?

$_____

Signed,

_____ _____

Foreperson Date

Note on Use

*The bracketed sentence in QUESTION NO. 4 should be used if the injured person is temporarily unemployed.

If the plaintiff is not the injured person, substitute the name of the injured person for the word "plaintiff" where necessary.

See MCL 500.3107(1)(a) for the statutory minimum and maximum for funeral and burial expenses.

Omit any questions that are not at issue, such as whether the injuries arose out of the ownership, operation, maintenance, or use of a motor vehicle, and any benefits that are not claimed by the plaintiff.

This Special Verdict Form may have to be modified where there are questions involving coordination of benefits, governmental setoffs, or other issues arising under the no-fault statutes that are not specifically addressed by the format set forth.

For applicable monthly maximum, see Note on Use to M Civ JI 35.01.

History

M Civ JI 67.01 was added February 1981. Amended May 1999.

M Civ JI 67.02 Form of Verdict: No-Fault Auto Negligence; Noneconomic Loss [*Form of Verdict Deleted*]

Note on Use

This form of verdict, deleted by the Committee May 1998, was used for causes of action that arose before October 1, 1986. See 1986 PA 178, §3.

History

M Civ JI 67.02 was added November 1980. Amended January 1984, January 1988, November 1995. Deleted May 1998.

M Civ JI 67.02A Form of Verdict: No-Fault Auto Negligence; Noneconomic Loss (and Allocation of Fault) [*Form of Verdict Deleted*]

Note on Use

See M Civ JI 67.17 Form of Verdict: No-Fault Auto Negligence: (As Applicable) Economic Loss and Noneconomic Loss—and Comparative Negligence/Single or Multiple Defendants/Allocation of Fault.

History

M Civ JI 67.02A was added October 1987. Amended November 1995. Deleted December 1999.

M Civ JI 67.03 Form of Verdict: No-Fault Auto Negligence; Economic Loss [*Form of Verdict Deleted*]

Note on Use

This form of verdict, deleted by the Committee May 1998, was used for causes of action that arose before October 1, 1986. See 1986 PA 178, §3.

History

M Civ JI 67.03 was added November 1980. Amended September 1989. Deleted May 1998.

M Civ JI 67.03A Form of Verdict: No-Fault Auto Negligence; Economic Loss (and Allocation of Fault) [*Form of Verdict Deleted*]

Note on Use

See M Civ JI 67.17 Form of Verdict: No-Fault Auto Negligence: (As Applicable) Economic Loss and Noneconomic Loss—and Comparative Negligence/Single or Multiple Defendants/Allocation of Fault.

History

M Civ JI 67.03A was added October 1987. Amended September 1989. Deleted December 1999.

M Civ JI 67.04 Form of Verdict: No-Fault Auto Negligence; Economic Loss and Noneconomic Loss [*Form of Verdict Deleted*]

Note on Use

This form of verdict, deleted by the Committee May 1998, was used for causes of action that arose before October 1, 1986. See 1986 PA 178, §3.

History

M Civ JI 67.04 was added November 1980. Amended January 1984, January 1988, September 1989. Deleted May 1998.

M Civ JI 67.04A Form of Verdict: No-Fault Auto Negligence; Economic Loss and Noneconomic Loss (and Allocation of Fault) [*Form of Verdict Deleted*]

Note on Use

See M Civ JI 67.17 Form of Verdict: No-Fault Auto Negligence: (As Applicable) Economic Loss and Noneconomic Loss—and Comparative Negligence/Single or Multiple Defendants/Allocation of Fault.

History

M Civ JI 67.04A was added October 1987. Amended September 1989. Deleted December 1999.

M Civ JI 67.15 Form of Verdict: No-Fault Auto Negligence: Economic Loss and Noneconomic Loss—Comparative Negligence Not an Issue [*Form of Verdict Deleted*]

Note on Use

See M Civ JI 67.17 Form of Verdict: No-Fault Auto Negligence: (As Applicable) Economic Loss and Noneconomic Loss—and Comparative Negligence/Single or Multiple Defendants/Allocation of Fault.

History

M Civ JI 67.15 was added June 1997. Deleted December 1999.

M Civ JI 67.16 Form of Verdict: No-Fault Auto Negligence: Economic Loss and Noneconomic Loss—and Comparative Negligence/Multiple Defendants/Allocation of Fault (To Be Used in Cases in Which 1995 PA 222 Applies) [*Form of Verdict Deleted*]

Note on Use

See M Civ JI 67.17 Form of Verdict: No-Fault Auto Negligence: (As Applicable) Economic Loss and Noneconomic Loss—and Comparative Negligence/Single or Multiple Defendants/Allocation of Fault.

History

M Civ JI 67.16 was added June 1997. Deleted December 1999.

M Civ JI 67.17 Form of Verdict: No-Fault Auto Negligence: (As Applicable) Economic Loss and Noneconomic Loss—and Comparative Negligence/Single or Multiple Defendants/Allocation of Fault

We, the jury, answer the questions submitted as follows:

QUESTION NO. 1: Was [*name of defendant A*] negligent?

Answer: ____ (yes or no)

If your answer is "yes" or "no," go on to QUESTION NO. 2.

*QUESTION NO. 2: Was [*name of defendant B*] negligent?

Answer: ____ (yes or no)

If your answer is "yes," go on to QUESTION NO. 3.

If your answer is "no" and your answer to QUESTION NO. 1 is "yes," go on to QUESTION NO. 3.

If your answer is "no" and your answer to QUESTION NO. 1 is "no," do not answer any further questions.

QUESTION NO. 3: Was the plaintiff injured?

Answer: ____ (yes or no)

If your answer is "yes" and your answer to QUESTION NO. 1 is "yes," go on to QUESTION NO. 4.

If your answer is "yes," your answer to QUESTION NO. 1 is "no," and your answer to QUESTION NO. 2 is "yes," go on to QUESTION NO. 5.

If your answer is "no," do not answer any further questions.

QUESTION NO. 4: Was [*name of defendant A*] 's negligence a proximate cause of the plaintiff's [injury / injuries]?

Answer: ____ (yes or no)

If your answer is "yes" and your answer to QUESTION NO. 2 is "yes," go on to QUESTION NO. 5.

If your answer is "no" and your answer to QUESTION NO. 2 is "yes," go on to QUESTION NO. 5.

If your answer is "yes" and your answer to QUESTION NO. 2 is "no," go on to QUESTION NO. 6.

If your answer is "no" and your answer to QUESTION NO. 2 is "no," do not answer any further questions.

*QUESTION NO. 5: Was [*name of defendant B*] 's negligence a proximate cause of the plaintiff's [injury / injuries]?

Answer: ____ (yes or no)

If your answer is "yes," go on to QUESTION NO. 6.

If your answer is "no" and your answer to QUESTION NO. 4 is "yes," go on to QUESTION NO. 6.

If your answer is "no" and your answer to QUESTION NO. 4 is "no," do not answer any further questions.

PLAINTIFF'S NEGLIGENCE

QUESTION NO. 6: Was the plaintiff negligent?

Answer: ____ (yes or no)

If your answer is "yes," go on to QUESTION NO. 7.

If your answer is "no" and your answers to both Questions No. 4 and 5 are "yes," do not answer QUESTION NO. 7; go on to QUESTION NO. 8.

If your answer is "no" and you answered "no" to either QUESTION NO. 4 or QUESTION NO. 5, do not answer QUESTION NO. 7 or QUESTION NO. 8; go on to QUESTION NO. 9.

QUESTION NO. 7: Was the plaintiff's negligence a proximate cause of the plaintiff's [injury / injuries]?

Answer: ____ (yes or no)

If your answer is "yes," go on to QUESTION NO. 8.

If your answer is "no" and your answers to Questions No. 4 and 5 are "yes," go on to QUESTION NO. 8.

If your answer is "no" and you answered "no" to either QUESTION NO. 4 or QUESTION NO. 5, do not answer QUESTION NO. 8; go on to QUESTION NO. 9.

QUESTION NO. 8:

A. If you answered "yes" to QUESTION NO. 4, then using 100 percent as the total, enter the percentage of negligence attributable to [*name of defendant A*]: ____ percent

*B. If you answered "yes" to QUESTION NO. 5, then using 100 percent as the total, enter the percentage of negligence attributable to [*name of defendant B*]: ____ percent

C. If you answered "yes" to QUESTION NO. 7, then using 100 percent as the total, enter the percentage of negligence attributable to the plaintiff: ____ percent

The total of these must equal 100 percent: TOTAL 100 percent

ECONOMIC LOSS CLAIM

QUESTION NO. 9: Did the plaintiff's injury result in damages for economic loss for [*for insured defendants, insert those applicable economic loss damages suffered by the plaintiff in excess of compensable no-fault benefits for which plaintiff seeks recovery: for the first three years, amounts in excess of no-fault benefits for work loss, allowable expenses, and survivors' loss, and, for the period after three years, all work loss, allowable expenses, and survivors' loss. For uninsured defendants, insert any economic loss damages*] to the present date?

Answer: _____ (yes or no)

If your answer is "yes", go on to QUESTION NO. 10.

If your answer is "no", do not answer QUESTION NO. 10; go on to QUESTION NO. 12.

QUESTION NO. 10: What is the total amount of the plaintiff's damages for economic loss to the present date?

Answer: $_____.____

[Please note that the judge will reduce the total amount of the plaintiff's damages for economic loss by the percentage of negligence attributable to the plaintiff, if any, entered in QUESTION NO. 8.]

QUESTION NO. 11: Will plaintiff sustain economic damages in the future for [*for insured defendants, insert those applicable economic loss damages suffered by the plaintiff in excess of compensable no-fault benefits for which plaintiff seeks recovery: for the first three years, amounts in excess of no-fault benefits for work loss, allowable expenses, and survivors' loss, and, for the period after three years, all work loss, allowable expenses, and survivors' loss. For uninsured defendants, insert any economic loss damages*]?

Answer: _____ (yes or no)

If your answer is "yes", go on to QUESTION NO. 12.

If your answer is "no", do not answer QUESTION NO. 12; go on to QUESTION NO. 13.

QUESTION NO. 12: Give the total amount for each year in which the plaintiff will incur economic damages in the future.

Answer:

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

NONECONOMIC LOSS CLAIM

**[NOTE: If you determined in QUESTION NO. 8 that the plaintiff was more than 50 percent at fault, then do not answer any further questions. If you determined in QUESTION NO. 8 that the plaintiff was 50 percent or less at fault, then go on to QUESTION NO. 13.]

QUESTION NO. 13: Did the plaintiff's injury result in [death / serious impairment of ***[*a body function*][1] [*body function*][2] / or / permanent serious disfigurement]?

Answer: ____ (yes or no)

If your answer is "yes," go on to QUESTION NO. 14.

If your answer is "no," do not answer any further questions.

QUESTION NO. 14: What is the total amount of the plaintiff's damages for noneconomic loss for [*describe noneconomic damages claimed by the plaintiff such as M Civ JI 50.02 Pain and Suffering, Etc., M Civ JI 50.03 Disability and Disfigurement, and M Civ JI 50.04 Aggravation of Preexisting Ailment or Condition*] to the present date?

Answer: $_____.____

[Please note that the judge will reduce the total amount of the plaintiff's damages for noneconomic loss by the percentage of negligence attributable to the plaintiff, if any, entered in QUESTION NO. 8.]

QUESTION NO. 15: Will plaintiff sustain damages for noneconomic loss in the future for [*describe noneconomic damages claimed by the plaintiff such as M Civ JI 50.02 Pain and Suffering, Etc., M Civ JI 50.03 Disability and Disfigurement, and M Civ JI 50.04 Aggravation of Preexisting Ailment or Condition*]?

Answer: ____ (yes or no)

If your answer is "yes," go on to QUESTION NO. 16.

If your answer is "no," do not answer any further questions.

QUESTION NO. 16: Give the total amount for each year in which the plaintiff will incur noneconomic damages in the future.

Answer:

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

[Please note that the judge will reduce the total amount of the plaintiff's damages for noneconomic loss by the percentage of negligence attributable to the plaintiff, if any, entered in QUESTION NO. 8.]

Signed,

_____ _____

Foreperson Date

Note on Use

*Delete Questions No. 2 and 5 and subpart B of QUESTION NO. 8 if there is only one defendant.

This verdict form may also be adapted by deleting questions under headings such as "Plaintiff's Negligence," "Economic Loss Claim," and "Noneconomic Loss Claim" if they are not issues in the case.

Deleting questions will require renumbering remaining questions and the references to the deleted questions.

See MCL 500.3135 for economic and noneconomic losses. MCL 500.3135(3) abolishes tort liability of drivers and owners of insured vehicles with exceptions listed in that subsection. MCL 500.3135(3)(c) identifies recoverable economic losses for amounts or periods beyond first-party no-fault benefits: "allowable expenses, work loss, and survivors' loss as defined in sections 3107 to 3110 [MCL 500.3107-.3110]. Excess "replacement services" beyond those recoverable under MCL 500.3107 are not recoverable under MCL 500.3135(3). *Johnson v Recca*, 492 Mich 169 (2012).

**Include the bracketed instructional note for those cases that are controlled by 1995 PA 222. For cases not controlled by this statute, omit the bracketed note.

***In QUESTION NO. 13, use bracketed phrase number 2 for cases that are controlled by 1995 PA 222 and bracketed phrase number 1 for cases not controlled by this statute.

This form of verdict is appropriate in a case in which the evidence would allow an award of damages for a 20-year period in the future. The form must be modified by the court to add or delete lines

in Questions No. 12 and 16 in cases where the evidence supports an award of damages for a period longer or shorter than 20 years.

Comment

Both insured and uninsured motorist tortfeasors have immunity from tort liability for noneconomic loss damages, except where the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement. *Auto Club Insurance Ass'n v Hill*, 431 Mich 449; 430 NW2d 636 (1988). However, the uninsured motorist tortfeasor (unlike the insured motorist tortfeasor) has no tort immunity for economic loss damages. *Hill*.

In cases in which 1995 PA 222 applies, an uninsured plaintiff (who was operating his or her own vehicle at the time the injury occurred) is not entitled to noneconomic loss damages. MCL 500.3135(2)(c), added by 1995 PA 222. This restriction on uninsured plaintiffs does not apply in cases not controlled by 1995 PA 222.

In cases in which 1995 PA 222 applies, a plaintiff who is more than 50 percent at fault is not entitled to noneconomic loss damages. MCL 500.3135(2)(b), added by 1995 PA 222. This restriction does not apply in cases not controlled by 1995 PA 222.

History

M Civ JI 67.17 was added December 1999. Amended September 2008, October 2013.

Chapter 68: Forms of Verdicts: Product Liability

M Civ JI 68.01 Form of Verdict: Products Liability 362

M Civ JI 68.01A Form of Verdict: Products Liability (Personal Injury Action) 364

M Civ JI 68.03 Form of Verdict: Products Liability—Personal Injury Action (To Be Used in Cases Filed on or After March 28, 1996) 369

M Civ JI 68.01 Form of Verdict: Products Liability

We, the jury, make the following answers to the questions submitted by the court:

QUESTION NO. 1A: Was the defendant negligent in one or more of the ways claimed by the plaintiff?

Answer: ____(yes or no)

QUESTION NO. 1B: Did the defendant breach an implied warranty in one or more of the ways claimed by the plaintiff?

Answer: ____(yes or no)

If your answer is "no" to both QUESTION NO. 1A and QUESTION NO. 1B, do not answer any further questions.

If you answered QUESTION NO. 1A "no," then do not answer QUESTION NO. 2A:

QUESTION NO. 2A: Was the defendant's negligence a proximate cause of [injuries / damages] to the plaintiff?

Answer: ____(yes or no)

If you answered QUESTION NO. 1B "no," do not answer QUESTION NO. 2B:

QUESTION NO. 2B: Was the defendant's breach of implied warranty a proximate cause of [injuries / damages] to the plaintiff?

Answer: ____(yes or no)

If your answer to QUESTION NO. 2A and QUESTION NO. 2B is "no," do not answer any further questions.

QUESTION NO. 3: What is the total amount of the plaintiff's damages?

Answer: $_____

QUESTION NO. 4: Was the plaintiff negligent?

Answer: ____(yes or no)

If your answer is "no," do not answer any further questions.

QUESTION NO. 5: Was the plaintiff's negligence a proximate cause of the damages to the plaintiff?

Answer: ____(yes or no)

If your answer is "no," do not answer any further questions.

QUESTION NO. 6: Using 100 percent as the total combined negligence and/or breach of warranty which proximately caused the plaintiff's damages, what percentage was due to the plaintiff's negligence?

Answer: ____ percent

Please note that the Court will reduce the total amount of the plaintiff's damages answered in QUESTION NO. 3 by the percentage of plaintiff's negligence, if any, entered in the answer to QUESTION NO. 6. The remainder will be the amount which the plaintiff is entitled to recover.

Signed,

_____ _____

Foreperson Date

Note on Use

This form of verdict should not be used in an action against a manufacturer for an alleged defect in the design of its product. *Prentis v Yale Manufacturing Co*, 421 Mich 670; 365 NW2d 176 (1984).

History

M Civ JI 68.01 was added October 1984.

M Civ JI 68.01A Form of Verdict: Products Liability (Personal Injury Action)

We, the jury, answer the questions submitted as follows:

QUESTION NO. 1A: Was the defendant negligent in one or more of the ways claimed by the plaintiff?

Answer: ____(yes or no)

QUESTION NO. 1B: Did the defendant breach an implied warranty in one or more of the ways claimed by the plaintiff?

Answer: ____(yes or no)

If your answer is "no" to both QUESTION NO. 1A and QUESTION NO. 1B, do not answer any further questions.

If your answer to QUESTION NO. 1A is "yes," then answer QUESTION NO. 2A.

If your answer to QUESTION NO. 1B is "yes," then answer QUESTION NO. 2B.

QUESTION NO. 2A: Was the defendant's negligence a proximate cause of [injuries / damages] to the plaintiff?

Answer: ____(yes or no)

QUESTION NO. 2B: Was the defendant's breach of implied warranty a proximate cause of [injuries / damages] to the plaintiff?

Answer: ____(yes or no)

If your answer to either QUESTION NO. 2A or QUESTION NO. 2B is 'yes," go on to QUESTION NO. 3.

DAMAGES TO THE PRESENT DATE

QUESTION NO. 3: What is the total amount of plaintiff's damages to the present date for [*describe past economic damages claimed by the plaintiff such as lost wages, medical expenses, etc.*]?

Answer: $_____.____

QUESTION NO. 4: What is the total amount of plaintiff's damages to the present date for [*describe past noneconomic damages claimed by the plaintiff such as M Civ JI 50.02 Pain and Suffering, Etc., M Civ JI 50.03 Disability and Disfigurement, and M Civ JI 50.04 Aggravation of Preexisting Ailment or Condition*]?

Answer: $_____.____

FUTURE DAMAGES

QUESTION NO. 5: If you find that the plaintiff will incur costs for medical or other health care in the future, give the total amount for each year in which the plaintiff will incur costs.

Answer:

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

QUESTION NO. 6: If you find that the plaintiff will sustain damages for [lost wages or earnings / or / lost earning capacity / and / [*describe other economic loss claimed by plaintiff*]] in the future, give the total amount for each year in which the plaintiff will sustain damages.

Answer:

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

QUESTION NO. 7: If you find that the plaintiff will sustain damages for [*describe future noneconomic damages claimed by plaintiff*] in the future, give the total amount for each year in which the plaintiff will sustain damages.

Answer:

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

CONTRIBUTORY NEGLIGENCE/ALLOCATION OF FAULT

QUESTION NO. 8: Was the plaintiff negligent?

Answer: ____(yes or no)

If your answer is "yes," go on to QUESTION NO. 9.

If your answer is "no," go on to QUESTION NO. 11.

QUESTION NO. 9: Was the plaintiff's negligence a proximate cause of the injury or damage to the plaintiff?

Answer: ____(yes or no)

If your answer is "yes," go on to QUESTION NO. 10.

If your answer is "no," go on to QUESTION NO. 11.

QUESTION NO. 10: Using 100 percent as the total, and considering the nature of the conduct and the extent to which each party's conduct caused or contributed to plaintiff's injury, enter the percentage of fault attributable:

Answer:

Defendant [*name of defendant*] ____ percent

Defendant [*name of defendant*] ____ percent

Plaintiff [*name of plaintiff*] ____ percent

QUESTION NO. 11: Using 100 percent as the total, and considering the nature of the conduct and the extent to which each party's conduct caused or contributed to plaintiff's injury, enter the percentage of fault attributable:

Answer:

Defendant [*name of defendant*] ____ percent

Defendant [*name of defendant*] ____ percent

Please note that the judge will reduce the total amount of the plaintiff's damages answered in Questions No. 3 through 7 by the percentage of plaintiff's fault, if any, entered in the answer to QUESTION NO. 10.

Signed,

_____ _____

Foreperson Date

Note on Use

For cases filed before October 1, 1986, use M Civ JI 68.01. For cases filed on or after October 1, 1986, relating to causes of action arising before October 1, 1986, use Questions No. 1 through 9 from M Civ JI 68.01A followed by QUESTION NO. 6 from M Civ JI 68.01. For cases filed on or after October 1, 1986, relating to causes of action arising after October 1, 1986, use M Civ JI 68.01A. See 1986 PA 178, §3.

This form of verdict must be modified by deleting Questions No. 1B and 2B in an action against a manufacturer for an alleged defect in the design of its product. *Prentis v Yale Manufacturing Co*, 421 Mich 670; 365 NW2d 176 (1984).

Where there are multiple plaintiffs or defendants, the appropriate questions should be asked separately as to each one.

A separate Special Verdict sheet should be furnished to the jury for each plaintiff and each defendant.

Omit any questions that are not an issue, such as the question on contributory negligence or those on future damages.

This verdict form should not be used if the plaintiff is over 60 years of age.

This form of verdict is appropriate in a case in which the evidence would allow an award of damages for a 20-year period in the future. The form must be modified by the court to add or delete lines in Questions No. 5, 6, and 7 in cases where the evidence supports an award of damages for a period longer or shorter than 20 years.

Comment

MCL 600.6305; MCL 600.6304.

History

M Civ JI 68.01A was added February 1987.

M Civ JI 68.03 Form of Verdict: Products Liability—Personal Injury Action (To Be Used in Cases Filed on or After March 28, 1996)

We, the jury, answer the questions submitted as follows:

QUESTION NO. 1: Was the defendant negligent?

Answer: ____(yes or no)

If your answer is "yes" or "no," go on to QUESTION NO. 2.

QUESTION NO. 2: Was the plaintiff injured and/or damaged in one or more of the ways claimed?

Answer: ____(yes or no)

If your answer is "yes" and your answer to QUESTION NO. 1 is "yes," go on to QUESTION NO. 3.

If your answer is "yes" and your answer to QUESTION NO. 1 is "no," go on to QUESTION NO. 4.

If your answer is "no," do not answer any further questions.

QUESTION NO. 3: Was the defendant's negligence a proximate cause of the injury or damage claimed by the plaintiff?

Answer: ____(yes or no)

If your answer is "yes" or "no," go on to QUESTION NO. 4.

QUESTION NO. 4: Did the defendant breach an express warranty?

Answer: ____(yes or no)

If your answer is "yes," go on to QUESTION NO. 5.

If your answer is "no," go on to QUESTION NO. 6.

QUESTION NO. 5: Was the defendant's breach of express warranty a proximate cause of the injury or damage claimed by the plaintiff?

Answer: ____(yes or no)

If your answer is "yes" or "no," go on to QUESTION NO. 6.

*QUESTION NO. 6: Did the defendant breach an implied warranty?

Answer: ____(yes or no)

If your answer is "yes," go on to QUESTION NO. 7.

If your answer is "no," but your answer to either QUESTION NO. 3 or 5 is "yes," go on to QUESTION NO. 8.

If your answer is "no," and your answer to either QUESTION NO. 1 or 3 is "no," and your answer to either QUESTION NO. 4 or 5 is "no," do not answer any further questions.

*QUESTION NO. 7: Was the defendant's breach of implied warranty a proximate cause of the injury or damage claimed by the plaintiff?

Answer: ____(yes or no)

If your answer is "yes," go on to QUESTION NO. 8.

If your answer is "no," but your answer to either QUESTION NO. 3 or QUESTION NO. 5 is "yes," go on to QUESTION NO. 8.

If your answer is "no," and your answer to either QUESTION NO. 1 or 3 is "no," and your answer to either QUESTION NO. 4 or 5 is "no," do not answer any further questions.

QUESTION NO. 8: Was [*name of nonparty*] negligent?

Answer: ____(yes or no)

If your answer is "yes," go on to QUESTION NO. 9.

If your answer is "no," go on to QUESTION NO. 10.

QUESTION NO. 9: Was [*name of nonparty*]'s negligence a proximate cause of the injury or damage claimed by the plaintiff?

Answer: ____(yes or no)

If your answer is "yes" or "no," go on to QUESTION NO. 10.

QUESTION NO. 10: Was the plaintiff negligent?

Answer: ____(yes or no)

If your answer is "yes," go on to QUESTION NO. 11.

If your answer is "no," go on to QUESTION NO. 12.

QUESTION NO. 11: Was the plaintiff's negligence a proximate cause of the injury or damage to the plaintiff?

Answer: ____(yes or no)

If your answer is "yes" or "no," go on to QUESTION NO. 12.

QUESTION NO. 12:

A. Using 100 percent as the total, enter the percentage of fault attributable to the defendant: ____ percent

B. If you answered "yes" to QUESTION NO. 9, then using 100 percent as the total, enter the percentage of fault attributable to [*name of nonparty*]: ____ percent

C. If you answered "yes" to QUESTION NO. 11, then using 100 percent as the total, enter the percentage of fault attributable to the plaintiff: ____ percent

The total of these must equal 100 percent: TOTAL 100 percent

QUESTION NO. 13: If you find that plaintiff has sustained damages for [*describe past economic damages claimed by the plaintiff such as lost wages, medical expenses, etc.*] to the present date, give the total amount of damages to the present date.

Answer: $_____.____

QUESTION NO. 14: If you find that the plaintiff will incur costs for medical or other health care in the future, give the total amount for each year in which the plaintiff will incur costs.

Answer:

$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]

QUESTION NO. 15: If you find that plaintiff will sustain damages for [lost wages or earnings / or / lost earning capacity / and / [*describe other economic loss claimed by plaintiff*]] in the future, give the total amount for each year in which the plaintiff will sustain damages.

Answer:

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

NONECONOMIC DAMAGES

NOTE: If you determined in QUESTION NO. 12 that plaintiff was more than 50 percent at fault, then do not answer any further questions. If you determined in QUESTION NO. 12 that plaintiff was 50 percent or less at fault, then go on to QUESTION NO. 16.

QUESTION NO. 16: What is the total amount of plaintiff's damages to the present date for [*describe past noneconomic damages claimed by the plaintiff such as M Civ JI*

50.02 Pain and Suffering, Etc., M Civ JI 50.03 Disability and Disfigurement, and M Civ JI 50.04 Aggravation of Preexisting Ailment or Condition]?

Answer: $_____.____

QUESTION NO. 17: If you find that plaintiff will sustain damages for [*describe future noneconomic damages claimed by plaintiff*] in the future, give the total amount for each year in

Answer:

$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]

Signed,

_____ _____
Foreperson Date

Note on Use

This form of verdict should only be used for cases that are filed on or after March 28, 1996. 1995 PA 161, §3; 1995 PA 249, §3.

This verdict form should not be used if the plaintiff is over 60 years of age.

This form of verdict is appropriate in a case in which the evidence would allow an award of damages for a twenty-year period in the future. This form must be modified by the trial judge to add or delete lines in Questions No. 14, 15, and 17 in cases in which the evidence supports an award of damages for a period longer or shorter than twenty years.

*This form of verdict must be modified by deleting Questions No. 6 and 7 in an action against a manufacturer for an alleged defect in the design of its product. *Prentis v Yale Manufacturing Co*, 421 Mich 670; 365 NW2d 176 (1984).

The trial judge should omit any questions that are not an issue in the case.

Chapter 70: Forms of Verdicts: Medical Malpractice

M Civ JI 70.01 Form of Verdict: Special Questions in Medical Malpractice Cases (Limitation on Noneconomic Damages) 376

M Civ JI 70.01 Form of Verdict: Special Questions in Medical Malpractice Cases (Limitation on Noneconomic Damages)

QUESTION NO. 1: Did the professional negligence or malpractice of the defendant cause or contribute to the plaintiff's death?

Answer: ____(yes or no)

QUESTION NO. 2: Did the defendant wrongfully leave a foreign object in plaintiff's body?

Answer: ____(yes or no)

QUESTION NO. 3: Did the injury proximately caused by defendant's professional negligence or malpractice involve the reproductive system of the plaintiff?

Answer: ____(yes or no)

QUESTION NO. 4: Did the defendant wrongfully remove plaintiff's [limb / organ]?

Answer: ____(yes or no)

QUESTION NO. 5: Did the professional negligence or malpractice of the defendant cause or contribute to the loss of a vital bodily function of plaintiff?

Answer: ____(yes or no)

QUESTION NO. 6: Did the fraudulent conduct of [*name of health care provider*] prevent the discovery of the existence of plaintiff's claim?

Answer: ____(yes or no).

QUESTION NO. 7: Did the conduct of the defendant amount to a [*specify intentional tort, e.g., battery, etc.*]?

Answer: ____(yes or no)

Signed,

_____ _____

Foreperson Date

Note on Use

This form of verdict should only be used if the cause of action arose before April 1, 1994. 1993 PA 78.

The court should use only the question or questions that are applicable. These questions may be added to the applicable questions in M Civ JI 66.01A, the form of verdict for negligence actions, but the questions relating to defendant's negligence should be revised to refer to defendant's "professional negligence or malpractice."

History

M Civ JI 70.01 was added June 1987.

Chapter 72: Forms of Verdicts: Contribution Among Tort-Feasors

M Civ JI 72.01A Form of Verdict: Contribution Among Tort-Feasors by Relative Fault [*Form of Verdict Deleted*] 379

M Civ JI 72.01B Form of Verdict: Contribution Among Tort-Feasors by Relative Fault (Bifurcation) [*Form of Verdict Deleted*] 380

M Civ JI 72.01A Form of Verdict: Contribution Among Tort-Feasors by Relative Fault [*Form of Verdict Deleted*]

Note on Use

This verdict form was deleted because allocation of fault among defendants and others in a lawsuit is incorporated as a question in the comparative negligence, no-fault, and products liability verdict forms (chapters 66–68).

Comment

See MCL 600.2925a–.2925d for rights to contribution among joint tort-feasors.

In late 1995, the Michigan legislature abrogated joint liability in most cases and thereby eliminated most actions for contribution. See Comment to M Civ JI 43.01A Contribution among Tortfeasors by Relative Fault.

History

M Civ JI 72.01A was added February 1983. Deleted May 1998.

M Civ JI 72.01B Form of Verdict: Contribution Among Tort-Feasors by Relative Fault (Bifurcation) [*Form of Verdict Deleted*]

Note on Use

This verdict form was deleted because allocation of fault among defendants and others in a lawsuit is incorporated as a question in the comparative negligence, no-fault, and products liability verdict forms (chapters 66–68).

Comment

See MCL 600.2925a–.2925d for rights to contribution among joint tort-feasors.

In late 1995, the Michigan legislature abrogated joint liability in most cases and thereby eliminated most actions for contribution. See Comment to M Civ JI 43.01B Contribution among Tortfeasors by Relative Fault (Bifurcation).

History

M Civ JI 72.01B was added February 1983. Deleted May 1998.

Chapter 73: Forms of Verdicts: Damages of Spouse of Injured Plaintiff

M Civ JI 73.01 Form of Verdict: Damages of Spouse of Injured Plaintiff 382

M Civ JI 73.01 Form of Verdict: Damages of Spouse of Injured Plaintiff

NOTE: If you find that [*name of injured spouse*] is not entitled to damages, do not complete this verdict form.

If you find that [*name of injured spouse*] is entitled to damages, you should complete this verdict form.

We, the jury, answer the questions submitted as follows:

QUESTION NO. 1: Did [*name of spouse*] sustain damages for [expense of necessary medical care, treatment or services received by [*name of injured spouse*] / the services of [*name of injured spouse*] of which [*name of spouse*] has been deprived / society, companionship and sexual relationship with [*name of injured spouse*] of which [*name of spouse*] has been deprived]?

Answer: ____(yes or no)

If your answer is "no," do not answer any further questions.

If your answer is "yes," go on to Questions No. 2 through 6.

DAMAGES TO THE PRESENT DATE

QUESTION NO. 2: What is the total amount of [*name of spouse*]'s damages to the present date for [expense of necessary medical care, treatment, or services received by [*name of injured spouse*] / the services of [*name of injured spouse*] of which [*name of spouse*] has been deprived]?

Answer: $_____.____

QUESTION NO. 3: What is the total amount of [*name of spouse*]'s damages to the present date for society, companionship and sexual relationship with [*name of injured spouse*] of which [*name of spouse*] has been deprived?

Answer: $_____.____

FUTURE DAMAGES

QUESTION NO. 4: If you find that in the future [*name of spouse*] will incur costs for the expense of necessary medical care, treatment, or services received by [*name of injured spouse*], give the total amount for each year in which [*name of spouse*] will incur costs.

Answer:

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

QUESTION NO. 5: If you find that in the future [*name of spouse*] will sustain damages for the services of [*name of injured spouse*] of which [*name of spouse*] has been deprived, give the total amount for each year in which [*name of spouse*] will sustain damages.

Answer:

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

QUESTION NO. 6: If you find that in the future [*name of spouse*] will sustain damages for society, companionship and sexual relationship with [*name of injured spouse*] of which [*name of spouse*] has been deprived, give the total amount for each year in which [*name of spouse*] will sustain damages.

Answer:

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____._____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

$_____.____ for [*year*]

Please note that the judge will reduce the total amount of [*name of spouse*]'s damages entered in Questions No. 2 through 6 by the percentage of [*name of injured spouse*]'s fault, if any, in causing [*name of injured spouse*]'s own injury.

Signed,

_____ _____

Foreperson Date

Note on Use

This verdict form is designed for a lawsuit in which the action for damages to the spouse is combined with the action for the injured spouse's damages. The verdict form assumes that the spouse's action is a personal injury action and subject to MCL 600.6305, .6304. Personal injury action is defined at MCL 600.6301. This verdict form may be used for cases filed on or after October 1, 1986, relating to causes of action arising after October 1, 1986. See 1986 PA 178, § 3.

This verdict form should not be used in no-fault cases.

Where there are multiple plaintiffs or defendants, the appropriate questions should be asked separately as to each one.

A separate Special Verdict sheet should be furnished to the jury for each plaintiff and each defendant.

Omit any questions that are not an issue.

This verdict form should not be used if the plaintiff is over 60 years of age.

This form of verdict is appropriate in a case in which the evidence would allow an award of damages for a 20-year period in the future. The form must be modified by the court to add or delete lines in Questions No. 4, 5, and 6 in cases where the evidence supports an award of damages for a period longer or shorter than 20 years.

Comment

Where a derivative action by a spouse for loss of consortium or other damages is tried jointly with an action by the other spouse for his or her own injury, recovery in the derivative action is dependent on whether the injured spouse is entitled to recover. *Bias v Ausbury*, 369 Mich 378, 120 NW2d 233 (1963); *Morrison v Grass*, 314 Mich 87, 22 NW2d 82 (1946).

Recovery of damages for loss of consortium in the suit by one spouse is to be reduced by the other spouse's negligence in causing his or her own injury. *Danaher v Partridge Creek Country Club*, 116 Mich App 305, 323 NW2d 376 (1982).

A husband may recover for necessary medical expense incurred as a result of injury to his wife. *Burns v Van Buren Twp*, 218 Mich 44; 187 NW 278 (1922); *Laskowski v People's Ice Co*, 203 Mich 186; 168 NW 940 (1918). But see *Morse v Deschaine*, 13 Mich App 101, 107; 163 NW2d 693, 696 (1968), for a discussion of situations in which a wife may sue in her own right for her medical expenses. A husband may also recover the reasonable value of the loss of his wife's ability to carry on her services and housework. *Leeds v Masha*, 328 Mich 137; 43 NW2d 92 (1950); *Burns*.

Both husband and wife have a right to recover for the loss of consortium. See *Montgomery v Stephan*, 359 Mich 33; 101 NW2d 227 (1960).

The no-fault law has not abolished the common-law action for loss of consortium by the spouse of a person who receives above threshold injuries, *Rusinek v Schultz, Snyder & Steele Lumber Co*, 411 Mich 502; 309 NW2d 163 (1981); nor is a consortium action precluded by the Michigan Civil Rights Act, MCL 37.2101 et seq. *Eide v Kelsey-Hayes Co*., 431 Mich 26; 427 NW2d 488 (1988).

History

M Civ JI 73.01 was added June 1989.

Chapter 75: Dram Shop Actions

Dram Shop Actions—Introduction 388
M Civ JI 75.01 Dram Shop—Explanation of Statute 395
M Civ JI 75.02 Dram Shop—Definitions 396
M Civ JI 75.11 Dram Shop—Sale to Minor: Burden of Proof 398
M Civ JI 75.12 Dram Shop—Sale to Visibly Intoxicated Person: Burden of Proof 400
M Civ JI 75.13 Dram Shop—Contributing to Occurrence Not a Defense 401

Dram Shop Actions—Introduction

In 1986 (1986 PA 176), the legislature made substantial modifications to the Dram Shop Act. The act was renumbered in 1998 as part of the repeal and recodification of the Michigan Liquor Control Code. Subsection (3) of MCL 436.1801, sets forth the cause of action as follows:

> (3) Except as otherwise provided in this section, an individual who suffers damage or who is personally injured by a minor or visibly intoxicated person by reason of the unlawful selling, giving, or furnishing of alcoholic liquor to the minor or visibly intoxicated person, if the unlawful sale is proven to be a proximate cause of the damage, injury, or death, or the spouse, child, parent, or guardian of that individual, shall have a right of action in his or her name against the person who by selling, giving, or furnishing the alcoholic liquor has caused or contributed to the intoxication of the person or who has caused or contributed to the damage, injury, or death. In an action pursuant to this section, the plaintiff shall have the right to recover actual damages in a sum of not less than $50.00 in each case in which the court or jury determines that intoxication was a proximate cause of the damage, injury, or death.

I. Elements of a Cause of Action

A. Unlawful Selling, Giving, or Furnishing of Alcoholic Liquor

The transaction giving rise to liability under the Dram Shop Act is an "unlawful selling, giving, or furnishing of alcoholic liquor to the minor or visibly intoxicated person."

Although most of the cases have involved an actual "sale," the statute makes clear that "giving, or furnishing" will also suffice. In *King v Partridge*, 9 Mich App 540; 157 NW2d 417 (1968), the court of appeals decided that a bar employee's serving herself intoxicating liquor constitutes an unlawful "giving or furnishing" where there was no indication that the taking of the liquor was in violation of the employer's orders.

A sale of liquor that is illegal due to its time or day (i.e., a Sunday sale) is not the type of illegal sale that gives rise to liability under the Dram Shop Act. *Pesola v Pawlowski*, 45 Mich App 516; 206 NW2d 780 (1973).

The requirements of the statute vary depending on which of the two types of unlawful sales is involved: an unlawful sale to a minor, or an unlawful sale to a visibly intoxicated person. (The term "minor" is defined in the act to mean a person under 21 years of age. MCL 436.1109(3).)

Direct and Indirect Sales

"Unlawful" sale to a minor may be interpreted with reference to subsection (2) of MCL 436.1801, which says that a retail licensee shall not directly sell (give or furnish) to a minor. (The pre-1986 statute prohibited indirect as well as direct sales to minors.) If indirect sale means a situation where a licensee sells to a buyer who then furnishes the liquor to a minor, the licensee may not be liable under the present statute if the minor became intoxicated and injured someone. This may represent a departure from case law that recognizes the potential liability of a licensee who knew or had reason to know that the

purchase of liquor was being made for the minor who ultimately caused the injury. *Maldonado v Claud's, Inc*, 347 Mich 395; 79 NW2d 847 (1956); *Meyer v State Line Super Mart, Inc*, 1 Mich App 562; 137 NW2d 299 (1965); *Verdusco v Miller*, 138 Mich App 702; 360 NW2d 281 (1984).

Where a dram shop action is based on an unlawful sale to a visibly intoxicated person, if "unlawful" is to be construed with reference to subsection (2) of MCL 436.1801, that subsection prohibits both indirect and direct sales, giving, or furnishing to visibly intoxicated persons.

State of Intoxication at the Time of Sale

In an action based on a sale to a minor, it is not necessary to show that the minor was intoxicated at the time of the sale. Maldonado.

Where the cause of action is based on a sale to one other than a minor, it is necessary to show that the person is "visibly intoxicated" at the time of the sale. MCL 436.1801(3). See also MCL 436.1801(2). The requirement of "visibly" intoxicated dates back to a 1972 amendment to the act. See *Hollis v Abraham*, 67 Mich App 426; 241 NW2d 231 (1975); *McKnight v Carter*, 144 Mich App 623; 376 NW2d 170 (1985).

B. Causal Relationship Issues

Two issues of causal relationship may arise under the act: (1) whether the injury or damage was caused by the minor or visibly intoxicated person, and (2) whether the unlawful sale was a proximate cause of the plaintiff's injury or damages.

(1) Injury Caused by a Minor or Visibly Intoxicated Person

The statute requires that the plaintiff "suffers damage or … is personally injured by a minor or visibly intoxicated person." The issue suggested by this language is whether the visibly intoxicated person or minor caused the injury or damage. In some cases, it is contended that the injury was caused by someone or something else. *Duma v Janni*, 26 Mich App 445; 182 NW2d 596 (1970). Where the injury was not caused by the intoxicated person, the conclusion must also be that the sale was not a proximate cause of the injury. See discussion under 1(B)(2) Sale as a Proximate Cause of the Injury, infra.

(2) Sale as a Proximate Cause of the Injury

Before the 1972 amendment to the Dram Shop Act, which added the proximate cause requirement, the statute provided for an action against a licensee who "caused or contributed to the intoxication of said person or persons or who shall have caused or contributed to any such injury."

Although this language remains a part of the statute, the question of the sale's contributing to the intoxication is seldom an issue and is obscured by the current express requirement of a proximate cause relationship between the unlawful sale and the injury or damage.

Before the 1972 amendment, it apparently was not necessary to show that the unlawful sale was a proximate cause of the injury or damages. In *Heikkala v Isaacson*, 178 Mich 176, 182; 144 NW 508, 510 (1913), the court said: "[T]here was no question before the jury whether the intoxication of Lund was or was not the natural cause of the act which caused the injury. The act itself by a person intoxicated, to

whom liquor has been sold unlawfully, fixes the liability for the damage upon the person furnishing the liquor which caused or contributed to the intoxication." See also *Brockway v Patterson*, 72 Mich 122, 128; 40 NW 192, 195 (1888). (It should be noted, however, that several Michigan cases construed the pre-1972 version of the Dram Shop Act to require a causal connection between the unlawful sale and the injury. *Rizzo v Kretschmer*, 389 Mich 363, 370 n 4; 207 NW2d 316, 319 n 4 (1973); *Durbin v K-K-M Corp*, 54 Mich App 38, 58; 220 NW2d 110, 121 (1974).

The present version of the statute continues the express requirement that "the unlawful sale is proven to be a proximate cause of the damage, injury, or death." The effect of the proximate cause requirement is that in addition to proving that the intoxicated person caused the injuries or damages, the plaintiff must prove that the conduct, act, or omission that caused the injury or damages was the natural and probable result of the selling, giving, or furnishing of alcoholic liquor. Since the probable effect of the alcoholic liquor on the person's behavior may be difficult to establish by objective evidence, this element of the case will have to be supplied by an inference to be drawn by the trier of fact from the circumstances as shown by the evidence. Cases have considered the proximate cause requirement where there is no indication that the person continued to be intoxicated or sobered up before the injury occurred. *Bryant v Athans*, 362 Mich 17; 106 NW2d 389 (1960).

This added requirement of proximate cause has potential for denying recovery in some of the factual situations described in early cases. See *Dice v Sherberneau*, 152 Mich 601; 116 NW 416 (1908), where the court said it was not necessary for the plaintiff widow to show that the intoxication was the cause of her husband's suicide.

C. What Types of Injuries Are Covered by the Act?

See discussion under III Who Has a Cause of Action Under the Act?, infra.

D. "Visibly Intoxicated"

See Comment to M Civ JI 75.02 Dram Shop—Definitions

II. Who Can Be Held Liable Under the Act?

Only retail licensees can be held liable under the Dram Shop Act. *Tennille v Action Distributing Company*, Inc, 225 Mich App 66; 570 NW2d 130 (1997) (act not applicable to wholesale licensees). MCL 436.1801(2), (3). This class also includes those who fail to obtain or maintain the required licensing. *Guitar v Bieniek*, 402 Mich 152; 262 NW2d 9 (1978).

Suit may be maintained against each of several bars that sold liquor to an intoxicated person. *Rizzo v Kretschmer*, 389 Mich 363; 207 NW2d 316 (1973). However, the statute provides that: "There shall be a rebuttable presumption that a retail licensee, other than the retail licensee who last sold, gave, or furnished alcoholic liquor to the minor or the visibly intoxicated person, has not committed any act giving rise to a cause of action under subsection (3)." MCL 436.1801(8).

An owner of an establishment is liable for unlawful sales made by employees even if the sale was not authorized or was contrary to instructions. *Dice v Sherberneau*, 152 Mich 601; 116 NW 416 (1908).

Under prior law, a surety could be sued under the Dram Shop Act. *Browder v International Fidelity Insurance Co*, 413 Mich 603; 321 NW2d 668 (1982). While the 1986 amendments (MCL 436.22a(6)) prohibit naming a surety or insurer as a defendant, a new section was added permitting suit, including recovery of punitive damages, where an insurer fails to pay a judgment against the insured within 90 days. MCL 436.22e. (See now MCL 436.1803(4), .1809.)

One with only a security interest in assets of a bar who becomes a co-receiver after an unlawful sale cannot be sued under the Dram Shop Act. *Ray v Taft*, 125 Mich App 314; 336 NW2d 469 (1983).

A plaintiff must name and retain in the action the alleged intoxicated person or minor who caused the injury. MCL 436.1801(5). (The name-and-retain provision is excused under certain circumstances. *Green v Martin*, 455 Mich 342; 565 NW2d 813 (1997).) Settlements or agreements to limit recovery preclude a suit against the dram shop defendant. *Putney v Haskins*, 414 Mich 181; 324 NW2d 729 (1982), reh denied, 414 Mich 1111 (1982); *Riley v Richards*, 428 Mich 198; 404 NW2d 618 (1987).

Private individuals who supply alcoholic liquor to social guests are not liable under the Dram Shop Act, but are subject to common-law negligence liability based on violation of section 33 (now section 701, MCL 436.1701) of the Michigan Liquor Control Act, MCL 436.1101 et seq., if they serve liquor to a minor. *Longstreth v Gensel*, 423 Mich 675; 377 NW2d 804 (1985). However, a common-law negligence action based on violation of section 26c(2) of the Michigan Liquor Control Act (now section 913(2) of the Michigan Liquor Control Code of 1998) may not be maintained against an unlicensed banquet facility operator who allows liquor consumption on the premises. *Gardner v Wood*, 429 Mich 290; 414 NW2d 706 (1987).

III. Who Has a Cause of Action Under the Act?

An individual (or the spouse, child, parent, or guardian of an individual) who sustains injury or damage as a result of the conduct of a minor or visibly intoxicated person to whom liquor has been unlawfully sold has a cause of action under the act. However, 1986 PA 176 made a substantial departure from prior law regarding claims for damages by relatives of a visibly intoxicated person who has injured himself or herself.

Prior law allowed a suit by a relative of an adult intoxicated person for damages such as loss of support, loss of society and companionship, etc. caused by the intoxicated person injuring himself or herself. *O'Dowd v General Motors Corp*, 419 Mich 597; 358 NW2d 553 (1984); *Eddy v Courtright*, 91 Mich 264, 51 NW 887 (1892). The amended Dram Shop Act expressly excludes actions by relatives for these kinds of damages:

> … and a person shall not have a cause of action pursuant to this section for the loss of financial support, services, gifts, parental training, guidance, love, society, or companionship of the alleged visibly intoxicated person.

MCL 436.1801(9). (The constitutionality of this limitation on the types of damages that relatives may recover has been upheld. *Roy v Rau Tavern, Inc*, 167 Mich App 664; 423 NW2d 54 (1988).) The amendment, however, does not preclude an action by a relative of the alleged visibly intoxicated person for other kinds of damages, or for personal injury to the relative that was caused by the intoxicated person. See *Podbielski v Argyle Bowl, Inc*, 392 Mich 380; 220 NW2d 397 (1974).

Cases construing the prior statute permitted actions by relatives of minors for damages, including loss of support, caused by the minor injuring himself or herself. *La Blue v Specker*, 358 Mich 558; 100 NW2d 445 (1960). However, the present statute has been construed to preclude such actions by relatives of an intoxicated minor. *LaGuire v Kain*, 440 Mich 367; 487 NW2d 389 (1992).

Visibly Intoxicated Person and Minor

The 1986 amendments to the Dram Shop Act (recodified in 1998) explicitly exclude the alleged visibly intoxicated person from those who have a cause of action against a licensee. MCL 436.1801(9). This codifies prior case law. *Malone v Lambrecht*, 305 Mich 58; 8 NW2d 910 (1943) (intoxicated person injured himself falling down flight of stairs in bar); *Brooks v Cook*, 44 Mich 617; 7 NW 216 (1880) (opinion by Justice Cooley; plaintiff who had pockets picked while drunk was denied recovery under dram shop statute). But see *Heikkala v Isaacson*, 178 Mich 176, 144 NW 508 (1913) (recovery possible where innocent intoxicated person injured by another intoxicated person).

Subsection (3) of MCL 436.1801, which provides a cause of action to "an individual who suffers damage or who is personally injured by a minor," has been construed to preclude an action by the imbibing minor or the minor's estate. *LaGuire*. However, the minor does have a common-law negligence action against a social host. *Longstreth v Gensel*, 423 Mich 675, 696; 377 NW2d 804 (1985).

IV. Defenses to a Cause of Action Under the Act

All Defenses of the Visibly Intoxicated Person or Minor Available to Licensee

A 1972 amendment to the Dram Shop Act, 1972 PA 196, allowed the licensee to raise "all factual defenses open to the alleged intoxicated person or minor." Comparative negligence is a factual defense based on causation; where plaintiff sues a licensee in a dram shop action and sues an intoxicated person on a negligence theory, the intoxicated person's defense that plaintiff was contributorily negligent is equally available to the licensee. *Lyman v Bavar Co*, 136 Mich App 407; 356 NW2d 28 (1984). (Thus, the licensee is entitled to have the judgment against it reduced by the percentage of plaintiff's negligence.) A licensee is also entitled to have a judgment against it reduced by the percentage of the plaintiff's fault in an altercation with the defendant to whom the illegal sale was made. *Brown v Swartz Creek Memorial Post 3720—Veterans of Foreign Wars, Inc*, 214 Mich App 15; 542 NW2d 588 (1995).

1986 PA 176 (recodified in 1998) broadened defenses available to licensees by deleting the word "factual": "All defenses of the alleged visibly intoxicated person or the minor shall be available to the licensee." MCL 436.1801(7). The most probable and significant impact of this change is to allow the licensee to assert the no-fault threshold defenses.

The 1986 amendment giving the licensee "all" defenses available to the alleged visibly intoxicated person or minor also eliminates the potential, which existed under prior law, for the licensee to be liable to a plaintiff injured in an affray even though the intoxicated person would escape liability because he or she acted in self-defense. See *Archer v Burton*, 91 Mich App 57, 61; 282 NW2d 833 (1979); see also *Doty v Postal*, 87 Mich 143; 49 NW 534 (1891); *Morgan v Backseat Saloon Country Cousin, Inc*, 114 Mich App 89; 318 NW2d 617 (1982). Under the statute, a successful defense of self-defense by an alleged intoxicated person will eliminate any liability of the licensee.

Noninnocent Person—Actively Contributing to Intoxication

One who actively contributes to the intoxication of a person and is subsequently injured by that person is precluded from recovery. *Kangas v Suchorski*, 372 Mich 396; 126 NW2d 803 (1964); *Morton v Roth*, 189 Mich 198; 155 NW 459 (1915). These noninnocent person cases have usually involved purchasing liquor for or supplying liquor to the intoxicated person, but in *Larrow v Miller*, 216 Mich App 317; 548 NW2d 704 (1996), the court determined that plaintiff's decedent who supplied defendant with an illegal drug (marijuana cigarettes) actively contributed to defendant's intoxication. The mere act of buying drinks for an adult before he or she becomes visibly intoxicated does not as a matter of law make that person a noninnocent party. *Arciero v Wicks*, 150 Mich App 522; 389 NW2d 116 (1986). (The court distinguished the case of minors for whom supplying alcohol at any time is illegal.) Where the plaintiff merely drinks liquor with the intoxicated person, that is not the active participation in the actor's intoxication that would preclude recovery. *Dahn v Sheets*, 104 Mich App 584; 305 NW2d 547 (1981), lv denied, 412 Mich 928 (1982).

The Michigan Supreme Court has rejected the argument that in light of the adoption of comparative negligence, contributing to the intoxication should no longer be a bar but rather should be a partial defense to a dram shop action. *Craig v Larson*, 432 Mich 346; 439 NW2d 899 (1989). This noninnocent party rule applies equally to minors as to adults who actively participate in the intoxication of the tortfeasor. Id.

Identification Card As Defense to Sale to Minor

Under subsection (7) of the statute (MCL 436.1801(7)), it is a defense to an action based on unlawful sale to a minor that the defendant retail licensee (agent or employee) demanded and was shown a Michigan driver's license or official state personal identification card, appearing to be genuine and showing that the minor was at least 21 years of age. In a case where this defense is proved but where the minor also happened to be visibly intoxicated at the time of the sale, the plaintiff would presumably have the option of showing an unlawful sale based on the fact of visible intoxication (as well as the other elements of the action) and succeed despite the defense.

V. Damages and Allocation of Fault

Dramshop actions against retail licensees are subject to the provisions of the Revised Judicature Act. MCL 436.1801(11). The sections of the Revised Judicature Act that require specific findings of past and future damages and types of damages (MCL 600.6305) and postverdict adjustments by the trial judge (MCL 600.6306) apply to dramshop actions. *Weiss v Hodge*, 223 Mich App 620; 567 NW2d 468 (1997), lv den, 457 Mich 886; 586 NW2d 231 (1998). If there are multiple defendants, including a dramshop defendant, the allocation of fault provisions of MCL 600.6304 apply. *Brown*; see also *Weiss*, in which the court of appeals upheld the jury's allocation of a greater percentage of fault to the licensee and lesser fault to the intoxicated defendant.

Prior to 1972, the Dram Shop Act allowed for recovery of "damages actual and exemplary." The word "exemplary" was deleted and the current version of the statute provides for "actual damages in a sum of not less than $50." MCL 436.1801(3). For a discussion of actual and exemplary damages as they

pertain to mental distress and other injury to feelings, see *Hink v Sherman*, 164 Mich 352; 129 NW 732 (1911); *Veselenak v Smith*, 414 Mich 567; 327 NW2d 261 (1982).

VI. Dram Shop Action As Exclusive Remedy for Unlawful Sale

The 1986 amendments to the Dram Shop Act (recodified in 1998) expressly provide that it is the "exclusive remedy for money damages against a licensee arising out of the selling, giving, or furnishing of alcoholic liquor." MCL 436.1801(10). This was previously well recognized in case law but not embodied in the statute. See, e.g., *Brownier v International Fidelity Insurance Co*, 413 Mich 603; 321 NW2d 668 (1982); *Verdusco v Miller*, 138 Mich App 702; 360 NW2d 281 (1984); *Rowan v Southland Corp*, 90 Mich App 61; 282 NW2d 243 (1979).

The exclusive remedy provision precludes an injured intoxicated person from bringing a common-law action for gross negligence, willful and wanton, or intentional misconduct against a liquor licensee, notwithstanding the fact that the licensee knew that the person was an alcoholic or intoxicated to the point of helplessness. *Jackson v PKM Corp*, 430 Mich 262; 422 NW2d 657 (1988).

The Dram Shop Act is also the exclusive remedy where a licensee furnishes alcoholic beverages to an employee and the common law does not recognize a separate claim for negligent supervision of the employee to whom alcohol has been served. *Millross v Plum Hollow Golf Club*, 429 Mich 178; 413 NW2d 17 (1987).

But the exclusive remedy provision does not preclude common-law actions against the dram shop defendant for unlawful or negligent conduct other than the selling, giving, or furnishing of alcoholic liquor. *Manuel v Weitzman*, 386 Mich 157; 191 NW2d 474 (1971) (count in negligence against bar owner for failure to keep premises safe for business invitee may be maintained in addition to dram shop count).

M Civ JI 75.01 Dram Shop—Explanation of Statute

We have a state law known as the Dram Shop Act which provides that persons who are injured or damaged by a minor or a visibly intoxicated person may, under certain circumstances, receive damages from the person who sold, gave or furnished the alcoholic liquor.

Note on Use

The instructions in this chapter should be given only where there is some evidence of a Dram Shop Act violation and that the injured party is within the class intended to be protected by the statute.

History

M Civ JI 75.01 was SJI 27.01. Amended May 1982, May 1988.

M Civ JI 75.02 Dram Shop—Definitions

"Intoxicated"

A person is "intoxicated" when, as a result of drinking alcoholic liquor, his or her mental or physical senses are impaired.

"Visibly Intoxicated"

A person is "visibly intoxicated" when his or her intoxication would be apparent to an ordinary observer.

"Alcoholic Liquor"

"Alcoholic liquor" includes beer and wine as well as other alcoholic beverages.

Note on Use

The court may wish to precede this instruction with M Civ JI 10.01 Definitions Introduced.

Comment

In *Lafler v Fisher*, 121 Mich 60, 62–63; 79 NW 934, 935 (1899), the Michigan Supreme Court approved the following definition of "intoxication," which had been given by the trial court:

When it is apparent that a person is under the influence of liquor, or when his manner is unusual or abnormal, and his inebriated condition is reflected in his walk or conversation, when his ordinary judgment and common sense are disturbed, or his usual will power is temporarily suspended, when these or similar symptoms result from the use of liquors, and are manifest, then, within the meaning of the statute, the person is intoxicated, and anyone who makes a sale of liquor to such person violates the law of the State. It is not necessary that the person be so-called "dead drunk", or hopelessly intoxicated; it is enough that his senses are obviously destroyed or distracted by the use of intoxicating liquors.

See also *Groth v DeGrandchamp*, 71 Mich App 439; 248 NW2d 576 (1976), where the Court of Appeals approved the trial court's use of the Lafler instruction.

The thrust of the instruction in *Lafler* is that a person is intoxicated when, as a result of drinking liquor, there is an impairment of his or her mental or physical senses.

Other than actions involving sales to minors, the Dram Shop Act requires injury or damage by an intoxicated person by reason of an unlawful selling, giving, or furnishing of alcoholic liquor to the "visibly" intoxicated person. A person is visibly intoxicated when his or her intoxication would be apparent to an ordinary observer. *Miller v Ochampaugh*, 191 Mich App 48; 477 NW2d 105 (1991); *Heyler v Dixon*, 160 Mich App 130; 408 NW2d 121 (1987).

The definition of alcoholic liquor is found in the statute. MCL 436.1105(2).

History

M Civ JI 75.02 was SJI 27.02. Amended May 1988.

M Civ JI 75.11 Dram Shop—Sale to Minor: Burden of Proof

The plaintiff has the burden of proving each of the following:

(a) that [*name of plaintiff*] was [injured / damaged] by [*name of minor*];

(b) that [*name of defendant / name of agent / name of employee*] *(directly) [sold / gave / furnished] alcoholic liquor to [*name of minor*];

(c) that [*name of minor*] was under the lawful drinking age of 21 years at the time [he / she] was [sold / given / furnished] alcoholic liquor by [*name of defendant / name of agent / name of employee*];

(d) that the [selling / giving / furnishing] of the alcoholic liquor was a proximate cause of [*name of plaintiff*]'s [injury / damage].

The defendant has the burden of proving the defense(s) that:

(e) plaintiff purchased for or gave or furnished alcoholic liquor to [*name of minor*];

(f) †[*name of defendant / name of agent / name of employee*] demanded and was shown [a Michigan driver's license / an official state personal identification card] that appeared to be genuine and showed that [*name of minor*] was 21 years of age or older.

If [*name of minor*] was visibly intoxicated at the time of the [selling / giving / furnishing] of alcoholic liquor, then it is not a defense that [*name of defendant / name of agent / name of employee*] demanded and was shown [a Michigan driver's license / an official state personal identification card] that appeared to be genuine and showed that [*name of minor*] was 21 years of age or older.

The court will provide you with a Special Verdict Form. Your answers to the questions on the Special Verdict Form will provide the basis on which this case will be resolved.

Note on Use

*If there is an issue whether the retail licensee directly sold, gave, or furnished alcoholic liquor to the minor, the word "directly" should be read to the jury and the trial judge may give an additional instruction on the meaning of "directly." See the Comment below.

†The statute (MCL 436.1801(7)) does not define "official state personal identification card," e.g., other state or foreign driver's license, etc.

All defenses of the minor or alleged visibly intoxicated person are available to the licensee. MCL 436.1801(7). See Introduction to this chapter, part IV.

Comment

"Unlawful sale" to a minor may be interpreted with reference to subsection (2) of MCL 436.1801, which says that a retail licensee shall not directly sell, give, or furnish alcoholic liquor to a minor. (The pre-1986 statute prohibited indirect as well as direct sales to minors.) If indirect sale means a situation where a licensee sells to a buyer who then furnishes the liquor to a minor, the licensee may not be liable under the present statute if the minor became intoxicated and injured someone. This may represent a departure from case law that recognizes the potential liability of a licensee who knew or had reason to know that the purchase of liquor was being made for the minor who ultimately caused the injury. *Maldonado v Claud's, Inc*, 347 Mich 395; 79 NW2d 847 (1956); *Meyer v State Line Super Mart, Inc*, 1 Mich App 562; 137 NW2d 299 (1965); *Verdusco v Miller*, 138 Mich App 702; 360 NW2d 281 (1984).

History

M Civ JI 75.11 was added May 1988 to replace M Civ JI 75.03 and 75.04. Amended November 1989, January 2001.

M Civ JI 75.12 Dram Shop—Sale to Visibly Intoxicated Person: Burden of Proof

The plaintiff has the burden of proving each of the following:

(a) that [*name of plaintiff*] was [injured / damaged] by [*name of alleged intoxicated person*];

(b) that [*name of alleged intoxicated person*] was visibly intoxicated at the time [he / she] was [sold / given / furnished] alcoholic liquor by *[name of defendant / name of agent / name of employee*];

(c) that the [selling / giving / furnishing] of the alcoholic liquor was a proximate cause of [*name of plaintiff*]'s [injury / damage].

The defendant has the burden of proving the defense that plaintiff actively contributed to the intoxication of [*name of alleged intoxicated person*].

The court will provide you with a Special Verdict Form. Your answers to the questions on the Special Verdict Form will provide the basis on which this case will be resolved.

Note on Use

All defenses of the minor or alleged visibly intoxicated person are available to the licensee. MCL 436.1801(7). See Introduction to this chapter, part IV.

Subsection (2) of the statute (MCL 436.1801) prohibits both direct and indirect sales (giving or furnishing) to visibly intoxicated persons. This instruction and the corresponding form of verdict, M Civ JI 190.02 Form of Verdict: Dram Shop—Sale to Visibly Intoxicated Person, may have to be modified if there is an issue whether the sale, giving, or furnishing was indirect.

History

M Civ JI 75.12 was added May 1988 to replace M Civ JI 75.03 and 75.04. Amended November 1989, January 2001.

M Civ JI 75.13 Dram Shop—Contributing to Occurrence Not a Defense

There has been evidence that [plaintiff / plaintiff's spouse / [other]] was [*description of conduct*]. I instruct you that such conduct is not a defense to a claim under the Dram Shop Act.

Note on Use

This instruction should not be used to describe conduct that is a defense to a dram shop action. See Comment in Section IV of Introduction, Defenses to a Cause of Action Under the Act.

In cases where there is evidence of conduct by the plaintiff, plaintiff's spouse, or other person that would not be a defense, this instruction should be used to distinguish such conduct. See the Comment below.

Comment

Prior case law held that the licensee cannot raise a defense that the intoxicated person was contributorily negligent in actions that are brought by a relative of the intoxicated person for damages (i.e., loss of support, consortium) caused by the intoxicated person injuring himself or herself. *Genesee Merchants Bank & Trust Co v Bourrie*, 375 Mich 383; 134 NW2d 713 (1965); *James v Dixon*, 95 Mich App 527; 291 NW2d 106 (1980). Other wrongdoing by the alleged intoxicated person has also been held not to be a defense. *Weatherbee v Byam*, 160 Mich 600; 125 NW 686 (1910) (plaintiff's husband unlawfully fishing when he drowned).

Under the 1986 amendments to the Dram Shop Act, claims for these types of damages have been eliminated for relatives of the alleged intoxicated person. But insofar as relatives of intoxicated minors may still sue for such damages, the licensee does not have a defense that the minor was contributorily negligent.

History

M Civ JI 75.13 was added May 1988 to replace M Civ JI 75.05.

Chapter 80: Dog Bite Actions

Introduction 403
M Civ JI 80.01 Dog Bite Statute—Explanation 404
M Civ JI 80.02 Dog Bite Statute—Burden of Proof 405
M Civ JI 80.03 Dog Bite Statute—Definition of Provocation 406
M Civ JI 80.04 Dog Bite Statute—Lawfully on Property 407
M Civ JI 80.05 Dog Bite Statute—Lawfully on Property of Dog Owner 408

Introduction

There are three alternative theories of liability for dog bites recognized in Michigan:

1. Common law, based upon negligence. See MCL 287.288; *Grummel v Decker*, 294 Mich 71 (1940); *Knowles v Mulder*, 74 Mich 202 (1889).

2. Common law, based on strict liability. *Trager v Thor*, 445 Mich 95 (1994); *Hiner v Mojica*, 271 Mich App ___ (2006).

3. Statutory, imposing strict liability upon the owner. See MCL 287.351; *Nicholes v Lorenz*, 396 Mich 53 (1976); *Cox v Hayes*, 34 Mich App 527 (1971); *Hill v Sacka*, 256 Mich App 443 (2003).

Provocation is the only defense to an action maintained under the dog bite statute. Comparative negligence principles and MCL 600.2959 are not applicable. MCL 600.2957 and MCL 600.6304, concerning allocation of fault, also do not apply. *Hill*, *supra*.

M Civ JI 80.01 Dog Bite Statute—Explanation

We have a state statute that provides that the owner of a dog that without provocation bites a person while that person is [on public property / lawfully on private property] is liable for any damages suffered by the person bitten, regardless of the previous viciousness of the dog or whether the owner knew of that viciousness.

Note on Use

As stated above, principles of comparative negligence and allocation of fault do not apply.

History

Added February 1981. Amended September 2006.

M Civ JI 80.02 Dog Bite Statute—Burden of Proof

The plaintiff has the burden of proof on each of the following matters:

(a) that the plaintiff [was injured by / sustained damage from] a dog bite,

(b) that the plaintiff was [on public property / lawfully on private property],

(c) that the biting was without provocation, and

(d) that the defendant was the owner of the dog.

Your verdict will be for the plaintiff if you decide that all of these have been proved.

Your verdict will be for the defendant if you decide that any of these has not been proved.

History

Added February 1981. Amended September 2006.

M Civ JI 80.03 Dog Bite Statute—Definition of Provocation

When I say "provocation," I mean any action or activity, whether intentional or unintentional, which would reasonably be expected to cause a dog in similar circumstances to react in a manner similar to that shown by the evidence.

Comment

In *Brans v Extrom*, 266 Mich App 216 (2005), the Court of Appeals held a person can commit unintentional acts that are sufficiently provocative to relieve a dog owner of liability under MCL 287.351. The Court held the trial court did not err in giving essentially the above instruction.

History

Added September 2006.

M Civ JI 80.04 Dog Bite Statute—Lawfully on Property

A person is lawfully on the property unless the person has gained lawful entry upon the premises for the purpose of an unlawful or criminal act or is a trespasser.

Comment

If there is a dispute as to the plaintiff's status, the Court would then review the definitions of licensee, invitee, or trespasser as defined in MCJI 19.01 and draft a specific instruction for the fact pattern in dispute.

History

Added September 2006.

M Civ JI 80.05 Dog Bite Statute—Lawfully on Property of Dog Owner

A person is lawfully on the property of the owner of the dog if the person is on the owner's property in the performance of any duty imposed upon [him/her] by the laws of this state or by the laws or postal regulations of the United States.

Note on Use

This instruction should be used only if the incident occurred on the property of the dog's owner.

History

Added September 2006.

Chapter 85: Emergency Vehicles

M Civ JI 85.01 Exemption of Emergency Vehicles from Certain Statutory Regulations 410
M Civ JI 85.02 Requirement of Due Care by Operator of an Emergency Vehicle..... 411

M Civ JI 85.01 Exemption of Emergency Vehicles from Certain Statutory Regulations

It is claimed that [plaintiff / defendant] was *(contributorily) negligent in that [he / she] [*nature of violation*]. We have a state statute which provides that [*Quote or paraphrase the applicable part of the statute as construed by the courts*].

Note on Use

This instruction should be given when one party claims an exemption from a statutory requirement as an emergency vehicle, or vehicle at work on a highway, under Section 603, 632, or 653 of the Michigan Vehicle Code, or MCL 333.20938. M Civ JI 85.02 must also be given.

*Add the word "contributorily" if appropriate.

Comment

Sections 603, 632 and 653 of the Michigan Vehicle Code, MCL 257.603, .632, .653, and MCL 333.20938 exempt authorized emergency vehicles from statutory requirements concerning parking, standing, stoplights, stop signs, prima facie speed limits, direction of movement, turning in specified directions, and right-of-way, under certain circumstances and upon displaying or sounding certain warning devices. Vehicles at work on a highway are also exempted from certain of the foregoing statutes.

History

M Civ JI 85.01 was SJI 71.01.

M Civ JI 85.02 Requirement of Due Care by Operator of an Emergency Vehicle

This statute excuses the claimed [*nature of violation*] by [plaintiff / defendant] if [plaintiff / defendant] complied with the provisions of the statute which I have just read to you.

However, the [plaintiff / defendant] must always use that care which a reasonably careful [*description of operator*] would use under the circumstances which you find existed in this case.

Note on Use

This instruction must be given whenever M Civ JI 85.01 is given. If there is a question of fact as to whether the vehicle is "authorized," or whether it is "responding to an emergency call," etc., such issue must be covered by an additional instruction to be drafted for the particular case.

Comment

Such an instruction has been approved in conjunction with the reading of the statute by the Court to the jury in *McKay v Hargis*, 351 Mich 409; 88 NW2d 456 (1958). Other Michigan Supreme Court opinions have used similar language. See *Holser v City of Midland*, 330 Mich 581; 48 NW2d 208 (1951); *Kalamazoo v Priest*, 331 Mich 43; 49 NW2d 52 (1951).

History

M Civ JI 85.02 was SJI 71.02.

Chapter 90: Condemnation

Introductory Directions to the Court 413
M Civ JI 90.01 Pretrial Instruction: Nature of Condemnation Action 415
M Civ JI 90.02 Power of Eminent Domain 417
M Civ JI 90.03 Burden of Proof [*Recommend No Instruction*] 418
M Civ JI 90.04 Absence of Fault 419
M Civ JI 90.05 Just Compensation—Definition 420
M Civ JI 90.06 Market Value—Definition 421
M Civ JI 90.07 Special Purpose Property 422
M Civ JI 90.08 Assessed Value 423
M Civ JI 90.09 Highest and Best Use 424
M Civ JI 90.10 Possibility of Rezoning 425
M Civ JI 90.11 Refusal to Rezone 426
M Civ JI 90.12 Partial Taking 427
M Civ JI 90.13 Date of Valuation 428
M Civ JI 90.14 Date of Valuation: Early Date of Taking 429
M Civ JI 90.15 Effect of Proposed Public Improvement 430
M Civ JI 90.16 Comparable Market Transactions 431
M Civ JI 90.17 Easements 433
M Civ JI 90.18 Total Taking 434
M Civ JI 90.19 Benefits 435
M Civ JI 90.20 Compensation for Fixtures; Definition 436
M Civ JI 90.21 Fixtures: Election to Remove—Compensation 437
M Civ JI 90.22 Effect of View 438
M Civ JI 90.22A Valuation Witnesses 439
M Civ JI 90.23 Range of Testimony 440
M Civ JI 90.24 Mechanics of Verdict 441
M Civ JI 90.30 Going Concern 442
M Civ JI 90.31 Business Interruption 443

Introductory Directions to the Court

The following are standard jury instructions for cases involving the taking of private property by government agencies or utility companies. The taking can occur either (1) through formal action instituted by the condemning authority (de jure) or (2) by extrajudicial conduct on the part of the condemning authority which is inimical to an owner's property interests to such an extreme degree as to constitute a constitutional de facto taking giving rise to an inverse condemnation action. It should be noted at the outset that all eminent domain cases, except inverse condemnation cases, are commenced pursuant to a particular enabling statute which may have some bearing on the jury instructions to be given.

These standard instructions and any supplementary instructions should be preceded by the applicable standard instructions dealing with credibility (M Civ JI 4.01–4.12) and the usual cautionary instructions (M Civ JI 3.01–3.15).

These jury instructions do not purport to cover all situations which may occur in an eminent domain case. There are many issues which do not arise with sufficient frequency to warrant inclusion in a set of standard jury instructions, yet are important or even crucial in those few cases in which they do arise. In addition, eminent domain is a rapidly changing area in which new issues may arise which are not covered by these jury instructions. In either case it is appropriate for additional jury instructions to be given by the trial judge. Some of the issues which arise infrequently and are therefore not covered by these jury instructions are listed below with some important cases. This list does not purport to be exhaustive.

Cost to Cure:

In re Widening of Bagley Avenue, 248 Mich 1; 226 NW 688 (1929)

Detroit v Loula, 227 Mich 189; 198 NW 837 (1924)

Necessity:

Grand Rapids Board of Education v Baczewski, 340 Mich 265; 65 NW2d 810 (1954)

In re Huron-Clinton Metropolitan Authority's Petition, 306 Mich 373; 10 NW2d 920 (1943)

Lansing v Jury Rowe Realty Co, 59 Mich App 316; 229 NW2d 432 (1975)

Leasehold Interest:

Pierson v H R Leonard Furniture Co, 268 Mich 507; 256 NW 529 (1934)

Frustration of Plans for Business Expansion—Loss of Potential Use:

State Highway Commission v Great Lakes Express Co, 50 Mich App 170; 213 NW2d 239 (1973)

Scope of the Parcel in Partial Taking Cases:

State Highway Commissioner v Snell, 8 Mich App 299; 154 NW2d 631 (1967)

Port Huron & S W R Co v Voorheis, 50 Mich 506; 15 NW 882 (1883)

In re Slum Clearance, 331 Mich 714; 50 NW2d 340 (1951)

Denial of Access:

Pearsall v Board of Supervisors, 74 Mich 558; 42 NW 77 (1889)

Violation of Restrictive Covenants:

Bales v State Highway Commission, 72 Mich App 50; 249 NW2d 158 (1976)

Johnstone v Detroit, GH & M R Co, 245 Mich 65; 22 NW 325 (1928)

Allen v Detroit, 167 Mich 464; 133 NW 317 (1911)

Vacation of an Alley:

Forster v Pontiac, 56 Mich App 415; 224 NW2d 325 (1974)

Diversion of Traffic:

State Highway Commissioner v Watt, 374 Mich 300; 132 NW2d 113 (1965)

State Highway Commissioner v Gulf Oil Corp, 377 Mich 309; 140 NW2d 500 (1966)

Special Adaptability of Property to Use for Which It Is Being Taken:

Allegan v Vonasek, 261 Mich 16; 245 NW 557 (1932)

Loss of Light, Air and View:

Gerson v Lansing, 250 Mich 587; 231 NW 125 (1930)

Noise:

Boyne City, G & A R Co v Anderson, 146 Mich 328; 109 NW 429 (1906)

Lost Rentals:

Muskegon v DeVries, 59 Mich App 415; 229 NW2d 479 (1975)

See 2 Michigan Municipal Law (ICLE 1980), ch 13, for further discussion and sources.

History

Amended September 1998.

M Civ JI 90.01 Pretrial Instruction: Nature of Condemnation Action

This is a case in eminent domain, which means the power of the government to take private property for a public purpose upon payment of just compensation to the owner of the property taken. Under the constitution and laws of this state, all private property is held subject to this right of eminent domain.

The right of eminent domain is exercised through proceedings commonly called a condemnation action. This is such an action.

By your verdict, you will decide the disputed [issue / issues] of fact, which in this case [concerns / concern] *(the necessity for the project and) the just compensation to be paid to the [owner / owners] for the property taken.

There are three matters that make this case different from most trials:

†(First, this trial involves several parcels of property owned by several landowners named in the action. All of these parcels are being tried together, but each is separate from the other and each constitutes a separate trial as to each individual parcel and owner. The trials are consolidated for convenience and to save time and expense.)

†(Second, you, as jurors in this case, may make a personal inspection of the property involved in this action. The purpose of the view is to enable you, the jurors, to better understand the evidence and testimony concerning the property. You must not visit or view the property unless and until the Court directs you to do so.)

†(Third, because you will hear witnesses who will testify concerning values of property involving numerous mathematical computations, you will be permitted to take notes as the various witnesses testify. Pads and pencils will be provided for you.)

Note on Use

*The phrase in parentheses should be read to the jury only if necessity for the taking is an issue in the case.

The name of the appropriate condemning authority may be substituted for the term "government."

†Each of the paragraphs in parentheses should be included in the instruction only if applicable.

This is a pretrial instruction which should be read after the jurors are sworn.

Comment

See US Const, Am V; Const 1963, art 10, § 2.

History

M Civ JI 90.01 was added February 1, 1981.

M Civ JI 90.02 Power of Eminent Domain

This case is one in eminent domain, which means the power of the government to take private property for a public purpose upon payment of just compensation to the owner of the property taken. Under the constitution and laws of this state, all private property, real and personal, and any interest therein, is held subject to this right of eminent domain.

The right of eminent domain is exercised through proceedings commonly called a condemnation action. This is such an action.

Note on Use

The name of the appropriate condemning authority may be substituted for the word "government."

History

M Civ JI 90.02 was added February 1, 1981.

M Civ JI 90.03 Burden of Proof [*Recommend No Instruction*]

Comment

The committee recommends that no instruction on general burden of proof be given in condemnation cases. There is strictly speaking no general burden of proof applicable to all issues in all condemnation proceedings.

Neither party has the burden of proof on the issue of damages, except where benefits to the remainder are claimed by the government.

If the government claims an offset for benefits under express statutory authority, it has the burden of proving the existence of such benefits. MCL 213.73(4).

There may be other special issues where there is an express burden of proof, by statute or otherwise.

History

M Civ JI 90.03 was added February 1, 1981.

M Civ JI 90.04 Absence of Fault

The property owners in this case are not in any way at fault, but are in the position of owning property which the [*name of condemning authority*] has determined to take for public use.

History

M Civ JI 90.04 was added February 1, 1981.

M Civ JI 90.05 Just Compensation—Definition

Whenever private property is taken for a public purpose, the Constitution commands that the owner shall be paid just compensation.

Just compensation is the amount of money which will put the person whose property has been taken in as good a position as the person would have been in had the taking not occurred. The owner must not be forced to sacrifice or suffer by receiving less than full and fair value for the property. Just compensation should enrich neither the individual at the expense of the public nor the public at the expense of the individual.

The determination of value and just compensation in a condemnation case is not a matter of formula or artificial rules, but of sound judgment and discretion based upon a consideration of all of the evidence you have heard and seen in this case.

*(In determining just compensation, you should not consider what the *[name of condemning authority*] has gained. The value of the property taken to the [*name of condemning authority*] and to its customers is not to be considered in any way.)

Note on Use

*The paragraph in parentheses should be used in public utility condemnation cases.

Comment

See *State Highway Commissioner v Eilender*, 362 Mich 697; 108 NW2d 755 (1961); *In re Grand Haven Highway*, 357 Mich 20; 97 NW2d 748 (1959); *Fitzsimons & Galvin, Inc v Rogers*, 243 Mich 649; 220 NW 881 (1928); *Consumers Power Co v Allegan State Bank*, 20 Mich App 720; 174 NW2d 578 (1969).

History

M Civ JI 90.05 was added February 1, 1981. Amended October 1981.

M Civ JI 90.06 Market Value—Definition

Your award must be based upon the market value of the property as of the date of taking.

By "market value" we mean:

(a) the highest price estimated in terms of money that the property will bring if exposed for sale in the open market with a reasonable time allowed to find a purchaser buying with knowledge of all of the uses and purposes to which it is adapted and for which it is capable of being used

(b) the amount which the property would bring if it were offered for sale by one who desired, but was not obliged, to sell, and was bought by one who was willing, but not obliged, to buy

(c) what the property would bring in the hands of a prudent seller, at liberty to fix the time and conditions of sale

(d) what the property would sell for on negotiations resulting in sale between an owner willing, but not obliged, to sell and a willing buyer not obliged to buy

(e) what the property would be reasonably worth on the market for a cash price, allowing a reasonable time within which to effect a sale.

Note on Use

If there is evidence that the property is a special purpose property, M Civ JI 90.07 should be used in addition to this instruction.

Comment

See *Consumers Power Co v Allegan State Bank*, 20 Mich App 720, 744–745; 174 NW2d 578, 591 (1969).

History

M Civ JI 90.06 was added February 1, 1981.

M Civ JI 90.07 Special Purpose Property

There are certain kinds of properties for which the market value standard is, for one reason or another, inappropriate. These properties are referred to as "special purpose" properties.

The adaptability of the property sought to be taken in eminent domain for a special purpose or use may be considered as an element of value. If the property possesses a special value to the owner which can be measured in money, the owner has a right to have that value considered in the estimate of compensation and damages.

While market value is always the ultimate test, it occasionally happens that the property taken is of a class not commonly bought and sold, such as a church or a college or a cemetery or the fee of a public street, or some other piece of property which may have an actual value to the owner but which under ordinary conditions the owner would be unable to sell for an amount even approximating its real value. As market value presupposes a willing buyer, the usual test breaks down in such a case, and hence it is sometimes said that such property has no market value. In one sense this is true; but it is certain that for that reason it cannot be taken for nothing. From the necessity of the case the value must be arrived at from the opinions of well-informed persons, based upon the purposes for which the property is suitable. This is not taking the "value in use" to the owner as distinguished from the market value. What is done is merely to take into consideration the purposes for which the property is suitable as a means of ascertaining what reasonable purchasers would in all probability be willing to give for it, which in a general sense may be said to be the market value.

If you determine that a property is, in fact, a "special purpose" property, you should consider that fact in determining the value of the property.

The value of a "special purpose" property is to be determined by what a purchaser who desired to buy such a "special purpose" property, but did not have to have it, would be willing to give for it, and what a seller who had such a "special purpose" property and desired to sell it, but did not have to sell it, would be willing to take for it.

Comment

See *In re Grand Haven Highway*, 357 Mich 20; 97 NW2d 748 (1959).

History

M Civ JI 90.07 was added February 1, 1981.

M Civ JI 90.08 Assessed Value

The owners of certain parcels have introduced in evidence the assessed values placed on the property by the [*name of assessing authority*] for real estate taxes. The assessed values are not controlling, but you have a right to consider these assessments in connection with all other evidence in arriving at the market value of the property.

The law requires that assessments for real estate tax purposes be made at 50 percent of the true cash value.

Note on Use

If the property owner has introduced evidence of the condemning authority's assessed valuation of the property, this instruction should be given.

Comment

See *In re Memorial Hall Site*, 316 Mich 360; 25 NW2d 516 (1947); *Detroit v Sherman*, 68 Mich App 494; 242 NW2d 818 (1976); *Muskegon v Berglund Food Stores, Inc*, 50 Mich App 305; 213 NW2d 195 (1973).

History

M Civ JI 90.08 was added February 1, 1981.

M Civ JI 90.09 Highest and Best Use

In deciding the market value of the subject property, you must base your decision on the highest and best use of the property.

By "highest and best use" we mean the most profitable and advantageous use the owner may make of the property even if the property is presently used for a different purpose or is vacant, so long as there is a market demand for such use.

Comment

See *St Clair Shores v Conley*, 350 Mich 458; 86 NW2d 271 (1957); *In re Condemnation of Lands in Battle Creek*, 341 Mich 412; 67 NW2d 49 (1954); *In re Dillman*, 255 Mich 152; 237 NW 552 (1931); *In re Widening of Fulton Street*, 248 Mich 13; 226 NW 690 (1929); *Ecorse v Toledo, C S & D R Co*, 213 Mich 445; 182 NW 138 (1921).

History

M Civ JI 90.09 was added February 1, 1981.

M Civ JI 90.10 Possibility of Rezoning

The Court has instructed you on the subject of highest and best use. One of the things that must be considered in deciding what the highest and best use of the property was at the time of taking is the zoning classification of the property at that time. However, if there was a reasonable possibility, absent the threat of this condemnation case, that the zoning classification would have been changed, you should consider this possibility in arriving at the value of the property on the date of taking. In order to affect the value of the property, the possibility of rezoning must be real enough to have caused a prudent prospective buyer to pay more for the property than he or she would otherwise pay.

Comment

See *State Highway Commissioner v Eilender*, 362 Mich 697; 108 NW2d 755 (1961).

History

M Civ JI 90.10 was added February 1, 1981.

M Civ JI 90.11 Refusal to Rezone

You should ignore a refusal to rezone unless you believe that the request to rezone would also have been denied even in the absence of the condemnation and the planned public improvement. It is improper for one agency of government to artificially depress the value of property by unreasonably restrictive zoning so that another agency of government can obtain it by condemnation at a lower price.

Comment

See *Gordon v Warren Planning & Urban Renewal Commission*, 388 Mich 82; 199 NW2d 465 (1972); *Grand Trunk Western R Co v Detroit*, 326 Mich 387; 40 NW2d 195 (1949).

History

M Civ JI 90.11 was added February 1, 1981.

M Civ JI 90.12 Partial Taking

This case involves what is known as a "partial taking"; that is to say, the property being acquired by the [*name of condemning authority*] is part of a larger parcel under the control of the owner.

When only part of a larger parcel is taken, as is the case here, the owner is entitled to recover not only for the property taken, but also for any loss in the value to his or her remaining property.

The measure of compensation is the difference between (1) the market value of the entire parcel before the taking and (2) the market value of what is left of the parcel after the taking.

*(In valuing the property that is left after the taking, you should take into account various factors, which may include: (1) its reduced size, (2) its altered shape, (3) reduced access, (4) any change in utility or desirability of what is left after the taking, (5) the effect of the applicable zoning ordinances on the remaining property, and (6) the use which the [*name of condemning authority*] intends to make of the property it is acquiring and the effect of that use upon the owner's remaining property.)

Further, in valuing what is left after the taking, you must assume that the [*name of condemning authority*] will use its newly acquired property rights to the full extent allowed by the law.

Note on Use

*The six factors listed in this paragraph are illustrative, not exclusive. But see MCL 213.70(2). If no evidence has been introduced on one or more of the factors, it should be deleted from the instruction.

An alternative test of compensation for a partial taking (i.e., value of the part taken plus damages to the remainder) may be appropriate in certain cases in lieu of this instruction. *State Highway Commissioner v Flanders*, 5 Mich App 572; 147 NW2d 441 (1967); *State Highway Commissioner v Englebrecht*, 2 Mich App 572; 140 NW2d 781 (1966). *Michigan Dep't of Transportation v Sherburn*, 196 Mich App 301; 492 NW2d 517 (1992).

Comment

See *State Highway Commissioner v Schultz*, 370 Mich 78; 120 NW2d 733 (1963); *State Highway Commissioner v Walma*, 369 Mich 687; 120 NW2d 833 (1963); *State Highway Commissioner v Sabo*, 4 Mich App 291; 144 NW2d 798 (1966).

History

M Civ JI 90.12 was added February 1, 1981.

M Civ JI 90.13 Date of Valuation

In this case, the market value of the property *(both before and after the taking) must be determined as of [*applicable date*] and not at any earlier or later date.

Note on Use

*The parenthetical phrase should be read to the jury in a partial taking case.

Comment

See *State Highway Commission v Mobarak*, 49 Mich App 115; 211 NW2d 539 (1973).

History

M Civ JI 90.13 was added February 1, 1981.

M Civ JI 90.14 Date of Valuation: Early Date of Taking

The market value of the property is to be determined as of the date of taking which shall be decided by you.

In some situations, the government's actions with respect to a particular property have an impact which deprives an owner of the practical benefits of ownership of the property. In such a case, you may find that the government's actions constitute a "taking" of the property at a date earlier than the date legal title is transferred to the government. This does not mean that the government has actually seized or confiscated the property, but merely that the impact of the government's actions on the property is such that the law treats the situation as though a taking has occurred.

The test to be applied in determining whether or not a taking has occurred is whether the actions of the government substantially contributed to and accelerated the decline in value of the property.

You should first determine whether or not such a taking in the legal sense occurred. Then you must determine the date that such taking occurred. Then you must determine the value of the property on that date.

Comment

See *In re Urban Renewal, Elmwood Park Project*, 376 Mich 311; 136 NW2d 896 (1965); *Heinrich v Detroit*, 90 Mich App 692; 282 NW2d 448 (1979).

History

M Civ JI 90.14 was added February 1, 1981.

M Civ JI 90.15 Effect of Proposed Public Improvement

The process of determining the value on the date of taking may be complicated by the government's actions leading up to the taking, if those actions have had an effect on the market value of the property. In such case, you must disregard any change in value resulting from such actions and grant compensation on the basis of what the market value of the property would be if such actions had not occurred. In other words, in arriving at market value you should disregard any conditions which may exist in this area resulting from the prospect of condemnation for this project and the other proceedings leading up to this condemnation case.

You should determine the value of the property as though this project had not been contemplated.

This does not mean that the announcement of the project acts to insulate the properties concerned from normal economic forces. The market may go up or down, the property may deteriorate or be improved, and you should recognize those factors. However, a change in value directly traceable to the prospect of this condemnation should not penalize either owners or the public. By the same token, you should disregard any increases in value which may have occurred by reason of the prospect of the completion of the project.

Note on Use

This instruction applies in total taking cases and to the before value only in a partial taking case.

In public utility condemnation cases, the word "condemnor's" should be substituted for the word "government's" in the first paragraph.

Comment

See *United States v Miller*, 317 US 369; 63 S Ct 276; 87 L Ed 336 (1943); *In re Urban Renewal, Elmwood Park Project*, 376 Mich 311; 136 NW2d 896 (1965); *Heinrich v Detroit*, 90 Mich App 692; 282 NW2d 448 (1979); *Detroit Board of Education v Clarke*, 89 Mich App 504; 280 NW2d 574 (1979); *In re Medical Center Rehabilitation Project*, 50 Mich App 164; 212 NW2d 780 (1973); *Madison Realty Co v Detroit*, 315 F Supp 367 (ED Mich, 1970).

History

M Civ JI 90.15 was added February 1, 1981.

M Civ JI 90.16 Comparable Market Transactions

The witnesses who have expressed opinions about market value have relied upon various market transactions to help them arrive at their opinions. These transactions are referred to as "comparables" and may include sales, offers to sell, offers to buy and rentals.

These witnesses have been permitted to testify as to the price and other terms and circumstances of these transactions which they consider to be comparable to the owner's property as shedding light on the value of the owner's property. Generally, the more similar one property is to another, the closer the price paid for the one may be expected to approach the value of the other. *(Thus, in weighing the opinion of a witness as to the value of the subject property based upon other market transactions, you may consider the following matters:

(a) Was the transaction freely entered into in good faith?

(b) If the transaction was on credit, how much should the price be discounted to reflect the amount which the property would have brought in cash?

(c) How near is the date of the other transaction to the date of valuation in this case?

(d) How near is the size and shape of the property to the size and shape of the owner's property?

(e) How similar are the physical features, including both improvements and natural features?

(f) How similar is the use to which the other property is, or may be, put, to the use which is, or may be, made of the owner's property?

(g) How far is the other property from the owner's property, and is the distance important?

(h) How similar is the neighborhood of the other property to the neighborhood of the owner's property?

(i) Is the zoning classification the same on both properties?)

You should also consider the extent to which the witness has taken into account whatever dissimilarities may exist. If you are not satisfied that the transactions being used as comparables are, in fact, comparable, then you may consider that fact in weighing [his / or / her] opinion.

You should bear in mind that comparable sales are not themselves direct evidence of value, but merely the basis on which the witnesses have formed their opinions of value.

You should apply these standards to all witnesses rendering an opinion of value.

Note on Use

*The list of matters that the jury may consider is illustrative, but not exclusive. If there is no evidence as to one or more of the matters, it should be deleted from this instruction.

Comment

See *Western Michigan University Board of Trustees v Slavin*, 381 Mich 23; 158 NW2d 884 (1968); *In re Brewster Street Housing Site*, 291 Mich 313; 289 NW 493 (1939); *Commission of Conservation v Hane*, 248 Mich 473; 227 NW 718 (1929); *State Highway Commission v McGuire*, 29 Mich App 32; 185 NW2d 187 (1970).

History

M Civ JI 90.16 was added February 1, 1981.

M Civ JI 90.17 Easements

The [*name of condemning authority*] is attempting to acquire through this condemnation proceeding certain limited rights in the owner's lands. The rights being acquired are as follows: [*describe and define the rights being acquired*]. The owner will have and retain all the uses of [his / her] land not inconsistent with those easement rights.

Note on Use

On measure of compensation, see M Civ JI 90.12 and the Note on Use thereunder.

Comment

See *Cantieny v Friebe*, 341 Mich 143; 67 NW2d 102 (1954); *Hasselbring v Koepke*, 263 Mich 466; 248 NW 869 (1933); *Nicholls v Healy*, 37 Mich App 348; 194 NW2d 727 (1971).

History

M Civ JI 90.17 was added February 1, 1981.

M Civ JI 90.18 Total Taking

The [*name of condemning authority*] has the right and duty to acquire and take the entire property whenever the acquisition of the part actually needed would destroy the practical value or utility of the remainder of the property. It is for you to determine whether or not the practical value or utility of the remainder is, in fact, being destroyed.

The burden of proof is on the owner to show by a preponderance of the evidence that the practical value or utility of the remainder of the property has been destroyed.

Comment

See MCL 213.54(1); MCL 213.365; *State Highway Commission v Mobarak*, 49 Mich App 115; 211 NW2d 539 (1973).

History

M Civ JI 90.18 was added February 1, 1981.

M Civ JI 90.19 Benefits

You must disregard any testimony which indicates or implies that because of this taking the remaining property has in any way benefited. You may only consider testimony that bears on damages to the subject property.

Note on Use

This instruction should only be given if the benefits issue has been raised, inadvertently or otherwise, at trial.

The instruction should not be given if the applicable statute authorizes offset of benefit and the issue has been properly pleaded.

Comment

See *Custer Twp v Dawson*, 178 Mich 367; 144 NW 862 (1914); *State Highway Commission v McLaughlin*, 16 Mich App 22; 167 NW2d 468 (1969); *State Highway Commissioner v Sabo*, 4 Mich App 291; 144 NW2d 798 (1966).

History

M Civ JI 90.19 was added February 1, 1981.

M Civ JI 90.20 Compensation for Fixtures; Definition

The market value of the property taken includes the value of its fixtures. An item is a fixture if it meets all three of the following criteria:

The item is attached *(or constructively attached) to the land or to a building or structure attached to the land.

*("Constructively attached" means that an item is a fixture even though it is not physically attached if it is a part of something else that is physically attached, and when the item, if removed, either could not generally be used elsewhere or would leave the part remaining unfit for use.)

The item is a necessary or useful part, considering the purpose for which the land, building, or structure is used.

The surrounding circumstances indicate that the owner intended to make the attachment *(or constructive attachment) permanent.

†(Improvements made by a tenant are to be valued on the basis of their useful life without regard to the term of the lease.)

Note on Use

*The parenthetical paragraph in subsection 1 and the phrases in parentheses preceded by an asterisk should be used only when applicable.

†The final paragraph of this instruction should be used only if applicable.

Comment

Wayne County v Britton Trust, 454 Mich 608; 563 NW2d 674 (1997). Stocks of goods and ordinary movable office furniture are not fixtures. Britton.

For a discussion of just compensation for improvements made by a tenant, see *Almota Farmers Elevator & Warehouse Co v United States*, 409 US 470; 93 S Ct 791; 35 L Ed 2d 1 (1973).

History

M Civ JI 90.20 was added February 1, 1981. Amended October 1998.

M Civ JI 90.21 Fixtures: Election to Remove—Compensation

In this case, the owner has elected to remove fixtures from the property. When the owner makes such an election, the market value of the property including the fixtures must be decreased by the value of the fixtures removed. The owner shall be awarded the cost of removing the fixtures, moving them to a new location, and reinstalling them at the new location.

Note on Use

An owner may not recover moving expenses for the fixtures that have been duplicated by relocation benefits paid under federal, state, or local law. MCL 213.63a.

The condemning authority cannot be required to pay more to move a fixture than its value-in-place. *In re Grand Haven Highway*, 357 Mich 20; 97 NW2d 748 (1959).

Comment

A condemnee automatically receives value-in-place for fixtures without the necessity of an election. However, a condemnee may elect to remove fixtures and receive the value of the property as enhanced by the fixtures less the value-in-place of the fixtures that have or will be severed plus the cost of detaching, moving, and reattaching the fixtures in the new location. *Wayne County v Britton Trust*, 454 Mich 608; 563 NW2d 674 (1997).

History

M Civ JI 90.21 was added February 1, 1981. Amended October 1998.

M Civ JI 90.22 Effect of View

During the course of this trial, you were taken to the subject property. In addition to the testimony which you have heard and the exhibits which you have seen here in the courtroom, you may also consider what you saw when you visited the property if you believe the things you saw would be helpful to you in reaching a decision.

Note on Use

This instruction should be given in lieu of M Civ JI 3.12, since in a condemnation case the view encompasses the item to be valued.

Comment

See *In re Grand Haven Highway*, 357 Mich 20; 97 NW2d 748 (1959); *In re Widening of Michigan Avenue*, 299 Mich 544; 300 NW 877 (1941); *In re Widening of Bagley Avenue*, 248 Mich 1; 226 NW 688 (1929).

History

M Civ JI 90.22 was added February 1, 1981.

M Civ JI 90.22A Valuation Witnesses

Witnesses have testified as valuation experts to assist you in arriving at a conclusion as to the value of the property taken. In weighing the soundness of such opinions, you should consider the following:

(a) the length and diversity of the witness's experience;

(b) the professional attainments of the witness;

(c) whether the witness is regularly retained by diverse, responsible persons and thus has a widespread professional standing to maintain;

(d) the experience that the witness has had in dealing with the kind of property about which [he / or / she] has testified; and/or

(e) whether the witness has accurately described the physical condition of the property, or has made inaccurate statements about its physical characteristics that may have been reflected in the valuation the witness placed on such property.

The opinion of a valuation witness is to be weighed by you, but you must form your own intelligent opinion. In weighing the testimony of any witness as to value, you should consider whether [he / or / she] has accompanied [his / or / her] opinion with a frank and complete disclosure of facts and a logical explanation of [his / or / her] reasons that will enable you properly to determine the weight to be given to the opinion the witness has stated.

Comment

See *In re Dillman*, 256 Mich 654; 239 NW 883 (1932); *George v Harrison Twp*, 44 Mich App 357, 205 NW2d 254 (1973).

History

M Civ JI 90.22A was added October 1981.

M Civ JI 90.23 Range of Testimony

In reaching a verdict, you must keep within the range of the testimony submitted. You may accept the lowest figure submitted as to a particular item of damage, the highest figure submitted, or a figure somewhere between the highest and lowest. You may not go below the lowest figure or above the highest figure submitted.

In this case, the lowest valuation placed in evidence for the property is $_____.____ and the highest valuation is $_____.____. Any award between those two figures would be a proper jury verdict; any award which is not between those two figures would not be a valid jury verdict.

Note on Use

The second paragraph of the instruction is appropriate only in a total taking case without the issues contemplated by M Civ JI 90.12 Partial Taking; 90.14 Date of Valuation: Early Date of Taking; 90.18 Total Taking (destruction of practical value or utility); 90.19 Benefits; 90.21 Compensable Business Property: Measure of Compensation, or other damage claims. Where those issues are involved, the second paragraph of the instruction may require modification.

Comment

See *In re Grand Haven Highway*, 357 Mich 20; 97 NW2d 748 (1959); *In re Acquisition of Land for Civic Center*, 335 Mich 528; 56 NW2d 375 (1953).

History

M Civ JI 90.23 was added February 1, 1981.

M Civ JI 90.24 Mechanics of Verdict

When you retire to the jury room, your first duty is to elect a jury foreman. You may have all the various exhibits that have been admitted in evidence, and your notes, with you. You will also have a prepared Form of Jury Verdict which will contain a blank line in which you should insert the amount of just compensation as determined by you. I also want to emphasize that your verdict does not have to be unanimous. If any five of you agree on a verdict, that constitutes a legal jury verdict. The foreman must sign the verdict.

Note on Use

If two or more parcels are consolidated for trial, the jury should be instructed: "When any five of you agree on a verdict as to a parcel, that will be the verdict on that parcel. However, the same five members of the jury do not have to agree on all of the parcels."

The uniform condemnation statute of 1980 (MCL 213.51 et seq.) does not specify a verdict form. The form of verdict for actions brought under this statute will depend on the nature of the particular case.

History

M Civ JI 90.24 was added February 1, 1981.

M Civ JI 90.30 Going Concern

The defendant claims that condemnation of the property destroyed the business.

If you find that the defendant cannot relocate the business, the defendant is entitled to just compensation for the value of the business as a going concern. If you find that the business can be relocated, the defendant is not entitled to compensation for the value of the business as a going concern.

Comment

City of Detroit v King, 207 Mich App 169; 523 NW2d 644 (1994); *Department of Transportation v Campbell*, 175 Mich App 629; 438 NW2d 267 (1988); *Detroit v Michael's Prescriptions*, 143 Mich App 808; 373 NW2d 219 (1985); *Detroit v Whalings, Inc*, 43 Mich App 1; 202 NW2d 816 (1972).

The Committee has found no Michigan appellate decisions that either permit or deny compensation for a partial taking of a going concern.

A defendant may not recover both going concern and business interruption damages because the theories are mutually exclusive. *Detroit v Larned Associates*, 199 Mich App 36; 501 NW2d 189 (1993).

History

M Civ JI 90.30 was added October 1998.

M Civ JI 90.31 Business Interruption

Just compensation includes damages caused by interruption of a business or avoiding interruption of the business.

Note on Use

Additional instructions may be needed if there are issues about whether specific damages are compensable as business interruption damages. See *Spiek v Department of Transportation*, 456 Mich 331; 572 NW2d 201 (1998); *State Highway Comm'r v Gulf Oil Corp*, 377 Mich 309; 140 NW2d 500 (1966); *Mackie v Watt*, 374 Mich 300; 132 NW2d 113 (1965).

Lost profits are not compensable as business interruption damages. *Detroit v Larned Associates*, 199 Mich App 36; 501 NW2d 189 (1993).

A defendant may not recover both going concern and business interruption damages because the theories are mutually exclusive. *Larned Associates*.

Comment

In re Grand Haven Highway, 357 Mich 20; 97 NW2d 748 (1959); *Grand Rapids & Indiana Railroad Co v Weiden*, 70 Mich 390; 38 NW 294 (1888); *Allison v Chandler*, 11 Mich 542 (1863); *Larned Associates*; *Detroit v Hamtramck Community Federal Credit Union*, 146 Mich App 155; 379 NW2d 405 (1985).

History

M Civ JI 90.31 was added March 1999.

Chapter 97: Child Protection Proceedings

M Civ JI 97.01 Preliminary Instructions to Prospective Jurors 446
M Civ JI 97.02 Selection of Fair and Impartial Jury 447
M Civ JI 97.03 Challenges 448
M Civ JI 97.04 Brief Description 449
M Civ JI 97.05 Introduction to Parties, Counsel, and Witnesses 450
M Civ JI 97.06 Reading of Petition 451
M Civ JI 97.07 Juror Oath Before Voir Dire 452
M Civ JI 97.08 Seating of Jurors 453
M Civ JI 97.09 Juror Oath Following Selection 454
M Civ JI 97.10 Description of Trial Procedure 455
M Civ JI 97.11 Function of Judge and Jury 456
M Civ JI 97.12 Jury Must Only Consider Evidence; What Evidence Is; Prohibited Actions by Jurors 457
M Civ JI 97.13 Judging Credibility and Weight of Evidence 460
M Civ JI 97.14 Questions Not Evidence 461
M Civ JI 97.15 Court's Questioning Not Reflective of Opinion 462
M Civ JI 97.16 Questions by Jurors Allowed 463
M Civ JI 97.17 Objections 464
M Civ JI 97.18 Disregard Out-of-Presence Hearings 465
M Civ JI 97.19 Jurors Not to Discuss Case 466
M Civ JI 97.20 Recesses 467
M Civ JI 97.21 Caution about Publicity in Cases of Public Interest 468
M Civ JI 97.22 Visiting Scene/Conducting Experiments 469
M Civ JI 97.23 Notetaking by Jurors Allowed 470
M Civ JI 97.24 Notetaking Not Allowed 471
M Civ JI 97.25 Inability to Hear Witness or See Exhibit 472
M Civ JI 97.26 Defining Legal Names of Parties and Counsel 473
M Civ JI 97.27 Number of Jurors 474
M Civ JI 97.28 Instructions to be Taken as a Whole 475
M Civ JI 97.29 Deliberations and Verdict 476
M Civ JI 97.30 Maintaining an Open Mind 477

M Civ JI 97.31 Duties of Judge and Jury 478
M Civ JI 97.32 Evidence 479
M Civ JI 97.33 Witnesses-Credibility 481
M Civ JI 97.34 Circumstantial Evidence 483
M Civ JI 97.35 Statutory Grounds 484
M Civ JI 97.36 Definitions 486
M Civ JI 97.37 Standard of Proof 488
M Civ JI 97.38 No Duty to Present Evidence 489
M Civ JI 97.39 Treatment of One Child as Evidence of Treatment of Another Child 490
M Civ JI 97.40 Improvement in Circumstances Not Controlling 491
M Civ JI 97.41 Not Necessary to Prove Each Fact Alleged 492
M Civ JI 97.42 Unfit Home by Reason of Neglect or Cruelty—Res Ipsa Loquitur 493
M Civ JI 97.43 Findings Re: Statutory Grounds 494
M Civ JI 97.44 Court to Determine Disposition 496
M Civ JI 97.45 Not a Criminal Proceeding 497
M Civ JI 97.46 Deliberations and Verdict 498
M Civ JI 97.47 Communications with the Court 500
M Civ JI 97.48 Exhibits 501
M Civ JI 97.49 Verdict 502
M Civ JI 97.50 Dismissal of Extra Juror 503
M Civ JI 97.51 Bailiff's Oath 504
M Civ JI 97.52 Begin Deliberations 505
M Civ JI 97.60 Form of Verdict: Statutory Grounds Alleged 506
M Civ JI 97.61 Form of Verdict: One Statutory Ground Alleged [*Instruction Deleted*] 508

M Civ JI 97.01 Preliminary Instructions to Prospective Jurors

(1) Ladies and gentlemen, I am Judge [_____] and it is my pleasure and privilege to welcome you to the [_____] County Circuit Court .

(2) I know that jury service may be a new experience for some of you. Jury duty is one of the most serious duties that members of a free society are called upon to perform.

(3) The jury is an important part of this court. The right to a trial by jury is an ancient tradition and is part of our legal heritage.

(4) Jurors must be as free as humanly possible from bias, prejudice or sympathy for any party. All parties in a trial are entitled to jurors who can keep an open mind until the time comes to decide the case.

History

M Civ JI 97.01 was added March 2005.

M Civ JI 97.02 Selection of Fair and Impartial Jury

(1) A trial begins with the selection of a jury. The purpose of this process is to obtain information about you that will help us choose a fair and impartial jury to hear this case.

(2) During jury selection the lawyers and I will ask you questions. This is called the voir dire. The questions are meant to find out if you know anything about the case. Also, we need to find out if you have any opinions or personal experiences that might influence you for or against any of the parties or witnesses.

(3) The questions may probe deeply into your attitudes, beliefs and experiences. They are not meant to be an unreasonable prying into your private lives. The law requires that we get this information so that an impartial jury can be chosen.

(4) If you do not hear or understand a question, you should say so. If you do understand it, you should answer it truthfully and completely. Please do not hesitate to speak freely about anything you believe we should know.

Note on Use

The judge may indicate the method he or she wishes jurors to follow in answering questions.

History

M Civ JI 97.02 was added March 2005.

M Civ JI 97.03 Challenges

During jury selection you may be excused from serving on the jury in one of two ways. First, I may excuse you for cause; that is, I may decide that there is a valid reason why you cannot or should not serve in this case. Second, a lawyer for one of the parties may excuse you without giving any reason for doing so. This is called a peremptory challenge. The law gives each party the right to excuse a certain number of jurors in this way. If you are excused, you should not feel bad or take it personally. As I explained before, there simply may be something that causes you to be excused from this particular case.

History

M Civ JI 97.03 was added March 2005.

M Civ JI 97.04 Brief Description

You have been called here today as prospective jurors in the Family Division of the [_____] County Circuit Court. This is a child protection proceeding. It is not a criminal case.

History

M Civ JI 97.04 was added March 2005.

M Civ JI 97.05 Introduction to Parties, Counsel, and Witnesses

(1) I will now introduce the parties to this case, the lawyers, and the witnesses, and you will be asked if you know any of them.

(2) The petitioner is [_____]. The petitioner's case will be presented by [Prosecutor, Attorney General, other Attorney]. The People of the State of Michigan are represented by [_____], an assistant prosecuting attorney for [_____] County.*

(3) The [mother/father/parents/guardian/nonparent adult/ respondent/custodian] [is/are] [_____/ and _____] and [he/she/they] [is/are] represented by lawyer _____.

(4) [_____], a lawyer, has been appointed by the Court to represent the [child/children]. (If both a lawyer-guardian ad litem and an attorney have been appointed for one or more of the children, give the following instead: [_____], a lawyer, has been appointed by the court to represent the best interests of the [child/children] and is called the lawyer-guardian ad litem for the [child/children]. [_____], a lawyer, has been appointed by the court to represent the wishes of [*child's name*].)

(5) The witnesses who may testify in this case are: (read list of witnesses).

Note on Use

The alternative language in subsection 2 recognizes that Petitioner is not always the State of Michigan or the Family Independence Agency.

* This sentence should be read only if the prosecutor appears on behalf of the People, as opposed to appearing on behalf of or as legal consultant to, for example, the Family Independence Agency. MCL 712A.17(4) and (5), and MCR 3.914.

History

M Civ JI 97.05 was added March 2005.

M Civ JI 97.06 Reading of Petition

We are here today on a petition filed by [_____], a Children's Protective Services worker for the [_____] County Family Independence Agency*, alleging that the Court has jurisdiction over [*names of children*], who [was/were] born on [_____], and [is/are] now ____ years of age. Under Michigan law, the Family Division of the Circuit Court has jurisdiction in proceedings concerning any child under 18 years of age found within the County: (read pertinent statutory allegations from MCL 712A.2(b)(1),(2),(3),(4) and/or (5)).

The allegations which the petitioner will attempt to prove are as follows: (read factual allegations in petition.)

Note on Use

* Because others may file petitions, this sentence may need to modified accordingly.

History

M Civ JI 97.06 was added March 2005.

M Civ JI 97.07 Juror Oath Before Voir Dire

(1) I will now ask you to stand and swear to truthfully and completely answer all the questions that you will be asked about your qualifications to serve as jurors in this case. If you have religious beliefs against taking an oath, you may affirm that you will answer all the questions truthfully and completely.

(2) Please raise your right hand. Do you solemnly swear or affirm that you will truthfully and completely answer all questions about your qualifications to serve as jurors in this case?

History

M Civ JI 97.07 was added March 2005.

M Civ JI 97.08 Seating of Jurors

The [bailiff/clerk] will now draw the names of [six/seven] prospective jurors. As your name is called, please come forward and take your seat in the jury box, starting in the back row with the seat closest to the back of the courtroom, and filling in across the back row and then the front row in the same manner.

History

M Civ JI 97.08 was added March 2005.

M Civ JI 97.09 Juror Oath Following Selection

Ladies and gentlemen of the jury, I will now ask you to stand and swear or affirm to perform your duty to try this case justly and to reach a true verdict. Please rise and raise your right hand:

Do you solemnly swear or affirm that, in this case now before the court, you will justly decide the questions submitted to you and unless you are discharged by the Court from further deliberation, you will render a true verdict; that you will render your verdict only on the evidence introduced and in accordance with the instructions of the Court?

History

M Civ JI 97.09 was added March 2005.

M Civ JI 97.10 Description of Trial Procedure

(1) Now I will explain some of the legal principles you will need to know and the procedure we will follow in this trial.

(2) First, [Prosecutor, Attorney General, other Attorney] will make an opening statement in which [he/she] will give [his/her] theory of the case. The other lawyers do not have to make opening statements, but if they choose to do so, they may make an opening statement after [Prosecutor, Attorney General, other Attorney] makes [his/her], or they may wait until later. These opening statements are not evidence. They are only meant to help you understand how each party sees the case.

(3) Next, [Prosecutor, Attorney General, other Attorney] will present [his/her] evidence. [He/she] may call witnesses to testify and may show you exhibits such as documents or physical objects. The other lawyers have the right to cross-examine, that is, to question, [Mr./Ms. _____'s] witnesses.

(4) After [Prosecutor, Attorney General, other Attorney] has presented all of [his/her] evidence, the other lawyers may also offer evidence, but they do not have to. If they do call any witnesses, [Prosecutor, Attorney General, other Attorney] has the right to cross-examine them. [He/she] may also call witnesses to contradict the testimony of the other parties' witnesses.

(5) After all the evidence has been presented, the lawyers for each party will make their closing arguments. Like opening statements, they are not evidence. They are only meant to help you understand the evidence and the way each party sees the case. You must base your verdict only on the evidence.

Note on Use

The alternative language in subsections 2-4 recognizes that Petitioner is not always the State of Michigan or the Family Independence Agency.

History

M Civ JI 97.10 was added March 2005.

M Civ JI 97.11 Function of Judge and Jury

(1) My responsibility as the judge in this trial is to make sure that the trial is run fairly and efficiently, to make decisions about evidence, and to instruct you about the law that applies to this case. You must take the law as I give it to you. Nothing I say is meant to reflect my own opinions about the facts of the case. As jurors, you are the ones who will decide this case.

(2) Your responsibility as jurors is to decide what the facts of the case are. That is your job and no one else's. You must think about all the evidence and then decide what each piece of evidence means and how important you think it is. This includes how much you believe what each of the witnesses said. What you decide about any fact in this case is final.

History

M Civ JI 97.11 was added March 2005.

M Civ JI 97.12 Jury Must Only Consider Evidence; What Evidence Is; Prohibited Actions by Jurors

(1) When it is time for you to decide the case, you are only allowed to consider the evidence that was admitted in the case. Evidence includes only the sworn testimony of the witnesses, the exhibits, such as documents or other things which I admit into evidence, and anything else I tell you to consider as evidence.

*(It may also include some things which I specifically tell you to consider as evidence.)

(2) There are some things presented in the trial that are not evidence, and I will now explain what is not evidence:

(a) The lawyers' statements, commentaries, and arguments are not evidence. They are only meant to help you understand the evidence and each side's legal theories. You should only accept things the lawyers say that are supported by the evidence or by your own common sense and general knowledge. However, an admission of a fact by a lawyer is binding on [his / her] client.

(b) Questions by the lawyers, you or me to the witnesses are not evidence. You should consider these questions only as they give meaning to the witnesses' answers.

(c) My comments, rulings, [summary of the evidence,] and instructions are also not evidence. It is my duty to see that the trial is conducted according to the law, and to tell you the law that applies to this case. However, when I make a comment or give an instruction, I am not trying to influence your vote or express a personal opinion about the case. If you believe that I have an opinion about how you should decide this case, you must pay no attention to that opinion. You are the only judges of the facts, and you should decide this case from the evidence.

(3) In addition, you are not to consider anything about the case from outside of the courtroom as it is not evidence admitted during the trial. Under the law, the evidence you consider to decide the case must meet certain standards. For example, witnesses must swear to tell the truth, and the lawyers must be able to cross-examine them. Because information obtained outside of the courtroom does not have to meet these standards, it could give you incorrect or misleading information that might unfairly favor one side, or you may begin to improperly form an opinion on information that has not been admitted. This would compromise the parties' right to have a verdict rendered only by the jurors and based only on the evidence you hear and see in the courtroom. So, to be fair to both sides, you must follow these instructions. I will now describe some of the things you may not consider from outside of the courtroom:

(a) Newspaper, television, radio and other news reports, emails, blogs and social media posts and commentary about this case are not evidence. Until I discharge you as jurors, do not search for, read, listen to, or watch any such information about this case from any source, in any form whatsoever.

(b) Opinions of people outside of the trial are not evidence. You are not to discuss or share information, or answer questions, about this case at all in any manner with anyone—this includes family, friends or even strangers—until you have been discharged as a juror. Don't allow anyone to say anything to you or say anything about this case in your presence. If anyone does, advise them that you are on the jury hearing the case, ask them to stop, and let me know immediately.

(c) Research, investigations and experiments not admitted in the courtroom are not evidence. You must not do any investigations on your own or conduct any research or experiments of any kind. You may not research or investigate through the Internet or otherwise any evidence, testimony, or information related to this case, including about a party, a witness, an attorney, a court officer, or any topics raised in the case.

(d) Except as otherwise admitted in trial, the scene is not evidence. You must not visit the scene of the occurrence that is the subject of this trial. If it should become necessary that you view or visit the scene, you will be taken as a group. You must not consider as evidence any personal knowledge you have of the scene.

(4) To avoid even the appearance of unfairness or improper conduct on your part, you must follow the following rules of conduct:

(a) While you are in the courtroom and while you are deliberating, you are prohibited altogether from using a computer, cellular telephone or any other electronic device capable of making communications. You may use these devices during recesses so long as your use does not otherwise violate my instructions.

(b) Until I have discharged you as a juror, you must not talk to any party, lawyer, or witness even if your conversation has nothing to do with this case. This is to avoid even the appearance of impropriety.

(5) If you discover that any juror has violated any of my instructions about prohibited conduct, you must report it to me.

(6) After you are discharged as a juror, you may talk to anyone you wish about the case. Until that time, you must control your natural desire to discuss the case outside of what I've said is permitted.

History

M Civ JI 97.12 was added March 2005. Amended November 2015.

M Civ JI 97.13 Judging Credibility and Weight of Evidence

(1) It is your job to decide what the facts of this case are. You must decide which witnesses you believe and how important you think their testimony is. You do not have to accept or reject everything a witness says. You are free to believe all, none, or part of any person's testimony.

(2) In deciding which testimony you believe, you should rely on your own common sense and everyday experience. However, in deciding whether you believe a witness's testimony, you must set aside any bias or prejudice you have based on the race, gender, or national origin of the witness.*

(3) There is no fixed set of rules for judging whether you believe a witness, but it may help you to think about these questions:

(a) Was the witness able to see or hear clearly? How long was the witness watching or listening? Was anything else going on that might have distracted the witness?

(b) Does the witness seem to have a good memory?

(c) How does the witness look and act while testifying? Does the witness seem to be making an honest effort to tell the truth, or does the witness seem to evade the questions or argue with the lawyers?

(d) Does the witness's age or maturity affect how you judge his or her testimony?

(e) Does the witness have any bias or prejudice or any personal interest in how this case is decided?

(f) Have there been any promises, threats, suggestions, or other influences that affect how the witness testifies?

(g) In general, does the witness have any special reason to tell the truth, or any special reason to lie?

(h) All in all, how reasonable does the witness's testimony seem when you think about all the other evidence in the case?

Note on Use

*Include other improper considerations, such as religion or sexual orientation, where appropriate.

History

M Civ JI 97.13 was added March 2005.

M Civ JI 97.14 Questions Not Evidence

The questions the lawyers ask the witnesses are not evidence. Only the answers are evidence. You should not think that something is true just because one of the lawyers asks questions that assume or suggest that it is true.

History

M Civ JI 97.14 was added March 2005.

M Civ JI 97.15 Court's Questioning Not Reflective of Opinion

I may ask questions of some of the witnesses. These questions are not meant to reflect my opinion about the evidence. If I ask questions, my only reason would be to ask about things that may not have been fully explored.

History

M Civ JI 97.15 was added March 2005.

M Civ JI 97.16 Questions by Jurors Allowed

(1) During the trial you may think of an important question that would help you understand the facts in this case. You are allowed to ask such questions.

(2) You should wait to ask questions until after a witness has finished testifying. If you still have an important question after all of the lawyers have finished asking their questions, don't ask it yourself. Instead, raise your hand, write the question down, and pass it to the bailiff. [He / she] will give it to me. Do not show the question to the other jurors, or announce what the question is.

(3) There are rules of evidence that a trial must follow. If your question is allowed under those rules, I will ask the witness your question. If your question is not allowed, I will either rephrase it or I will not ask it at all.

Note on Use

Allowing jurors to ask questions is optional.

History

M Civ JI 97.16 was added March 2005. Amended November 2015.

M Civ JI 97.17 Objections

During the trial the lawyers may object to certain questions or statements made by the other lawyers or witnesses. I will rule on these objections according to the law. My rulings are not meant to reflect my opinion about the facts of the case.

History

M Civ JI 97.17 was added March 2005.

M Civ JI 97.18 Disregard Out-of-Presence Hearings

Sometimes the lawyers and I will have discussions out of your hearing. Also, while you are in the jury room I may have to take care of other matters that have nothing to do with this case. Please pay no attention to these interruptions.

History

M Civ JI 97.18 was added March 2005.

M Civ JI 97.19 Jurors Not to Discuss Case

(1) Because the law requires that cases be decided only on the evidence presented during the trial and only by the deliberating jurors, you must keep an open mind and not make a decision about anything in the case until after you have (a) heard all of the evidence, (b) heard the closing arguments of counsel, (c) received all of my instructions on the law and the verdict form, and (d) any alternate jurors have been excused. At that time, you will be sent to the jury room to decide the case. Sympathy must not influence your decision. Nor should your decision be influenced by prejudice regarding race, sex, religion, national origin, age, handicap, or any other factor irrelevant to the rights of the parties.

(2) [Alternative A] (Before you are sent to the jury room to decide the case, you may discuss the case among yourselves during recesses in the trial, but there are strict rules that must be followed:

First, you may only discuss the case when (a) all of you are together, (b) you are all in the jury room, and (c) no one else is present in the jury room. You must not discuss the case under any other circumstances. The reason you may not discuss the case with other jurors while some of you are not present is that all of you are entitled to participate in all of the discussions about the case.

Second, as I stated before, you must keep an open mind until I send you to the jury room to decide the case. Your discussions before then are only tentative.

Third, you do not have to discuss the case during the trial. But if you choose to do so, you must follow the rules I have given you.)

[Alternative B] (Before you are sent to the jury room to decide the case, you are not to discuss the case even with the other members of the jury. This is to ensure that all of you are able to participate in all of the discussions about the case, and so that you do not begin to express opinions about the case until it has been submitted to you for deliberation.)

Note on Use

The court will choose between Alternative A or B in paragraph 2 based on the court's decision whether to permit the jurors to discuss the evidence among themselves during trial recesses.

History

M Civ JI 97.19 was added March 2005. Amended November 2015.

M Civ JI 97.20 Recesses

(1) If I call for a recess during the trial, I will either send you back to the jury room or allow you to leave the building. During these recesses you must not discuss the case with anyone or let anyone discuss it with you or in your presence. If someone tries to do that, tell him or her to stop, and explain that as a juror you are not allowed to discuss the case. If he or she continues, leave them at once and report the incident to me as soon as you return to court.

(2) You must not talk to the parties, lawyers, or the witnesses about anything at all, even if it has nothing to do with the case.

(3) It is very important that you only get information about the case here in court, when you are acting as the jury and when the parties, the lawyers, and I are all here.

History

M Civ JI 97.20 was added March 2005.

M Civ JI 97.21 Caution about Publicity in Cases of Public Interest

(1) During the trial, do not read, listen to, or watch any news reports about the case. Under the law, the evidence you consider to decide the case must meet certain standards. For example, witnesses must swear to tell the truth, and the lawyers must be able to cross-examine them. Because news reports do not have to meet these standards, they could give you incorrect or misleading information that might unfairly favor one side. So, to be fair to both sides, you must follow this instruction.

(2) (Give the instruction below when recessing)

Remember, for the reasons I explained to you earlier, you must not read, listen to, or watch any news reports about this case while you are serving on this jury.

Note on Use

Give this instruction only if media coverage is expected.

History

M Civ JI 97.21 was added March 2005.

M Civ JI 97.22 Visiting Scene/Conducting Experiments

Do not go to the scene of any of the incidents alleged in the petition. If it is necessary for you to view a scene, you will be taken there as a group under my supervision. Do not make any investigation of your own or conduct an experiment of any kind.

History

M Civ JI 97.22 was added March 2005.

M Civ JI 97.23 Notetaking by Jurors Allowed

You may take notes during the trial if you wish, but of course, you don't have to. If you do take notes, you should be careful that it does not distract you from paying attention to all the evidence. When you go to the jury room to decide on your verdict, you may use your notes to help you remember what happened in the courtroom. If you take notes, do not let anyone see them. After you have begun your deliberations, it is then permissible to allow other jurors to see your notes. You must turn them over to the [bailiff / clerk] during recesses. If you do take notes, please write your name on the first page. The notes will be destroyed at the end of trial.

History

M Civ JI 97.23 was added March 2005. Amended November 2015.

M Civ JI 97.24 Notetaking Not Allowed

I don't believe that it is desirable or helpful for you to take notes during this trial. If you take notes, you might not be able to give your full attention to the evidence. Therefore, please do not take any notes while you are in the courtroom.

History

M Civ JI 97.24 was added March 2005.

M Civ JI 97.25 Inability to Hear Witness or See Exhibit

If you cannot hear a question by a lawyer, an answer by a witness, or anything I say, please raise your hand. When I recognize you, you should indicate what you did not hear. Do not hesitate to ask something be repeated, as it is very important that you hear everything that is said.

History

M Civ JI 97.25 was added March 2005.

M Civ JI 97.26 Defining Legal Names of Parties and Counsel

From time to time throughout the trial I may address the lawyers as counsel, which is another word for lawyer.

History

M Civ JI 97.26 was added March 2005.

M Civ JI 97.27 Number of Jurors

You can see that we have chosen a jury of seven. After you have heard all the evidence and my instructions, there will be a drawing by lot to decide which one of you will be excused in order to form a jury of six.

Note on Use

For multi-day trials.

History

M Civ JI 97.27 was added March 2005.

M Civ JI 97.28 Instructions to be Taken as a Whole

I may give you more instructions during the trial, and at the end of the trial I will give you detailed instructions about the law in this case. You should consider all of my instructions as a connected series. Taken together, they are the law which you must follow.

History

M Civ JI 97.28 was added March 2005.

M Civ JI 97.29 Deliberations and Verdict

After all of the evidence has been presented and the lawyers have given their closing arguments, I will give you detailed instructions about the rules of law that apply to this case. You will then go to the jury room to decide on your verdict.

History

M Civ JI 97.29 was added March 2005.

M Civ JI 97.30 Maintaining an Open Mind

It is important for you to keep an open mind and not make a decision about anything in the case until you go to the jury room to decide the case.

History

M Civ JI 97.30 was added March 2005.

M Civ JI 97.31 Duties of Judge and Jury

(1) Members of the jury, the evidence and arguments in this case are finished, and I will now instruct you on the law. That is, I will explain the law that applies to this case.

(2) Remember that you have taken an oath to return a true and just verdict, based only on the evidence and my instructions on the law. You must not let sympathy or prejudice influence your decision.

(3) It is my duty to instruct you on the law. You must take the law as I give it to you. If a lawyer says something different about the law, follow what I say. At various times, I have already given you some instructions about the law. You must take all my instructions together as the law you are to follow. You should not pay attention to some instructions and ignore others.

(4) As jurors, you must decide what the facts of this case are. You must think about all the evidence and then decide what each piece of evidence means and how important you think it is. This includes whether you believe what each of the witnesses said.

(5) To sum up, it is your job to decide what the facts of the case are, to apply the law as I give it to you, and, in that way, to decide the case.

History

M Civ JI 97.31 was added March 2005.

M Civ JI 97.32 Evidence

(1) When you discuss the case and decide on your verdict, you may only consider the evidence that has been properly admitted in this case. Therefore, it is important for you to understand what is evidence and what is not evidence.

(2) The evidence in this case includes only the sworn testimony of witnesses (the exhibits which I admitted into evidence, and anything else I told you to consider as evidence).

(3) Many things are not evidence and you must be careful not to consider them as evidence. I will now describe some of the things that are not evidence.

(4) The fact that a petition was filed alleging that the Court has jurisdiction over [Children's names], and that [he / she / they] [was / were] placed in foster care pending this hearing, and that [Mother's, Father's, Guardian's, Nonparent Adult's or Custodian's names] [is / are] present in court today is not evidence.

(5) The lawyers' statements and arguments are not evidence. They are only meant to help you understand the evidence and the theory of each party. The questions which the lawyers ask witnesses are also not evidence. You should consider these questions only as they give meaning to the witnesses' answers. You should only accept things the lawyers say that are supported by the evidence or by your own common sense and general knowledge.

(6) My comments, rulings, questions and instructions are also not evidence. It is my duty to see that the trial is conducted according to the law and to tell you the law that applies to this case. However, when I make a comment or give an instruction, I am not trying to influence your vote or express a personal opinion about the case. If you believe that I have an opinion about how you should decide this case, you must pay no attention to that opinion. You are the only judges of the facts and you should decide this case from the evidence.

(7) At times during the trial, I have excluded evidence that was offered or stricken testimony that was heard. Do not consider those things in deciding the case. Make your decision only on the evidence that I let in, and nothing else.

(8) Your decision should be based on all of the evidence regardless of which party produced it.

(9) You should use your own common sense and general knowledge in weighing and judging the evidence, but you should not use any personal knowledge you may have about a place, person or event. To repeat once more, you must decide this case based only on the evidence admitted during the trial.

Note on Use

The reference in Subsection 4 to foster care should only be used if the fact the child is in foster care is made known to the jury. Subsection 7 should only be given when warranted.

History

M Civ JI 97.32 was added March 2005.

M Civ JI 97.33 Witnesses-Credibility

(1) As I said before, it is your job to decide what the facts of this case are. You must decide which witnesses you believe and how important you think their testimony is. You do not have to accept or reject everything a witness said. You are free to believe all, none, or part of any person's testimony.

(2) In deciding which testimony you believe, you should rely on your own common sense and everyday experience. However, in deciding whether you believe a witness's testimony, you must set aside any bias or prejudice you may have based on the race, gender, or national origin of the witness.*

(3) There is no fixed set of rules for judging whether you believe a witness, but it may help you to think about these questions:

(a) Was the witness able to see or hear clearly? How long was the witness watching or listening? Was anything else going on that might have distracted the witness?

(b) Did the witness seem to have a good memory?

(c) How did the witness look and act while testifying? Did the witness seem to be making an honest effort to tell the truth, or did the witness seem to evade the questions or argue with the lawyers?

(d) Does the witness's age or maturity affect how you judge his or her testimony?

(e) Does the witness have any bias or prejudice or any personal interest in how this case is decided?

(f) Have there been any promises, threats, suggestions, or other influences that affected how the witness testified?

(g) In general, does the witness have any special reason to tell the truth, or any special reason to lie?

(h) All in all, how reasonable does the witness's testimony seem when you think about all the other evidence in the case?

(4) Sometimes the testimony of different witnesses will not agree, and you must decide which testimony you accept. You should think about whether the disagreement involves something important or not, and whether you think someone is lying or is simply mistaken. People see and hear things differently, and witnesses may testify honestly but simply be wrong about what they thought they saw or remembered. It is also a good idea to think about which testimony agrees best with the other evidence in the case.

(5) However, you may conclude that a witness deliberately lied about something that is important to how you decide the case. If so, you may choose not to accept anything that witness said. On the other hand, if you think the witness lied about some things but told the truth about others, you may simply accept the part you think is true and ignore the rest.

Note on Use

* Include other improper considerations, such as religion or sexual orientation, where appropriate.

History

M Civ JI 97.33 was added March 2005.

M Civ JI 97.34 Circumstantial Evidence

(1) Facts can be proved by direct evidence from a witness or an exhibit. Direct evidence is evidence about what we actually see or hear. For example, if you look outside and see rain falling, that is direct evidence that it is raining.

(2) Facts can also be proved by indirect, or circumstantial, evidence. Circumstantial evidence is evidence that normally or reasonably leads to other facts. So, for example, if you see a person come in from outside wearing a raincoat covered with small drops of water, that would be circumstantial evidence that it is raining.

(3) You may consider circumstantial evidence. Circumstantial evidence by itself, or a combination of circumstantial evidence and direct evidence, can be used to prove a fact.

History

M Civ JI 97.34 was added March 2005.

M Civ JI 97.35 Statutory Grounds

(1) The issue that you, the jury, will have to decide is whether one or more of the statutory grounds alleged in the petition have been proven.* If you find that one or more of the statutory grounds alleged in the petition have been proven, then the Court will have jurisdiction over [*children's names*]. I will now explain what those statutory grounds are. The Court has jurisdiction over a child**:

(a) If that child's parent or other person legally responsible for the care and maintenance of that child, when able to do so, neglects or refuses to provide proper or necessary support, education, medical, surgical, or other care necessary for his or her health or morals, or

(b) If that child is subject to a substantial risk of harm to his or her mental well-being, or

(c) If that child is abandoned by his or her parents, guardian or other custodian, or

(d) If that child is without proper custody or guardianship, or

(e) If that child's home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent, guardian, nonparent adult or other custodian, is an unfit place for that child to live in, or

(f) If that child's parent has substantially failed, without good cause, to comply with a limited guardianship placement plan regarding the child, or

(g) If that child's parent has substantially failed, without good cause, to comply with a court-structured plan regarding the child, or

(h) If that child has a guardian appointed for him or her under the Michigan Estates and Protected Individuals Code, and

(i) that child's parent, having the ability to support or assist in supporting the child, has failed or neglected, without good cause, to provide regular and substantial support for the child for a period of two years or more before the filing of the petition, or if a support order has been entered, has failed to substantially comply with the order for a period of two years or more before the filing of the petition, and

(ii) that child's parent, having the ability to visit, contact or communicate with the child, has regularly and substantially

failed or neglected, without good cause, to do so for a period of two years or more before the filing of the petition.

Note on Use

* If only one statutory ground is alleged in the petition, substitute "the statutory ground" for "one or more of the statutory grounds" throughout these instructions.

** The court should select the subsections that apply.

Comment

MCL 712A.2(b)(1)-(5)

History

M Civ JI 97.35 was added March 2005.

M Civ JI 97.36 Definitions

(1) Neglect means the failure of a parent, guardian, nonparent adult or custodian to provide the care that a child needs, including the failure to protect the physical and emotional health of a child. Neglect may be intentional or unintentional. It is for you, the jury, to determine from the evidence in this case, what care was necessary for the [child/children] and whether or not [his/her/their] parent(s), guardian, nonparent adult or custodian provided that care.

(2) The legal definition of cruelty is the same as the common understanding of the word cruelty. It implies physical or emotional mistreatment of a child.

(3) Depravity means a morally corrupt act or practice.

(4) The legal definition of criminality is the same as the common understanding of the word criminality. Criminality is present when a person violates the criminal laws of the State of Michigan or of the United States. Whether a violation of the criminal laws of the State of Michigan or of the United States by a parent, guardian, nonparent adult or custodian renders the home or environment of a child an unfit place for the child to live in is for you to decide based on all of the evidence in the case.

(5) A child is without proper custody or guardianship when he or she is: 1) left with, or found in the custody of, a person other than a legal parent, legal guardian or other person authorized by law or court order to have custody of the child, and 2) the child was originally placed, or came to be, in the custody of a person not legally entitled to custody of the child for either an indefinite period of time, no matter how short, or for a definite, but unreasonably long, period of time. What is unreasonably long depends on all the circumstances. It is proper for a parent or guardian to place his or her child with another person who is legally responsible for the care and maintenance of the child and who is able to and does provide the child with proper care and maintenance. A baby sitter, relative or other care-giver is not legally responsible for the care and maintenance of a child after the previously agreed-upon period of care has ended.

(6) Education means learning based on an organized educational program that is appropriate, given the age, intelligence, ability, and any psychological limitations of a child, in the subject areas of reading, spelling, mathematics, science, history, civics, writing, and English grammar.

(7) A child is abandoned when the child's [parent(s)/guardian/custodian] leave(s) the child for any length of time, no matter how short, with the intention of never returning for the child. The intent of the [parent(s)/guardian/custodian] to abandon the child may be inferred from the [parent's/parents'/guardian's/custodian's] words and/or actions surrounding the act of leaving the child.

Comment

MCL 712A.2(b)(1)(A) and (B).

History

M Civ JI 97.36 was added March 2005.

M Civ JI 97.37 Standard of Proof

The standard of proof in this case is proof by a preponderance of the evidence. Proof by a preponderance of the evidence means that the evidence that a statutory ground alleged in the petition is true outweighs the evidence that that statutory ground is not true.

History

M Civ JI 97.37 was added March 2005.

M Civ JI 97.38 No Duty to Present Evidence

[*Mother's, father's, guardian's, nonparent adult's or custodian's names*] [has/have] no duty to present evidence that the statutory grounds alleged in the petition are not true. It is your duty to decide from the evidence that you have heard whether one or more of the statutory grounds alleged in the petition are true.

Note on Use

Give this instruction only if the respondent(s) present no evidence.

History

M Civ JI 97.38 was added March 2005.

M Civ JI 97.39 Treatment of One Child as Evidence of Treatment of Another Child

You have heard testimony about [another child/other children] of [*mother's/father's names*], namely, [*children's names*]. [That child/those children] [is/are] not the subject(s) of the petition(s) before you now.* How a parent treats one child is evidence of how that parent may treat another child. Therefore, if you choose to believe the evidence, presented by any party, relating to how [*mother's/father's names*] treated [that other child/those other children], you may consider it in making your decision in relation to [this child/any or all of these children].*

Note on Use

* Do not read this sentence if the "other child or children" are also subjects of the present petition.

History

M Civ JI 97.39 was added March 2005.

M Civ JI 97.40 Improvement in Circumstances Not Controlling

If you find that one or more of the statutory grounds alleged in the petition have been proven, the fact that circumstances may have improved since [*date petition filed or another more appropriate date, where applicable*] does not negate your finding.

History

M Civ JI 97.40 was added March 2005.

M Civ JI 97.41 Not Necessary to Prove Each Fact Alleged

It is not necessary that each and every fact alleged in the petition be proven before you can find that one or more of the statutory grounds alleged in the petition have been proven. It is necessary, however, that sufficient facts be proven so that, in your judgment, you can find by a preponderance of the evidence that one or more of the statutory grounds alleged in the petition have been proven.

History

M Civ JI 97.41 was added March 2005.

M Civ JI 97.42 Unfit Home by Reason of Neglect or Cruelty—Res Ipsa Loquitur

You may, but are not required to, find that the child's home or environment was an unfit place for the child to live in by reason of neglect or cruelty on the part of his or her parent, guardian, nonparent adult or custodian if you find all the following:

(a) The child has suffered an injury or injuries.

(b) The child was not capable of inflicting the injury or injuries on himself or herself.

(c) The injury or injuries are such that would not ordinarily occur unless they were caused by another person inflicting them on the child or another person not providing proper care and supervision for the child in order to prevent the injury or injuries.

(d) The child was in the exclusive control of his or her parent, guardian, nonparent adult or custodian at the time the injury or injuries occurred. The term "custodian" includes any other person to whom the parent or guardian entrusted the care of the child if the parent or guardian knew, or should have known, that that person might injure the child or permit the child to be injured through lack of proper care and supervision.

(e) The true explanation of what happened to the child is more likely to be within the knowledge of the parent, guardian, nonparent adult or custodian than the petitioner.

Comment

Jones v Poretta, 428 Mich 132 (1987).

History

M Civ JI 97.42 was added March 2005.

M Civ JI 97.43 Findings Re: Statutory Grounds

You must find that one or more of the statutory grounds alleged in the petition have been proven if:

(a) you find by a preponderance of the evidence that [*children's names*], mother, or father, or both, when able to do so, neglected or refused to provide proper or necessary support, medical, surgical or other care necessary for [his / her / their] health or morals, or

(b) you find by a preponderance of the evidence that [*children's names*] [was / were] subject to a substantial risk of harm to [his / her / their] mental well-being, or

(c) you find by a preponderance of the evidence that [*children's names*] [was / were] abandoned by [his / her / their] [mother / father / parents / guardian / custodian], or

(d) you find by a preponderance of the evidence that [*children's names*] [was / were] without proper custody or guardianship, or

(e) you find by a preponderance of the evidence that the home or environment of [*children's names*] was an unfit place for [him / her / them] to live in by reason of neglect, cruelty, drunkenness, criminality or depravity on the part of [his / her / their] [mother, father, or both /guardian / nonparent adult / custodian], or

(f) you find by a preponderance of the evidence that [*children's names*] mother, or father, or both, [has / have] substantially failed, without good cause, to comply with a limited guardianship placement plan regarding the [child / children], or

(g) you find by a preponderance of the evidence that [*children's names*] mother, or father, or both, [has / have] substantially failed, without good cause, to comply with a court-structured plan regarding the [child / children], or

(h) you find by a preponderance of the evidence that [*children's names*] [has / have] a guardian appointed for [him / her / them] under the Michigan Estates and Protected Individuals Code, and

(i) that [*children's names*] mother, or father, or both, having the ability to support or assist in supporting the [child / children], [has / have] failed or neglected, without good cause, to provide regular and substantial support for the [child / children] for a period of two years or more before the filing of the petition, or if a support order has been entered, [has / have] failed to

substantially comply with the order for a period of two years or more before the filing of the petition, and

(ii) that [*children's names*] mother, or father, or both, having the ability to visit, contact or communicate with the [child / children]), [has / have] regularly and substantially failed or neglected, without good cause, to do so for a period of two years or more before the filing of the petition.

If you find that none of those have been proven, then you must find that none of the statutory grounds alleged in the petition have been proven.

Note on Use

Read only those paragraphs that apply to the case.

History

M Civ JI 97.43 was added March 2005. Amended June 2011.

M Civ JI 97.44 Court to Determine Disposition

You are not to concern yourselves with what will happen to [*children's names*] if you should find that one or more of the statutory grounds alleged in the petition have been proven. If the Court has jurisdiction of [this child / these children], that does not necessarily mean that [he / she / they] will be removed from their home or made [a ward / wards] of the court either temporarily or permanently. If the Court has jurisdiction of [this child / these children], the Court will then decide at a later time what to do about [this child / these children] and [his / her / their] family. There are many options available to the Court.

History

M Civ JI 97.44 was added March 2005.

M Civ JI 97.45 Not a Criminal Proceeding

I instruct you that this is a child protection proceeding. It is not a criminal case. Therefore, the issue before you is not that of guilt or innocence, but whether one or more of the statutory grounds alleged in the petition have been proven. You should not consider this proceeding to be in any way involved with the criminal law so far as your deliberations are concerned.

History

M Civ JI 97.45 was added March 2005.

M Civ JI 97.46 Deliberations and Verdict

(1) You will be given a written copy of the final jury instructions for your use in the jury room for deliberation. [I will also provide you with an electronically recorded copy of these instructions.]

(2) When you go to the jury room, you should first choose a foreperson. [He / she] should see to it that your discussions are carried on in a businesslike way and that everyone has a fair chance to be heard.

(3) When at least five of you agree upon a verdict, it will be received as the jury's verdict. In the jury room you will discuss the case among yourselves, but ultimately each of you will have to make up your own mind. Any verdict must represent the individual, considered judgment of at least five of you.

(4) It is your duty as jurors to talk to each other and make every reasonable effort to reach agreement. Express your opinions and the reasons for them, but keep an open mind as you listen to your fellow jurors. Rethink your opinions and do not hesitate to change your mind if you decide you were wrong. Try your best to work out your differences.

(5) However, although you should try to reach agreement, none of you should give up your honest opinion about the case just because other jurors disagree with you or just for the sake of reaching a verdict. In the end, your vote must be your own, and you must vote honestly and in good conscience.

(6) During your deliberations, and before you reach a verdict, you must not disclose anything about your discussions to others outside the jury room, not even how your voting stands. Therefore, until you reach a verdict, do not disclose that information, even in the courtroom.

(7) During your deliberations you may not communicate with persons outside the jury room (other than the judge), or seek information by any means, including cellular telephones or other electronic devices. In other words, you cannot talk to anyone on the phone, correspond with anyone, or electronically communicate with anyone about this case. You can only discuss the case in the jury room with your fellow jurors during deliberations. You may not use these electronic means to investigate or communicate about the case because it is important that you decide the case based solely on the evidence presented in the courtroom and my instructions on the law. Information from the Internet or available through social media might be wrong, incomplete, or inaccurate.

If you discover a juror has violated my instructions, you should report it to me right away.

History

M Civ JI 97.46 was added March 2005. Amended November 2015.

M Civ JI 97.47 Communications with the Court

(1) If you want to communicate with me while you are deliberating, please have your foreperson write a note and deliver it to the bailiff. It is not proper for you to talk directly with the judge, lawyers, court officers, or other people involved in the case.

(2) As you discuss the case, you must not let anyone, even me, know how your voting stands. Therefore, until you reach a verdict, do not reveal this to anyone outside the jury room.

History

M Civ JI 97.47 was added March 2005.

M Civ JI 97.48 Exhibits

(Option 1) If you want to look at any or all of the exhibits that have been admitted into evidence, just ask for them.

(Option 2) You may take the exhibits which have been admitted into evidence into the jury room with you.

Note on Use

Either option is acceptable.

History

M Civ JI 97.48 was added March 2005.

M Civ JI 97.49 Verdict

[You are to render separate verdicts as to each parent.]** There are only two possible verdicts in this case:

[As to _____ (*mother's name*)]**

(1) One or more of the statutory grounds alleged in the petition have been proven.

(2) None of the statutory grounds alleged in the petition have been proven.

[As to _____ (*father's name*)]**

(1) One or more of the statutory grounds alleged in the petition have been proven.

(2) None of the statutory grounds alleged in the petition have been proven.

These possible verdicts are set forth in the verdict form(s) which you will receive. Only one of the possible verdicts may be returned by you [as to each child]* [as to each parent]**. When at least five of you have agreed upon one verdict [as to each child]* [as to each parent],** your foreperson should mark that verdict.

Note on Use

* Use this phrase if jurisdiction is being sought for more than one child.

** Use this phrase if the adjudication concerns the fitness of both parents as envisioned by In re Sanders, 495 Mich 394 (2014). In cases with multiple respondent fathers, add two possible verdicts for each.

History

M Civ JI 97.49 was added March 2005. Amended June 2015.

M Civ JI 97.50 Dismissal of Extra Juror

Ladies and gentlemen of the jury: You will recall that at the beginning of the trial, I told you that while seven jurors were seated to hear this case, only six would deliberate and decide the case. Seven jurors were selected in the event one of you become ill or otherwise could not complete the case. Fortunately, all of you remained healthy, so we must now excuse one of you from further participation in this trial. If you are excused, you may either leave or may remain in the courtroom to see what the verdict will be. If you are excused, please don't feel your time has been wasted. You may have been needed and your participation was important to the administration of justice. The [bailiff / clerk] will now draw the name of one juror by lot. [Bailiff draws name]. Thank you [*name of juror*], you may step down.

Note on Use

Use when a jury of seven has been seated.

History

M Civ JI 97.50 was added March 2005.

M Civ JI 97.51 Bailiff's Oath

Do you solemnly swear that you will, to the best of your ability, keep the persons sworn as jurors in this trial from separating from each other, that you will not permit any communication to be made to them, or to any of them, orally or otherwise, that you will not communicate with them, or with any of them, orally or otherwise, except upon the order of this Court, or to ask them if they have agreed upon a verdict, until they shall be discharged, and that you will not, before they render their verdict, communicate to any person the state of their deliberations or the verdict they have agreed upon?

History

M Civ JI 97.51 was added March 2005.

M Civ JI 97.52 Begin Deliberations

Ladies and gentlemen of the jury: Throughout this trial I have told you not to discuss the case among yourselves or with anyone else. Now is the time for you to discuss it among yourselves. Please follow the bailiff to the jury room to begin your deliberations.

History

M Civ JI 97.52 was added March 2005.

M Civ JI 97.60 Form of Verdict: Statutory Grounds Alleged

We the jury find:

As to Mother*

[ ] None of the statutory grounds alleged in the petition concerning [*child's name*] has been proven.

OR

[ ] that [*name of mother*], when able to do so, neglected or refused to provide proper or necessary support, education, medical, surgical, or other care necessary for [*name of child*]'s health or morals, or

[ ] that [*name of child*] is subject to a substantial risk of harm to [his / her] mental well-being, or

[ ] that [*name of child*] has been abandoned by [*name of mother*], or

[ ] that [*name of child*] is without proper custody or guardianship, or

[ ] that [*name of child*]'s home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of [*name of mother*], is an unfit place for [*name of child*] to live in, or

[ ] that [*name of child*]'s mother has substantially failed, without good cause, to comply with a limited guardianship placement plan regarding [*name of child*], or

[ ] that [*name of child*]'s mother has substantially failed, without good cause, to comply with a court-structured plan regarding [*name of child*], or

[ ] that [*name of child*] has a guardian appointed for [him / her] under the Michigan Estates and Protected Individuals Code and

(i) that [*name of child*]'s mother, having the ability to support or assist in supporting [*name of child*], has failed or neglected, without good cause, to provide regular and substantial support for [*name of child*] for a period of two years or more before the filing of the petition, or if a support order has been entered, has failed to substantially comply with the order for a period of two years or more before the filing of the petition, and

(ii) that [*name of child*]'s mother, having the ability to visit, contact or communicate with [*name of child*], has regularly and substantially failed or neglected, without good cause, to do so for a period of two years or more before the filing of the petition.

As to Father*

[ ] None of the statutory grounds alleged in the petition concerning [*child's name*] has been proven.

OR

[ ] that [*name of father*], when able to do so, neglected or refused to provide proper or necessary support, education, medical, surgical, or other care necessary for [*name of child*]'s health or morals, or

[ ] that [*name of child*] is subject to a substantial risk of harm to [his / her] mental well-being, or

[ ] that [*name of child*] has been abandoned by [*name of father*], or

[ ] that [*name of child*] is without proper custody or guardianship, or

[ ] that [*name of child*]'s home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of [*name of father*], is an unfit place for [*name of child*] to live in, or

[ ] that [*name of child*]'s father has substantially failed, without good cause, to comply with a limited guardianship placement plan regarding [*name of child*], or

[ ] that [*name of child*]'s father has substantially failed, without good cause, to comply with a court-structured plan regarding [*name of child*], or

[ ] that [*name of child*] has a guardian appointed for [him / her] under the Michigan Estates and Protected Individuals Code and

(i) that [*name of child*]'s father, having the ability to support or assist in supporting [*name of child*], has failed or neglected, without good cause, to provide regular and substantial support for [*name of child*] for a period of two years or more before the filing of the petition, or if a support order has been entered, has failed to substantially comply with the order for a period of two years or more before the filing of the petition, and

(ii) that [*name of child*]'s father, having the ability to visit, contact or communicate with [*name of child*], has regularly and substantially failed or neglected, without good cause, to do so for a period of two years or more before the filing of the petition.

Note on Use

* Use this format if the adjudication concerns the fitness of both parents as envisioned by In re Sanders, 495 Mich 394 (2014). In cases with multiple respondent fathers, add two possible verdicts for each. Use only those statutory grounds that are applicable.

In the Committee's opinion, special verdict forms are not prohibited.

History

Added March 2005. Amended June 2015.

M Civ JI 97.61 Form of Verdict: One Statutory Ground Alleged [*Instruction Deleted*]

~~We, the jury, find that:~~

~~[ ] The statutory ground alleged in the petition concerning [*child's name*] has been proven.~~

~~[ ] The statutory ground alleged in the petition concerning [*child's name*] has not been proven.~~

Note on Use

In the Committee's opinion, special verdict forms are not prohibited.

History

Added March 2005. Deleted June 2015.

Chapter 100: Rent Action—Residential Property

Introduction 510

M Civ JI 100.01 Rent Action: Explanation of Statutes; Defense of Failure to Keep Premises Fit for Use Intended / Failure to Repair / Noncompliance with Health or Safety Laws / Retaliatory Rent Increase 515

M Civ JI 100.02 Rent Action: Burden of Proof 517

Introduction

Litigation of disputes between tenants and landlords generally falls into one of two categories: (1) actions for possession for nonpayment of rent and (2) actions for possession for termination of tenancy. Affirmative defenses and counterclaims generally involve claims of failure by the landlord to keep the premises in reasonable repair in the rent cases and claims of retaliatory eviction in the termination cases.

Although various statutes may have some application in landlord-tenant disputes depending upon the particular circumstances, three statutes have general application.

1. MCL 554.134 sets forth the basic requisites for termination of the estates involved in landlord-tenant matters in the following language:

   (1) Except as provided otherwise in this section, an estate at will or by sufferance may be terminated by either party by 1 month's notice given to the other party. If the rent reserved in a lease is payable at periods of less than 3 months, the time of notice is sufficient if it is equal to the interval between the times of payment. Notice is not void because it states a day for the termination of the tenancy that does not correspond to the conclusion or commencement of a rental period. The notice terminates the tenancy at the end of a period equal in time to that in which the rent is made payable.

   (2) If a tenant neglects or refuses to pay rent on a lease at will or otherwise, the landlord may terminate the tenancy by giving the tenant a written 7-day notice to quit.

   (3) A tenancy from year to year may be terminated by either party by a notice to quit, given at any time to the other party. The notice shall terminate the lease at the expiration of 1 year from the time of the service of the notice.

   (4) If a tenant holds over after a lease is terminated pursuant to a clause in the lease providing for termination because the tenant, a member of the tenant's household, or other person under the tenant's control has manufactured, delivered, possessed with intent to deliver, or possessed a controlled substance on the leased premises, the landlord may terminate the tenancy by giving the tenant a written 7-day notice to quit. This subsection applies only if a formal police report has been filed alleging that the person has unlawfully manufactured, delivered, possessed with intent to deliver, or possess a controlled substance on the leased premises. For purposes of this subsection, "controlled substance" means a substance or a counterfeit substance classified in schedule 1, 2, or 3 pursuant to sections 7211, 7212, 7213, 7214, 7215, and 7216 of Act No. 368 of the Public Acts of 1978, being sections 333.7211, 333.7212, 333.7213, 333.7214, 333.7215, and 333.7216 of the Michigan Compiled Laws.

2. 1968 PA 295 contains statutory covenants imposed by law on residential landlords. That statute is contained in MCL 554.139, which provides as follows:

(1) In every lease or license of residential premises, the lessor or licensor covenants:

(a) That the premises and all common areas are fit for the use intended by the parties.

(b) To keep the premises in reasonable repair during the term of the lease or license, and to comply with the applicable health and safety laws of the state and of the local unit of government where the premises are located, except when the disrepair or violation of the applicable health or safety laws has been caused by the tenants [sic] wilful or irresponsible conduct or lack of conduct.

(2) The parties to the lease or license may modify the obligations imposed by this section where the lease or license has a current term of at least 1 year.

(3) The provisions of this section shall be liberally construed, and the privilege of a prospective lessee or licensee to inspect the premises before concluding a lease or license shall not defeat his right to have the benefit of the covenants established herein.

3. 1972 PA 120 governs summary proceedings for the recovery of land, and is contained in MCL 600.5701–.5759. Section 5714 outlines the grounds for summary recovery of possession:

(1) The person entitled to any premises may recover possession thereof by summary proceedings in the following cases:

(a) When a person holds over any premises, after failing or refusing to pay rent due under the lease or agreement by which he holds within 7 days from the service of a written demand for possession for nonpayment of the rent due. For the purpose of this provision, rent due shall not include any accelerated indebtedness by reason of a breach of the lease under which the premises are held.

(b) When a person holds over any premises in any of the following circumstances:

(i) After termination of the lease, pursuant to a power to terminate provided in the lease or implied by law.

(ii) After the term for which they are demised to him or to the person under whom he holds.

(iii) After the termination of his estate by a notice to quit as provided by section 34 of chapter 66 of the Revised Statutes of 1846, as amended, being section 554.134 of the Compiled Laws of 1948. [Notice must be at least as long as rental period.]

(c) When the person in possession wilfully or negligently causes a serious and continuing health hazard to exist on the premises, or causes extensive and

continuing physical injury to the premises, which was discovered or should reasonably have been discovered by the party seeking possession not earlier than 90 days before the institution of proceedings under this chapter and when the person in possession neglects or refuses for 7 days after service of a demand for possession of the premises to deliver up possession of the premises or to substantially restore or repair the premises.

(d) When a person takes possession of premises by means of a forcible entry, holds possession of premises by force after a peaceable entry or comes into possession of premises by trespass without color of title or other possessory interest.

(e) When a person continues in possession of any premises sold by virtue of any mortgage or execution, after the time limited by law for redemption of the premises.

(f) When a person continues in possession of any premises sold and conveyed by any executor or administrator under license from the probate court or under authority in the will.

(2) A tenant or occupant of housing operated by a city, village, township or other unit of local government, as provided in Act No. 18 of the Public Acts of the Extra Session of 1933, as amended, being sections 125.651 to 125.709e of the Compiled Laws of 1948, is not deemed to be holding over under subdivision (b) of subsection (1) unless the tenancy or agreement has been terminated for just cause, as provided by lawful rules of the local housing commission or by law.

Section 5720 sets forth specific statutory defenses to actions for possession:

(1) A judgment for possession of the premises for an alleged termination of tenancy shall not be entered against a defendant if 1 or more of the following is established:

(a) That the alleged termination was intended primarily as a penalty for the defendant's attempt to secure or enforce rights under the lease or agreement or under the laws of the state, of a governmental subdivision of this state, or of the United States.

(b) That the alleged termination was intended primarily as a penalty for the defendant's complaint to a governmental authority with a report of plaintiff's violation of a health or safety code or ordinance.

(c) That the alleged termination was intended primarily as retribution for a lawful act arising out of the tenancy, including membership in a tenant organization and a lawful activity of a tenant organization arising out of the tenancy.

(d) That the alleged termination was of a tenancy in housing operated by a city, village, township or other unit of local government and was terminated without cause.

(e) That the plaintiff attempted to increase the defendant's obligations under the lease or contract as a penalty for the lawful acts as are described in subdivisions (a) to (c) and that the defendant's failure to perform the additional obligations was the primary reason for the alleged termination of tenancy.

(f) That the plaintiff committed a breach of the lease which excuses the payment of rent if possession is claimed for nonpayment of rent.

(g) That the rent allegedly due, in an action where possession is claimed for nonpayment of rent, was paid into an escrow account under section 130 of Act No. 167 of the Public Acts of 1917, being section 125.530 of the Michigan Compiled Laws; was paid pursuant to a court order under section 134(5) of Act No. 167 of the Public Acts of 1917, as amended, being section 125.534 of the Michigan Compiled Laws; or was paid to a receiver under section 135 of Act No. 167 of the Public Acts of 1917, being section 125.535 of the Michigan Compiled Laws of 1948.

(2) If a defendant who alleges a retaliatory termination of the tenancy shows that within 90 days before the commencement of summary proceedings the defendant attempted to secure or enforce rights against the plaintiff or to complain against the plaintiff, as provided in subsection (1)(a), (b), (c), or (e), by means of official action to or through a court or other governmental agency and the official action has not resulted in dismissal or denial of the attempt or complaint, a presumption in favor of the defense of retaliatory termination arises, unless the plaintiff establishes by a preponderance of the evidence that the termination of tenancy was not in retaliation for the acts. If the defendant's alleged attempt to secure or enforce rights or to complain against the plaintiff occurred more than 90 days before the commencement of proceedings or was terminated adversely to the defendant, a presumption adverse to the defense of retaliatory termination arises and the defendant has the burden to establish the defense by a preponderance of the evidence.

At common law, the tenant's obligation to pay rent was independent of covenants by the landlord to repair the premises or to comply with health and safety laws and regulations. As a result, breach by the landlord of covenants to repair was not a defense to an action by the landlord to recover possession for nonpayment of rent. *Reaume v Wayne Circuit Judge*, 299 Mich 305; 300 NW 97 (1941).

The so-called "tenants' rights" legislation exemplified by 1968 PA 295, however, drastically altered that situation. As pointed out by the court of appeals in *Rome v Walker*, 38 Mich App 458, 463–465; 196 NW2d 850, 853–854 (1972):

[U]nder prior practice the tenant could raise no affirmative defenses on his behalf in an action by the landlord to regain possession for nonpayment of rent. The only defense was payment of the rent.

1968 PA 297, however, revolutionized the rights of tenants in this respect. MCL 600.5637(5) now allows the tenant to raise the question of a breach of the lease by the landlord 'which excuses the payment of rent'. While the phrase, 'which excuses the payment of rent', is undefined, it is clear from an examination of the language of MCL 600.5646(3) that the Legislature intended that any defense which the tenant may have can be raised in the proceeding brought by the landlord to regain possession for alleged nonpayment of rent.

The intent of the new language is clear. Tenants may now raise any defense, which would justify the withholding of rent, in an action by the landlord to regain possession for nonpayment of rent. Upon motion by either party, the court shall determine if summary judgment of possession should be granted to the moving party. If, as here, the trial court determines that the tenants' counterclaim raises a substantial question of fact, the court should deny the landlord's motion for summary judgment and the question of possession will thereby abide the determination of the case on the merits.

The current authorization for abatement is found in MCL 600.5741.

The instructions which follow are designed to deal with the situations which most often occur in landlord-tenant disputes when the issues relate to the recent statutes. In some cases, the instructions do not cover a particular issue or an aspect of a particular issue. In such situations, it is appropriate for the Court to add to the model instructions. The landlord-tenant instructions should be used with the applicable General Instructions as well as M Civ JI 16.01 Meaning of Burden of Proof to construct a logical and cohesive jury charge.

History

This Introduction was added April 1981.

M Civ JI 100.01 Rent Action: Explanation of Statutes; Defense of Failure to Keep Premises Fit for Use Intended / Failure to Repair / Noncompliance with Health or Safety Laws / Retaliatory Rent Increase

This is an action by the landlord [*name of landlord*] to recover possession of the premises located at [*address of premises*] for nonpayment of rent.

The law of our state provides that if a tenant fails or refuses to pay rent when due, the landlord or someone acting for the landlord may give the tenant seven days' written notice to either pay the rent due or leave the premises. If the tenant does not pay the rent or move within the seven-day period, then the landlord may recover possession of the [house / apartment / [other]] in court proceedings.

*(The law of our state also provides that the landlord has the duty [to keep the [house / apartment / [other]] fit for the use intended / to keep the [house / apartment / [other]] in reasonable repair / to comply with applicable health and safety laws of this state and of [*name of city, township or county*]] during the term of the lease.)

*(The landlord has these duties even if the tenant inspected or could have inspected the [house / apartment / [other]] before moving in.)

*([This duty / These duties] of the landlord may be modified by agreement between the landlord and the tenant whenever the term of the lease is for at least one year.)

*(Unless the [landlord / landlord's agent] knew or should have known of the [need for repairs / condition complained of], or the landlord's actions excuse notice, then notice of the [need for repairs / condition complained of] is necessary to hold the landlord responsible for [not making repairs / not correcting the condition]. Notice is not necessary, however, regarding [repairs needed / conditions complained of] in common areas.)

*(The landlord is not responsible for the condition complained of by the tenant if the condition was caused by the tenant's own willful or irresponsible conduct or lack of conduct.)

*(The law provides that if the landlord breaches [his / her] [duty / duties] to keep the premises in the condition required by law, the tenant need not pay any of the rent which is excused by the landlord's breach.)

*†(The law of our state also provides that the landlord may not raise the rent to punish the tenant for [*describe lawful acts of tenant*].)

Note on Use

*These paragraphs in parentheses should be used only if applicable.

†See MCL 600.5720(1)(e) on retaliatory rent increase for lawful acts of the tenant as a defense to a rent action.

Comment

The landlord may recover possession by summary proceedings if the tenant does not pay the rent or move after the seven days' written notice. MCL 600.5714.

The landlord's duty to keep the premises in reasonable repair, fit for the use intended, and to abide by health and safety laws, is found in MCL 554.139. See also *Bayview Estates, Inc v Bayview Estates Mobile Homeowners Association*, 508 F2d 405 (CA 6, 1974). The amount of rent which is found to be excused by the landlord's breach should be deducted from the rent due. MCL 600.5741.

On the requirement of notice to the landlord, and exceptions, see 49 Am Jur 2d, Landlord and Tenant, §§ 778, 838, pp 719, 805.

History

M Civ JI 100.01 was added April 1, 1981.

M Civ JI 100.02 Rent Action: Burden of Proof

The landlord has the burden of proof on the following:

(a) *(that [he / she] is the landlord and that [*name*] is [his / her] tenant);

(b) that the rental rate is $_____.____ per [month / week / [other]] for the [period / periods] of time for which the landlord claims rent, and the total amount due is $_____.____; and

(c) †(that the landlord served the tenant with a written seven-day notice to quit).

*(The tenant, [*name of tenant*], has the burden of proof on [his / her] claim that:

(a) **(the landlord knew or should have known of the [need for repairs / condition complained of] or the landlord's actions excused notice); and

(b) the landlord failed [to keep the [house / apartment / [other]] fit for the use intended / to keep the [house / apartment / [other]] in reasonable repair / to comply with applicable health and safety laws of this state and of [*name of city, township or county*]] during the term of the lease).

‡(The tenant has the burden of proof on [his / her] claim that the rent claimed by the landlord is an increase in rent to punish [him / her] for [*describe lawful acts of tenant*].)

*(The tenant has the burden of proof on [his / her] claim that [he / she] paid the rent during the [period / periods] for which the landlord claims rent.)

If you find that the landlord sustained [his / her] burden of proof, and you find that the tenant has not sustained [his / her] burden of proof on any of [his / her] defenses, your verdict should be for the landlord in the full amount claimed.

If you find that the landlord has not sustained [his / her] burden of proof, your verdict should be for the tenant.

If you find that the landlord has sustained [his / her] burden of proof, and you find that the tenant has sustained [his / her] burden of proof, then you should deduct [any of the rent that you find to be excused by the landlord's failure to [make repairs / correct conditions] / any rent which has been paid / any amount which you find is a retaliatory increase in the rent].

Note on Use

*These paragraphs in parentheses should be used only if applicable.

†If there are factual issues related to proper service or notice, subsection c must be augmented.

**If the need for repair or condition complained of is in a common area, subsection a should be deleted. See 49 Am Jur 2d, Landlord and Tenant, §§ 778, 838, pp 719, 805.

‡See MCL 600.5720(1)(e) on retaliatory rent increase for lawful acts of the tenant as a defense to a rent action.

This instruction should be used with M Civ JI 16.01 Meaning of Burden of Proof.

Comment

The elements of proper notice are found in MCL 600.5716, and the requirements of service are found in MCL 600.5718. A just cause hearing and additional notice requirements apply if public or other assisted housing is involved. MCL 600.5714.

History

M Civ JI 100.02 was added April 1, 1981.

Chapter 101: Termination Action—Residential Property

Introduction 520
M Civ JI 101.01 Termination Action: Explanation of Statutes 525
M Civ JI 101.02 Termination Action: Retaliatory Termination—Explanation of Statute 526
M Civ JI 101.03 Termination Action: Issues—Notice of Termination / Retaliatory Termination 527
M Civ JI 101.04 Termination Action: Retaliatory Termination—Tenant Burden of Proof 528
M Civ JI 101.05 Termination Action: Retaliatory Termination—Landlord Burden of Proof 529
M Civ JI 101.06 Termination Action: Retaliatory Termination—Tenant Burden of Proof on Complaint within Ninety Days 531

Introduction

Litigation of disputes between tenants and landlords generally falls into one of two categories: (1) actions for possession for nonpayment of rent and (2) actions for possession for termination of tenancy. Affirmative defenses and counterclaims generally involve claims of failure by the landlord to keep the premises in reasonable repair in the rent cases and claims of retaliatory eviction in the termination cases.

Although various statutes may have some application in landlord-tenant disputes depending upon the particular circumstances, three statutes have general application.

1. MCL 554.134 sets forth the basic requisites for termination of the estates involved in landlord-tenant matters in the following language: (1) Except as provided otherwise in this section, an estate at will or by sufferance may be terminated by either party by 1 month's notice given to the other party. If the rent reserved in a lease is payable at periods of less than 3 months, the time of notice is sufficient if it is equal to the interval between the times of payment. Notice is not void because it states a day for the termination of the tenancy that does not correspond to the conclusion or commencement of a rental period. The notice terminates the tenancy at the end of a period equal in time to that in which the rent is made payable.

(2) If a tenant neglects or refuses to pay rent on a lease at will or otherwise, the landlord may terminate the tenancy by giving the tenant a written 7-day notice to quit.

(3) A tenancy from year to year may be terminated by either party by a notice to quit, given at any time to the other party. The notice shall terminate the lease at the expiration of 1 year from the time of the service of the notice.

(4) If a tenant holds over after a lease is terminated pursuant to a clause in the lease providing for termination because the tenant, a member of the tenant's household, or other person under the tenant's control has manufactured, delivered, possessed with intent to deliver, or possessed a controlled substance on the leased premises, the landlord may terminate the tenancy by giving the tenant a written 7-day notice to quit. This subsection applies only if a formal police report has been filed by the landlord alleging that the person has unlawfully manufactured, delivered, possessed with intent to deliver, or possess a controlled substance on the leased premises. For purposes of this subsection, "controlled substance" means a substance or a counterfeit substance classified in schedule 1, 2, or 3 pursuant to sections 7211, 7212, 7213, 7214, 7215, and 7216 of Act No. 368 of the Public Acts of 1978, being sections 333.7211, 333.7212, 333.7213, 333.7214, 333.7215, and 333.7216 of the Michigan Compiled Laws.

2. 1968 PA 295 contains statutory covenants imposed by law on residential landlords. That statute is contained in MCL 554.139, which provides as follows:

(1) In every lease or license of residential premises, the lessor or licensor covenants:

(a) That the premises and all common areas are fit for the use intended by the parties.

(b) To keep the premises in reasonable repair during the term of the lease or license, and to comply with the applicable health and safety laws of the state and of the local unit of government where the premises are located, except when the disrepair or violation of the applicable health or safety laws has been caused by the tenants [sic] wilful or irresponsible conduct or lack of conduct.

(2) The parties to the lease or license may modify the obligations imposed by this section where the lease or license has a current term of at least 1 year.

(3) The provisions of this section shall be liberally construed, and the privilege of a prospective lessee or licensee to inspect the premises before concluding a lease or license shall not defeat his right to have the benefit of the covenants established herein.

3. 1972 PA 120 governs summary proceedings for the recovery of land, and is contained in MCL 600.5701–.5759. Section 5714 outlines the grounds for summary recovery of possession:

(1) The person entitled to any premises may recover possession thereof by summary proceedings in the following cases:

(a) When a person holds over any premises, after failing or refusing to pay rent due under the lease or agreement by which he holds within 7 days from the service of a written demand for possession for nonpayment of the rent due. For the purpose of this provision, rent due shall not include any accelerated indebtedness by reason of a breach of the lease under which the premises are held.

(b) When a person holds over any premises in any of the following circumstances:

(i) After termination of the lease, pursuant to a power to terminate provided in the lease or implied by law.

(ii) After the term for which they are demised to him or to the person under whom he holds.

(iii) After the termination of his estate by a notice to quit as provided by section 34 of chapter 66 of the Revised Statutes of 1846, as amended, being section 554.134 of the Compiled Laws of 1948. [Notice must be at least as long as rental period.]

(c) When the person in possession wilfully or negligently causes a serious and continuing health hazard to exist on the premises, or causes extensive and continuing physical injury to the premises, which was discovered or should reasonably have been discovered by the party seeking possession not earlier than 90 days before the institution of proceedings under this chapter and when the person in possession neglects or refuses for 7 days after service of a

demand for possession of the premises to deliver up possession of the premises or to substantially restore or repair the premises.

(d) When a person takes possession of premises by means of a forcible entry, holds possession of premises by force after a peaceable entry or comes into possession of premises by trespass without color of title or other possessory interest.

(e) When a person continues in possession of any premises sold by virtue of any mortgage or execution, after the time limited by law for redemption of the premises.

(f) When a person continues in possession of any premises sold and conveyed by any executor or administrator under license from the probate court or under authority in the will.

(2) A tenant or occupant of housing operated by a city, village, township or other unit of local government, as provided in Act No. 18 of the Public Acts of the Extra Session of 1933, as amended, being sections 125.651 to 125.709e of the Compiled Laws of 1948, is not deemed to be holding over under subdivision (b) of subsection (1) unless the tenancy or agreement has been terminated for just cause, as provided by lawful rules of the local housing commission or by law.

Section 5720 sets forth specific statutory defenses to actions for possession:

(1) A judgment for possession of the premises for an alleged termination of tenancy shall not be entered against a defendant if 1 or more of the following is established:

(a) That the alleged termination was intended primarily as a penalty for the defendant's attempt to secure or enforce rights under the lease or agreement or under the laws of the state, of a governmental subdivision of this state, or of the United States.

(b) That the alleged termination was intended primarily as a penalty for the defendant's complaint to a governmental authority with a report of plaintiff's violation of a health or safety code or ordinance.

(c) That the alleged termination was intended primarily as retribution for a lawful act arising out of the tenancy, including membership in a tenant organization and a lawful activity of a tenant organization arising out of the tenancy.

(d) That the alleged termination was of a tenancy in housing operated by a city, village, township or other unit of local government and was terminated without cause.

(e) That the plaintiff attempted to increase the defendant's obligations under the lease or contract as a penalty for the lawful acts as are described in

subdivisions (a) to (c) and that the defendant's failure to perform the additional obligations was the primary reason for the alleged termination of tenancy.

(f) That the plaintiff committed a breach of the lease which excuses the payment of rent if possession is claimed for nonpayment of rent.

(g) That the rent allegedly due, in an action where possession is claimed for nonpayment of rent, was paid into an escrow account under section 130 of Act No. 167 of the Public Acts of 1917, being section 125.530 of the Michigan Compiled Laws; was paid pursuant to a court order under section 134(5) of Act No. 167 of the Public Acts of 1917, as amended, being section 125.534 of the Michigan Compiled Laws; or was paid to a receiver under section 135 of Act No. 167 of the Public Acts of 1917, being section 125.535 of the Michigan Compiled Laws of 1948.

(2) If a defendant who alleges a retaliatory termination of the tenancy shows that within 90 days before the commencement of summary proceedings the defendant attempted to secure or enforce rights against the plaintiff or to complain against the plaintiff, as provided in subsection (1)(a), (b), (c), or (e), by means of official action to or through a court or other governmental agency and the official action has not resulted in dismissal or denial of the attempt or complaint, a presumption in favor of the defense of retaliatory termination arises, unless the plaintiff establishes by a preponderance of the evidence that the termination of tenancy was not in retaliation for the acts. If the defendant's alleged attempt to secure or enforce rights or to complain against the plaintiff occurred more than 90 days before the commencement of proceedings or was terminated adversely to the defendant, a presumption adverse to the defense of retaliatory termination arises and the defendant has the burden to establish the defense by a preponderance of the evidence.

At common law, the tenant's obligation to pay rent was independent of covenants by the landlord to repair the premises or to comply with health and safety laws and regulations. As a result, breach by the landlord of covenants to repair was not a defense to an action by the landlord to recover possession for nonpayment of rent. *Reaume v Wayne Circuit Judge*, 299 Mich 305; 300 NW 97 (1941).

The so-called "tenants' rights" legislation exemplified by 1968 PA 295, however, drastically altered that situation. As pointed out by the court of appeals in *Rome v Walker*, 38 Mich App 458, 463–465; 196 NW2d 850, 853–854 (1972):

[U]nder prior practice the tenant could raise no affirmative defenses on his behalf in an action by the landlord to regain possession for nonpayment of rent. The only defense was payment of the rent. 1968 PA 297, however, revolutionized the rights of tenants in this respect. MCL 600.5637(5) now allows the tenant to raise the question of a breach of the lease by the landlord 'which excuses the payment of rent'. While the phrase, 'which excuses the payment of rent', is undefined, it is clear from an examination of the language of MCL 600.5646(3) that the Legislature intended that any defense which the tenant may have can be raised in the proceeding brought by the landlord to regain possession for alleged nonpayment of rent.

The intent of the new language is clear. Tenants may now raise any defense, which would justify the withholding of rent, in an action by the landlord to regain possession for nonpayment of rent. Upon motion by either party, the court shall determine if summary judgment of possession should be granted to the moving party. If, as here, the trial court determines that the tenants' counterclaim raises a substantial question of fact, the court should deny the landlord's motion for summary judgment and the question of possession will thereby abide the determination of the case on the merits.

The current authorization for abatement is found in MCL 600.5741.

The instructions which follow are designed to deal with the situations which most often occur in landlord-tenant disputes when the issues relate to the recent statutes. In some cases, the instructions do not cover a particular issue or an aspect of a particular issue. In such situations, it is appropriate for the Court to add to the model instructions. The landlord-tenant instructions should be used with the applicable General Instructions as well as M Civ JI 16.01 Meaning of Burden of Proof to construct a logical and cohesive jury charge.

History

This Introduction was added April 1981.

M Civ JI 101.01 Termination Action: Explanation of Statutes

This case involves a termination of tenancy. Under the law of this state a landlord may seek to recover possession of the [house / apartment / [other]] after giving the tenant a proper notice of termination.

In this case, the rent is paid on a [monthly / weekly / [other]] basis, and therefore the landlord may terminate the tenancy by giving the tenant [one month's / one week's / [other]] notice. This notice of termination must be in writing, and shall be dated and signed by the landlord, [his / her] attorney or [his / her] agent. The landlord may seek to recover possession of the premises by legal action if the tenant does not move by the end of the notice period.

Comment

Requirements of notice to terminate a tenancy are found in MCL 554.134; MCL 600.5716; and MCL 600.5718. After proper notice, the landlord may recover possession by summary proceedings, MCL 600.5714, unless other defenses are proved, e.g., retaliatory eviction.

History

M Civ JI 101.01 was added April 1, 1981.

M Civ JI 101.02 Termination Action: Retaliatory Termination—Explanation of Statute

By statute, a landlord is not entitled to possession of the premises—

(a) *(if termination of the tenancy was intended primarily as a penalty for the tenant's attempt to secure or enforce rights under the lease or rental agreement, or under the laws of the State of Michigan or its governmental subdivisions or of the United States)

(b) *(if termination of the tenancy was intended primarily as a penalty for the tenant's complaint to a governmental authority concerning a violation of any health or safety code or ordinance)

(c) *(if termination of the tenancy was intended primarily as retribution for any lawful act arising out of the tenancy, including membership in a tenant organization and a lawful activity of a tenant organization arising out of the tenancy)

(d) *(if it is a tenancy in housing operated by a city, village, township, or other unit of local government, and was terminated without cause)

(e) *(if termination of the tenancy was intended primarily as a penalty because of the tenant's failure to perform additional obligations under the lease or contract imposed by the landlord—

(i) as a result of the tenant's attempt to secure or enforce rights under the lease or rental agreement, under the laws of the State of Michigan or its governmental subdivisions or of the United States

(ii) as a result of the tenant's complaint to a governmental authority concerning a violation of any health or safety code or ordinance

(iii) as retribution for any lawful act arising out of the tenancy)

Note on Use

*Select the subsections applicable to the facts of case.

History

M Civ JI 101.02 was added April 1, 1981.

M Civ JI 101.03 Termination Action: Issues—Notice of Termination / Retaliatory Termination

There is an issue in this case of whether the landlord served the tenant with a written [one month's / one week's / [other]] notice to terminate the tenancy.

There is *(also) an issue in this case of whether the landlord intended primarily to penalize or retaliate against the tenant for exercising [his / her] rights as a tenant in one or more of the ways claimed by the tenant as I have explained to you in these instructions.

Note on Use

Requirements of the notice to terminate a tenancy are found in MCL 554.134.

This instruction should precede an applicable burden of proof instruction, M Civ JI 101.04, 101.05 or 101.06.

*Insert if applicable.

History

M Civ JI 101.03 was added April 1, 1981.

M Civ JI 101.04 Termination Action: Retaliatory Termination—Tenant Burden of Proof

The landlord has the burden of proof that [he / she] served the tenant with a written [one month's / one week's / [other]] notice to terminate the tenancy.

The tenant has the burden of proof on [his / her] claim that the termination of tenancy by the landlord was intended primarily as a penalty or retaliation for exercising [his / her] rights as a tenant in one or more of the ways that I previously described.

Your verdict will be for the landlord if [he / she] served the tenant with the required [one month's / one week's / [other]] notice, unless the termination of tenancy was intended primarily as a penalty or retaliation.

Your verdict will be for the tenant if the landlord did not serve the tenant with the required [one month's / one week's / [other]] notice, or if the termination of tenancy was intended primarily as a penalty or retaliation.

Note on Use

This instruction should be given if there is no claim by the tenant that he or she attempted to secure or enforce rights or complained within ninety days before the termination action was commenced.

This instruction should also be given if the evidence of such an attempt is insufficient to go to the jury, or, for example, if it is clear that the attempt or complaint was made more than ninety days before the termination action, or resulted in a dismissal or denial.

This instruction should be used with M Civ JI 16.01 Meaning of Burden of Proof.

Comment

Requirements of notice to terminate a tenancy are found in MCL 554.134.

See MCL 600.5720(2) for burden of proof on retaliatory termination.

History

M Civ JI 101.04 was added April 1, 1981.

M Civ JI 101.05 Termination Action: Retaliatory Termination—Landlord Burden of Proof

The landlord has the burden of proof that [he / she] served the tenant with a written [one month's / one week's / [other]] notice to terminate the tenancy.

In this case the tenant has [attempted to secure or enforce rights against the landlord / complained against the landlord [*describe complaint*]] to [name of court / name of governmental agency] within ninety days of the commencement of this termination action, [*date action filed*], and the [attempt / complaint] has not been dismissed or denied.

Under these circumstances, the law places on the landlord the burden of proof that [his / her] termination of the tenancy was not intended primarily as a penalty or retaliation against the tenant for [that act / those acts].

Your verdict will be for the landlord if [he / she] served the tenant with the required [one month's / one week's / [other]] notice, and if the termination of tenancy was not intended primarily as a penalty or retaliation for [that act / those acts].

Your verdict will be for the tenant if the landlord did not serve the tenant with the required [one month's / one week's / [other]] notice or if the termination of tenancy was intended primarily as a penalty or retaliation for [that act / those acts].

Note on Use

This instruction should be given if there is no dispute on the facts indicated in the second paragraph.

If the tenant claims that the termination is in retaliation both for his or her complaint within the ninety-day period and for a complaint or attempt to secure rights prior to the ninety-day period, this instruction must be modified. The landlord has the burden of proof to show that he or she was not retaliating against the tenant only with regard to a complaint or attempt to secure rights within the ninety-day period, while the tenant has the burden of proof to show that the landlord was retaliating with regard to any complaint or attempt to secure rights prior to the ninety-day period.

This instruction should be used with M Civ JI 16.01 Meaning of Burden of Proof.

Comment

Requirements of notice to terminate a tenancy are found in MCL 554.134.

See MCL 600.5720(2) for burden of proof on retaliatory termination.

History

M Civ JI 101.05 was added April 1, 1981.

M Civ JI 101.06 Termination Action: Retaliatory Termination—Tenant Burden of Proof on Complaint within Ninety Days

The landlord has the burden of proof that [he / she] served the tenant with a written [one month's / one week's / [other]] notice to terminate the tenancy.

In this case the tenant claims that [he / she] has [attempted to secure or enforce rights against the landlord / complained against the landlord [*describe complaint*]] to [*name of court / name of governmental agency*] within ninety days of the commencement of this termination action, [*date action filed*], and the [attempt / complaint] has not been dismissed or denied. The tenant has the burden of proof on this claim.

If you find that the tenant has sustained [his / her] burden of proof on this claim, then the landlord has the burden of proof that [his / her] termination of the tenancy was not intended primarily as a penalty or retaliation against the tenant for [that act / those acts].

If you find that the tenant has not sustained [his / her] burden of proof that [he / she] [attempted to secure or enforce rights / complained] within ninety days before this termination action, then the burden of proof is on the tenant to show that the termination of tenancy was intended by the landlord primarily as a penalty or retaliation against the tenant.

Your verdict will be for the landlord if [he / she] served the tenant with the required [one month's / one week's / [other]] notice, and if the termination of tenancy was not intended primarily as a penalty or retaliation against the tenant.

Your verdict will be for the tenant if the landlord did not serve the tenant with the required [one month's / one week's / [other]] notice or if the termination of tenancy was intended primarily as a penalty or retaliation against the tenant.

Note on Use

This instruction should be used where there are factual issues relating to the complaint or attempt to secure rights, i.e., whether the complaint was made within the ninety-day period, or whether it was dismissed or denied.

If the tenant claims that the termination is in retaliation both for his or her complaint within the ninety-day period and for a complaint or attempt to secure rights prior to the ninety-day period, this instruction must be modified. The landlord has the burden of proof to show that he or she was not retaliating against the tenant only with regard to a complaint or attempt to secure rights within the ninety-day period, while the tenant has the burden of proof to show that the landlord was retaliating with regard to any complaint or attempt to secure rights prior to the ninety-day period.

This instruction should be used with M Civ JI 16.01 Meaning of Burden of Proof.

Comment

Requirements of notice to terminate a tenancy are found in MCL 554.134.

See MCL 600.5720(2) for burden of proof on retaliatory termination.

History

M Civ JI 101.06 was added April 1, 1981.

Chapter 105: Employment Discrimination

Introduction 534

M Civ JI 105.01 Employment Discrimination Statute (Disparate Treatment)—Explanation 535

M Civ JI 105.02 Employment Discrimination (Disparate Treatment)—Definition 536

M Civ JI 105.03 Employment Discrimination (Disparate Treatment)—Cautionary Instruction as to Business Judgment 537

M Civ JI 105.04 Employment Discrimination (Disparate Treatment)—Burden of Proof 538

M Civ JI 105.04A Employment Discrimination—Burden of Proof—Retaliation 539

M Civ JI 105.05 Employment Discrimination (Constructive Discharge)—Definition 540

M Civ JI 105.10 Employment Discrimination—Sexual Harassment—Explanation 541

M Civ JI 105.12 Employment Discrimination—Quid Pro Quo Harassment—Burden of Proof 542

M Civ JI 105.14 Employment Discrimination—Hostile Environment Sexual Harassment—Burden of Proof—Employer Defendant 543

M Civ JI 105.18 Employment Discrimination—Hostile Environment Sexual Harassment—Burden of Proof—Unwelcome Sexual Conduct or Communication 544

M Civ JI 105.20 Employment Discrimination—Hostile Environment Sexual Harassment—Sexually Hostile Work Environment 545

M Civ JI 105.24 Employment Discrimination—Hostile Environment Sexual Harassment—Employer Liability 546

M Civ JI 105.26 Employment Discrimination—Hostile Environment Sexual Harassment—Notice 547

M Civ JI 105.28 Employment Discrimination—Hostile Environment Sexual Harassment—Prompt Remedial Action 548

M Civ JI 105.30 Employment Discrimination—Hostile Environment Sexual Harassment—Damages—Tangible Employment Act Not Required 549

M Civ JI 105.32 Employment Discrimination—Hostile Environment Sexual Harassment—Burden of Proof—Employee Defendant 550

M Civ JI 105.41 Employment Discrimination—Mitigation of Damages for Loss of Compensation 551

M Civ JI 105.42 Employment Discrimination—Mitigation of Damages for Loss of Compensation: Conditional and Unconditional Offers by Defendant 553

Introduction

In adopting the employment discrimination instructions in 1985, the Committee deliberately eschewed reliance on the "order and allocation of proof in a private, non-class action challenging employment discrimination," articulated by the United States Supreme Court in *McDonnell Douglas Corp v Green*, 411 US 792, 800; 93 S Ct 1817, 1823; 36 L Ed 2d 668, 676 (1973). As the Supreme Court was well aware, Title VII claims are not tried to a jury (*Albemarle Paper Co v Moody*, 422 US 405, 422–444; 95 S Ct 2362, 2385; 45 L Ed 2d 280, 312–313 (1975) (Rehnquist, J., concurring)), and *McDonnell Douglas* was not written as a prospective jury charge.

It was precisely because the McDonnell Douglas formulation would "add little to the juror's understanding of the case and, even *worse*, may lead jurors to abandon their own judgment and to seize upon poorly understood legalisms to decide the ultimate question of discrimination" (*Loeb v Textron, Inc*, 600 F2d 1003, 1016 (CA 1, 1979)) that the Committee decided not to develop its instructions around the *McDonnell Douglas* model. Since the adoption of these instructions the Michigan Supreme Court has issued two opinions discussing the *McDonnell Douglas* approach. In *DeBrow v Century 21 Great Lakes, Inc*, 463 Mich 534; 620 NW2d 836 (2001), the Court held that the shifting burdens of producing evidence described in *McDonnell Douglas* are not applicable in cases involving direct evidence of discrimination (citing *Trans World Airlines, Inc v Thurston*, 469 US 111, 121; 105 S Ct 613; 83 L Ed2d 523 (1985). In *Hazle v Ford Motor Co*, 464 Mich 456; 628 NW2d 515 (2001), the Court explained that in cases based solely on indirect or circumstantial evidence in which the *McDonnell Douglas* approach does apply, the jury should not be instructed on its application:

As the Supreme Court explained in *Burdine, supra* at 256, n 8, the *McDonnell Douglas* burden-shifting framework is merely intended "to progressively sharpen the inquiry into the elusive factual question of intentional discrimination." It is important to keep in mind, therefore, that for purposes of claims brought under the Michigan Civil Rights Act, the *McDonnell Douglas* approach merely provides a mechanism for assessing motions for summary disposition and directed verdict in cases involving circumstantial evidence of discrimination. It is useful only for purposes of assisting trial courts in determining whether there is a jury-submissible issue on the ultimate fact question of unlawful discrimination. The *McDonnell Douglas* model is not relevant to a jury's evaluation of evidence at trial. Accordingly, a jury should not be instructed on its application. See *Gehrig v Case Corp*, 43 F3d 340, 343 (CA 7, 1995) (explaining that, in federal discrimination cases, "[o]nce the judge finds that the plaintiff has made the minimum necessary demonstration [the 'prima facie case'] and that the defendant has produced an age-neutral explanation, the burden-shifting apparatus has served its purpose, and the only remaining question—the only question the jury need answer—is whether the plaintiff is a victim of intentional discrimination"). (Footnote omitted.)

M Civ JI 105.01 Employment Discrimination Statute (Disparate Treatment)—Explanation

(1) The law provides that an employer shall not discriminate against a person regarding employment, compensation, or a term, condition, or privilege of employment because of [religion / race / color / national origin / age / sex / height / weight / marital status].

(2) The law also provides that a person shall not retaliate or discriminate against a person because the person has opposed a violation of the Act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under the Act.

Note on Use

The use of any particular subsection will be dictated by the facts of the case.

Comment

MCL 37.2202; MCL 37.2701.

History

Added September 2005. Amended July 2012.

M Civ JI 105.02 Employment Discrimination (Disparate Treatment)—Definition

The plaintiff must prove that [he / she] was discriminated against because of [religion / race / color / national origin / age / sex / height / weight / marital status].

The discrimination must have been intentional. It cannot have occurred by accident. Intentional discrimination means that one of the motives or reasons for plaintiff's [discharge / failure to be hired / failure to be promoted / failure to be trained / harassment / [other]] was [religion / race / color / national origin / age / sex / height / weight / marital status]. [Religion / race / color / national origin / age / sex / height / weight / marital status] does not have to be the only reason, or even the main reason, but it does have to be one of the reasons which made a difference in determining whether or not to [discharge / hire / promote / train / harass / [other]] the plaintiff.

Note on Use

Intent to discriminate need not be proven by direct evidence, *United States Postal Service Board of Governors v Aikens*, 460 US 711; 103 S Ct 1478; 75 L Ed 2d 403 (1983). Where circumstantial evidence is relied on, M Civ JI 3.10 should be given.

Comment

MCL 37.2202. This instruction was approved in *Matras v Amoco Oil Co*, 424 Mich 675; 385 NW2d 586 (1986) and *Hazle v Ford Motor Co*, 464 Mich 456; 628 NW2d 515 (2001). See also *Gallaway v Chrysler Corp*, 105 Mich App 1; 306 NW2d 368 (1981); *Farmington Education Association v Farmington School District*, 133 Mich App 566; 351 NW2d 242 (1984).

History

M Civ JI 105.02 was added January 1985.

M Civ JI 105.03 Employment Discrimination (Disparate Treatment)—Cautionary Instruction as to Business Judgment

Your task is to determine whether defendant discriminated against the plaintiff. You are not to substitute your judgment for the defendant's business judgment, or decide this case based upon what you would have done.

However, you may consider the reasonableness or lack of reasonableness of defendant's stated business judgment along with all the other evidence in determining whether defendant discriminated or did not discriminate against the plaintiff.

Comment

Adama v Doehler-Jarvis Div of NL Industries, 115 Mich App 82; 320 NW2d 298 (1982); rev'd on other grounds, 419 Mich 905; 353 NW2d 438 (1984); *Bouwman v Chrysler Corp*, 114 Mich App 670; 319 NW2d 621 (1982); *Gallaway v Chrysler Corp*, 105 Mich App 1; 306 NW2d 368 (1981).

History

M Civ JI 105.03 was added January 1985.

M Civ JI 105.04 Employment Discrimination (Disparate Treatment)—Burden of Proof

Plaintiff has the burden of proving that:

(a) defendant [discharged / failed to hire / failed to promote / failed to train / harassed / [other]] the plaintiff, and

(b) [religion / race / color / national origin / age / sex / height / weight / marital status] was one of the motives or reasons which made a difference in determining to [discharge / fail to hire / fail to promote / fail to train / harass / [other]] the plaintiff.

Your verdict will be for the plaintiff if you find that defendant [discharged / failed to hire / failed to promote / failed to train / harassed / [other]] the plaintiff, and that [religion / race / color / national origin / age / sex / height / weight / marital status] was one of the motives or reasons which made a difference in determining to [discharge / fail to hire / fail to promote / fail to train / harass / [other]] the plaintiff.

Your verdict will be for the defendant if you find that the defendant did not [discharge / fail to hire / fail to promote / fail to train / harass / [other]] the plaintiff. Your verdict will also be for the defendant if you find that defendant did [discharge / fail to hire / fail to promote / fail to train / harass / [other]] the plaintiff, but that [religion / race / color / national origin / age / sex / height / weight / marital status] was not one of the motives or reasons which made a difference in determining to [discharge / fail to hire / fail to promote / fail to train / harass / [other]] the plaintiff.

Comment

This instruction was approved in *Cobb v General Motors*, unpublished opinion *per curiam* of the Court of Appeals decided March 29, 1989 (Docket Nos. 97545, 99515).

History

M Civ JI 105.04 was added January 1985.

M Civ JI 105.04A Employment Discrimination—Burden of Proof—Retaliation

Plaintiff has the burden of proving the following elements:

(a) that [he / she] [opposed a violation of the civil rights act / made a charge, filed a complaint, or testified, assisted, or participated in an investigation, proceeding or hearing, under the Act];

(b) that was known by the defendant;

(c) that defendant took an employment action adverse to the plaintiff; and

(d) that there was a causal connection between the protected activity and the adverse employment action.

To establish a causal connection, plaintiff must demonstrate that [his / her] participation in the protected activity was a significant factor in the defendant's adverse employment action.

Comment

MCL 37.2701. *Barrett v Kirtland Com College*, 245 Mich App 306 (2002).

History

Added July 2012.

M Civ JI 105.05 Employment Discrimination (Constructive Discharge)—Definition

The plaintiff [resigned / left the job]. Plaintiff claims that [he / she] was constructively discharged by the defendant. Defendant claims that the plaintiff voluntarily [resigned / left the job]. Plaintiff has the burden of proving that [he / she] was constructively discharged.

Constructive discharge means that an employer deliberately made an employee's working conditions so intolerable that the employee was forced to [resign / leave the job].

It is not necessary to show that defendant intended plaintiff to [resign / leave the job], so long as you find that a reasonable person in the same circumstances as plaintiff would have felt compelled to [resign / leave the job].

Note on Use

This instruction is applicable in cases where an employer is indifferent to or tolerant of harassment of plaintiff by coemployees. *Easter v Jeep Cor*p, 750 F2d 520 (CA 6, 1984).

Comment

See *Jenkins v American Red Cross*, 141 Mich App 785; 369 NW2d 223 (1985); *LeGalley v Bronson Community Schools*, 127 Mich App 482; 339 NW2d 223 (1983); *Bourque v Powell Electrical Mfg Co*, 617 F2d 61 (CA 5, 1980); *Alicea Rosado v Garcia Santiago*, 562 F2d 114 (CA 1, 1977); *Held v Gulf Oil Co*, 684 F2d 427 (CA 6, 1982); *Easter*.

History

M Civ JI 105.05 was added October 1985.

M Civ JI 105.10 Employment Discrimination—Sexual Harassment—Explanation

Sexual harassment is a type of sex discrimination prohibited by state law. There are two types of sexual harassment. The first is known as quid pro quo, which means "this for that." The second is known as sexually hostile work environment harassment. In this case plaintiff claims [quid pro quo / sexually hostile environment] harassment.

Comment

MCL 37.2103(i); *Chambers v Trettco, Inc*, 463 Mich 297 (2000).

History

Added February 1987. Amended March 1995. Amended June 2006.

M Civ JI 105.12 Employment Discrimination—Quid Pro Quo Harassment—Burden of Proof

On plaintiff's claim of quid pro quo harassment, plaintiff has the burden of proving the following elements:

(a) that the employer or [its / his / her] agent subjected plaintiff to unwelcome [sexual advances / requests for sexual favors / other verbal or physical conduct or communication of a sexual nature]; and

(b)

(i) that the employer or [its / his / her] agent explicitly or implicitly made the plaintiff's submission to such conduct or communication a term or condition to obtain employment; and

or

(ii) that the employer or [its / his / her] agent used plaintiff's submission to or rejection of such conduct or communication as a factor in a decision affecting the plaintiff's employment; and

(c) that [he / she] suffered damages.

A decision affecting the plaintiff's employment must be a tangible employment action. To be a tangible employment action, the action must constitute a change in employment status such as hiring, firing, or failing to promote.

To prove that the submission to or rejection of the conduct or communication was a factor in a decision, plaintiff must demonstrate that the tangible employment action which [he / she] suffered was because of [his / her] rejection of, or submission to, the harassment.

Your verdict will be for plaintiff if the plaintiff has proved all of those elements. Your verdict will be for the defendant if the plaintiff has failed to prove any one of those elements.

Comment

MCL 37.2202(1)(a); MCL 37.2103(i); *Chambers v Trettco, Inc*, 463 Mich 297 (2000); *Haynie v Michigan*, 468 Mich 302 (2003); *Champion v Nationwide Security*, 450 Mich 702 (1996).

History

Added June 2006.

M Civ JI 105.14 Employment Discrimination—Hostile Environment Sexual Harassment—Burden of Proof—Employer Defendant

On plaintiff's claim of hostile environment sexual harassment against the defendant employer, plaintiff has the burden of proving the following elements, and I'll define these terms in a moment:

(a) that [he / she] was subjected to communication or conduct on the basis of gender; and

(b) that [he / she] was subjected to unwelcome sexual conduct or communication; and

(c) that [he / she] was subjected to a sexually hostile work environment; and

(d) that the employer was legally responsible for the sexually hostile work environment; and

(e) that [he / she] has suffered damages.

Your verdict will be for plaintiff if the plaintiff has proved all of those elements. Your verdict will be for the defendant if the plaintiff has failed to prove any one of those elements.

Comment

Radtke v Everett, 442 Mich 368 (1993); *Chambers v Trettco, Inc*, 463 Mich 297 (2000); *Haynie v Michigan*, 468 Mich 302 (2003).

History

Added June 2006.

M Civ JI 105.18 Employment Discrimination—Hostile Environment Sexual Harassment—Burden of Proof—Unwelcome Sexual Conduct or Communication

When I use the phrase "unwelcome sexual conduct or communications," I mean that plaintiff is the recipient of unwanted conduct or communication that is inherently sexual.

Comment

Haynie v Michigan, 468 Mich 302 (2003); *Corley v Detroit Bd Of Ed*, 470 Mich 274 (2004).

History

Added June 2006.

M Civ JI 105.20 Employment Discrimination—Hostile Environment Sexual Harassment—Sexually Hostile Work Environment

When I use the phrase "sexually hostile work environment," I mean the work environment was so tainted that, in the totality of the circumstances, the unwelcome sexual conduct complained of had the purpose or effect of substantially interfering with [his / her] employment or created an intimidating, hostile or offensive employment environment.

You must view the conduct or communication complained of from an objective standard, deciding how a reasonable person would have perceived the conduct or communication alleged in this case.

Comment

Radtke v Everett, 442 Mich 368 (1993); *Faragher v Boca Raton*, 524 US 775; 118 SCt 2275; 141 L Ed 2d 662 (1998).

History

Added June 2006.

M Civ JI 105.24 Employment Discrimination—Hostile Environment Sexual Harassment—Employer Liability

When I said the employer must be legally responsible, I mean the plaintiff must prove that the employer (1) had adequate notice that plaintiff was subjected to sexual harassment, and (2) failed to take prompt and adequate remedial action which reasonably served to prevent future harassment of the plaintiff, and (3) further sexual harassment of plaintiff occurred as a result of the employer's failure to take adequate remedial action.

Comment

Radtke v Everett, 442 Mich 368 (1993); *Chambers v Trettco, Inc*., 463 Mich 297 (2000).

History

Added June 2006.

M Civ JI 105.26 Employment Discrimination—Hostile Environment Sexual Harassment—Notice

By the term adequate notice, I mean that under the totality of the circumstances either the employer knew, or a reasonable employer should have known, of a substantial probability that plaintiff was being sexually harassed.

Comment

Elezovic v Ford Motor Co, 472 Mich 408 (2005); *Gilbert v DaimlerChrysler Corp*, 470 Mich 749 (2004); *Chambers v Trettco, Inc*, 463 Mich 297 (2000).

History

Added June 2006.

M Civ JI 105.28 Employment Discrimination—Hostile Environment Sexual Harassment—Prompt Remedial Action

By the term "prompt and adequate remedial action," I mean that the employer must take steps reasonably calculated to stop the harassment of the plaintiff. In determining whether the steps are reasonable, you should consider the totality of the circumstances.

Comment

Chambers v Trettco, Inc, 463 Mich 297 (2000).

History

Added June 2006.

M Civ JI 105.30 Employment Discrimination—Hostile Environment Sexual Harassment—Damages—Tangible Employment Act Not Required

[For a sexually hostile work environment claim,] plaintiff need not suffer the loss of (his/her) job or other tangible benefit. It is the harassment and resulting change in the work environment that constitutes the injury.

Note on Use

The bracketed language should only be used if a quid pro quo claim is also being submitted to the jury.

Comment

Radtke v Everett, 442 Mich 368 (1993).

History

Added June 2006.

M Civ JI 105.32 Employment Discrimination—Hostile Environment Sexual Harassment—Burden of Proof—Employee Defendant

On plaintiff's claim of hostile environment sexual harassment against the defendant employee, plaintiff has the burden of proving the following elements:

(a) that [he / she] was subjected to communication or conduct on the basis of gender; and

(b) that [he / she] was subjected to unwelcome sexual conduct or communication; and

(c) that the unwelcome sexual conduct or communication was intended to or in fact did substantially interfere with [his / her] employment or created an intimidating, hostile, or offensive work environment; and

(d) that the defendant employee was the agent of the employer; and

(e) that [he / she] has suffered damages.

Your verdict will be for plaintiff if the plaintiff has proved all of those elements. Your verdict will be for the defendant if the plaintiff has failed to prove any one of those elements.

Comment

Radtke v Everett, 442 Mich. 368 (1993); *Chambers v Trettco, Inc*, 463 Mich 297 (2000).

History

Added June 2006.

M Civ JI 105.41 Employment Discrimination—Mitigation of Damages for Loss of Compensation

The plaintiff must make every reasonable effort to minimize or reduce [his / her] damages for loss of compensation by seeking employment. This is called "mitigation" of damages.

The defendant has the burden of proving that the plaintiff failed to mitigate [his / her] damages for loss of compensation.

If you find that the plaintiff is entitled to damages, you must reduce these damages by:

(a) *(what the plaintiff earned) (and)

(b) *(what the plaintiff could have earned with reasonable effort) during the period for which you determine that [he / she] is entitled to damages.

†(If you find that the plaintiff is entitled to future damages, you must reduce these damages by an amount the plaintiff could reasonably earn or reasonably be expected to earn in the future.)

Whether the plaintiff was reasonable in not seeking or accepting particular employment is a question for you to decide. However, the plaintiff is obligated to accept an offer of employment which is of "a like nature." In determining whether employment is of "a like nature," you may consider, for example, the type of work, the hours worked, the compensation, the job security, working conditions, and other conditions of employment.

Note on Use

If there are mitigation issues other than for loss of compensation, use M Civ JI 53.05.

*The court should use subsection a, b, or both as applicable.

†This sentence should be used only if applicable. Where the court is prepared to order reinstatement, future damages are not an issue for the jury. *Riethmiller v Blue Cross & Blue Shield of Michigan*, 151 Mich App 188; 390 NW2d 227 (1986). In other circumstances, an instruction on future damages may be appropriate. *Adama v Doehler-Jarvis, Division of N L Industries (On Remand)*, 144 Mich App 764; 376 NW2d 406 (1985); *Goins v Ford Motor Co*, 131 Mich App 185; 347 NW2d 184 (1983); *Riethmiller*.

Comment

This instruction was cited with approval in *Morris v Clawson Tank Co*, 459 Mich 256; 587 NW2d 253 (1998).

The plaintiff's duty to mitigate damages, including future damages, is also discussed in *Department of Civil Rights v Horizon Tube Fabricating, Inc*, 148 Mich App 633; 385 NW2d 685 (1986); *Grix v Liquor Control Commission*, 304 Mich 269, 277; 8 NW2d 62 (1943); *Higgins v Kenneth R Lawrence, DPM, PC*, 107 Mich App 178, 181; 309 NW2d 194 (1981); cf *Davis v Combustion Engineering, Inc*, 742 F2d 916 (CA 6, 1984); *Whittlesey v Union Carbide Corp*, 742 F2d 724 (CA 2, 1984).

The plaintiff is obligated to accept employment of "a like nature." *Morris*; *Higgins; Flickema v Henry Kraker Co*, 252 Mich 406; 233 NW 632; 72 ALR 1046 (1930); *Michigan Employment Relations Commission v Kleen-O-Rama*, 60 Mich App 61; 230 NW2d 308 (1975); *Rasimas v Michigan Department of Mental Health*, 714 F2d 614 (CA 6, 1983), cert denied, 466 US 950; 104 S Ct 2151; 80 L Ed 2d 537 (1984).

Failure to mitigate is an affirmative defense, and the burden of proof is on the defendant. *Morris*; *Department of Civil Rights v Horizon Tube Fabricating, Inc*; *Higgins*; *Fothergill v McKay Press*, 374 Mich 138; 132 NW2d 144 (1965); *Flickema; Ogden v George F Alger Co*, 353 Mich 402, 408; 91 NW2d 288 (1958).

History

M Civ JI 105.41 was added February 1987. Amended March 1996.

M Civ JI 105.42 Employment Discrimination—Mitigation of Damages for Loss of Compensation: Conditional and Unconditional Offers by Defendant

In this case, defendant has offered to [hire / promote / reinstate] the plaintiff to the position [previously held / applied for] or a substantially equivalent position, and plaintiff has rejected the offer. "Substantially equivalent position" means one with virtually identical promotion opportunities, compensation, job responsibilities, working conditions, and status.

Offers to [hire / promote / reinstate] are either conditional or unconditional. It is for you to decide whether defendant's offer was conditional or unconditional. An offer is conditional if it involves discriminatory or other unreasonable conditions. An offer is unconditional if it does not involve discriminatory or other unreasonable conditions.

If an offer is conditional, plaintiff does not have to accept the offer.

If the offer is unconditional, then you should determine whether plaintiff's rejection of the offer was reasonable. To be reasonable, plaintiff's rejection must be grounded in the employment as contemplated by the offer to [hire / promote / reinstate] the plaintiff and not be for a purely personal reason.

If you determine that defendant unconditionally offered to [hire / promote / reinstate] the plaintiff to the position [previously held / applied for] or a substantially equivalent position, and it was not reasonable for plaintiff to reject the offer, then you shall not award damages for loss of compensation after the date plaintiff rejected the offer.

If you determine that the offer was conditional, or that it was reasonable for plaintiff to reject the offer, then you may award damages for loss of compensation after the date plaintiff rejected the offer, so long as plaintiff is otherwise entitled to damages as I have explained to you in these instructions.

Note on Use

This instruction should be used with M Civ JI 105.41, Employment Discrimination—Mitigation of Damages for Loss of Compensation.

This instruction should only be used if defendant has made an offer to hire, promote, or reinstate the plaintiff, and fact questions about the conditionality of the offer and the reasonableness of rejecting it are presented.

This instruction must be modified if plaintiff has neither accepted nor rejected the offer.

In some cases, whether an offer is conditional or unconditional may be a question of law for the court. *Rasheed v Chrysler Corp*, 445 Mich 109; 517 NW2d 19 (1994). For a discussion of conditional

and unconditional offers, see *Ford Motor Co v Equal Employment Opportunity Comm'n*, 458 US 219; 102 S Ct 3057; 73 L Ed 2d 721 (1982); *O'Donnell v Georgia Osteopathic Hospital, Inc*, 748 F2d 1543 (CA 11, 1984); and *National Labor Relations Bd v Madison Courier, Inc*, 472 F2d 1307 (DC Cir, 1972). In *Ford Motor Co*, the court commented that when the employer offers reinstatement in exchange for dismissal of the lawsuit, the offer is conditional. 458 US 219, 232 fn 18.

Comment

An unconditional offer to hire, promote, or reinstate the plaintiff to the same or a substantially equivalent position bars damages for loss of compensation after the date the plaintiff rejects the offer. *Ford Motor Co*; *Jenkins v Southeastern Michigan Chapter, American Red Cross*, 141 Mich App 785; 369 NW2d 223 (1985); *Flickema v Henry Kraker Co*, 252 Mich 406; 233 NW 362; 72 ALR 1046 (1930), but see *Department of Civil Rights ex rel Cornell v Edward W Sparrow Hospital Ass'n*, 423 Mich 548; 377 NW2d 755 (1985) (an offer of reinstatement to a job without removing the discriminatory dress code is not an unconditional offer). See also the Note on Use for this instruction.

Failure to mitigate is an affirmative defense, and the burden of proof is on the defendant. *Department of Civil Rights v Horizon Tube Fabricating, Inc*, 148 Mich App 633; 385 NW2d 685 (1986); *Higgins v Kenneth R Lawrence, DPM, PC*, 107 Mich App 178; 309 NW2d 194 (1981); *Fothergill v McKay Press*, 374 Mich 138; 132 NW2d 144 (1965); *Flickema; Ogden v George F Alger Co*, 353 Mich 402, 408; 91 NW2d 288 (1958).

Whether plaintiff's rejection of an offer was reasonable is a question for the jury. *Rasheed*. The court stated that it is reasonable to reject an offer of a position that is not substantially equivalent or has a discriminatory or other unreasonable condition, but it is not reasonable to reject an offer for reasons unrelated to the terms of that offer.

The jury could find that an offer made on the eve of trial and rescinded ten days later was conditional, and plaintiff's failure to accept the offer in that period did not preclude damages for loss of compensation. *Paulitch v Detroit Edison Co*, 208 Mich App 656; 528 NW2d 200 (1995).

History

M Civ JI 105.42 was added March 1996.

Chapter 106: Persons With Disabilities Civil Rights Act

M Civ JI 106.01 Employment Discrimination Statute—Explanation 556
M Civ JI 106.05 Employment Discrimination—Disability—Definition 557
M Civ JI 106.07A Employment Discrimination—Burden of Proof—Disability 559
M Civ JI 106.07C Employment Discrimination—Burden of Proof—Physical or Mental Examinations 560
M Civ JI 106.07D Employment Discrimination—Burden of Proof—Accommodation 561
M Civ JI 106.07E Employment Discrimination—Burden of Proof—Retaliation 563
M Civ JI 106.09 Employment Discrimination Statute—Accommodation—Duty of Employer 564
M Civ JI 106.11A Employment Discrimination Statute—Accommodation—Undue Hardship—Equipment or Device 565
M Civ JI 106.11B Employment Discrimination Statute—Accommodation—Undue Hardship—Equipment or Device 566
M Civ JI 106.11C Employment Discrimination Statute—Accommodation—Undue Hardship—Equipment or Device 567
M Civ JI 106.11D Employment Discrimination Statute—Accommodation—Undue Hardship—Readers or Interpreters 568
M Civ JI 106.11E Employment Discrimination Statute—Accommodation—Undue Hardship—Reader or Interpreter 569
M Civ JI 106.21 Public Accommodation Statute—Explanation—Accommodation 570
M Civ JI 106.23 Public Accommodation—Disability—Definition 571
M Civ JI 106.25 Public Accommodation—Definition 572
M Civ JI 106.27 Public Service—Definition 573
M Civ JI 106.29 Public Accommodation—Burden of Proof 574
M Civ JI 106.29A Public Accommodation—Burden of Proof—Retaliation 575
M Civ JI 106.30 Educational Institution Statute—Explanation 576
M Civ JI 106.31 Accommodation—Educational Institution—Definition 578
M Civ JI 106.33 Accommodation—Educational Institution—Disability—Definition 579
M Civ JI 106.35 Accommodation—Educational Institution—Burden of Proof 580
M Civ JI 106.36 Educational Institution—Burden of Proof—Retaliation 581

M Civ JI 106.01 Employment Discrimination Statute—Explanation

We have a state law known as the Persons with Disabilities Civil Rights Act, which provides that an employer shall:

(1)

(a) not discriminate against a person regarding employment, compensation, or a term, condition, or privilege of employment because of [a disability / genetic information] that is unrelated to the individual's ability to perform the duties of a particular job or position;

(b) not discriminate against a person on the basis of physical or mental examinations that are not directly related to the requirements of the specific job;

(c) not discriminate against a person when adaptive devices or aids may be utilized that enable the individual to perform the specific requirements of the job;

(d) not require an individual to submit to a genetic test or to provide genetic information as a condition of employment or promotion;

(e) accommodate a person with a disability unless the employer demonstrates that the accommodation would impose an undue hardship.

(2) The Persons with Disabilities Civil Rights Act also provides that a person shall not retaliate or discriminate against a person because the person has opposed a violation of the act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under the act.

Note on Use

The use of any particular subsection will be dictated by the facts of the case.

Comment

MCL 37.1202; MCL 37.1602.

History

Added September 2005. Amended July 2012.

M Civ JI 106.05 Employment Discrimination—Disability—Definition

"Disability" means a determinable physical or mental characteristic of an individual, which may result from disease, injury, congenital condition of birth, or functional disorder, if the characteristic [substantially limits 1 or more of the major life activities of that individual and is unrelated to the individual's ability to perform the duties of a particular job or position / substantially limits 1 or more of the major life activities of that individual and is unrelated to the individual's qualifications for employment or promotion.]

When I say "major life activity," I am referring to functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.

When I say "substantially limits," I mean you should look at the nature and severity of the impairment, its duration or expected duration, and its permanent or expected permanent or long-term effect.

When I say "unrelated to the individual's ability," I mean an individual's disability does not prevent the individual from performing the duties of a particular job or position with or without accommodation.

"Disability" can also mean a history of a determinable physical or mental characteristic like I have just described.

Lastly, "disability" can also mean being regarded as having a determinable physical or mental characteristic like I have just described.

*"Disability" does not include either of the following:

(a) A determinable physical or mental characteristic caused by the current illegal use of a controlled substance by that individual.

(b) A determinable physical or mental characteristic caused by the use of an alcoholic liquor by that individual, if that physical or mental characteristic prevents that individual from performing the duties of his or her job.

Note on Use

*Use as applicable.

Comment

MCL 37.1103, *Stevens v Inland Waters, Inc* , 220 Mich App 212 (1996).

History

Added September 2005.

M Civ JI 106.07A Employment Discrimination—Burden of Proof—Disability

Plaintiff has the burden of proving the following elements:

(a) that (he/she) [has a disability / has a history of a disability / is regarded as having a disability] that is unrelated to the plaintiff's ability to perform the duties of a particular job or position; and

(b) that defendant [discharged / failed or refused to hire / failed to promote / failed to train / other] the plaintiff; and

(c) that [the disability / the history of a disability / being regarded as having a disability] was one of the motives or reasons which made a difference in determining to [discharge / fail to hire / fail to promote / fail to train / other] the plaintiff. The [disability / history of a disability / being regarded as having a disability] does not have to be the only reason, or even the main reason, but it does have to be one of the reasons which made a difference in determining whether to [discharge / hire / promote / train / other] the plaintiff; and

(d) that (he/she) suffered damages as a result of the [discharge / failure or refusal to hire / failure to promote / failure to train / other].

Your verdict will be for plaintiff if the plaintiff has proved all of those elements. Your verdict will be for the defendant if the plaintiff has failed to prove any one of those elements.

Comment

MCL 37.1202

History

Added September 2005.

M Civ JI 106.07C Employment Discrimination—Burden of Proof—Physical or Mental Examinations

Plaintiff has the burden of proving the following elements:

(a) that (he/she) has undergone physical or mental examinations that are not directly related to the requirements of the specific job; and

(b) that defendant [discharged / failed or refused to hire / failed to promote / failed to train / other] the plaintiff; and

(c) that the information or conditions [disclosed / revealed / diagnosed] [by / during / in / as a result of] the physical or mental examination was one of the motives or reasons which made a difference in determining to [discharge / fail to hire / fail to promote / fail to train / other] the plaintiff. The information or condition does not have to be the only reason, or even the main reason, but it does have to be one of the reasons which made a difference in determining whether to [discharge / hire / promote / train / other] the plaintiff; and

(d) that (he/she) suffered damages as a result of the [discharge / failure or refusal to hire / failure to promote / failure to train / other].

Your verdict will be for plaintiff if the plaintiff has proved all of those elements. Your verdict will be for the defendant if the plaintiff has failed to prove any one of those elements.

Comment

MCL 37.1202

History

Added September 2005.

M Civ JI 106.07D Employment Discrimination—Burden of Proof—Accommodation

Plaintiff has the burden of proving the following elements:

(a) that (he/she) has a disability that is unrelated to (his/her) ability to perform the duties of a particular job or position; and

*(b) that (he/she) notified defendant in writing of the need for an accommodation to enable (him/her) to perform the specific requirements of the job. Notification must have been made within 182 days after the date plaintiff knew or reasonably should have known that an accommodation was needed; and

(c) that defendant [discharged / failed or refused to hire / failed to promote / failed to train / other] the plaintiff for not performing the specific requirements of the job when the use of the accommodation would have enabled the plaintiff to do so. The disability does not have to be the only reason, or even the main reason, but it does have to be one of the reasons which made a difference in determining whether to [discharge / hire / promote / train / other] the plaintiff; and

(d) that (he/she) suffered damages as a result of the [discharge / failure or refusal to hire / failure to promote / failure to train / other].

Your verdict will be for plaintiff if the plaintiff has proved all of those elements. Your verdict will be for the defendant if the plaintiff has failed to prove any one of those elements.

Defendant has the burden of proving that [the accommodations were provided / the provision of the accommodations would have imposed an undue hardship].

Your verdict will also be for defendant if defendant proves either of those elements.

Note on Use

This instruction should be preceded by MCJI 106.09.

* Use as applicable where it is alleged plaintiff did not notify defendant and it is alleged defendant failed to tell the plaintiff how to give notice or of the requirement that notice be given.

Subsection (b) may be eliminated if there is no factual dispute regarding the timing of notice or if the 182-day period does not apply pursuant to MCL 37.1606(5).

Comment

MCL 37.1202, MCL 37.1210, and MCL 37.1606(5).

History

Added September 2005.

M Civ JI 106.07E Employment Discrimination—Burden of Proof—Retaliation

Plaintiff has the burden of proving the following elements:

(a) that [he / she] [opposed a violation of the Persons with Disabilities Civil Rights Act / made a charge, filed a complaint, or testified, assisted, or participated in an investigation, proceeding or hearing, under the Act];

(b) that was known by the defendant;

(c) that defendant took an employment action adverse to the plaintiff; and

(d) that there was a causal connection between the protected activity and the adverse employment action.

To establish a causal connection, plaintiff must demonstrate that [his / her] participation in the protected activity was a significant factor in the defendant's adverse employment action.

Comment

MCL 37.1602. *Bachman v Swan Harbour Associates*, 252 Mich App 400, 434 (2002), *Aho v Dept of Corrections*, 263 Mich App 281(2004).

History

Added July 2012.

M Civ JI 106.09 Employment Discrimination Statute—Accommodation—Duty of Employer

An employer has a twofold duty to accommodate a disabled person. The first kind of accommodation is to provide access to the place of employment, in other words, the alteration of physical structures to allow access. The second kind of accommodation is one that permits the actual performance of the job duties. This can include, but is not limited to, [the purchase of equipment and devices / hiring readers and interpreters / restructuring jobs / altering schedules for minor and infrequent duties].

Defendant does not have a duty to provide accommodations that would impose an undue hardship.

Comment

MCL 37.1210; *Rourk v Oakwood Hospital Corporation*, 458 Mich 25 (1998).

History

Added September 2005.

M Civ JI 106.11A Employment Discrimination Statute—Accommodation—Undue Hardship—Equipment or Device

An undue hardship is defined by statute. In this case, because [defendant employs fewer than four employees / defendant employs four or more but less than 15 employees], if the equipment or devices required to accommodate the plaintiff cost more than [the state average weekly wage / 1.5 times the state average weekly wage], that accommodation imposes an undue hardship. If it is less than or equal to that amount, the accommodation does not impose an undue hardship.

Comment

MCL 37.1210(2), (3).

History

Added September 2005.

M Civ JI 106.11B Employment Discrimination Statute—Accommodation—Undue Hardship—Equipment or Device

An undue hardship is defined by statute. In this case, because defendant has 15 or more but less than 25 employees, if the equipment or devices required to accommodate the plaintiff cost more than 2.5 times the state average weekly wage, [that accommodation imposes an undue hardship / you must determine if the accommodation poses an undue hardship*]. If it is less than or equal to that amount, the accommodation does not impose an undue hardship.

Note on Use

*To be used where the plaintiff is an employee because where the plaintiff is an employee and the cost to accommodate is more than 2.5 times the state average weekly wage, there is no conclusive statement that there is an undue hardship. MCL 37.1210(6).

Comment

MCL 37.1210(4), (6). Earlier provisions defining an undue hardship, e.g., MCL 37.1210(2), refer to the cost to accommodate a person with a disability. Subsection (6), however, refers only to the cost to accommodate an employee.

History

Added September 2005.

M Civ JI 106.11C Employment Discrimination Statute—Accommodation—Undue Hardship—Equipment or Device

An undue hardship is defined by statute. In this case, because defendant has 15 or more employees, if the equipment or devices required to accommodate the plaintiff cost more than 2.5 times the state average weekly wage, you must determine if the accommodation poses an undue hardship. If it does not exceed that amount, the accommodation does not impose an undue hardship.

Note on Use

This instruction should be used where the plaintiff is an employee, and the defendant employs 15 or more employees. MCL 37.1210(6). As noted in the Comment to M Civ JI 106.11B, subsection (6) refers to the cost to accommodate an employee.

Comment

MCL 37.1210(5), (6). An instruction is not provided for cases where defendant has 25 or more employees. MCL 37.1210(5). As enacted by 1990 PA 121, MCL 37.1210(6) and (12) began with the clause "If Senate Bill No. 933 or House Bill No. 2273 of the 101st Congress of the United States is enacted into law, and beginning 2 years after the effective date of that law[.]" That clause was removed by 1998 PA 20. Senate Bill 933 was enacted as the Americans with Disabilities Act, 42 USC 12101. The ADA currently defines an employer as having 15 or more employees.

History

Added September 2005.

M Civ JI 106.11D Employment Discrimination Statute—Accommodation—Undue Hardship—Readers or Interpreters

An undue hardship is defined by statute. In this case, because [defendant employs fewer than four employees / defendant employs four or more but less than 15 employees], if the cost to [hire / retain] the [reader / interpreter] to accommodate the plaintiff is more than [seven times the state average weekly wage for the first year the person with a disability is hired, transferred, or promoted to the job and five times the state average weekly wage for each year thereafter / 10 times the state average weekly wage for the first year the person with a disability is hired, transferred, or promoted to the job and seven times the state average weekly wage for each year thereafter], that accommodation imposes an undue hardship. If it is less than or equal to that amount, the accommodation does not impose an undue hardship.

Comment

MCL 37.1210(8), (9).

History

Added September 2005.

M Civ JI 106.11E Employment Discrimination Statute—Accommodation—Undue Hardship—Reader or Interpreter

An undue hardship is defined by statute. In this case, because defendant has 15 or more employees, if the cost to [hire / retain] the [reader / interpreter] to accommodate the plaintiff is less than or equal to 15 times the state average weekly wage for the first year the person with a disability is hired, transferred, or promoted to the job and 10 times the state average weekly wage for each year thereafter, the accommodation does not impose an undue hardship. If the cost is more than that amount, you must determine if the accommodation poses an undue hardship.

Comment

MCL 1210(12). An instruction is not provided for cases where defendant has 25 or more employees. MCL 37.1210(5). As enacted by 1990 PA 121, MCL 37.1210(6) and (12) began with the clause "If Senate Bill No. 933 or House Bill No. 2273 of the 101st Congress of the United States is enacted into law, and beginning 2 years after the effective date of that law[.]" That clause was removed by 1998 PA 20. Senate Bill 933 was enacted as the Americans with Disabilities Act, 42 USC 12101. The ADA currently defines an employer as having 15 or more employees.

History

Added September 2005.

M Civ JI 106.21 Public Accommodation Statute—Explanation—Accommodation

(1) We have a state law known as the Persons with Disabilities Civil Rights Act, which provides that a person shall accommodate a person with a disability for purposes of [public accommodation / public service / education / housing] unless the person demonstrates that the accommodation would impose an undue hardship.

(2) The Persons with Disabilities Civil Rights Act also provides that a person shall not retaliate or discriminate against a person because the person has opposed a violation of the act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under the act.

Comment

MCL 37.1102(2); MCL 37.1602.

History

Added September 2005. Amended July 2012.

M Civ JI 106.23 Public Accommodation—Disability—Definition

Disability means a determinable physical or mental characteristic of an individual, which may result from disease, injury, congenital condition of birth, or functional disorder, if the characteristic is unrelated to the individual's ability to utilize and benefit from a place of public accommodation or public service.

Disability can also mean a history of a determinable physical or mental characteristic as I have just described.

Lastly, disability can also mean being regarded as having a determinable physical or mental characteristic as I have just described.

When I say "unrelated to the individual's ability," I mean an individual's disability does not prevent the individual from utilizing and benefiting from a place of public accommodation or public service, with or without accommodation.

Comment

MCL 37.1103.

History

Added September 2005.

M Civ JI 106.25 Public Accommodation—Definition

Place of public accommodation" means a business, educational institution, refreshment, entertainment, recreation, health, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the public.

Comment

MCL 37.1301(a)

History

Added September 2005.

M Civ JI 106.27 Public Service—Definition

"Public service" means a public facility, department, agency, board, or commission owned, operated, or managed by or on behalf of this state or a subdivision of this state, a county, city, village, township, or independent or regional district in this state or a tax exempt private agency established to provide service to the public, except that public service does not include a state or county correctional facility with respect to actions or decisions regarding an individual serving a sentence of imprisonment.

Comment

MCL 37.1301(b)

History

Added September 2005.

M Civ JI 106.29 Public Accommodation—Burden of Proof

Plaintiff has the burden of proving the following elements:

(a) that (he/she) [has a disability / has a history of a disability / is regarded as having a disability] that is unrelated to (his/her) ability to utilize and benefit from the [place of public accommodation / public service]; and

(b) that (he/she) uses adaptive devices or aids; and

(c) that (he/she) was denied the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a [place of public accommodation / public service] because of [a disability / a history of a disability / being regarded as having a disability]; and

(d) that (he/she) was denied the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a [place of public accommodation / public service] because of his/her use of adaptive devices or aids; and

(e) that (he/she) suffered damages.

Note on Use

Particular subparagraphs may be deleted based on the facts of the case.

History

Added September 2005.

M Civ JI 106.29A Public Accommodation—Burden of Proof—Retaliation

Plaintiff has the burden of proving the following elements:

(a) that [he / she] [opposed a violation of the Persons with Disabilities Civil Rights Act / made a charge, filed a complaint, or testified, assisted, or participated in an investigation, proceeding or hearing, under the Act];

(b) that was known by the defendant;

(c) that defendant took an employment action adverse to the plaintiff; and

(d) that there was a causal connection between the protected activity and the adverse employment action.

To establish a causal connection, plaintiff must demonstrate that [his / her] participation in the protected activity was a significant factor in the defendant's adverse employment action.

Comment

MCL 37.1602. *Bachman v Swan Harbour Associates*, 252 Mich App 400, 434 (2002), *Aho v Dept of Corrections*, 263 Mich App 281(2004).

History

Added July 2012.

M Civ JI 106.30 Educational Institution Statute—Explanation

(1) We have a state law known as the Persons with Disabilities Civil Rights Act, which provides that an educational institution shall not:

(a) Discriminate in any manner in the full utilization of or benefit from the institution, or the services provided and rendered by the institution to an individual because of a disability that is unrelated to the individual's ability to utilize and benefit from the institution or its services, or because of the use by an individual of adaptive devices or aids.

(b) Exclude, expel, limit, or otherwise discriminate against an individual seeking admission as a student or an individual enrolled as a student in the terms, conditions, and privileges of the institution, because of a disability that is unrelated to the individual's ability to utilize and benefit from the institution, or because of the use by an individual of adaptive devices or aids.

(c) Make or use a written or oral inquiry or form of application for admission that elicits or attempts to elicit information, or make or keep a record, concerning the disability of an applicant for admission for reasons contrary to the provisions or purposes of this act.

(d) Print or publish or cause to be printed or published a catalog or other notice or advertisement indicating a preference, limitation, specification, or discrimination based on the disability of an applicant that is unrelated to the applicant's ability to utilize and benefit from the institution or its services, or the use of adaptive devices or aids by an applicant for admission to the educational institution.

(e) Announce or follow a policy of denial or limitation through a quota or otherwise of educational opportunities of a group or its members because of a disability that is unrelated to the group or member's ability to utilize and benefit from the institution or its services, or because of the use by the members of a group or an individual in the group of adaptive devices or aids.

(f) Develop a curriculum or utilize textbooks and training or learning materials which promote or foster physical or mental stereotypes.

(2) The Persons with Disabilities Civil Rights Act also provides that a person shall not retaliate or discriminate against a person because the person has opposed a violation of the act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under the act.

Note on Use

The use of any particular subsection will be dictated by the facts of the case.

Comment

MCL 37.1402; MCL 37.1602.

History

Added July 2012.

M Civ JI 106.31 Accommodation—Educational Institution—Definition

"Educational institution" means a public or private institution or a separate school or department of a public or private institution including an academy, college, elementary or secondary school, extension course, kindergarten, nursery, school system, school district, or university, and a business, nursing, professional, secretarial, technical, or vocational school, and includes an agent of an educational institution.

Note on Use

Use only if there is a dispute over whether the defendant is an educational institution, and eliminate those examples that do not apply.

Comment

MCL 37.1401

History

Added September 2005.

M Civ JI 106.33 Accommodation—Educational Institution—Disability—Definition

"Disability means a determinable physical or mental characteristic of an individual, which may result from disease, injury, congenital condition of birth, or functional disorder, if the characteristic is unrelated to the individual's ability to utilize and benefit from educational opportunities, programs, and facilities at an educational institution

Disability can also mean a history of a determinable physical or mental characteristic as I have just described.

Lastly, disability can also mean being regarded as having a determinable physical or mental characteristic as I have just described.

When I say "unrelated to the individual's ability," I mean an individual's disability does not prevent the individual from utilizing and benefiting from educational opportunities, programs, and facilities at an educational institution.

History

Added September 2005.

M Civ JI 106.35 Accommodation—Educational Institution—Burden of Proof

Plaintiff has the burden of proving the following elements:

(a) that [he / she] [has a disability / has a history of a disability / is regarded as having a disability] that is unrelated to [his / her] ability to utilize and benefit from the educational institution; and

(b) that (he/she) uses adaptive devices or aids; and

(c) that (he/she) was [excluded / expelled / limited / other] [while seeking admission / while enrolled as a student] in the terms, conditions, and privileges of the institution because of [a disability / a history of a disability / being regarded as having a disability] that is unrelated to [his / her] ability to utilize and benefit from the educational institution; and

(d) that (he/she) was [excluded / expelled / limited / other] [while seeking admission / while enrolled as a student] in the terms, conditions, and privileges of the institution because of [his / her] use of adaptive devices or aids; and

(e) that [he / she] suffered damages.

Note on Use

Particular subparagraphs may be deleted based on the facts of the case.

Comment

MCL 37.1402

History

Added September 2005.

M Civ JI 106.36 Educational Institution—Burden of Proof—Retaliation

Plaintiff has the burden of proving the following elements:

(a) that [he / she] [opposed a violation of the Persons with Disabilities Civil Rights Act / made a charge, filed a complaint, or testified, assisted, or participated in an investigation, proceeding or hearing, under the Act];

(b) that was known by the defendant;

(c) that defendant took an employment action adverse to the plaintiff; and

(d) that there was a causal connection between the protected activity and the adverse employment action.

To establish a causal connection, plaintiff must demonstrate that [his / her] participation in the protected activity was a significant factor in the defendant's adverse employment action.

Comment

MCL 37.1602. *Bachman v Swan Harbour Associates*, 252 Mich App 400, 434 (2002), *Aho v Dept of Corrections*, 263 Mich App 281(2004).

History

Added July 2012.

Chapter 107: Whistleblowers' Protection Act

Introduction 583
M Civ JI 107.01 Whistleblowers' Protection Act: Explanation 584
M Civ JI 107.02 Whistleblowers' Protection Act: Protected Activity—Definition 585
M Civ JI 107.03 Whistleblowers' Protection Act: Causation 587
M Civ JI 107.04 Whistleblowers' Protection Act: Good Faith Belief 588
M Civ JI 107.11 Whistleblowers' Protection Act: Distinction in Standard of Proof Between "Report" and "About to Report" 589
M Civ JI 107.15 Whistleblowers' Protection Act: Burden of Proof 590

Introduction

The Michigan Supreme Court has held that the approach in *McDonnell Douglas Corp v Green*, 411 US 792, 800; 93 S Ct 1817, 1823; 36 L Ed 2d 668, 676 (1973) is not the proper subject of an instruction to a jury. *Hazle v Ford Motor Co*, 464 Mich 456; 628 NW2d 515 (2001). See also the discussion of the *McDonnell Douglas* formulation in the Introduction to Chapter 105 Employment Discrimination.

M Civ JI 107.01 Whistleblowers' Protection Act: Explanation

We have a state law known as the Whistleblowers' Protection Act which provides that an employer shall not [discharge / or / threaten / or / discriminate against] an employee regarding employment, compensation, or a term, condition, location or privilege of employment because of protected activity.

Comment

MCL 15.362.

History

M Civ JI 107.01 was added April 1, 2002.

M Civ JI 107.02 Whistleblowers' Protection Act: Protected Activity—Definition

"Protected activity" means:

*(a) [an employee / a person acting on behalf of an employee] [reports / or / is about to report] (verbally or in writing) a violation or a suspected violation of a law or regulation (or rule promulgated pursuant to the law of the state, a political subdivision of the state, or the United States) by [his or her employer / ** a third party / **a co-employee] to a public body, unless the employee knows that the report is false; (or)

*(b) an employee [participates at the request of a public body / has been requested by a public body to participate] in [an investigation / or / a hearing / or / an inquiry held by that public body / or / a court action].

***The employee's motive does not matter and you should not consider it in determining whether the employee engaged in "protected activity."

****(A request for the employee to participate in [an investigation / or / a hearing / or / an inquiry / or / a court action] is considered protected activity even though the employee does not actually participate in the [investigation / or / hearing / or / inquiry / or / court action].)

Note on Use

*The court should choose one or both of the subsections that apply to the case. The phrases in parentheses in subsection a. may be deleted if not an issue in the case.

** The court should choose the phrase that applies depending on whether the violation or suspected violation involves a third party (see *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 382; 563 NW2d 23 (1997), or a co-employee (see *Dudewicz v Norris-Schmid, Inc*, 443 Mich 68; 503 NW2d 645 (1993). For the relationship of the violation or suspected violation to the employment setting, see, e.g., Dolan.

***This paragraph should be used if there is any evidence, argument, or implication regarding the employee's motive.

****This paragraph should be used only if the employee does not participate in the investigation, hearing, inquiry or court action.

Comment

MCL 15.362.

If plaintiff did not engage in protected activity, plaintiff may not recover even if defendant mistakenly believed that plaintiff engaged in such activity. *Chandler v Dowell Schlumberger, Inc*, 456 Mich 395; 572 NW2d 210 (1998).

"Public body" is defined in MCL 15.361(d). For cases on what constitutes a request by a public body, see *Henry v City of Detroit*, 234 Mich App 405; 594 NW2d 107 (1999), or a report to a public body, see *Branch v Azalea/Epps Home, Ltd*, 189 Mich App 211; 472 NW2d 73 (1991). For circumstances in which a report to a public body employer can constitute a report to a public body, see *Phinney v Perlmutter*, 222 Mich App 513; 564 NW2d 532 (1997); but see *Dickson v Oakland University*, 171 Mich App 68; 429 NW2d 640 (1988).

Whitman v City of Burton, 493 Mich 303; 831 NW2d 223 (2013), held that motive is irrelevant in determining whether the employee engaged in a protected activity.

History

M Civ JI 107.02 was added April 1, 2002. Amended January 2014.

M Civ JI 107.03 Whistleblowers' Protection Act: Causation

When I use the term "because of" I mean that protected activity must be one of the motives or reasons defendant [discharged / or / threatened / or / discriminated against] the plaintiff. Protected activity does not have to be the only reason, or even the main reason, but it does have to be one of the reasons that made a difference in defendant's decision to [discharge / or / threaten / or / discriminate against] the plaintiff.

*(In order to prove causation, plaintiff must show that a decision-maker or a person who influenced the decision knew of plaintiff's protected activity. Knowledge may be shown by direct evidence or circumstantial evidence.)

Note on Use

*This paragraph should be read only if knowledge is an issue in the case. See *Kaufman & Payton, PC v Nikkila*, 200 Mich App 250; 503 NW2d 728 (1993); *Roberson v Occupational Health Centers of America, Inc*, 220 Mich App 322; 559 NW2d 86 (1996); *Roulston v Tendercare (Michigan) Inc*, 239 Mich App 270; 608 NW2d 525 (2000); *Barrett v Kirtland Community College*, 245 Mich App 306; 628 NW2d 63 (2001); see also *Melchi v Burns Int'l Sec Serv, Inc*, 597 F Supp 575 (ED Mich 1984).

Comment

On the meaning of "because of" in the employment discrimination context, see *Hazle v Ford Motor Co*, 464 Mich 456; 628 NW2d 515 (2001), and other cases cited in the comment to M Civ JI 105.02 Employment Discrimination (Disparate Treatment)—Definition.

History

M Civ JI 107.03 was added April 1, 2002. Amended April 1, 2004.

M Civ JI 107.04 Whistleblowers' Protection Act: Good Faith Belief

Plaintiff must reasonably believe that a violation of law or a regulation has occurred. It is not necessary that an actual violation of law or a regulation has occurred, but the employee cannot have a reasonable belief if [he / she] knows [his / her] report is false.

Comment

MCL 15.362; *Melchi v Burns Int'l Sec Serv, Inc*, 597 F Supp 575 (ED Mich 1984); *Clark County Sch Dist v Breeden*, 532 US 268; 121 S Ct 1508; 149 L Ed 2d 509 (2001).

History

M Civ JI 107.04 was added April 1, 2002.

M Civ JI 107.11 Whistleblowers' Protection Act: Distinction in Standard of Proof Between "Report" and "About to Report"

If the plaintiff claims that he or she reported a violation or suspected violation of law or regulation to a public body, the plaintiff must prove by a preponderance of the evidence that [he / she] made such a report.

If the plaintiff claims that he or she was about to report a violation or suspected violation of law or regulation to a public body, the plaintiff must prove by clear and convincing evidence that he or she was about to report such a violation.

Note on Use

This instruction should be followed by the definitions of preponderance and clear and convincing evidence in M Civ JI 8.01.

This instruction must be given whenever "about to report" is an issue in the case.

Comment

The clear and convincing requirement for an employee "about to report" a violation or suspected violation is found in MCL 15.363(4).

History

M Civ JI 107.11 was added April 1, 2002.

M Civ JI 107.15 Whistleblowers' Protection Act: Burden of Proof

Plaintiff has the burden of proving each of the following elements:

(a) that [he / she] was engaged in a protected activity as defined in these instructions; and

(b) the defendant [discharged / or / threatened / or / discriminated against] the plaintiff; and

(c) the [discharge / threat / discrimination] was because of protected activity; and

(d) the plaintiff suffered damages as a result of the [discharge / threat / discrimination].

Your verdict will be for the plaintiff if you find that plaintiff has proved each of these elements. Your verdict will be for the defendant if you find that the plaintiff has failed to prove any one of these elements.

Comment

West v General Motors, 469 Mich 177 (2003).

History

M Civ JI 107.15 was added April 1, 2002. Amended July 2012.

Chapter 108: Public Accommodations

M Civ JI 108.01 Public Accommodation or Services; Prohibited Practices—Explanation 592

M Civ JI 108.02 Public Accommodation—Definition 593

M Civ JI 108.03 Public Service—Definition 594

M Civ JI 108.04 Public Accommodation/Public Service Discrimination—Disparate Treatment—Definition 595

M Civ JI 108.06 Public Accommodation/Public Service Discrimination—Burden Of Proof 596

M Civ JI 108.06A Public Accommodation/Public Service Discrimination-Burden of Proof-Retaliation 597

M Civ JI 108.07 Public Accommodation/Public Service Discrimination—Sexual Harassment—Explanation 598

M Civ JI 108.09 Public Accommodation/Public Service Discrimination—Quid Pro Quo Harassment—Burden of Proof 599

M Civ JI 108.11 Public Accommodation/Public Service Discrimination—Hostile Environment Harassment—Burden of Proof 600

M Civ JI 108.12 Public Accommodation/Public Service Discrimination—Hostile Environment Harassment—Unwelcome Sexual Conduct or Communication—Definition 601

M Civ JI 108.13 Public Accommodation/Public Service Discrimination—Hostile Environment Harassment— Sexually Hostile Environment—Definition 602

M Civ JI 108.01 Public Accommodation or Services; Prohibited Practices—Explanation

(1) We have a state law known as the Elliott-Larsen Civil Rights Act, which provides that a person shall not deny a person the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of a place of public accommodation or public service because of [religion / race / color / national origin / age / sex / height / weight / marital status].

(2) The law also provides that a person shall not retaliate or discriminate against a person because the person has opposed a violation of the act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under the act.

Note on Use

The use of any particular subsection will be dictated by the facts of the case.

Comment

MCL 37.2302; MCL 37.2701.

History

Added September 2005. Amended July 2012.

M Civ JI 108.02 Public Accommodation—Definition

When I use the term "place of public accommodation" I mean a business, or an educational, refreshment, entertainment, recreation, health, or transportation facility, or institution of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the public. A "place of public accommodation" also includes the facilities of the following private clubs:

(a) A country club or golf club.

(b) A boating or yachting club.

(c) A sports or athletic club.

(d) A dining club, except a dining club that in good faith limits its membership to the members of a particular religion for the purpose of furthering the teachings or principles of that religion and not for the purpose of excluding individuals of a particular gender, race, or color.

Note on Use

The list of entities included as a public accommodation should be tailored to the facts of the case.

Comment

MCL 37.2301(a)

History

Added December 2008.

M Civ JI 108.03 Public Service—Definition

When I use the term "public service" I mean a public facility, department, agency, board, or commission, owned, operated, or managed by or on behalf of the state, a political subdivision, or an agency thereof or a tax exempt private agency established to provide service to the public, except that public service does not include a state or county correctional facility with respect to actions and decisions regarding an individual serving a sentence of imprisonment.

Note on Use

The list of entities included as a public service should be tailored to the facts of the case.

Comment

MCL 37.2301(b)

History

Added December 2008.

M Civ JI 108.04 Public Accommodation/Public Service Discrimination—Disparate Treatment—Definition

The plaintiff must prove that [he / she] was discriminated against because of [religion / race / color / national origin / age / sex / height / weight / marital status]. The discrimination must have been intentional. It cannot have occurred by accident. Intentional discrimination means that one of the motives or reasons for the alleged denial of the full and equal enjoyment of a public accommodation or public service was [religion / race / color / national origin / age / sex / height / weight / marital status]. [Religion / race / color / national origin / age / sex / height / weight / marital status] does not have to be the only reason, or even the main reason, but it does have to be one of the reasons that made a difference in determining whether to afford plaintiff the full and equal enjoyment of a public accommodation or public service.

History

Added December 2008.

M Civ JI 108.06 Public Accommodation/Public Service Discrimination—Burden Of Proof

Plaintiff has the burden of proving that:

(a) [He / She] was discriminated against on the basis of [religion / race / color / national origin / age / sex / height / weight / marital status],

(b) by defendant,

(c) resulting in the denial of the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations,

(d) of a [place of public accommodation / public service].

Your verdict will be for the plaintiff if the plaintiff has proved all of those elements. Your verdict will be for the defendant if the plaintiff has failed to prove any one of those elements.

Comment

Haynes v Neshewat, 477 Mich 29 (2007).

History

Added December 2008.

M Civ JI 108.06A Public Accommodation/Public Service Discrimination-Burden of Proof-Retaliation

Plaintiff has the burden of proving the following elements:

(a) that [he / she] [opposed a violation of the civil rights act / made a charge, filed a complaint, or testified, assisted, or participated in an investigation, proceeding or hearing, under the Act];

(b) that was known by the defendant;

(c) that defendant took an employment action adverse to the plaintiff; and

(d) that there was a causal connection between the protected activity and the adverse employment action.

To establish a causal connection, plaintiff must demonstrate that [his / her] participation in the protected activity was a significant factor in the defendant's adverse employment action.

Comment

MCL 37.2701. *Barrett v Kirtland Com College*, 245 Mich App 306 (2002).

History

Added July 2012.

M Civ JI 108.07 Public Accommodation/Public Service Discrimination—Sexual Harassment—Explanation

Discrimination based on sex includes sexual harassment. Sexual harassment is a type of sex discrimination prohibited by state law. There are two types of sexual harassment. The first is known as quid pro quo, which means "this for that." The second is known as sexually hostile environment harassment. In this case plaintiff claims [quid pro quo / sexually hostile environment] harassment.

History

Added December 2008.

M Civ JI 108.09 Public Accommodation/Public Service Discrimination—Quid Pro Quo Harassment—Burden of Proof

On plaintiff's claim of quid pro quo harassment, plaintiff has the burden of proving the following elements:

(a) that the defendant subjected plaintiff to unwelcome [sexual advances / requests for sexual favors / other verbal or physical conduct or communication of a sexual nature]; and

(b) that the defendant explicitly or implicitly used the plaintiff's submission to or rejection of such conduct or communication as a factor in a decision affecting the decision to afford plaintiff the full and equal enjoyment of a public accommodation or public service; and

(c) that [he / she] suffered damages.

To prove that the submission to or rejection of the conduct or communication was a factor in a decision, plaintiff must demonstrate that the action that [he / she] suffered was because of [his / her] rejection of, or submission to, the harassment.

Your verdict will be for plaintiff if the plaintiff has proved all of those elements. Your verdict will be for the defendant if the plaintiff has failed to prove any one of those elements.

Comment

Diamond v Witherspoon, 265 Mich App 673 (2005).

History

Added December 2008.

M Civ JI 108.11 Public Accommodation/Public Service Discrimination—Hostile Environment Harassment—Burden of Proof

On plaintiff's claim of hostile environment sexual harassment against the defendant, plaintiff has the burden of proving the following elements, and I'll define these terms in a moment:

(a) that [he / she] was subjected to communication or conduct on the basis of gender; and

(b) that [he / she] was subjected to unwelcome sexual conduct or communication; and

(c) that [he / she] was subjected to a sexually hostile environment; and

(d) that the defendant was legally responsible for the sexually hostile environment; and

(e) that [he / she] has suffered damages.

Your verdict will be for plaintiff if the plaintiff has proved all of those elements. Your verdict will be for the defendant if the plaintiff has failed to prove any one of those elements.

History

Added December 2008.

M Civ JI 108.12 Public Accommodation/Public Service Discrimination—Hostile Environment Harassment—Unwelcome Sexual Conduct or Communication—Definition

When I use the phrase "unwelcome sexual conduct or communication," I mean that plaintiff is the recipient of unwanted conduct or communication that is inherently sexual.

Comment

Haynie v Michigan, 468 Mich 302 (2003); *Corley v Detroit Bd of Ed*, 470 Mich 274 (2004).

History

Added December 2008.

M Civ JI 108.13 Public Accommodation/Public Service Discrimination—Hostile Environment Harassment— Sexually Hostile Environment—Definition

When I use the phrase "sexually hostile environment," I mean the environment was so tainted that, in the totality of the circumstances, the unwelcome sexual conduct complained of had the purpose or effect of substantially interfering with [his / her] full and equal enjoyment of the public accommodation or public service.

You must view the conduct or communication complained of from an objective standard, deciding how a reasonable person would have perceived the conduct or communication alleged in this case.

Comment

Radtke v Everett, 442 Mich 368 (1993); *Faragher v Boca Raton*, 524 US 775; 118 SCt 2275; 141 L Ed 2d 662 (1998).

History

Added December 2008.

Chapter 110: Wrongful Discharge

Introduction 604

M Civ JI 110.01 Introductory Instruction Where Wrongful Discharge Is Combined with Other Claims 605

M Civ JI 110.05 Wrongful Discharge: Employment Relationship Terminable at Will Unless Terms or Conditions to the Contrary 606

M Civ JI 110.06 Wrongful Discharge: Employment Policies or Terms or Conditions of the Employment Contract 607

M Civ JI 110.07 Wrongful Discharge: Employment Policies or Terms or Conditions of the Employment Contract—Express or Implied 609

M Civ JI 110.10 Wrongful Discharge: Good or Just Cause Contract or Policy—Burden of Proof 610

M Civ JI 110.11 Wrongful Discharge: Satisfaction Contract or Policy—Burden of Proof 612

M Civ JI 110.12 Wrongful Discharge: Special Conditions or Performance Standards—Burden of Proof 614

M Civ JI 110.13 Wrongful Discharge: Procedural Terms or Conditions—Burden of Proof 615

M Civ JI 110.20 Wrongful Discharge: Mitigation of Damages [*No Instruction Prepared*] 616

Introduction

These instructions are entitled "Wrongful Discharge." This does not mean that the Committee has a position on whether an action for "wrongful discharge" exists under Michigan law separate from an action for breach of contract or violation of legitimate expectations. See *Bullock v Automobile Club of Michigan*, 432 Mich 472; 444 NW2d 114 (1989), reh'g denied, 433 Mich 1201 (1989), cert denied, 493 US 1072; 110 S Ct 1118; 107 L Ed 2d 1024 (1990). As used in these instructions, "wrongful discharge" is merely a convenient label for characterizing Toussaint-type claims.

These instructions are not intended to be all-inclusive with respect to such evolving issues as contract modification or adverse economic circumstances. See *Bullock*; *In re Certified Question (Bankey v Storer Broadcasting Co)*, 432 Mich 438; 443 NW2d 112 (1989); *McCart v J Walter Thompson USA, Inc*, 437 Mich 109; 469 NW2d 284 (1991); *Ewers v Stroh Brewery Co*, 178 Mich App 371; 443 NW2d 504 (1989).

These instructions may not be applicable to actions for breach of definite term contracts, or individual written employment contracts. If there are claims based on such contracts, or claims for promissory estoppel, detrimental reliance, or other contract-type theories of recovery, supplemental instructions will be necessary.

Generally, these instructions do not apply to claims brought by employees where the remedy is provided by a collective bargaining agreement. *Hickman v General Motors Corp*, 177 Mich App 246, 251; 441 NW2d 430 (1989).

The Committee has not drafted an instruction defining the terms "cause" and "good cause" or "just cause." While such an instruction may be given if the parties can agree on a definition, the Committee's decision not to draft a definition rests on three premises. First, it would be difficult to construct any definition applicable to all cases. Second, providing a standard definition might hamper the parties' efforts to delineate through evidence and argument the meaning of "cause" in a specific employment setting. Third, the Michigan case law since Toussaint does not appear to be evolving a standard definition of "cause" beyond the general observations made in Toussaint.

The Michigan Supreme Court has held that because a wrongful discharge action is a contract action, the common-law tort collateral source rule does not apply, and an employer is entitled to a set off from a wrongful discharge damages award for plaintiff's unemployment compensation benefits. *Corl v Huron Castings, Inc*, 450 Mich 620; 544 NW2d 278 (1996)."

M Civ JI 110.01 Introductory Instruction Where Wrongful Discharge Is Combined with Other Claims

In this case, plaintiff presents [*number of claims*]. One claim is that the termination of plaintiff's employment violated [a term or condition of the employment relationship / and / or / one or more of defendant's employment policies]. Another claim is that the termination was [unlawful / discriminatory / other] because [*describe discrimination or other claim*]. Each claim consists of different elements which plaintiff must prove. Each claim is entitled to separate consideration.

I will now instruct you on the law applicable to each claim.

Note on Use

Where there are more than two claims, this instruction should be modified accordingly.

History

M Civ JI 110.01 was added December 1990.

M Civ JI 110.05 Wrongful Discharge: Employment Relationship Terminable at Will Unless Terms or Conditions to the Contrary

An employment relationship is terminable at will unless an employer has agreed otherwise or the employer's policies provide otherwise. Terminable at will means that the employment relationship may be terminated by either party at any time, with or without cause, for any reason or for no reason at all. However, the employment relationship is not terminable at will if one or more of the express or implied terms or conditions of the employment relationship provide otherwise. (Where it is claimed that there was an agreement for job security based on oral statements, those statements must be clear and unequivocal.)

Note on Use

The sentence in parentheses should not be read to the jury if there is no issue as to whether the statements are clear and unequivocal.

Comment

Toussaint v Blue Cross & Blue Shield of Michigan, 408 Mich 579; 292 NW2d 880 (1980); *Valentine v General American Credit, Inc*, 420 Mich 256; 362 NW2d 628 (1984); *Bullock v Automobile Club of Michigan*, 432 Mich 472; 444 NW2d 114, reh'g denied, 433 Mich 1201 (1989), cert denied, 493 US 1072; 110 S Ct 1118; 107 L Ed 2d 1024 (1990). *Rowe v Montgomery Ward & Co, Inc*, 437 Mich 627; 473 NW2d 268 (1991).

History

M Civ JI 110.05 was added December 1990. Amended January 1993.

M Civ JI 110.06 Wrongful Discharge: Employment Policies or Terms or Conditions of the Employment Contract

The plaintiff claims that the following were [terms or conditions of the employment relationship / and / or / defendant's employment policies]:

(a) that the employment relationship can be terminated by the employer if the employer is dissatisfied with the [employee / or / employee's services].

(b) that the employment relationship can be terminated by the employer if the employer has good or just cause.

(c) [*Describe special conditions or performance standards*].

(d) [*Describe other terms or conditions or policies*].

The plaintiff has the burden of proving the [term / condition / terms and conditions] which [he / she] claims [was / were] part of the employment relationship [and / or / defendant's employment policies].

Note on Use

This instruction should be given only if there is a factual issue as to the terms or conditions of the employment contract or the employment policy involved.

Delete any subsection that is not applicable.

Subsections c. and d. are included to recognize that it may be necessary to instruct the jury on terms or conditions or policies that do not fall under either subsection a. or subsection b. The court may describe in subsection c. special conditions or performance standards, e.g., where continued employment is conditioned on the employee's meeting sales or production quotas. Cf. *Bullock v Automobile Club of Michigan*, 432 Mich 472; 444 NW2d 114 (1989), reh'g denied, 433 Mich 1201 (1989), cert denied, 493 US 1072; 110 S Ct 1118; 107 L Ed 2d 1024 (1990); *Farrell v Automobile Club of Michigan*, 155 Mich App 378; 399 NW2d 531 (1986).

The court may describe in subsection d. job security provisions that do not fall into any of the usual categories, e.g., "You will be employed as long as the Smith family owns a majority of the company's stock and you are doing the job." See *Damrow v Thumb Cooperative Terminal, Inc*, 126 Mich App 354; 337 NW2d 338 (1983); lv denied, 418 Mich 899 (1983).

These instructions do not define what constitutes an "employer's policy." Additional instructions may be necessary if there is a dispute over whether a particular document, statement, or practice amounts to a policy of the employer.

History

M Civ JI 110.06 was added December 1990.

M Civ JI 110.07 Wrongful Discharge: Employment Policies or Terms or Conditions of the Employment Contract—Express or Implied

A term or condition of employment may be either express or implied.

(a) A term or condition is express if the employer and employee have agreed with one another orally or in writing that the employment will not be terminated except in accordance with that term or condition.

(b) A term or condition is implied if the employer has caused the employee to have a legitimate expectation that [his / her] employment will not be terminated except in accordance with that term or condition. The employee's expectation must arise from the employer's oral or written policy statements, or the employer's actions, as fairly understood. Plaintiff must believe that [his / her] employment could not be terminated except in accordance with that term or condition, and plaintiff's expectation must have been reasonable under all of the circumstances.

Comment

Toussaint v Blue Cross & Blue Shield of Michigan, 408 Mich 579; 292 NW2d 880 (1980); *Bullock v Automobile Club of Michigan*, 432 Mich 472; 444 NW2d 114 (1989), reh'g denied, 433 Mich 1201 (1989), cert denied, US; 110 S Ct 1118; 107 L Ed 2d 1024 (1990).

It is an issue for the jury whether the contract or policy has a just cause provision if there is sufficient evidence of 1) an express oral or written agreement or 2) a legitimate expectation that employment will not be terminated except for just cause, which expectation is grounded in the employer's policy statements. *Toussaint* at 598–599; *Renny v Port Huron Hospital*, 427 Mich 415, 428; 398 NW2d 327 (1986) reh'g denied, 428 Mich 1206 (1987); *Bullock*.

It is necessary that the employee actually believe that employment will not be terminated except for good or just cause. *Struble v Lacks Industries, Inc*, 157 Mich App 169; 403 NW2d 71 (1986), lv denied, 426 Mich 879 (1986). But an employee's subjective belief alone is not sufficient to create a just cause contract or policy. *Schwartz v Michigan Sugar Co*, 106 Mich App 471; 308 NW2d 459 (1981); *Riethmiller v Blue Cross & Blue Shield of Michigan*, 151 Mich App 188; 390 NW2d 227 (1986).

History

M Civ JI 110.07 was added December 1990.

M Civ JI 110.10 Wrongful Discharge: Good or Just Cause Contract or Policy—Burden of Proof

The plaintiff has the burden of proving each of the following:

(a) *(An employment relationship existed between plaintiff and defendant.)

(b) The employment relationship could not be terminated unless defendant had good or just cause.

(c) Plaintiff's employment was terminated by the defendant.

(d) †Plaintiff was performing the duties of [his / her] employment up to the time of termination.

(e) Plaintiff suffered economic damages as a result of the termination.

The defendant has the burden of proving that it had good or just cause to terminate the plaintiff's employment.

In order to decide whether there was good or just cause for the termination of plaintiff's employment, you must determine whether plaintiff actually engaged in the conduct complained of by the defendant and whether that conduct was the actual reason for the termination of plaintiff's employment.

If the plaintiff did not engage in the conduct, or if that was not the actual reason for the termination, then there was not good or just cause.

‡(If you decide that plaintiff did engage in the conduct and that the conduct was the reason for the termination, then you must decide whether defendant had a [rule / policy], whether that [rule / policy] was consistently applied, and whether plaintiff's conduct violated that [rule / policy]. If you decide that the conduct violated a consistently applied [rule / policy], then defendant had good or just cause and you cannot substitute your judgment as to the reasonableness of that [rule / policy].)

‡(If you decide that defendant had no [rule / policy], or if you decide that defendant had a [rule / policy] but it was applied only selectively, then it is up to you to decide whether the conduct of the plaintiff amounted to good or just cause for the termination; that is, whether an employer would terminate someone's employment for that reason.)

Your verdict will be for the plaintiff if you decide that the plaintiff has proved each of the elements I have just explained to you, and you decide that the defendant has not proved that it had good or just cause to terminate plaintiff's employment.

Your verdict will be for the defendant if you decide that the plaintiff has failed to prove any one of the elements I have just explained to you, or if you decide that the

defendant has proved that it had good or just cause to terminate the plaintiff's employment.

Note on Use

*Delete paragraph a. if it is not an issue.

†Paragraph d. may require modification if, for example, at the time of termination, plaintiff was absent from work due to an approved leave.

‡The paragraphs in parentheses should be used only if applicable.

Comment

In *Rasch v City of East Jordan*, 141 Mich App 336, 340–341; 367 NW2d 856 (1985), the court held that it is error to refuse to give a requested instruction that the defendant had the burden of proving that the discharge was for just cause. See also *Saari v George C. Dates & Associates, Inc*, 311 Mich 624; 19 NW2d 121 (1945); and *Johnson v Jessop*, 332 Mich 501; 51 NW2d 915 (1952); but see *Obey v McFadden Corp*, 138 Mich App 767; 360 NW2d 292 (1984), lv denied, 422 Mich 911 (1985). This instruction is based on *Rasch*.

In the case of a good or just cause (as contracted with a satisfaction) contract or policy, when an employee is discharged for alleged specific misconduct, it is up to the jury to decide if the employee did what the employer claims he or she did; it is not sufficient to show that the discharge was in good faith or reasonable. *Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich 579, 621–623; 398 NW2d 327 (1980).

Where specific misconduct or violation of defendant's rules or standards is the claimed basis for the discharge, the jury is permitted to determine whether that is the employer's true reason for the discharge. Id. at 622, 624.

Violation of uniformly applied rules constitutes good or just cause, and the only questions for the jury are whether the employer actually had a rule or policy and whether the employee was discharged for violation of it. Id. at 624. Employers are entitled to establish their own standards for job performance and to dismiss for nonadherence to those standards, and the jury may not substitute its own judgment and decide the reasonableness of those standards. Id. at 623, 624.

If there is no rule or policy, or if there is in practice no real rule because of an employer's selective enforcement of the stated rule or policy, then the jury may determine whether the conduct of an employee constituted good or just cause for the termination, that is, whether it is the type of conduct that justifies terminating employment (does it demonstrate that the employee was no longer doing the job?). Id.

History

M Civ JI 110.10 was added December 1990.

M Civ JI 110.11 Wrongful Discharge: Satisfaction Contract or Policy—Burden of Proof

Plaintiff has the burden of proving each of the following:

(a) *(An employment relationship existed between plaintiff and defendant.)

(b) The employment relationship could not be terminated unless defendant was dissatisfied with [plaintiff / or / plaintiff's work].

(c) Plaintiff's employment was terminated by the defendant.

(d) Defendant was not dissatisfied with [plaintiff / or / plaintiff's work].

(e) Plaintiff suffered economic damages as a result of the termination.

In deciding whether the employer is dissatisfied with the employee's services, you may not concern yourself with whether the employer's dissatisfaction is reasonable, †(but you are to decide whether the dissatisfaction is insincere, in bad faith, dishonest, or not the real reason).

Your verdict will be for the plaintiff if you decide that the plaintiff has proved each of the elements I have just explained to you.

Your verdict will be for the defendant if you decide that the plaintiff has failed to prove any one of the elements I have just explained to you.

Note on Use

*Delete paragraph a. if it is not an issue.

†The phrase in parentheses should be used only if there is some evidence that the claimed dissatisfaction is not the true reason for the discharge.

This instruction should only be given where the parties agree that the case involves a satisfaction contract or where there is sufficient evidence to warrant submission of the issue to the jury of whether the agreement is a satisfaction contract.

Comment

Toussaint v Blue Cross & Blue Shield of Michigan, 408 Mich 579; 292 NW2d 880 (1980); *Schmand v Jandorf*, 175 Mich 88; 140 NW 996 (1913).

The employer may discharge under a satisfaction contract as long as it is in good faith dissatisfied with the employee's performance or behavior. However, where the employee has secured a promise not to be discharged except for cause, he or she has contracted for more than the employer's promise to act in good faith or to provide continued employment absent employer dissatisfaction.

History

M Civ JI 110.11 was added December 1990.

M Civ JI 110.12 Wrongful Discharge: Special Conditions or Performance Standards—Burden of Proof

Plaintiff has the burden of proving each of the following:

(a) *(An employment relationship existed between plaintiff and defendant.)

(b) The employment relationship could only be terminated in accordance with [*describe special conditions or performance standards*].

(c) Plaintiff's employment was terminated by the defendant.

(d) The termination of employment was not in accordance with [*describe special conditions or performance standards*].

(e) Plaintiff suffered economic damages as a result of the termination.

Your verdict will be for the plaintiff if you decide that the plaintiff has proved each of the elements I have just explained to you.

Your verdict will be for the defendant if you decide that the plaintiff has failed to prove any one of the elements I have just explained to you.

Note on Use

*Delete paragraph a. if it is not an issue.

Comment

A wrongful discharge action may be maintained based on a claim that an employer failed to follow its policy regarding laying off employees. *King v Michigan Consolidated Gas Co*, 177 Mich App 531; 442 NW2d 714 (1989).

History

M Civ JI 110.12 was added December 1990.

M Civ JI 110.13 Wrongful Discharge: Procedural Terms or Conditions—Burden of Proof

Plaintiff has the burden of proving each of the following:

(a) *(An employment relationship existed between plaintiff and defendant.)

(b) The employment relationship could only be terminated in accordance with [*describe procedural terms or conditions*].

(c) Plaintiff's employment was terminated by the defendant.

(d) The termination of employment was not in accordance with [*describe procedural terms or conditions*].

(e) Plaintiff suffered economic damages as a result of the termination.

Your verdict will be for the plaintiff if you decide that the plaintiff has proved each of the elements I have just explained to you.

Your verdict will be for the defendant if you decide that the plaintiff has failed to prove any one of the elements I have just explained to you.

Note on Use

*Delete paragraph a. if it is not an issue.

Comment

Where an employee manual sets forth procedures for warning and temporary suspension prior to discharge, plaintiff may maintain a wrongful discharge action for the employer's failure to follow these procedures. *Damrow v Thumb Cooperative Terminal, Inc*, 126 Mich App 354; 337 NW2d 338 (1983), lv denied, 418 Mich 899 (1983).

History

M Civ JI 110.13 was added December 1990.

M Civ JI 110.20 Wrongful Discharge: Mitigation of Damages [*No Instruction Prepared*]

Comment

The committee has prepared no instruction on wrongful discharge—mitigation of damages. An instruction on mitigation of damages for wrongful discharge cases may be adapted from M Civ JI 105.41 Employment Discrimination—Mitigation of Damages for Loss of Compensation.

See *Farrell v School-District No. 2 of Twp of Rubicon*, 98 Mich 43; 56 NW 1053 (1893); *Bruno v Detroit Institute of Technology*, 51 Mich App 593; 215 NW2d 745 (1974). See also cases cited in comment to M Civ JI 105.41 Employment Discrimination—Mitigation of Damages for Loss of Compensation.

History

M Civ JI 110.20 was added December 1990.

Chapter 113: Consumer Protection Act

M Civ JI 113.01 Trade or Commerce; Prohibited Practices-Explanation 618
M Civ JI 113.02 Unfair, Unconscionable, or Deceptive Methods, Acts, or Practices 619
M Civ JI 113.03 Trade or Commerce-Definition 620
M Civ JI 113.04 Loss—Definition 621

M Civ JI 113.01 Trade or Commerce; Prohibited Practices-Explanation

We have a state law known as the Consumer Protection Act, which provides that certain unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce are unlawful.

Note on Use

MCL 445.904 provides that the Act does not apply to certain regulated transactions or conduct and methods, acts, or practices already made unlawful by certain other statutes.

Comment

MCL 445.903.

History

Added July 2012.

M Civ JI 113.02 Unfair, Unconscionable, or Deceptive Methods, Acts, or Practices

The methods, acts, or practices which are protected by the Consumer Protection Act include:

(a) _____.

(b) _____.

(c) _____.

Note on Use

The applicable provisions of MCL 445.903 should be inserted and read as indicated by the proofs.

Comment

MCL 445.903.

History

Added July 2012.

M Civ JI 113.03 Trade or Commerce-Definition

When I use the term "trade or commerce" I mean the conduct of a business providing goods, property, or service primarily for personal, family, or household purposes. ["Trade or commerce" includes the advertising, solicitation, offering for sale or rent, sale, lease, or distribution of a service or property, tangible or intangible, real, personal, or mixed, or any other article, or a business opportunity.] ["Trade or commerce" does not include the purchase or sale of a franchise, but does include pyramid and chain promotions.]

Note on Use

Use only if there is an issue concerning whether defendant was acting in trade or commerce. Use the bracketed language only if appropriate. If a franchise, pyramid or chain promotion is involved, additional instructions defining those terms may be necessary. Those instructions should be based on the definitions found in the Franchise Investment Law, MCL 445.1501 et seq.

Comment

MCL 445.902(g)

History

Added July 2012.

M Civ JI 113.04 Loss—Definition

When I use the term "loss," I mean either a monetary damage or the prevention of the fulfillment of plaintiff's reasonable expectations.

Comment

MCL 445.911(2); *Mayhill v AH Pond*, 129 Mich App 178 (1983).

History

Added July 2012.

Chapter 114: Invasion of Privacy Act

M Civ JI 114.01 Invasion of Privacy—Intrusion into Another's Private Affairs—Elements 623
M Civ JI 114.02 Invasion of Privacy—Intrusion Into Another's Private Affairs—Burden of Proof ... 624
M Civ JI 114.03 Invasion of Privacy—Public Disclosure of Private Facts—Elements 625
M Civ JI 114.04 Invasion of Privacy—Public Disclosure of Private Facts—Burden of Proof 626
M Civ JI 114.05 Invasion of Privacy—Publicity Which Places Plaintiff in a False Light—Elements 627
M Civ JI 114.06 Invasion of Privacy—Publicity Which Places Plaintiff in a False Light—Burden of Proof 628

M Civ JI 114.01 Invasion of Privacy—Intrusion into Another's Private Affairs—Elements

Plaintiff claims that defendant is responsible for invasion of [his / her] privacy. The claim here is that defendant intruded into plaintiff's private affairs. The elements of this claim are the following:

(a) the existence of a secret and private subject matter,

(b) a right possessed by the plaintiff to keep that subject matter private, and

(c) that defendant, without consent, obtained information about that subject matter through some method objectionable to a reasonable person.

It is not necessary that the information be revealed or made available to others in order for there to be an invasion of privacy.

Comment

Lewis v LeGrow, 258 Mich App 175 (2003); *Dalley v Dykema Gossett*, 287 Mich App 296 (2010).

History

Added July 2012.

M Civ JI 114.02 Invasion of Privacy—Intrusion Into Another's Private Affairs—Burden of Proof

Plaintiff has the burden of proving each of the following:

(a) the existence of a secret and private subject matter,

(b) a right possessed by the plaintiff to keep that subject matter private, and

(c) that defendant, without consent, obtained information about that subject matter through an objectionable method.

Your verdict will be for the plaintiff if the plaintiff has proved all of those elements. Your verdict will be for the defendant if the plaintiff has failed to prove any one of those elements.

History

Added July 2012.

M Civ JI 114.03 Invasion of Privacy—Public Disclosure of Private Facts—Elements

Plaintiff claims that defendant is responsible for invasion of [his / her] privacy. The claim here is that defendant publicly disclosed private facts about plaintiff. The elements of this claim are the following:

(a) the public disclosure of private information about the plaintiff that is not already a matter of public record or otherwise open to the public,

(b) that was highly offensive to a reasonable person, and

(c) that was of no legitimate concern to the public.

It is not necessary that the disclosure be made to the general public. It is sufficient if the disclosure is made to one or more persons such as fellow employees, club members, church members, family, neighbors or others whose knowledge of the facts would be embarrassing to the plaintiff.

Comment

Beaumont v Brown, 401 Mich 80 (1977) overruled in part on other grounds, *Bradley v Saranac Bd of Education*, 455 Mich 285 (1997); *Duran v Detroit News*, 200 Mich App 622 (1993); *Fry v Ionia Sentinel-Standard*, 101 Mich App 725 (1980).

History

Added July 2012.

M Civ JI 114.04 Invasion of Privacy—Public Disclosure of Private Facts—Burden of Proof

Plaintiff has the burden of proving each of the following:

(a) that defendant publicly disclosed private information about the plaintiff that was not already a matter of public record or otherwise open to the public,

(b) that was highly offensive to a reasonable person, and

(c) that was of no legitimate concern to the public.

Your verdict will be for the plaintiff if the plaintiff has proved all of those elements. Your verdict will be for the defendant if the plaintiff has failed to prove any one of those elements.

History

Added July 2012.

M Civ JI 114.05 Invasion of Privacy—Publicity Which Places Plaintiff in a False Light—Elements

Plaintiff claims that defendant is responsible for invasion of [his / her] privacy. The claim here is that defendant placed plaintiff in a false light in the public eye. The elements of this claim are the following:

(a) a disclosure to the general public or to a large number of people,

(b) of information that was highly objectionable to a reasonable person, which attributed to plaintiff characteristics, conduct, or beliefs that were false and placed plaintiff in a false light, and

(c) the defendant must have had knowledge of or acted in reckless disregard as to the falsity of the disclosed information and the false light in which the plaintiff would be placed.

Note on Use

If the plaintiff is a public figure, actual malice must be proved by clear and convincing evidence. *Battaglieri v Mackinac Center*, 261 Mich App 296 (2004). See M Civ JI 8.01. In *Collins v Detroit Free Press, Inc.*, 245 Mich. App. 27, 32 (2001), the Michigan Court of Appeals held that "[t]he First Amendment requires courts to determine whether the plaintiff is a public or private figure…." Collins involved allegations of both defamation and false light.

Comment

Dadd v Mount Hope Church, 486 Mich 857 (2010); *Duran v Detroit News*, 200 Mich App 622 (1993); *Battaglieri v Mackinac Center*, 261 Mich App 296 (2004); *Early Detection Center, PC v New York Life Ins Co*, 157 Mich App 618, 630 (1986).

History

Added July 2012.

M Civ JI 114.06 Invasion of Privacy—Publicity Which Places Plaintiff in a False Light—Burden of Proof

Plaintiff has the burden of proving each of the following:

(a) that defendant disclosed to the general public or a large number of people,

(b) information that was unreasonable and highly objectionable to a reasonable person, which attributed to plaintiff characteristics, conduct, or beliefs that were false and placed plaintiff in a false light, and

(c) that defendant must have had knowledge of or acted in reckless disregard as to the falsity of the published information and the false light in which the plaintiff would be placed.

Your verdict will be for the plaintiff if the plaintiff has proved all of those elements. Your verdict will be for the defendant if the plaintiff has failed to prove any one of those elements.

Note on Use

If the plaintiff is a public figure, actual malice must be proved by clear and convincing evidence. *Battaglieri v Mackinac Center*, 261 Mich App 296 (2004).

History

Added July 2012.

Chapters 115: Assault and Battery

M Civ JI 115.01 Assault—Definition 630

M Civ JI 115.02 Battery—Definition 631

M Civ JI 115.05 Assault and Battery—Defense of Self-Defense 632

M Civ JI 115.06 Assault and Battery—Defense of Consent by Voluntarily Entering a Mutual Affray 633

M Civ JI 115.07 Assault and Battery—Provocation by Mere Words Not a Defense 634

M Civ JI 115.08 Assault and Battery—Defense— Right to Resist an Unlawful Arrest 635

M Civ JI 115.09 Battery—Defense—Use of Force by Law Enforcement Officer in Lawful Arrest ... 636

M Civ JI 115.20 Assault—Burden of Proof 637

M Civ JI 115.21 Battery—Burden of Proof 638

M Civ JI 115.30 Partial Privilege of Merchant as to Exemplary Damages and Damages for Mental Anguish—False Arrest, False Imprisonment, Assault, Battery, Libel, Slander 639

M Civ JI 115.01 Assault—Definition

An assault is any intentional, unlawful threat or offer to do bodily injury to another by force, under circumstances which create a well-founded fear of imminent peril, coupled with the apparent present ability to carry out the act if not prevented.

Comment

See *Tinkler v Richter*, 295 Mich 396; 295 NW 201 (1940).

History

M Civ JI 115.01 was added September 1982.

M Civ JI 115.02 Battery—Definition

A battery is the willful or intentional touching of a person against that person's will [by another / by an object or substance put in motion by another person].

Comment

See *Tinkler v Richter*, 295 Mich 396; 295 NW 201 (1940).

History

M Civ JI 115.02 was added September 1982.

M Civ JI 115.05 Assault and Battery—Defense of Self-Defense

A person who is assaulted may use such reasonable force as may be, or reasonably appears at the time to be, necessary to protect himself or herself from bodily harm in repelling the assault.

Comment

See *Anders v Clover*, 198 Mich 763; 165 NW 640 (1917); *Kent v Cole*, 84 Mich 579; 48 NW 168 (1891).

History

M Civ JI 115.05 was added September 1982.

M Civ JI 115.06 Assault and Battery—Defense of Consent by Voluntarily Entering a Mutual Affray

If plaintiff voluntarily engaged in a fight with defendant for the sake of fighting and not as a means of self-defense, then plaintiff may not recover for an assault or battery unless the defendant beat the plaintiff excessively or used unreasonable force.

Comment

See *Galbraith v Fleming*, 60 Mich 403; 27 NW 581 (1886).

History

M Civ JI 115.06 was added September 1982.

M Civ JI 115.07 Assault and Battery—Provocation by Mere Words Not a Defense

Words alone, no matter how insulting, do not justify an assault or battery against the person who utters the words.

Comment

See *Gungrich v Anderson*, 189 Mich 144; 155 NW 379 (1915); *Goucher v Jamieson*, 124 Mich 21; 82 NW 663 (1900).

History

M Civ JI 115.07 was added September 1982.

M Civ JI 115.08 Assault and Battery—Defense— Right to Resist an Unlawful Arrest

A citizen has the right to resist an unlawful arrest. However, the amount of force a citizen may use to resist an unlawful arrest must be reasonable under the circumstances.

Comment

See *People v Krum*, 374 Mich 356; 132 NW2d 69 (1965).

History

M Civ JI 115.08 was added September 1982.

M Civ JI 115.09 Battery—Defense—Use of Force by Law Enforcement Officer in Lawful Arrest

If a person has knowledge, or by the exercise of reasonable care should have knowledge, that he or she is being lawfully arrested by a law enforcement officer, it is the duty of that person to refrain from resisting the arrest.

An arresting officer may use such force as is reasonably necessary to effect a lawful arrest. However, an officer who uses more force than is reasonably necessary to effect a lawful arrest commits a battery upon the person arrested to the extent the force used was excessive.

Comment

See *Delude v Raasakka*, 391 Mich 296; 215 NW2d 685 (1974); *Firestone v Rice*, 71 Mich 377; 38 NW 885 (1888).

History

M Civ JI 115.09 was added September 1982.

M Civ JI 115.20 Assault—Burden of Proof

Plaintiff has the burden of proving each of the following:

(a) that defendant made an intentional and unlawful threat or offer to do bodily injury to the plaintiff

(b) that the threat or offer was made under circumstances which created in plaintiff a well-founded fear of imminent peril

(c) that defendant had the apparent present ability to carry out the act if not prevented

If you find that plaintiff has proved each of the elements that I have explained to you, and the defendant has failed to prove the defense of [*describe defense*], your verdict will be for the plaintiff.

If you find that the plaintiff has failed to prove any one of the elements or if you find that the defendant has proved the defense of [*describe defense*], your verdict will be for the defendant.

History

M Civ JI 115.20 was added September 1982.

M Civ JI 115.21 Battery—Burden of Proof

Plaintiff has the burden of proving that [defendant willfully and intentionally touched the plaintiff against the plaintiff's will / defendant put in motion an object or substance that touched the plaintiff against the plaintiff's will].

If you find that this has been proved, and the defendant has failed to prove the defense of [*describe defense*], your verdict will be for the plaintiff.

If you find that the plaintiff has failed to prove this, or if you find that the defendant has proved the defense of [*describe defense*], your verdict will be for the defendant.

History

M Civ JI 115.21 was added September 1982.

M Civ JI 115.30 Partial Privilege of Merchant as to Exemplary Damages and Damages for Mental Anguish—False Arrest, False Imprisonment, Assault, Battery, Libel, Slander

If you find that [defendant / defendant's agent / defendant's employee] believed and had probable cause to believe that plaintiff [had taken / had aided or abetted in the taking of] goods for sale in the store, you may not award the plaintiff exemplary damages or damages for mental anguish unless you find that [defendant / defendant's agent / defendant's employee] —

(a) used unreasonable force, or

(b) detained plaintiff an unreasonable length of time, or

(c) acted with an unreasonable disregard of plaintiff's rights or sensibilities, or

(d) acted with intent to injure plaintiff.

Note on Use

This instruction should not be used in cases involving partial privilege of a merchant where a demand for retraction is an issue. See MCL 600.2911(2)(b).

Comment

See MCL 600.2917; *Bonkowski v Arlan's Department Store*, 383 Mich 90; 174 NW2d 765 (1970).

History

M Civ JI 115.30 was added September 1982.

Chapter 116: False Arrest and Imprisonment

M Civ JI 116.01 False Arrest—Definition 641
M Civ JI 116.02 False Imprisonment—Definition 642
M Civ JI 116.05 False Arrest—Law Enforcement Officer—Probable Cause to Arrest for Felony without Warrant 643
M Civ JI 116.06 False Arrest—Defense—Right of Private Citizen to Arrest 644
M Civ JI 116.07 False Arrest—Arrest with Warrant 645
M Civ JI 116.20 False Arrest—Burden of Proof 646
M Civ JI 116.21 False Imprisonment—Burden of Proof 647

M Civ JI 116.01 False Arrest—Definition

False arrest is an unlawful taking, seizing or detaining of a person, either by touching or putting hands on him or her, or by any other act that indicates an intention to take him or her into custody and subjects the person arrested to the actual control and will of the person making the arrest.

The act must have been performed with the intent to make an arrest and must have been so understood by the person arrested.

Comment

See *Bonkowski v Arlan's Department Store*, 383 Mich 90; 174 NW2d 765 (1970); *Bruce v Meijers Supermarkets, Inc*, 34 Mich App 352; 191 NW2d 132 (1971); *Hill v Taylor*, 50 Mich 549; 15 NW 899 (1883).

History

M Civ JI 116.01 was added September 1982.

M Civ JI 116.02 False Imprisonment—Definition

False imprisonment is the unlawful restraint of an individual's personal liberty or freedom of movement. To constitute a false imprisonment, there must be an intentional and unlawful restraint, detention or confinement that deprives a person of his or her personal liberty or freedom of movement against his or her will. The restraint necessary to create liability for false imprisonment may be imposed either by actual physical force or by an express or implied threat of force.

*(It is not necessary for the detention or confinement to be in a jail or prison.)

Note on Use

*The sentence in parentheses should be used when applicable.

Comment

See *Stowers v Wolodzko*, 386 Mich 119; 191 NW2d 355 (1971); *Tumbarella v Kroger Co*, 85 Mich App 482; 271 NW2d 284 (1978); *Hess v Wolverine Lake*, 32 Mich App 601; 189 NW2d 42 (1971).

History

M Civ JI 116.02 was added September 1982.

M Civ JI 116.05 False Arrest—Law Enforcement Officer—Probable Cause to Arrest for Felony without Warrant

An arrest is lawful if the defendant had probable cause to make the arrest. An arrest is unlawful if the defendant did not have probable cause.

There was probable cause if you find that—

(a) the defendant was aware of information, facts or circumstances which were sufficient to lead a reasonable and prudent person to believe that the crime of [*specify felony*] [had been committed / was in the process of being committed] and that plaintiff was the person who [had committed it / was in the process of committing it], and

(b) the defendant believed that the crime of [*specify felony*] [had been committed / was in the process of being committed] and that plaintiff was the person who [had committed it / was in the process of committing it].

The elements of the crime of [*specify felony*] are [*state elements of the felony*].

An arrest made with probable cause is lawful even if *(the crime of [*specify felony*] had not actually been committed, nor was it in the process of being committed) *(or) *(the crime of [*specify felony*] had been committed or was in the process of being committed, but plaintiff was not the person who had committed it or was in the process of committing it).

Note on Use

*Include one or more of the phrases in parentheses as applicable.

Comment

See MCL 764.15. See also *Hammitt v Straley*, 338 Mich 587; 61 NW2d 641 (1953); *People v Bressler*, 223 Mich 597; 194 NW 559 (1923).

If plaintiff makes a prima facie showing of arrest without a warrant, then defendant has the burden of going forward with evidence that the arrest was lawful. *Donovan v Guy*, 347 Mich 457; 80 NW2d 190 (1956); MRE 301.

If defendant is a private security guard, see MCL 338.1080.

History

M Civ JI 116.05 was added September 1982.

M Civ JI 116.06 False Arrest—Defense—Right of Private Citizen to Arrest

An arrest is lawful if it is made by a private citizen in any one of the following circumstances:

(a) for a felony committed in [his / her] presence

(b) when the person to be arrested had committed a felony although not in the presence of the citizen

(c) *(when [he / she] is summoned by a peace officer to assist said officer in making an arrest)

†(The elements of the crime of [*specify felony*] are [*state elements of the felony*].)

Note on Use

*Delete subparagraph c if not an issue.

†If defendant relies wholly on subparagraph c, the last paragraph of this instruction should not be given.

If defendant is a private security guard, see MCL 338.1080.

Comment

Subsections a through c of this instruction state substantially, in the language of the statute, three of four circumstances in which a private citizen has a right to arrest. MCL 764.16. See also *Bright v Littlefield*, ___ Mich ___; 641 NW2d 587 (2002); *Freeman v Meijer, Inc*, 95 Mich App 475; 291 NW2d 87 (1980); *Nash v Sears Roebuck & Co*, 12 Mich App 553; 163 NW2d 471 (1968); *Maliniemi v Gronlund*, 92 Mich 222; 52 NW 627 (1892). For rights of a merchant, agent, or employee of a merchant, or independent contractor providing security for a merchant, to make an arrest, see MCL 764.16(d).

History

M Civ JI 116.06 was added September 1982.

M Civ JI 116.07 False Arrest—Arrest with Warrant

An arrest is lawful if defendant made such arrest pursuant to a warrant naming [*name of plaintiff*], and did not act in bad faith.

Comment

An arrest made pursuant to a warrant which is valid on its face is a lawful arrest. See *Gooch v Wachowiak*, 352 Mich 347; 89 NW2d 496 (1958); *Tryon v Pingree*, 112 Mich 338, 345; 70 NW 905, 907 (1897); *Barker v Anderson*, 81 Mich 508; 45 NW 1108 (1890).

History

M Civ JI 116.07 was added September 1982.

M Civ JI 116.20 False Arrest—Burden of Proof

Plaintiff has the burden of proof on each of the following:

(a) that [he / she] was arrested by defendant

(b) that [he / she] was aware of the arrest and it was against [his / her] will

(c) that defendant intended to arrest the plaintiff

(d) that such arrest was unlawful

If you find that plaintiff has proved each of the elements that I have explained to you, and the defendant has failed to prove the defense of [*describe defense*], your verdict will be for the plaintiff.

If you find that the plaintiff has failed to prove any one of the elements, or if you find that the defendant has proved the defense of [*describe defense*], your verdict will be for the defendant.

History

M Civ JI 116.20 was added September 1982.

M Civ JI 116.21 False Imprisonment—Burden of Proof

Plaintiff has the burden of proof on each of the following:

(a) that [he / she] was imprisoned; that is, [he / she] was restrained, detained or confined by defendant and thereby deprived of [his / her] personal liberty or freedom of movement

(b) that such imprisonment was against [his / her] will

(c) that defendant accomplished the imprisonment by actual physical force or by an express or implied threat of force

(d) that defendant intended to deprive plaintiff of [his / her] personal liberty or freedom of movement

(e) that such imprisonment was unlawful

If you find that plaintiff has proved each of the elements that I have explained to you, and the defendant has failed to prove the defense of [*describe defense*], your verdict will be for the plaintiff.

If you find that the plaintiff has failed to prove any one of the elements, or if you find that the defendant has proved the defense of [*describe defense*], your verdict will be for the defendant.

History

M Civ JI 116.21 was added September 1982.

Chapter 117: Malicious Prosecution

M Civ JI 117.01 Malicious Prosecution—Criminal Proceeding..... 649
M Civ JI 117.02 Malicious Prosecution—Criminal Proceeding: Burden of Proof..... 650
M Civ JI 117.03 Malicious Prosecution—Criminal Proceeding: Termination in Favor of Accused ... 652
M Civ JI 117.04 Malicious Prosecution—Criminal Proceeding: Probable Cause..... 653
M Civ JI 117.20 Malicious Prosecution—Civil Proceeding..... 655
M Civ JI 117.21 Malicious Prosecution—Civil Proceeding—Burden of Proof..... 656

M Civ JI 117.01 Malicious Prosecution—Criminal Proceeding

The elements of malicious prosecution are the following:

(a) a prosecution caused or continued by one person against another

(b) termination of the proceeding in favor of the person who was prosecuted

(c) absence of probable cause for initiating or continuing the proceeding

(d) initiating or continuing the proceeding with malice or a primary purpose other than that of bringing the offender to justice

Comment

Matthews v Blue Cross & Blue Shield, 456 Mich 365; 572 NW2d 603 (1998); *Drobczyk v Great Lakes Steel Corp*, 367 Mich 318; 116 NW2d 736 (1962); *Rivers v Ex-Cell-O Corp*, 100 Mich App 824; 300 NW2d 420 (1980).

See MCL 600.2907 and *Camaj v S S Kresge Co*, 426 Mich 281; 393 NW2d 875 (1986), for the availability of treble damages where the underlying action was a "straw-party" suit.

History

M Civ JI 117.01 was added September 1982.

M Civ JI 117.02 Malicious Prosecution—Criminal Proceeding: Burden of Proof

Plaintiff has the burden of proving each of the following:

(a) Defendant caused or continued a prosecution against the plaintiff.

(b) The proceeding was terminated in favor of the plaintiff.

(c) Defendant initiated or continued the proceeding without probable cause.

(d) Defendant initiated or continued the proceeding with malice or a primary purpose other than that of bringing an offender to justice.

*(The defendant has the burden of proving the defense that [*describe defense*].)

If you find that plaintiff has proved each of the elements that I have explained to you, *(and the defendant has failed to prove the defense of [*describe defense*]), your verdict will be for the plaintiff.

If you find that the plaintiff has failed to prove any one of the elements, *(or if you find that the defendant has proved the defense of [*describe defense*]), your verdict will be for the defendant.

Note on Use

*The sentence and the phrases preceded by an asterisk should be used only if an affirmative defense is at issue.

Whether the proceeding terminated in favor of the plaintiff is a question of law if there are no disputed issues of material fact. *Cox v Williams*, 233 Mich App 388; 593 NW2d 173 (1999). If the trial judge determines as a matter of law that the proceeding terminated in plaintiff's favor, the jury should be so instructed and subsection b of this instruction should be deleted.

Probable cause is a question of law if there are no disputed issues of material fact. *Matthews v Blue Cross and Blue Shield*, 456 Mich 365, 381-382; 572 NW2d 603 (1998). If the trial judge determines as a matter of law that defendant did not have probable cause, the jury should be so instructed and subsection c of this instruction should be deleted.

Comment

It is a complete defense to an action for malicious prosecution that the prosecutor exercised independent discretion to initiate and maintain a prosecution, unless defendant knowingly provided false information on which the prosecutor based the decision to prosecute or unless defendant knowingly omitted exculpatory information which would have dissuaded the prosecutor from prosecuting the plaintiff. *Matthews v Blue Cross and Blue Shield*, 456 Mich 365; 572 NW2d 603 (1998). (Where the

prosecutor exercises independent discretion, it negates the first element of the cause of action; defendant is not considered to be the one who caused or continued the prosecution.)

For a discussion of the defense of reliance on advice of an attorney (including on the direction and advice of a prosecuting attorney) see *Matthews*, 456 Mich 365, 379-381.

History

M Civ JI 117.02 was added September 1982. Amended December 1, 2002.

M Civ JI 117.03 Malicious Prosecution—Criminal Proceeding: Termination in Favor of Accused

A criminal proceeding is terminated in favor of an accused if the accused is acquitted. It is also considered terminated in favor of an accused in other circumstances that I will now describe to you.

In this case, you must find that the proceeding terminated in favor of the plaintiff if [*describe facts and circumstances that, if found, would constitute a favorable termination, i.e., dismissal because of failure of complaining witness to testify, coerced guilty plea*]. You must find that the proceeding did not terminate in favor of the plaintiff if [*describe facts and circumstances that, if found, would not constitute a favorable termination*].

Note on Use

Whether the proceeding terminated in favor of the plaintiff is a mixed question of law and fact. *Cox v Williams*, 233 Mich App 388; 593 NW2d 173 (1999). If there are disputed issues of material fact, the trial judge should instruct the jury on the circumstances that would constitute a favorable termination. See, *Blase v Appicelli*, 195 Mich App 174; 489 NW2d 129 (1992).

Comment

Dismissal of criminal charges at the request of the prosecution or the complaining witness is a termination of proceedings in favor of the accused. *Cox v Williams*, 233 Mich App 388; 593 NW2d 173 (1999). Dismissal of criminal charges pursuant to a plea bargain is not a termination in favor of the accused, but such a settlement or compromise if brought about by duress, coercion or unfair means is a termination in favor of an accused. *Blase* (guilty plea taken under advisement and charges dismissed when no convictions after six months; claimed improper coercion by trial judge); see also, *Kostrzewa v City of Troy*, 247 F3d 633 (6th Cir 2001) (dismissal of obstruction of police officer charge and guilty plea to driving offense, claim that alleged plea bargain was induced by a threat to prosecute on the obstruction charge for which there was no probable cause).

History

M Civ JI 117.03 was added December 1, 2002.

M Civ JI 117.04 Malicious Prosecution—Criminal Proceeding: Probable Cause

Defendant had probable cause if, based on the facts and circumstances known to [him/her] at the time [he/she] [initiated/ continued] the criminal proceeding, [he/she] reasonably believed that plaintiff was guilty of a crime. Probable cause may be based on information received from others, but only if the information is of such a reliable kind and from such reliable sources that a reasonable person would believe the information is true.

*(In this case you must find that defendant had probable cause if [*describe facts and circumstances that, if found, would constitute probable cause*]. You must find that defendant did not have probable cause if [*describe facts and circumstances that, if found, would not constitute probable cause*].)

Note on Use

*This paragraph may be used if appropriate.

Probable cause is a mixed question of law and fact. *Matthews v Blue Cross and Blue Shield*, 456 Mich 365, 381-382; 572 NW2d 603 (1998). This instruction may be used if there are disputed issues of material fact.

In lieu of giving this instruction, the trial judge may instruct the jury to complete a special verdict form setting forth the circumstances under which they find the proceedings were initiated or continued, and the trial judge then will determine as a matter of law whether the facts as found by the jury constitute probable cause. (This approach is recommended in *Matthews v Blue Cross and Blue Shield*, 456 Mich 365, 382 n 22; 572 NW2d 603 (1998).

If a special verdict form is used, it should be carefully drafted to ensure that the jury decides all facts necessary to enable the court to determine probable cause. The difficulty in drafting such special verdict forms, as well as in setting forth in an instruction the hypothetical facts which, if proved, constitute probable cause is discussed in Comment Note – Probable Cause or Want Thereof, in Malicious Prosecution Action, as Question of Law for Court or Fact for Jury, 87 ALR2d 183 (1963).

Comment

This instruction is based on the frequently cited instruction to the jury in *Wilson v Bowen*, 64 Mich 133; 31 NW 81 (1887), quoted with approval most recently in *Matthews*. Probable cause involves an objective test—what a reasonable person would believe. *Matthews*. It is reversible error to allow the jury to determine probable cause without having been given a definition of probable cause. *Abdul-Mujeeb v Sears Roebuck & Co*, 154 Mich App 249; 397 NW2d 193 (1986).

It is not sufficient to merely define probable cause for the jury, the correct practice is for the trial court to instruct the jury under what set of facts and circumstances which may be found from the evidence the defendant would or would not have probable cause. *Renda v International Union, UAW*, 366 Mich

58; 114 NW2D 343 (1962); *Slater v Walter*, 148 Mich 650, 656-657; 112 NW 682 (1907); *Wilson*. The reason for this rule is that while the jury resolves factual disputes, whether the facts constitute probable cause is a question of law for the court. See, e.g., *Matthews*, 456 Mich 365, 382. However, a failure to augment a definition of probable cause may or may not result in reversible error. Compare *Wilson* and *Renda*.

Malice may be inferred from lack of probable cause, but probable cause may not be inferred from an absence of malice. *Matthews*, 456 Mich 365, 378.

The affirmative defense of reliance on advice of an attorney after full and fair disclosure of material facts should not be confused with probable cause. *Matthews*, 456 Mich 365, 379-380.

History

M Civ JI 117.04 was added December 1, 2002.

M Civ JI 117.20 Malicious Prosecution—Civil Proceeding

The elements of malicious prosecution are the following:

(a) a civil proceeding [instituted / continued / procured] by one person against another.

(b) termination of the proceeding in favor of the person against whom it was brought.

(c) absence of probable cause for bringing or continuing the proceeding.

(d) malice or a primary purpose other than that of securing the proper adjudication of the claim on which the proceeding is based.

(e) special injury resulting in damages.

Comment

See *Friedman v Dozorc*, 412 Mich 1, 74; 312 NW2d 585, 615 (1981). See also *Drobczyk v Great Lakes Steel Corp*, 367 Mich 318; 116 NW2d 736 (1962); *Drouillard v Metropolitan Life Insurance Co*, 107 Mich App 608; 310 NW2d 15 (1981); *Rivers v Ex-Cell-O Corp*, 100 Mich App 824; 300 NW2d 420 (1980); *Fort Wayne Mortgage Co v Carletos*, 95 Mich App 752; 291 NW2d 193 (1980); *Taft v J L Hudson Co*, 37 Mich App 692; 195 NW2d 296 (1972); *LaLone v Rashid*, 34 Mich App 193; 191 NW2d 98 (1971).

See MCL 600.2907 and *Camaj v S S Kresge Co*, 426 Mich 281; 393 NW2d 875 (1986), for the availability of treble damages where the underlying action was a “straw-party” suit.

History

M Civ JI 117.20 was added September 1982.

M Civ JI 117.21 Malicious Prosecution—Civil Proceeding—Burden of Proof

Plaintiff has the burden of proving each of the following:

(a) Defendant [instituted / continued / procured] a civil proceeding against the plaintiff.

(b) The proceeding was terminated in favor of the plaintiff.

(c) Defendant brought or continued the proceeding without probable cause.

(d) Defendant brought or continued the proceeding with malice or a primary purpose other than that of securing the proper adjudication of the claim on which the proceeding was based.

(e) Plaintiff sustained special injury resulting in damages.

If you find that plaintiff has proved each of the elements that I have explained to you, and the defendant has failed to prove the defense of [*describe defense*], your verdict will be for the plaintiff.

If you find that the plaintiff has failed to prove any one of the elements, or if you find that the defendant has proved the defense of [*describe defense*], your verdict will be for the defendant.

History

M Civ JI 117.21 was added September 1982.

Chapter 118: Libel and Slander

M Civ JI 118.01 Libel—Definition 658
M Civ JI 118.02 Slander—Definition 659
M Civ JI 118.03 Libel, Slander—Statement of and Concerning the Plaintiff 660
M Civ JI 118.04 Libel, Slander—Meaning of a Statement 661
M Civ JI 118.05 Libel, Slander—Burden of Proof 662
M Civ JI 118.06 Libel or Slander of Public Figure or Public Person (Actual Malice) 664
M Civ JI 118.07 Libel, Slander—Common-Law Qualified Privilege (Actual Malice) 665
M Civ JI 118.08 Libel or Slander of Private Person—Nonprivileged Communication 666
M Civ JI 118.19 Libel-Actual Damages (Public Figure or Public Person) 667
M Civ JI 118.20 Libel—Economic Damages (Private Individual) 668
M Civ JI 118.21 Libel—Exemplary Damages 669

M Civ JI 118.01 Libel—Definition

Libel is a statement *(of fact) which is false in some material respect and is communicated to a third person by [printing / writing / signs / pictures] and has a tendency to harm a person's reputation.

Note on Use

*The words in parentheses should be used if the alleged defamatory statement is one of pure fact. They should not be used if the alleged defamatory statement involves opinion and fact. *Gertz v Robert Welch, Inc*, 418 US 323; 94 S Ct 2997; 41 L Ed 2d 789 (1974); 2 Restatement Torts, 2d, § 566, pp 170–171.

Comment

Watson v Detroit Journal Co, 143 Mich 430; 107 NW 81 (1906). A statement of pure opinion is not actionable. *Gertz.*

History

M Civ JI 118.01 was added August 1983.

M Civ JI 118.02 Slander—Definition

Slander is a statement *(of fact) which is false in some material respect and is communicated to a third person by [words / gestures] and has a tendency to harm a person's reputation.

Note on Use

*The words in parentheses should be used if the alleged defamatory statement is one of pure fact. They should not be used if the alleged defamatory statement involves opinion and fact. *Gertz v Robert Welch, Inc*, 418 US 323; 94 S Ct 2997; 41 L Ed 2d 789 (1974); Restatement (Second) of Torts §566, at 170–171.

Comment

Watson v Detroit Journal Co, 143 Mich 430; 107 NW 81 (1906). A statement of pure opinion is not actionable. *Gertz*.

History

M Civ JI 118.02 was added August 1983.

M Civ JI 118.03 Libel, Slander—Statement of and Concerning the Plaintiff

The statement must have been of and concerning the plaintiff.

Comment

A person does not have a cause of action for defamation unless it is he or she who is defamed. *Lewis v Soule*, 3 Mich 514 (1855); *Watson v Detroit Journal Co*, 143 Mich 430; 107 NW 81 (1906); *Ball v White*, 3 Mich App 579; 143 NW2d 188 (1966). Others who are injured indirectly by the defamation may have a derivative suit (i.e., loss of consortium). *Peisner v Detroit Free Press, Inc*, 104 Mich App 59; 304 NW2d 814 (1981); aff'd in part on other grounds, 421 Mich 125; 364 NW2d 600 (1984).

A corporation has a cause of action for defamation. *Heritage Optical Center, Inc v Levine*, 137 Mich App 793; 359 NW2d 210 (1984).

History

M Civ JI 118.03 was added August 1983.

M Civ JI 118.04 Libel, Slander—Meaning of a Statement

The meaning of a statement is that meaning which, under the circumstances, a reasonable person who [hears / sees] the statement reasonably understands to be the meaning intended.

Comment

Ellis v Whitehead, 95 Mich 105; 54 NW 752 (1893). See also Restatement (Second) Torts §563, at 162–164.

History

M Civ JI 118.04 was added August 1983.

M Civ JI 118.05 Libel, Slander—Burden of Proof

Plaintiff has the burden of proving that—

(a) defendant made the statement *(of fact) complained of to a third person by [printing / writing / signs / pictures / words / gestures], and

(b) †(the statement was of and concerning the plaintiff, and)

(c) the statement was false in some material respect, and the statement had a tendency to harm the plaintiff's reputation, and

(d) ‡(as a result of the statement, the plaintiff suffered some damage, and)

(e) [*Insert M Civ JI 118.06 and/or M Civ JI 118.07 and/or M Civ JI 118.08 as applicable*.]

Your verdict will be for the plaintiff if you decide that all of these have been proved.

Your verdict will be for the defendant if you decide that any one of these has not been proved.

Note on Use

*The words in parentheses should be used if the alleged defamatory statement is one of pure fact. They should not be used if the alleged defamatory statement involves opinion. *Milkovich v Lorain Journal Co*, 497 US 1; 110 S Ct 2695; 111 L Ed 2d 1 (1990); Restatement (Second) of Torts §566, at 170–171.

†If M Civ JI 118.06 is inserted in subsection e, then delete subsection b.

‡ With regard to the applicability of any of these instructions (M Civ JI 118.05-118.21) where libel or slander per se of a private individual is at issue, compare *Gertz v Robert Welch, Inc*, 418 US 323, 324; 94 S Ct 2997; 41 L Ed 2d 789 (1974) ("For the reasons set forth below, we hold that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth"), with *Burden v Elias Bros Big Boy Restaurants*, 240 Mich App 723; 613 NW2d 378 (2000) and its interpretation of MCL 600.2911.

Generally, as to any single statement, if M Civ JI 118.08 is used, neither M Civ JI 118.06 nor M Civ JI 118.07 would be appropriate. Also, if M Civ JI 118.08 is used, the words "some damage" in subsection d should be changed to "economic damage." MCL 600.2911(7); *Glazer v Lamkin*, 201 Mich App 432; 506 NW2d 570 (1993).

Comment

On the issue of material falsity, see *Rouch v Enquirer & News of Battle Creek*, 440 Mich 238; 487 NW2d 205 (1992), cert denied, 507 US 967; 113 S Ct 1401; 122 L Ed 2d 774 (1993); *Locricchio v Evening News Ass'n*, 438 Mich 84; 476 NW2d 112 (1991), cert denied, 503 US 907; 112 S Ct 1267; 117 L Ed 2d 495 (1992).

History

M Civ JI 118.05 was added August 1983. Amended November 1990.

M Civ JI 118.06 Libel or Slander of Public Figure or Public Person (Actual Malice)

Because plaintiff was a [public official / public figure] at the time of the alleged [libel / slander], plaintiff must prove by clear and convincing evidence that:

(a) the statement was of and concerning [him / her], and

(i) the defendant had knowledge that the statement was false, or

(ii) the defendant acted with reckless disregard as to whether the statement was false.

"Reckless disregard" means that defendant must have made the statement with a high degree of awareness of its probable falsity, or must have entertained serious doubts as to the truth of the statement.

Comment

Although this instruction does not use the words "actual malice," it does incorporate the definition of that term. Use of the term in jury instructions has been criticized. *Harte-Hanks Communications, Inc v Connaughton*, 491 US 657, 666 n7; 105 L Ed 2d 562, 576 n7; 109 S Ct 2678, 2685 n7 (1989); *Masson v New Yorker Magazine, Inc*, 501 US 496; 115 L Ed 2d 447; 111 S Ct 2419 (1991).

On the meaning of "reckless disregard," see *Harte-Hanks Communications, Inc*, 491 US at 667, 692; 105 L Ed 2d 562; 109 S Ct 2678 (1989). Failure to give an instruction on "reckless disregard" has been criticized. *Faxon v Republican State Committee*, 244 Mich App 468; 624 NW2d 509 (2001).

The privilege to make communications about public figures or public persons is of constitutional magnitude. *New York Times Co v Sullivan*, 376 US 254; 84 S Ct 710; 11 L Ed 2d 686 (1964). This constitutional privilege has been incorporated into Michigan law by case law, *Arber v Stahlin*, 382 Mich 300; 170 NW2d 45 (1969), and more recently by statute, 1988 PA 396, MCL 600.2911(6).

Nonmedia defendants are entitled to the constitutional privilege regarding defamatory publications that concern a public official or public figure. *Dun & Bradstreet, Inc v Greenmoss Builders, Inc*, 472 US 749; 105 S Ct 2939; 86 L Ed 2d 593 (1985). See also *Vandentoorn v Bonner*, 129 Mich App 198; 342 NW2d 297 (1983).

Whether a person is a public figure or public person is a question of law for the trial court and should not be submitted to the jury unless the facts are in dispute. *Bufalino v Detroit Magazine, Inc*, 433 Mich 766; 449 NW2d 410 (1989).

History

M Civ JI 118.06 was added August 1983. Amended November 1990, August 1991. Amended June 2003.

M Civ JI 118.07 Libel, Slander—Common-Law Qualified Privilege (Actual Malice)

Because *(under Michigan law) in this case, the defendant had a qualified privilege to communicate information, the plaintiff has the burden of proving that the defendant had knowledge that the statement was false, or that the defendant acted with reckless disregard as to whether the statement was false.

Note on Use

*This phrase should be read in any case where both constitutional privilege and qualified privilege are issues.

Comment

Although this instruction does not use the words "actual malice," it does incorporate the definition of that term. Use of the term has been criticized. *Harte-Hanks Communications, Inc v Connaughton*, 491 US 657, 666 n7; 105 L Ed 2d 562, 576 n7; 109 S Ct 2678, 2685 n7 (1989); *Masson v New Yorker Magazine, Inc*, 501 US 496; 115 L Ed 2d 447; 111 S Ct 2419; 59 USLW 4726, 4730 (1991).

The qualified privilege to communicate information in the public interest is no longer recognized in Michigan. *Rouch v Enquirer & News of Battle Creek*, 427 Mich 157; 398 NW2d 245 (1986). However, the *Rouch* decision does not affect the privilege of fair comment and other common-law qualified privileges. Id. at 180, n 13. Michigan law has long recognized such other common-law privileges as the privilege applicable to communications on matters of shared interest or duty. See *Bufalino v Maxon Bros, Inc*, 368 Mich 140; 117 NW2d 150 (1962); *Wynn v Cole*, 91 Mich App 517; 284 NW2d 144 (1979); *Dalton v Herbruck Egg Sales Corp*, 164 Mich App 543; 417 NW2d 496 (1987); *Smith v Fergan*, 181 Mich App 594; 450 NW2d 3 (1989). For other qualified or conditional privileges, see Restatement (Second) of Torts §597, at 277–281.

History

M Civ JI 118.07 was added August 1983. Amended November 1990, August 1991.

M Civ JI 118.08 Libel or Slander of Private Person—Nonprivileged Communication

The plaintiff has the burden of proving that the defendant was negligent in making the statement.

When I use the word "negligent," I mean the failure to do something which a reasonably careful *person would do, or the doing of something which a reasonably careful *person would not do, under the circumstances that you find existed in this case. It is for you to decide what a reasonably careful *person would do or would not do under such circumstances.

Note on Use

*Use of the word "person" may be inappropriate. See *Gertz v Robert Welch, Inc*, 418 US 323; 94 S Ct 2997; 41 L Ed 2d 789 (1974); *Rouch v Enquirer & News of Battle Creek*, 427 Mich 157; 398 NW2d 245 (1986).

History

M Civ JI 118.08 was added November 1990.

M Civ JI 118.19 Libel-Actual Damages (Public Figure or Public Person)

If you find that [*plaintiff*] is entitled to damages then you may award the actual damages suffered by [*plaintiff*] to his or her property, business, trade, profession, occupation, or feelings.

Note on Use

This instruction should be incorporated into M Civ JI 50.01 and used in a public person or public figure case. See *Peisner v Detroit Free Press, Inc*, 421 Mich 125; 364 NW2d 600 (1984), for an actual damages instruction incorporating M Civ JI 50.01.

M Civ JI 118.20 Libel—Economic Damages (Private Individual)

If you find that [*plaintiff*] is entitled to damages, then you should award [*plaintiff*] any economic damages that [*plaintiff*] has proven. By economic damages, I mean any tangible loss suffered by [*plaintiff*] as a result of [*defendant's*] statement, such as lost wages, benefits, income, or profits. You should also award [*plaintiff*] any attorney fees incurred by [*plaintiff*] as a result of [*defendant's*] statement.

Note on Use

This instruction should be used in a "private person case." See MCL 600.2911(7).

History

M Civ JI 118.20 was added December 6, 2004.

M Civ JI 118.21 Libel—Exemplary Damages

The damages on which I have already instructed you are called actual damages. If you find that plaintiff is entitled to actual damages, you may then consider an award of exemplary damages. Exemplary damages may not be awarded to punish or to make an example of the defendant, but may only be awarded to compensate the plaintiff for any incremental or increased injury to plaintiff's feelings that you find were caused by defendant's bad faith or ill will. However, you may not award exemplary damages for any injury to feelings which you include in your award of actual damages.

In order to recover exemplary damages, plaintiff has the burden of proving the following elements:

(a) that defendant published the statements complained of with bad faith or ill will, and

(b) that before starting this lawsuit, plaintiff gave notice to defendant to publish a retraction, and allowed defendant a reasonable time to do so, and

(c) that plaintiff incurred some incremental or increased injury to feelings attributable to [his / her] sense of indignation and outrage, and

(d) that any such incremental or increased injury to feelings was caused by defendant's bad faith or ill will.

You may consider the publication, lack of publication, adequacy or inadequacy of a retraction or correction as bearing on whether the defendant acted in good or bad faith.

If you find that plaintiff has proven all of these elements, you must determine the amount of money that reasonably, fairly and adequately compensates [him / her] for such incremental or increased injury to feelings. In determining this amount, you may consider the publication, lack of publication, adequacy or inadequacy of a retraction or correction. A retraction or correction does not necessarily preclude an award of exemplary damages.

Note on Use

This instruction may not be applicable in private defamation, nonpublic interest cases. See *Gertz v Robert Welch, Inc*, 418 US 323; 94 S Ct 2997; 41 L Ed 2d 789 (1974). With regard to damages available and limitations on exemplary damages and damages in private plaintiff actions, see MCL 600.2911(2) and MCL 600.2911(7). These sections have been construed to mean that: "Under subsection 7, if the publication of the defamatory falsehood is negligent, a private plaintiff must prove economic damages but cannot recover for injuries to feelings. Under subsection 2(a), however, if a private plaintiff proves actual malice, the plaintiff is entitled to, among other things, actual damages to reputation or feelings." *Glazer v Lamkin*, 201 Mich App 432, 437; 506 NW2d 570, 572–573 (1993).

Comment

See *Peisner v Detroit Free Press, Inc*, 421 Mich 125; 364 NW2d 600 (1984); MCL 600.2911.

In order to recover exemplary and punitive damages, the plaintiff must prove that the defendant acted with common-law malice. Common-law malice is bad faith or ill will. *Peisner*, 421 Mich at 141–142; 364 NW2d at 608. The plaintiff must also prove that he or she notified the defendant of a request for a retraction and allowed the defendant a reasonable time to do so. MCL 600.2911(2)(b). However, "[t]he publication of such a retraction does not preclude an award of exemplary and punitive damages, but is admissible on the question of defendant's good faith and in mitigation and reduction of such damages." *Peisner*, 421 Mich at 130; 364 NW2d at 603.

The court in *Peisner* reiterated its long-held view that exemplary damages are purely compensatory and not intended to punish or make an example of a defendant. Id. at 135; 364 NW2d at 605.

History

M Civ JI 118.21 was added February 1986.

Chapter 119: Intentional Infliction of Emotional Distress

M Civ JI 119.01 Intentional Infliction of Emotional Distress—Burden of Proof..... 672

M Civ JI 119.01 Intentional Infliction of Emotional Distress—Burden of Proof

Plaintiff claims that defendant is responsible for the intentional infliction of emotional distress. For this claim, plaintiff has the burden of proving each of the following:

(a) that defendant's conduct was extreme and outrageous,

(b) that defendant's conduct was intentional or reckless,

(c) that defendant's conduct caused plaintiff severe emotional distress, and

(d) that defendant's conduct caused plaintiff damages.

Your verdict will be for the plaintiff if the plaintiff has proved all of those elements. Your verdict will be for the defendant if the plaintiff has failed to prove any one of those elements.

Comment

Lewis v LeGrow, 258 Mich App 175; 670 NW2d 675 (2003); Dalley v Dykema Gossett, 287 Mich App 296; 788 NW2d 679 (2010).

History

M Civ JI 119.01 was added October 2014.

Chapter 125: Tortious Interference With Contract

M Civ JI 125.01 Tortious Interference with Contract: Elements 674
M Civ JI 125.02 Tortious Interference with Contract: Contract/Consideration—Definitions 675
M Civ JI 125.03 Tortious Interference with Contract: Intent—Definition 676
M Civ JI 125.04 Tortious Interference with Contract: Improper—Definition 677
M Civ JI 125.05 Tortious Interference with Contract: Breach—Definition 678

M Civ JI 125.01 Tortious Interference with Contract: Elements

Plaintiff claims that defendant intentionally and improperly interfered with plaintiff's contract with [*name of other party to contract*]. In order to establish the claim, plaintiff has the burden of proving each of the following:

(a) Plaintiff had a contract with [*name of other party to contract*] at the time of the claimed interference.

(b) Defendant knew of the contract at that time.

(c) Defendant intentionally interfered with the contract.

(d) Defendant improperly interfered with the contract.

(e) Defendant's conduct caused [*name of breaching party*] to breach the contract.

(f) Plaintiff was damaged as a result of defendant's conduct.

Your verdict will be for plaintiff if you find that plaintiff has proved all of these elements.

Your verdict will be for defendant if you find that plaintiff has failed to prove any one of these elements.

Note on Use

If the validity of a contract is an issue, this instruction must be modified.

Comment

This instruction is supported by *Jim-Bob, Inc v Mehling*, 178 Mich App 71, 95–96; 443 NW2d 451 (1989); *Woody v Tamer*, 158 Mich App 764, 773–774; 405 NW2d 213 (1987); and *Trepel v Pontiac Osteopathic Hospital*, 135 Mich App 361, 374; 354 NW2d 341 (1984).

For a discussion of knowledge or constructive knowledge in the context of a claim of tortious interference with contract, see Restatement (Second) of Torts §766 cmt i, at 11–12.

History

M Civ JI 125.01 was added March 1993.

M Civ JI 125.02 Tortious Interference with Contract: Contract/Consideration—Definitions

A contract is an agreement to do or not to do a particular thing in exchange for adequate consideration. The agreement may be oral or in writing.

When I use the words "adequate consideration," I mean a benefit for one party to the contract or a loss sustained or a responsibility assumed by the other party to the contract.

Note on Use

Additional instructions may be required depending on the facts of the case.

Comment

The definition of contract comes from *McInerney v Detroit Trust Co*, 279 Mich 42, 46; 271 NW 545 (1937).

The definition of consideration comes from *Levitz v Capitol Savings & Loan Co*, 267 Mich 92, 96; 255 NW 166 (1934), and *Dow Chemical Co v Dept of Treasury*, 185 Mich App 458, 468; 462 NW2d 765 (1990).

If no contract exists, an action for tortious interference with contract cannot be maintained. *Williams v DeMan*, 7 Mich App 71; 151 NW2d 247 (1967). An action for tortious interference with contract may be maintained if there is a contract, even though plaintiff is not able to enforce it for reasons such as the statute of frauds. *Northern Plumbing & Heating, Inc v Henderson Bros, Inc*, 83 Mich App 84, 92–93; 268 NW2d 296 (1978). But see Restatement (Second) of Torts §766 cmt f, at 10, for the distinction between void and voidable contracts.

History

M Civ JI 125.02 was added March 1993.

M Civ JI 125.03 Tortious Interference with Contract: Intent—Definition

When I say that plaintiff must prove that defendant intentionally interfered with the contract, I mean that

(a) defendant's primary, but not necessarily sole, purpose was to cause [*name of breaching party*] to breach the contract, or

(b) defendant acted knowing that [his / her] conduct was certain or substantially certain to cause [*name of breaching party*] to breach the contract.

Comment

This instruction is adapted from Restatement (Second) of Torts §766 cmt j, at 12. See also *Derosia v Austin*, 115 Mich App 647, 654; 321 NW2d 760 (1982); F*ormall, Inc v Community National Bank of Pontiac*, 166 Mich App 772, 781; 421 NW2d 289 (1988).

History

M Civ JI 125.03 was added March 1993.

M Civ JI 125.04 Tortious Interference with Contract: Improper—Definition

Improper interference is conduct that is fraudulent, not lawful, not ethical, or not justified under any circumstances. If defendant's conduct was lawful, it is still improper if it was done without justification and for the purpose of interfering with plaintiff's contractual rights, but plaintiff must specifically show affirmative acts by defendant that corroborate that defendant had the wrongful purpose of interfering with plaintiff's contractual rights.

Comment

See *Feldman v Green*, 138 Mich App 360; 360 NW2d 881 (1984); *Formall, Inc v Community National Bank of Pontiac*, 166 Mich App 772, 780; 421 NW2d 289 (1988). See also *Trepel v Pontiac Osteopathic Hospital*, 135 Mich App 361, 374; 354 NW2d 341 (1984); *Weitting v McFeeters*, 104 Mich App 188, 198; 304 NW2d 525 (1981); *Feaheny v Caldwell*, 175 Mich App 291, 304; 437 NW2d 358 (1989); *Wilkinson v Powe*, 300 Mich 275; 1 NW2d 539 (1942); *Bahr v Miller Bros Creamery*, 365 Mich 415; 112 NW2d 463 (1961).

In determining whether defendant's conduct was improper, courts have considered the following factors:

1. the nature of defendant's conduct;
2. defendant's motive or reasons for its actions;
3. the interests of plaintiff with which the defendant's conduct allegedly interfered;
4. the interests that defendant sought to advance;
5. society's interest in (a) protecting the freedom of defendant to engage in such conduct, and (b) protecting contractual relationships, business relationships, or expectancies such as that held or sought by plaintiff;
6. how directly defendant's conduct influenced the breaching party; and
7. the nature of the relationships of plaintiff, defendant, and the other party to the contract.

In appropriate cases, instructions dealing with these factors may be given. This list of factors is consistent with the view of the Michigan courts that the preferred guidelines are those articulated in §767 of Restatement (Second) of Torts, which is increasingly endorsed by Michigan courts. See, e.g., *Jim-Bob, Inc v Mehling*, 178 Mich App 71, 96–97; 443 NW2d 451 (1989); *Woody v Tamer*, 158 Mich App 764, 775; 405 NW2d 213 (1987).

History

M Civ JI 125.04 was added March 1993. Amended March 1994.

M Civ JI 125.05 Tortious Interference with Contract: Breach—Definition

"Breach" means the failure to perform a promise, duty, or obligation that is required and due under a contract.

Note on Use

If there is a claim of anticipatory breach, partial breach, or any other reason why this instruction should not be read to the jury, an alternative instruction must be substituted.

Comment

Woody v Tamer, 158 Mich App 764, 774–775; 405 NW2d 213 (1987).

History

M Civ JI 125.05 was added March 1993.

Chapter 126: Tortious Interference with Business Relationship or Expectancy

M Civ JI 126.01 Tortious Interference with Business Relationship or Expectancy: Elements 680

M Civ JI 126.02 Tortious Interference with Business Relationship or Expectancy: Business Relationship or Expectancy—Definition 681

M Civ JI 126.03 Tortious Interference with Business Relationship or Expectancy: Intent—Definition 682

M Civ JI 126.04 Tortious Interference with Business Relationship or Expectancy: Improper—Definition 683

M Civ JI 126.01 Tortious Interference with Business Relationship or Expectancy: Elements

Plaintiff claims that defendant intentionally and improperly interfered with plaintiff's business relationship or expectancy with [*name of third party*]. In order to establish the claim, plaintiff has the burden of proving each of the following:

(a) Plaintiff had a business relationship or expectancy with [*name of third party*] at the time of the claimed interference.

(b) The business relationship or expectancy had a reasonable likelihood of future economic benefit for plaintiff.

(c) Defendant knew of the business relationship or expectancy at the time of the claimed interference.

(d) Defendant intentionally interfered with the business relationship or expectancy.

(e) Defendant improperly interfered with the business relationship or expectancy.

(f) Defendant's conduct caused [*name of third party*] to disrupt or terminate the business relationship or expectancy.

(g) Plaintiff was damaged as a result of defendant's conduct.

Your verdict will be for the plaintiff if you find that plaintiff has proved all of these elements.

Your verdict will be for the defendant if you find that plaintiff has failed to prove any one of these elements.

Comment

This instruction is supported by *Jim-Bob, Inc v Mehling*, 178 Mich App 71, 95–96; 443 NW2d 451 (1989); *Michigan Podiatric Medical Ass'n v National Foot Care Program, Inc*, 175 Mich App 723, 735; 438 NW2d 349 (1989); *Feaheny v Caldwell*, 175 Mich App 291, 301; 437 NW2d 358 (1989); *Bonelli v Volkswagen of America, Inc*, 166 Mich App 483, 496–498; 421 NW2d 213 (1988); *Woody v Tamer*, 158 Mich App 764, 773–774; 405 NW2d 213 (1987); *Feldman v Green*, 138 Mich App 360; 360 NW2d 881 (1984); and *Trepel v Pontiac Osteopathic Hospital*, 135 Mich App 361, 374; 354 NW2d 341 (1984).

History

M Civ JI 126.01 was added March 1993.

M Civ JI 126.02 Tortious Interference with Business Relationship or Expectancy: Business Relationship or Expectancy—Definition

Plaintiff claims that the business relationship or expectancy in this case is [*describe as briefly as possible the business relationship or expectancy claimed*].

The relationship or expectancy need not be evidenced by a contract, but there must be a realistic expectation. The law requires more than wishful thinking, hope, or optimism; what is required is a reasonable likelihood or probability of future economic benefit for the plaintiff.

Comment

Trepel v Pontiac Osteopathic Hospital, 135 Mich App 361; 354 NW2d 341 (1984); *Joba Construction Co, Inc v Burns & Roe, Inc*, 121 Mich App 615; 329 NW2d 760 (1982); *Schipani v Ford Motor Co*, 102 Mich App 606, 621–623; 302 NW2d 307 (1981).

History

M Civ JI 126.02 was added March 1993.

M Civ JI 126.03 Tortious Interference with Business Relationship or Expectancy: Intent—Definition

When I say that plaintiff must prove that defendant intentionally interfered with the business relationship or expectancy, I mean that

(a) defendant's primary, but not necessarily sole, purpose was to interfere with plaintiff's business relationship or expectancy, or

(b) defendant acted knowing that [his / her] conduct was certain or substantially certain to cause interference with plaintiff's business relationship or expectancy.

Comment

This instruction is adapted from Restatement (Second) of Torts §766 cmt j, at 12. See also *Derosia v Austin*, 115 Mich App 647, 654; 321 NW2d 760 (1982); *Formall, Inc v Community National Bank of Pontiac*, 166 Mich App 772, 781; 421 NW2d 289 (1988).

History

M Civ JI 126.03 was added March 1993.

M Civ JI 126.04 Tortious Interference with Business Relationship or Expectancy: Improper—Definition

Improper interference is conduct that is fraudulent, not lawful, not ethical, or not justified under any circumstances. If defendant's conduct was lawful, it is still improper if it was done without justification and for the purpose of interfering with plaintiff's business relationship or expectancy, but plaintiff must specifically show affirmative acts by defendant that corroborate that defendant had the wrongful purpose of interfering with plaintiff's business relationship or expectancy.

Comment

See *Feldman v Green*, 138 Mich App 360; 360 NW2d 881 (1984); *Formall, Inc v Community National Bank of Pontiac*, 166 Mich App 772, 780; 421 NW2d 289 (1988). See also *Trepel v Pontiac Osteopathic Hospital*, 135 Mich App 361, 374; 354 NW2d 341 (1984); *Weitting v McFeeters*, 104 Mich App 188, 198; 304 NW2d 525 (1981); *Feaheny v Caldwell*, 175 Mich App 291, 304; 437 NW2d 358 (1989); *Wilkinson v Powe*, 300 Mich 275; 1 NW2d 539 (1942); *Bahr v Miller Bros Creamery*, 365 Mich 415; 112 NW2d 463 (1961).

In determining whether defendant's conduct was improper, courts have considered the following factors:

1. the nature of defendant's conduct;
2. defendant's motive or reasons for its actions;
3. the interests of plaintiff with which the defendant's conduct allegedly interfered;
4. the interests that defendant sought to advance;
5. society's interest in (a) protecting the freedom of defendant to engage in such conduct, and (b) protecting contractual relationships, business relationships or expectancies such as that held or sought by plaintiff;
6. how directly defendant's conduct influenced the breaching party; and
7. the nature of the relationships of plaintiff, defendant, and the other party to the contract.

In appropriate cases, instructions dealing with these factors may be given. This list of factors is consistent with the view of the Michigan courts that the preferred guidelines are those articulated in §767 of Restatement (Second) of Torts, which is increasingly endorsed by Michigan courts. See, e.g., *Jim-Bob, Inc v Mehling*, 178 Mich App 71, 96–97; 443 NW2d 451 (1989); *Woody v Tamer*, 158 Mich App 764, 775; 405 NW2d 213 (1987).

History

M Civ JI 126.04 was added March 1993. Amended March 1994.

Chapter 128: Fraud and Misrepresentation

M Civ JI 128.01 Fraud Based on False Representation 685
M Civ JI 128.02 Fraud Based on Failure to Disclose Facts (Silent Fraud) 687
M Civ JI 128.03 Fraud Based on Bad-Faith Promise 689
M Civ JI 128.04 Innocent Misrepresentation 691
M Civ JI 128.10 Material Fact—Definition 692
M Civ JI 128.11 Reliance—Definition 693

M Civ JI 128.01 Fraud Based on False Representation

Plaintiff claims that defendant defrauded [him / her / it]. To establish fraud, plaintiff has the burden of proving each of the following elements by clear and convincing evidence:

(a) Defendant made a representation of [a material fact / material facts].

(b) The representation was false when it was made.

(c) Defendant knew the representation was false when [he / she / it] made it, or defendant made it recklessly, that is, without knowing whether it was true.

(d) Defendant made the representation with the intent that plaintiff rely on it.

(e) Plaintiff relied on the representation.

(f) Plaintiff was damaged as a result of [his / her / its] reliance.

Your verdict will be for the plaintiff (on the claim of fraud) if you decide that plaintiff has proved each of these elements by clear and convincing evidence.

Your verdict will be for the defendant (on the claim of fraud) if you decide that plaintiff has failed to prove any one of these elements by clear and convincing evidence.

Note on Use

If more than one type of fraud is at issue, the final paragraph of this instruction must be revised to instruct the jury that the verdict will be for the defendant only if plaintiff fails to prove any of the types of fraud claimed.

This instruction should be accompanied by the definition of clear and convincing evidence in M Civ JI 16.01.

This instruction is intended to be used in a tort action for damages for fraud. It is not designed for use in other types of cases.

Comment

Candler v Heigho, 208 Mich 115; 175 NW 141 (1919); *Blanksma v King*, 172 Mich 666; 138 NW 236 (1912). *Candler* was overruled in part insofar as it purported to hold that all six traditional common-law elements of fraud must be proved in an innocent misrepresentation case. *United States Fidelity & Guaranty Co v Black*, 412 Mich 99, 116; 313 NW2d 77 (1981).

For a discussion of Michigan cases on the quantum of proof in fraud actions, see *Disner v Westinghouse Electric Corp*, 726 F2d 1106 (6th Cir 1984); but see *Mina v General Star Indemnity Co*, 218 Mich App 678; 555 NW2d 1 (1996).

History

M Civ JI 128.01 was added December 1994.

M Civ JI 128.02 Fraud Based on Failure to Disclose Facts (Silent Fraud)

Plaintiff claims that defendant defrauded [him / her / it] by failing to disclose material facts. To establish this, plaintiff has the burden of proving each of the following elements by clear and convincing evidence:

(a) Defendant failed to disclose [a material fact / material facts] about [*insert subject matter of the claim*].

(b) Defendant had actual knowledge of the [fact / facts].

(c) Defendant's failure to disclose the [fact / facts] caused plaintiff to have a false impression.

(d) When defendant failed to disclose the [fact / facts], defendant knew the failure would create a false impression.

(e) When defendant failed to disclose the [fact / facts], defendant intended that plaintiff rely on the resulting false impression.

(f) Plaintiff relied on the false impression.

(g) Plaintiff was damaged as a result of [his / her / its] reliance.

Your verdict will be for the plaintiff (on the claim of fraud) if you decide that plaintiff has proved each of these elements by clear and convincing evidence.

Your verdict will be for the defendant (on the claim of fraud) if you decide that plaintiff has failed to prove any one of these elements by clear and convincing evidence.

Note on Use

This instruction should not be used unless the trial judge has determined that defendant had a duty to disclose. *Toering v Glupker*, 319 Mich 182; 29 NW2d 277 (1947); *Fassihi v Sommers, Schwartz, Silver, Schwartz & Tyler, PC*, 107 Mich App 509; 309 NW2d 645 (1981).

If more than one type of fraud is at issue, the final paragraph of this instruction must be revised to instruct the jury that the verdict will be for the defendant only if plaintiff fails to prove any of the types of fraud claimed.

This instruction should be accompanied by the definition of clear and convincing evidence in M Civ JI 16.01.

This instruction is intended to be used in a tort action for damages for fraud. It is not designed for use in other types of cases.

Comment

United States Fidelity & Guaranty Co v Black, 412 Mich 99, 124–128; 313 NW2d 77 (1981).

For a discussion of Michigan cases on the quantum of proof in fraud actions, see *Disner v Westinghouse Electric Corp*, 726 F2d 1106 (6th Cir 1984); but see *Mina v General Star Indemnity Co*, 218 Mich App 678; 555 NW2d 1 (1996).

History

M Civ JI 128.02 was added December 1994.

M Civ JI 128.03 Fraud Based on Bad-Faith Promise

Plaintiff claims that defendant defrauded [him / her / it] by making a promise of future conduct. To establish this, plaintiff has the burden of proving each of the following elements by clear and convincing evidence:

(a) Defendant promised that [*describe promise alleged by plaintiff*].

(b) At the time defendant made the promise, [he / she / it] did not intend to keep it.

(c) Defendant made the promise with the intent that plaintiff rely on it.

(d) Plaintiff relied on the promise.

(e) Plaintiff was damaged as a result of [his / her / its] reliance.

Your verdict will be for the plaintiff (on the claim of fraud) if you decide that plaintiff has proved each of these elements by clear and convincing evidence.

Your verdict will be for the defendant (on the claim of fraud) if you decide that plaintiff has failed to prove any one of these elements by clear and convincing evidence.

Note on Use

If more than one type of fraud is at issue, the final paragraph of this instruction must be revised to instruct the jury that the verdict will be for the defendant only if plaintiff fails to prove any of the types of fraud claimed.

This instruction should be accompanied by the definition of clear and convincing evidence in M Civ JI 16.01.

Comment

This instruction is based on the bad-faith exception to the rule that fraud cannot be based on promises of future conduct. *Hi-Way Motor Co v International Harvester Co*, 398 Mich 330; 247 NW2d 813 (1976); *Rutan v Straehly*, 289 Mich 341; 286 NW 639 (1939); *Laing v McKee*, 13 Mich 124; 87 Am Dec 738 (1865); *Jim-Bob, Inc v Mehling*, 178 Mich App 71, 90; 443 NW2d 451 (1989).

A mere broken promise standing alone is not sufficient evidence of fraud. *Marrero v McDonnell Douglas Capital Corp*, 200 Mich App 438; 505 NW2d 275 (1993); see also *Hi-Way Motor Co* (evidence was too remote to show fraudulent intent at the time the promise was made).

For a discussion of Michigan cases on the quantum of proof in fraud actions, see *Disner v Westinghouse Electric Corp*, 726 F2d 1106 (6th Cir 1984); but see *Mina v General Star Indemnity Co*, 218 Mich App 678; 555 NW2d 1 (1996).

History

M Civ JI 128.03 was added December 1994.

M Civ JI 128.04 Innocent Misrepresentation

Plaintiff claims that defendant made an innocent misrepresentation of material fact. To establish this, plaintiff has the burden of proving each of the following elements:

(a) Defendant made a representation of [a material fact / material facts].

(b) The representation was made in connection with the making of a contract between plaintiff and defendant.

(c) The representation was false when it was made.

(d) Plaintiff would not have entered into the contract if defendant had not made the representation.

(e) Plaintiff had a loss as a result of entering into the contract.

(f) Plaintiff's loss benefited the defendant.

Your verdict will be for the plaintiff (on the claim of innocent misrepresentation) if you decide that plaintiff has proved each of these elements.

Your verdict will be for the defendant (on the claim of innocent misrepresentation) if you decide that plaintiff has failed to prove any one of these elements.

Comment

United States Fidelity & Guaranty Co v Black, 412 Mich 99; 313 NW2d 77 (1981); *Irwin v Carlton*, 369 Mich 92; 119 NW2d 617 (1963); *Converse v Blumrich*, 14 Mich 109, 123; 90 Am Dec 230 (1866).

An action for innocent misrepresentation may be maintained even though plaintiff's loss is greater than defendant's gain. *Aldrich v Scribner*, 154 Mich 23; 117 NW2d 581 (1908).

History

M Civ JI 128.04 was added December 1994.

M Civ JI 128.10 Material Fact—Definition

A material fact cannot be an opinion, belief, speculation or prediction. It must relate to something past or present that can be proved or disproved.

A material fact must be of enough importance in the matter that a reasonable person would be likely to rely on it.

Note on Use

This instruction should be used with M Civ JI 128.01, 128.02, and 128.04.

Comment

Cases discussing material include *Lebeis v Rutzen*, 289 Mich 1; 286 NW 134 (1939); *Starr v Kleiser*, 224 Mich 75; 194 NW 568 (1923); and *Hall v Johnson*, 41 Mich 286; 2 NW 55 (1879).

Cases distinguishing statements of fact from statements of opinion or belief, predictions of future performance, or normal puffing include *Hayes Construction Co v Silverthorn*, 343 Mich 421; 72 NW2d 190 (1955); *Graham v Myers*, 333 Mich 111; 52 NW2d 621 (1952); *Mesh v Citrin*, 299 Mich 527; 300 NW2d 870 (1941); and *Van Tassel v McDonald Corp*, 159 Mich App 745; 407 NW2d 6 (1987).

History

M Civ JI 128.10 was added December 1994.

M Civ JI 128.11 Reliance—Definition

When I use the word relied, I mean that plaintiff would not have [entered into the contract / [*describe other action*]] if defendant had not made the [representation / false impression / promise], even if the [representation / false impression / promise] was not the only reason for plaintiff's action.

Comment

United States Fidelity & Guaranty Co v Black, 412 Mich 99, 121; 313 NW2d 77 (1981); *Callihan v Talkowski*, 372 Mich 1, 6; 124 NW2d 788 (1963); *McDonald v Smith*, 139 Mich 211; 102 NW 668 (1905).

History

M Civ JI 128.11 was added December 1994.

Chapter 130: Promissory Estoppel

M Civ JI 130.01 Promissory Estoppel 695
M Civ JI 130.05 Promissory Estoppel: Promise—Definition 697

M Civ JI 130.01 Promissory Estoppel

The plaintiff claims that the defendant is liable to [him / her / it] based on promissory estoppel. To establish this claim, the plaintiff has the burden of proving each of the following elements:

(a) The defendant made a promise to [the plaintiff / *[*name of other person*]] that was clear and definite.

(b) When the promise was made, the defendant knew or should reasonably have expected that this promise would induce the plaintiff to [take / refrain from] some action.

(c) The plaintiff did [take / refrain from] some action in reliance on the promise.

(d) The plaintiff was damaged as a result of [his / her / its] reliance.

Your verdict will be for the plaintiff on the claim of promissory estoppel if you decide that the plaintiff has proved all of these elements.

Your verdict will be for the defendant on the claim of promissory estoppel if you decide that the plaintiff has not proved one or more of these elements.

Note on Use

*Insert the name of a promisee other than the plaintiff if applicable. A person other than the promisee has a cause of action for promissory estoppel if the promisor should reasonably have expected the third person to act or refrain from acting in reliance. *First Security Savings Bank v Aitken*, 226 Mich App 291, 312; 573 NW2d 307 (1997). However, if the promise has been fulfilled, the third person cannot maintain an action. *Parkhurst Homes, Inc v McLaughlin*, 187 Mich App 357; 466 NW2d 404 (1991).

These instructions are not applicable in cases involving a defense of equitable estoppel because the elements are different from the elements of a cause of action for damages based on promissory estoppel. Compare *Huhtala v Travelers Ins Co*, 401 Mich 118; 257 NW2d 640 (1977) (contracts statute of limitations applies to promissory estoppel action) with *Cincinnati Ins Co v Citizens Ins Co*, 454 Mich 263, 269–270; 562 NW2d 648 (1997) (equitable estoppel as waiver of defense of statute of limitations). In *Huhtala*, the court explained that equitable estoppel is essentially a doctrine of waiver and conduct that might not constitute a clear and definite promise can be sufficient to establish an estoppel; promissory estoppel does not establish waiver, but substitutes for consideration in a case where there are no mutual promises, and it enables the promisee to assert a claim against the promisor independent of any other claim he or she may have against the promisor. 401 Mich at 132, 133.

Comment

State Bank of Standish v Curry, 442 Mich 76; 500 NW2d 104 (1993); *Huhtala*.

Although promissory estoppel is traditionally viewed as an equitable doctrine in Michigan, the claim may be submitted to the jury where the remedy sought is money damages or other nonequitable relief. *Ecco, Ltd v Balimoy Mfg Co*, 179 Mich App 748; 446 NW2d 546 (1989).

Applicability of the doctrine of promissory estoppel is a mixed question of law and fact, and the trial court needs to determine as a matter of law whether it is proper to invoke the doctrine of promissory estoppel by making a threshold inquiry into the circumstances surrounding the making of the promise and the promisee's reliance. *Standish*, 442 Mich at 84. *Standish* suggests that this threshold inquiry involves a determination that the doctrine must be invoked to avoid injustice. See *RS Bennett & Co v Economy Mechanical Industries, Inc*, 606 F2d 182 (CA 7, 1979), cited in *Standish*, 442 Mich at 85 n6. Certainly the avoidance of injustice requirement of promissory estoppel is equitable in nature and presents a policy decision for the court, not a question of fact for the jury. Commentators have cited this as the majority view, and several courts in other jurisdictions have held that whether injustice can be avoided only by enforcement of the promise is a question of law for the court and is not submissible to the jury. See 4 *Williston*, Contracts §8:5 (4th ed); *Hoffman v Red Owl Stores, Inc*, 26 Wisc 2d 683; 133 NW2d 267 (1965); *D & S Coal Co v USX Corp*, 678 F Supp 1318 (ED Tenn 1988), aff'd, 872 F2d 1024 (CA 6, 1989); *Cohen v Cowles Media Co*, 479 NW2d 387 (Minn 1992); see also *Taylor v First of America Bank-Wayne*, 973 F2d 1284 (CA 6, 1992); contra *Alaska v First National Bank*, 629 P2d 78 (Ala 1981) (question of law if reasonable minds do not differ).

Promissory estoppel is not available as a cause of action for a person who suffers an injury relying on an enforceable contract promise because the usual remedies for breach of contract apply. Promissory estoppel substitutes for consideration in a case where there are no mutual promises. *Huhtala*. Where the reliance claimed by the promisee is bargained-for and is performance required under a contract between the parties, the promisee must rely on contract remedies and cannot sue on a promissory estoppel theory. See *General Aviation v Cessna Aircraft Co*, 703 F Supp 637 (WD Mich 1988), aff'd in part, rev'd in part on other grounds, 13 F3d 178 (CA 6, 1993); *Paradata Computer Networks v Telebit Corp*, 830 F Supp 1001 (ED Mich 1993). Whether reliance is also performance under a contract is usually resolved by the court as a matter of law.

The measure of damages in an action based on promissory estoppel is what the plaintiff lost in relying on the defendant's promise. *Joerger v Gordon Food Service*, 224 Mich App 167; 568 NW2d 365 (1997); see also *Vogue v Shopping Centers, Inc* (After Remand), 402 Mich 546; 266 NW2d 148 (1978)(lost profits recoverable); *In re Estate of Timko*, 51 Mich App 662; 215 NW2d 750 (1974) (voluntary unilateral promise to make charitable contribution; damages are what was promised).

History

M Civ JI 130.01 was added March 1999.

M Civ JI 130.05 Promissory Estoppel: Promise—Definition

A "promise" is words, writing, or other conduct that shows an intent to act or refrain from acting in a certain way. To be a promise, it must be made in such a manner that the person to whom it is made is justified in believing that a commitment has been made to [him / her / it].

*(A statement of opinion or a prediction of future events is not a promise.)

Note on Use

*This paragraph should be used only if it is applicable to the facts in the case.

Comment

State Bank of Standish v Curry, 442 Mich 76; 500 NW2d 104 (1993); *Charter Township of Ypsilanti v General Motors Corp*, 201 Mich App 128; 506 NW2d 556 (1993).

History

M Civ JI 130.05 was added March 1999.

Chapter 140: Contract Action—UCC

M Civ JI 140.01 Contract Action—UCC: Explanation and Burden of Proof 699
M Civ JI 140.02 Contract Action—UCC: Offer and Acceptance 700
M Civ JI 140.03 Contract Action—UCC: Acceptance with Different or Additional Terms 701
M Civ JI 140.04 Contract Action—UCC: Enforceability of Contract: Statute of Frauds 702
M Civ JI 140.05 Contract Action—UCC: Contract Terms—Written Acceptance or Confirmation with Different or Additional Terms 703
M Civ JI 140.11 Contract Action—UCC: Buyer's Acceptance of Nonconforming Goods 705
M Civ JI 140.12 Contract Action—UCC: Buyer's Revocation of Acceptance 707
M Civ JI 140.13 Contract Action—UCC: Buyer's Rejection of Goods—Installment Contract 709
M Civ JI 140.14 Contract Action—UCC: Buyer's Rejection of Goods or Part of the Goods 711
M Civ JI 140.15 Contract Action—UCC: Anticipatory Repudiation—Definition 713
M Civ JI 140.21 Contract Action—UCC: Lost or Damaged Goods (Risk of Loss—Absence of Breach) 714
M Civ JI 140.22 Contract Action—UCC: Lost or Damaged Goods (Risk of Loss—Seller's Breach) 715
M Civ JI 140.23 Contract Action—UCC: Lost or Damaged Goods (Risk of Loss—Buyer's Breach) 716
M Civ JI 140.31 Contract Action—UCC: Resale by Seller—Private Sale 717
M Civ JI 140.32 Contract Action—UCC: Resale by Seller—Public Sale 718
M Civ JI 140.41 Contract Action—UCC: Express Warranty—Definition 719
M Civ JI 140.42 Contract Action—UCC: Express Warranty—Burden of Proof 720
M Civ JI 140.43 Contract Action—UCC: Implied Warranty of Merchantability—Definition 721
M Civ JI 140.44 Contract Action—UCC: Implied Warrranty of Merchantability—Elimination or Modification 722
M Civ JI 140.45 Contract Action—UCC: Implied Warranty of Merchantability—Burden of Proof 724
M Civ JI 140.51 Contract Action—UCC: Warranty of Title (Ownership) 726
M Civ JI 140.52 Contract Action—UCC: Warranty of Title (Encumbrances) 727
M Civ JI 140.53 Contract Action—UCC: Warranty of Title (Ownership and Encumbrances—Burden of Proof) 728

M Civ JI 140.01 Contract Action—UCC: Explanation and Burden of Proof

This case involves a claim by the [seller / buyer] for breach of a contract for the sale of goods. A contract for the sale of goods is an agreement between a buyer and a seller who by their words and conduct show that they intend to make a contract.

The [seller / buyer] has the burden of proving that:

(a) (the contract exists)

(b) (the [buyer / seller] breached the contract)

(c) (the [seller / buyer] was damaged by the breach of contract).

(The [buyer / seller] has the burden of proving the defense of [*describe defense*].)

This case also involves a counterclaim by the [buyer / seller] that the [seller / buyer] breached this contract. With respect to the counterclaim, the [buyer / seller] has the burden of proving that:

(d) (the [seller / buyer] breached the contract)

(e) (the [buyer / seller] was damaged by the breach of contract).

(The [seller / buyer] has the burden of proving the defense of [*describe defense*].)

Note on Use

If any of the matters in this instruction are admitted or otherwise not an issue in the case, this instruction must be modified to exclude such matters.

Comment

As to what constitutes a contract for the sale of goods, see *Lorenz Supply Co v American Standard Inc*, 419 Mich 610; 358 NW2d 845 (1984).

The burden of proving the existence of a contract is on the party alleging the contract. *American Parts Co Inc v American Arbitration Association*, 8 Mich App 156; 154 NW2d 5 (1967).

The statute of frauds is an affirmative defense and the burden of proof is on the party opposing enforcement. *Fairway Machinery Sales Co v Continental Motors Corp*, 40 Mich App 270; 198 NW2d 757 (1972). However, the moving party has the burden of proving part performance under the exception of MCL 440.2201(3)(c). *R G Moeller Co v Van Kampen Construction Co*, 57 Mich App 308; 225 NW2d 742 (1975).

History

M Civ JI 140.01 was added January 1987.

M Civ JI 140.02 Contract Action—UCC: Offer and Acceptance

A contract for the sale of goods exists when a [seller / buyer] offers to [sell / buy] goods and a [buyer / seller] accepts that offer. Acceptance occurs when the [seller / buyer] through words or actions indicates in any reasonable manner that [he / she / it] intends to enter into a contract under the terms proposed by the [buyer / seller].

*(Acceptance must occur within the time specified in the offer. If no time is specified, then acceptance must occur within a reasonable time.)

*(If the offer is to buy goods for immediate shipment or delivery, the offer may be accepted by a promise to ship or deliver or by actual shipment or delivery.)

Note on Use

*The paragraphs in parentheses should be read only when applicable.

Comment

MCL 440.2206, .2204.

History

M Civ JI 140.02 was added January 1987.

M Civ JI 140.03 Contract Action—UCC: Acceptance with Different or Additional Terms

The [seller / buyer] made an offer to the [buyer / seller]. The [buyer / seller] sent a written response to the offer. You must decide whether the response was an acceptance.

The [buyer's / seller's] response was an acceptance if it indicated that the [buyer / seller] intended to enter into a contract, even though the response stated terms that were not in the offer or that were different from those in the offer.

However, if the response indicated that the [buyer / seller] intended to accept the offer only if the [seller / buyer] agreed to the additional or different terms, then the response is not an acceptance unless the [seller / buyer] later indicated in any reasonable manner that [he / she / it] agreed to those terms.

Comment

MCL 440.2207(1). See also *Challenge Machinery Co v Mattison Machine Works*, 138 Mich App 15; 359 NW2d 232 (1984).

History

M Civ JI 140.03 was added January 1987.

M Civ JI 140.04 Contract Action—UCC: Enforceability of Contract: Statute of Frauds

A contract is enforceable if there is some writing or writings *(signed by the [seller / buyer / seller's agent / buyer's agent]) sufficient to show that the seller and buyer intended to enter into a contract. The writing or writings do not have to contain all of the terms of the contract, but must specify the quantity of goods to be [sold / purchased].

†("Signed" includes any symbol executed or adopted by a party with present intention to adopt or accept a writing.)

Note on Use

*If both the buyer and the seller are merchants, this instruction must be modified to reflect the special provisions of MCL 440.2201(2). If the status of either party as a merchant is an issue, see M Civ JI 140.05 b for the definition of merchant.

†This paragraph should be used only if applicable.

This instruction applies to contracts for the sale of goods for the price of $500 or more. MCL 440.2201(1), but note that section 2201(1) was amended by 2002 PA 15 to raise the amount from $500 to $1,000. It does not apply to cases under MCL 440.2201(3)(a) for goods which are to be specially manufactured (see *S C Gray Inc v Ford Motor Co*, 92 Mich App 789; 286 NW2d 34 (1979)) or to cases of part performance under MCL 440.2201(3)(c) (see *West Central Packing Inc v A F Murch Co*, 109 Mich App 493; 311 NW2d 404 (1981)).

Comment

MCL 440.2201(1), (2), .1201(2)(kk). MCL 440.1201(39), defining "signed", was amended effective July 1, 2013 and was redesignated MCL 440.1201(2)(kk).

On the applicability of the statute of frauds to modifications or extensions of existing contracts, see *S C Gray Inc; West Central Packing Inc*.

Between merchants, what constitutes a reasonable time for sending a confirmatory writing is a jury question. *Barron v Edwards*, 45 Mich App 210; 206 NW2d 508 (1973). A confirmation between merchants requires a quantity term. *Ace Concrete Products Co v Charles J Rogers Construction Co*, 69 Mich App 610; 245 NW2d 353 (1976); *In re Estate of Frost*, 130 Mich App 556; 344 NW2d 331 (1983) ("all" is sufficient quantity term).

History

M Civ JI 140.04 was added January 1987. Amended April 2014.

M Civ JI 140.05 Contract Action—UCC: Contract Terms—Written Acceptance or Confirmation with Different or Additional Terms

*(If you decide there is an enforceable contract,) you must *(then) decide what terms are included in the contract. The contract will include those terms in the offer to which the [buyer / seller] agreed.

It will include additional or different terms contained in the written [acceptance / response] if the [buyer / seller] through [his / her / its] words or actions indicated in any reasonable manner that [he / she / it] agreed to the additional or different terms.

It will also include additional terms that were not agreed to if:

(a) the [seller / buyer] did not notify the [buyer / seller] that [he / she / it] objected to the additional terms within a reasonable time after receiving the written [acceptance / response], and

(b) the seller and buyer are both merchants, that is, people who deal in [*specify types of goods*] or who, by their occupations, hold themselves out as having knowledge or skill about [*specify types of goods*] or transactions involving [*specify types of goods*], and

(c) the offer did not limit acceptance only to those terms contained in the offer, and

(d) the additional terms in the [acceptance / response] do not materially alter the terms contained in the offer.

Note on Use

*The words in parentheses should be used if applicable to the case.

Subparagraph b of this instruction defines merchant. See MCL 440.2104(1), (3).

This instruction does not apply to cases where, although no contract is formed via the exchange of forms, the parties by performance recognize the existence of a contract. MCL 440.2207(3); see also *American Parts Inc v American Arbitration Association*, 8 Mich App 156, 176; 154 NW2d 5 (1967).

Comment

MCL 440.2207.

Additional terms become part of the contract if a merchant fails to object to them, but different terms do not become part of the contract if there is a failure to object. *American Parts Inc v American Arbitration Association*; *Challenge Machinery Co v Mattison Machine Works*, 138 Mich App 15; 359 NW2d 232 (1984); *S C Gray Inc v Ford Motor Co*, 92 Mich App 789; 286 NW2d 34 (1979).

History

M Civ JI 140.05 was added January 1987.

M Civ JI 140.11 Contract Action—UCC: Buyer's Acceptance of Nonconforming Goods

The buyer is entitled to accept goods and recover damages if the goods or the manner, time, or place of their delivery do not conform to the contract, and the buyer notifies the seller of the nonconformity within a reasonable time after [he / she / it] discovered or should have discovered the nonconformity. The buyer has the burden of proving that [he / she / it] gave the seller the required notification.

In this case, the buyer accepted all of the goods. The buyer claims that the [goods / manner, time, or place of delivery] did not conform to the contract in that [*describe nonconformity*].

Goods are nonconforming if they are not in accordance with the contract requirements and their value to the buyer is substantially impaired.

You must decide whether the [goods / manner, time, and place of their delivery] conformed to the contract and, if not, whether the buyer notified the seller of the nonconformity within a reasonable time after [he / she / it] discovered or should have discovered the nonconformity.

If you determine that the [goods / manner, time, or place of their delivery] did not conform to the contract, and the buyer notified the seller of the nonconformity within a reasonable time after [he / she / it] discovered or should have discovered the nonconformity, then the seller has breached the contract.

If you determine that the [goods / manner, time, and place of their delivery] conformed to the contract, or that the buyer failed to notify the seller of the nonconformity within a reasonable time after [he / she / it] discovered or should have discovered the nonconformity, then the seller has not breached the contract.

Note on Use

If there are issues about acceptance, this instruction must be modified. See MCL 440.2606 for the definition of acceptance.

Comment

MCL 440.2601, .2607(3), .2714(1).

The buyer has the burden of proving that he notified the seller of the nonconformity. *S C Gray Inc v Ford Motor Co*, 92 Mich App 789; 286 NW2d 34 (1979).

For a discussion of reasonable time to notify of nonconformity, see *Michigan Sugar Co v Jebavy-Sorenson Orchard Co*, 66 Mich App 642; 239 NW2d 693 (1976).

History

M Civ JI 140.11 was added January 1987.

M Civ JI 140.12 Contract Action—UCC: Buyer's Revocation of Acceptance

The buyer must accept goods from the seller if the goods and the manner, time, and place of their [delivery / tender] conform to the contract.

In this case, the buyer accepted the goods and then revoked that acceptance. A buyer is entitled to revoke acceptance of all or some of the goods only if those goods do not conform to the contract, and the nonconformity substantially impairs the value of those goods to the buyer, and if:

(a) the buyer notified the seller of the revocation within a reasonable time after the buyer [discovered / should have discovered] the nonconformity,

and

(b)

(i) the buyer accepted the goods on the reasonable assumption that the nonconformity would be cured and it was not cured [within the time agreed / within a reasonable time],

or

(ii) the buyer did not discover the nonconformity, and the buyer's acceptance was reasonably induced either by difficulty of discovery before acceptance or by the seller's assurances.

The buyer has the burden of proving that [he / she / it] gave the seller the required notification.

*(If you determine that the buyer rightfully revoked the acceptance, then the seller has breached the contract.)

If you determine that the buyer has wrongfully revoked the acceptance, then the buyer has breached the contract.

Note on Use

*The paragraph in parentheses should be used if there is a counterclaim by the buyer.

The buyer cannot revoke acceptance after a substantial change in condition of the goods which is not caused by their own defects. MCL 440.2608(2). If that is an issue, this instruction must be modified.

Comment

MCL 440.2608.

The buyer can only revoke acceptance of commercial lots or units.

Subsection b.1 of this instruction incorporates the definition of seasonable found in MCL 440.1205(2).

For a discussion of what constitutes substantial impairment, see *Colonial Dodge Inc v Miller*, 420 Mich 452; 362 NW2d 704 (1984).

If a buyer revokes acceptance under MCL 440.2608(1)(b) on the basis of a defect that was not known at the time of acceptance, the seller has no right to cure after the buyer has revoked; it is reversible error to instruct the jury that it is a defense to plaintiff's claim for revocation that the seller has made all reasonable and necessary efforts to repair any alleged defects. *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94; 593 NW2d 595 (1999). (But efforts to repair are relevant on the questions whether the buyer revoked in a reasonable time and whether the nonconformity substantially impaired the value of the goods.)

A buyer does not have a remedy under MCL 440.2608 against a manufacturer not in privity with the buyer. *Henderson v Chrysler Corp*, 191 Mich App 337; 477 NW2d 505 (1991), lv denied, 439 Mich 1010; 485 NW2d 501 (1992).

History

M Civ JI 140.12 was added January 1987.

M Civ JI 140.13 Contract Action—UCC: Buyer's Rejection of Goods—Installment Contract

The buyer rejected some of the goods. The [buyer / seller] claims that the contract is an installment contract. An installment contract is one that requires or authorizes the seller to deliver goods in separate installments and the buyer to accept each installment separately. *(A contract can be an installment contract even if it contains the clause ["each delivery is a separate contract" / [other equivalent clause]].) You must determine whether this contract is an installment contract.

If it is an installment contract, the buyer must accept an installment if:

(a) the goods in that installment and the manner, time, and place of their [delivery / tender] conform to the contract. (Tender means that the seller has put and holds goods at the buyer's disposal and has given the buyer any notification reasonably necessary to enable [him / her / it] to take delivery.)

or

(b) the goods in that installment or the manner, time, or place of their [delivery / tender] do not conform to the contract, but the nonconformity does not substantially impair the value of that installment.

or

(c) the goods in that installment or the manner, time, or place of their [delivery / tender] do not conform to the contract, but the nonconformity does not substantially impair the value of the whole contract and the seller gives adequate assurance of its cure.

†The buyer is entitled to reject an installment if the goods in that installment, or the manner, time, or place of their [delivery / tender] do not conform to the contract, and the nonconformity substantially impairs the value of that installment and cannot be cured, and the buyer notified the seller of the nonconformity within a reasonable time after the [delivery / tender]. The buyer has the burden of proving that [he / she / it] gave the seller the required notification.

If you determine that the buyer was entitled to reject an installment(s), then the seller has breached the contract.

You must then determine whether the breach is a breach of [an installment / one or more of the installments] or a breach of the whole contract. If the nonconformity of [an installment / one or more of the installments] substantially impaired the value of the whole contract, then there is a breach of the whole contract.

If you determine that the buyer was not entitled to reject [an installment / one or more of the installments], then the buyer has breached the contract.

Note on Use

*Use the sentence in parentheses if applicable to the case.

†If the contract defines substantial impairment, or the contract or surrounding circumstances imply specific requirements as to quality, time, quantity, assortment, or the like, then these portions of the instruction may have to be modified. See UCC Official Comment Number 4 at MCL 440.2612.

If there are issues concerning reinstatement of the contract, this instruction may require modification. See MCL 440.2612(3).

Comment

MCL 440.2612. See also MCL 440.2602.

History

M Civ JI 140.13 was added January 1987.

M Civ JI 140.14 Contract Action—UCC: Buyer's Rejection of Goods or Part of the Goods

*(The buyer rejected [all / some] of the goods (and accepted the rest of the goods).)

†(If the contract is not an installment contract,) the buyer must accept goods from the seller if the goods and the manner, time, and place of their [delivery / tender] conform to the contract. ‡(Tender means that the seller has put and holds goods at the buyer's disposal and has given the buyer any notification reasonably necessary to enable [him / her / it] to take delivery.) The buyer is entitled to reject [all / some] of the goods if the goods or the manner, time, or place of their [delivery / tender] do not conform to the contract and the buyer notifies the seller of the nonconformity within a reasonable time after [delivery / tender]. The buyer has the burden of proving that [he / she / it] gave the seller the required notification.

If you determine that the [goods / manner, time, and place of their [delivery / tender]] conformed to the contract or that the buyer failed to notify the seller of [his / her / its] rejection within a reasonable time after [delivery / tender], then the buyer has breached the contract.

**(If you determine that the [goods / manner, time, or place of their [delivery / tender]] did not conform to the contract and that the buyer notified the seller of [his / her / its] rejection within a reasonable time after [delivery / tender], then the seller has breached the contract.)

Note on Use

*Delete this sentence if M Civ JI 140.13 is used.

†This phrase should be read if M Civ JI 140.13 is used.

‡The definition in parentheses should be read when appropriate.

**The paragraph in parentheses should be used if there is a counterclaim by the buyer.

A buyer who has accepted (see the definition in MCL 440.2606) goods may not reject, but may be entitled to revoke acceptance (M Civ JI 140.12). *Colonial Dodge Inc v Miller*, 420 Mich 452; 362 NW2d 704 (1984).

Comment

MCL 440.2601, .2602, .2603.

In certain situations involving shipment contracts, a buyer can only reject for material delay or loss. MCL 440.2504. The right of the seller to cure is a limitation on the right to reject. MCL 440.2508.

There may also be contractual limitations on the right to reject. See *North American Steel Corp v Siderius Inc*, 75 Mich App 391; 254 NW2d 899 (1977) (but where seller refused to comply with trade usage term of contract calling for price adjustment for nonconforming steel, buyer was entitled to reject).

History

M Civ JI 140.14 was added January 1987.

M Civ JI 140.15 Contract Action—UCC: Anticipatory Repudiation—Definition

The [buyer / seller] claims that the [seller / buyer] breached the contract by repudiating [his / her / its] obligations under the contract before performance was due.

Repudiation occurs when a [seller / buyer] distinctly tells, or through [his / her / its] actions clearly shows, the [buyer / seller] that [he / she / it] does not intend or is unable to perform the contract or any part of the contract, and the loss of performance substantially impairs the value of the contract to the [buyer / seller].

You must determine whether the [seller / buyer] breached the contract by repudiation.

Comment

MCL 440.2610. See also *Buys v Travis*, 243 Mich 470; 220 NW 798 (1928); *Fredonia Broadcasting Corp Inc v RCA Corp*, 481 F2d 781 (CA 5, 1973).

History

M Civ JI 140.15 was added January 1987.

M Civ JI 140.21 Contract Action—UCC: Lost or Damaged Goods (Risk of Loss—Absence of Breach)

The buyer has failed to pay for [lost / damaged] goods. The buyer must pay for [lost / damaged] goods when:

(a) the buyer has accepted the goods, or

(b) conforming goods are [lost / damaged]

(i) *(within a commercially reasonable time after [the goods are delivered to the carrier / the goods are duly tendered by the carrier at the

(ii) *(after the seller delivers the goods to [*name of bailee*] and [gives the buyer such notification and/or documents necessary to enable the buyer to take delivery / the bailee acknowledges the buyer's right to possession of the goods].)

(iii) *([after the buyer has received the goods, if the seller is a merchant / or / after the seller has duly tendered delivery of the goods if the seller is not a merchant].)

Note on Use

*The court should choose the subsection that is applicable. If there is an issue of which subsection applies, this instruction must be modified.

This instruction does not apply if there is a contractual agreement to the contrary, or if the sale is on approval. See MCL 440.2509(4). (See *Hayward v Postma*, 31 Mich App 720; 188 NW2d 31 (1971) for a discussion of contractual agreements on risk of loss.)

If an issue, this instruction may have to be supplemented to indicate the special rules relating to negotiable and nonnegotiable documents of title.

Comment

MCL 440.2509, .2709.

See *Eberhard Manufacturing Co v Brown*, 61 Mich App 268; 232 NW2d 378 (1975) (applying MCL 440.2509(1) to a "shipment" contract), and *Hayward* (applying MCL 440.2509(3)).

History

M Civ JI 140.21 was added January 1987.

M Civ JI 140.22 Contract Action—UCC: Lost or Damaged Goods (Risk of Loss—Seller's Breach)

The buyer does not have to pay for [lost / damaged] goods if:

*(a) the goods, or the manner, time, or place of their delivery did not conform to the contract, or

(b) the buyer has accepted the goods, but has rightfully revoked that acceptance before the goods are [lost / damaged]. If the buyer has rightfully revoked, the buyer does not have to pay for the goods and the buyer may recover damages from the seller to the extent that [he / she / it] has not or will not receive insurance proceeds.

Note on Use

*Subsection a applies only if a tender or delivery so fails to conform to the contract as to give the buyer a right of rejection. MCL 440.2510(1).

Comment

MCL 440.2510(1), (2).

History

M Civ JI 140.22 was added January 1987.

M Civ JI 140.23 Contract Action—UCC: Lost or Damaged Goods (Risk of Loss—Buyer's Breach)

If the buyer repudiated or otherwise breached the contract after existing conforming goods were shipped, marked, or otherwise designated to the contract, to the extent that the seller [has not received / will not receive] insurance proceeds, [he / she / it] may recover damages from the buyer if the goods were [lost / damaged] within a commercially reasonable time after the repudiation or other breach.

Comment

MCL 440.2510(3).

History

M Civ JI 140.23 was added January 1987.

M Civ JI 140.31 Contract Action—UCC: Resale by Seller—Private Sale

The seller resold the goods at a private sale. If you find that the buyer breached the contract, you must then determine whether the seller resold the goods in good faith and in a commercially reasonable manner, and whether the resale was reasonably identified as referring to the broken contract.

Good faith means honesty in fact in the conduct or transaction. A private resale is conducted in a commercially reasonable manner if the amount of goods sold, the time, place, terms, method, and manner of sale are all commercially reasonable, and the seller gives the buyer reasonable notification of [his / her / its] intention to resell.

*(A seller may resell the goods pursuant to a commercially reasonable contract which the seller entered into with another prior to the buyer's breach.)

Note on Use

*Use the sentence in parentheses if it is applicable to the case.

Comment

MCL 440.2706.

History

M Civ JI 140.31 was added January 1987.

M Civ JI 140.32 Contract Action—UCC: Resale by Seller—Public Sale

The seller resold the goods at a public sale. If you find that the buyer breached the contract, you must then determine whether the seller resold the goods in good faith and in a commercially reasonable manner and whether this resale was reasonably identified as referring to the broken contract.

Good faith means honesty in fact in the conduct or transaction. A public sale is conducted in a commercially reasonable manner if:

(a) The amount of goods sold, the time, place, terms, method, and manner of sale are all commercially reasonable.

(b) The sale is made at a usual place or market for public sale if one is reasonably available.

(c) *(Only existing, conforming goods are sold.)

(d) The seller gives the buyer reasonable notice of the time and place of the resale (unless you determine that the goods are perishable or threaten to decline in value speedily).

(e) [The goods are within the view of those attending the sale / The notice of sale states the place where the goods are located and provides for reasonable inspection by prospective bidders].

Note on Use

*Do not use subsection c if there is a recognized market for a public sale of futures in goods of the kind.

Comment

MCL 440.2706.

Uganski v Little Giant Crane and Shovel Inc, 35 Mich App 88; 192 NW2d 580 (1971) (sale by purchaser).

History

M Civ JI 140.32 was added January 1987.

M Civ JI 140.41 Contract Action—UCC: Express Warranty—Definition

An express warranty is a statement, promise, or description made in writing, orally, or through other means by the seller to the buyer that the goods have certain characteristics or will meet certain standards, which becomes part of the basis of the bargain. A description of the goods, a sample, or a model, which is made a part of the basis of the bargain, creates an express warranty that all of the goods will conform to that description, sample, or model.

A seller can create an express warranty without intending to make a warranty, or without using words such as "warranty" or "guarantee."

An expression of the seller's opinion, a statement of value or recommendation is sales talk or trade puffing and is not an express warranty.

Comment

MCL 440.2313.

Statutory extension of express warranties of goods that have been repaired is found in MCL 440.2313b.

History

M Civ JI 140.41 was added January 1987.

M Civ JI 140.42 Contract Action—UCC: Express Warranty—Burden of Proof

The buyer has the burden of proving that:

(a) the seller made an express warranty, and

(b) the goods did not conform to the warranty at the time of sale or within the time period covered by the warranty, and

(c) the buyer notified the seller of the nonconformity within a reasonable time after [he / she / it] discovered or should have discovered the nonconformity, and

(d) as a result of the nonconformity the buyer sustained damages.

Your verdict will be for the buyer if you find that the buyer has proved all of these elements.

Your verdict will be for the seller if you find that the buyer has not proved one or more of these elements.

Comment

MCL 440.2313, .2607(3).

On the requirement of notice, see *S C Gray Inc v Ford Motor Co*, 92 Mich App 789, 804–805; 286 NW2d 34, 40–41 (1979); *Fargo Machine & Tool Co v Kearney & Trecker Corp*, 428 F Supp 364, 375 (ED Mich SD 1977).

History

M Civ JI 140.42 was added January 1987.

M Civ JI 140.43 Contract Action—UCC: Implied Warranty of Merchantability—Definition

In every contract of sale by a merchant who regularly sells goods of the same kind as those purchased by the buyer, the law implies a warranty that the goods shall be merchantable.

Merchantable means that the goods:

(a) are fit for the ordinary purpose(s) for which such goods are used, and

(b) are acceptable in the trade under the contract description, and

(c) *(are of fair, average quality, and)

(d) are of even kind, quality, and quantity within each unit and among all units †(within variations permitted by the agreement), and

(e) ‡(are adequately contained, packaged, and labeled as required by the agreement, and)

(f) ‡(conform to any statement of fact made upon their container or label.)

Note on Use

*Subsection c applies only to fungible goods, and should be used only if applicable.

†This phrase should be used only if variations are permitted by the agreement.

‡Subsection e and f should be used only if applicable.

If it is an issue, the definition of merchant is found in M Civ JI 140.05 b.

This instruction does not cover implied warranties from course of dealing or usage of trade. See MCL 440.2314(3).

Comment

MCL 440.2314.

History

M Civ JI 140.43 was added January 1987.

M Civ JI 140.44 Contract Action—UCC: Implied Warrranty of Merchantability—Elimination or Modification

The seller claims that the implied warranty of merchantability was changed or eliminated.

*(If, before entering the contract, the buyer examined the goods or the sample or model as fully as [he / she / it] desired, or refused to examine the goods, there is no implied warranty regarding defects that would have been discovered by an examination.)

*(Unless the circumstances indicate otherwise, the warranty is eliminated by expressions like "as is" or "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty.)†

The implied warranty of merchantability may *(also) be changed or eliminated by:

(a) *(specific language, if it includes the word "merchantability"‡);

(b) *(the course of prior dealings between the buyer and seller);

(c) *(the way the buyer and seller have performed this contract);

(d) *(custom in the trade).

Note on Use

*The sentences and words in parentheses should be used only if applicable to the case.

†To be effective to change or eliminate the warranty of merchantability, in a writing expressions like "as is" or "with all faults" must be conspicuous. *Lumber Mutual Insurance Co v Clarklift, Inc*, 224 Mich App 737; 569 NW2d 681 (1997). Whether the expression is conspicuous is a question of law for the court. MCL 440.1201(10).

‡To be effective to change or eliminate the warranty of merchantability, specific written language that includes the word "merchantability" must be conspicuous. Whether the written language is conspicuous is a question of law for the court. MCL 440.1201(j).

Comment

MCL 440.2316.

The Magnuson-Moss Warranty Act, 15 USC§2301 et seq., and the Michigan Consumer Protection Act, MCL 445.903, also govern the validity of some disclaimers of implied warranties of merchantability and fitness.

Michigan cases on exclusion and modification of implied warranties include *S C Gray, Inc v Ford Motor Co*, 92 Mich App 789, 807–808; 286 NW2d 34, 41–42 (1979) (where writings conflict as to warranties, UCC warranties are in effect); *Mallory v Conida Warehouses, Inc*, 134 Mich App 28; 350 NW2d 825 (1984) (disclaimer tag insufficient to exclude warranty); *McGhee v GMC Truck & Coach Division, General Motors Corp*, 98 Mich App 495; 296 NW2d 286 (1980) (disclaimers of warranty in documents of sale are sufficient); *Ambassador Steel Co v Ewald Steel Co*, 33 Mich App 495; 190 NW2d 275 (1971) (seller of noncommercial-quality steel breached warranty of fitness for ordinary purpose; warranty not excluded where buyer neither inspected nor refused to inspect).

There are special rules on implied warranties for cattle, sheep, and hogs. MCL 440.2316(3)(d).

History

M Civ JI 140.44 was added January 1987. Amended November 1999.

M Civ JI 140.45 Contract Action—UCC: Implied Warranty of Merchantability—Burden of Proof

The buyer has the burden of proving that:

(a) at the time of [tender of delivery / delivery], the goods were not merchantable, and

(b) the buyer notified the seller that the goods were not merchantable within a reasonable time after [he / she / it] discovered or should have discovered it, and

(c) as a result of the nonmerchantability, the buyer sustained damages.

Goods can be not merchantable at the time of [tender of delivery / delivery] even though the defect does not manifest itself until later. It is for you to determine whether the goods were merchantable at the time of [tender of delivery / delivery].

*(The seller has the burden of proving that the implied warranty of merchantability was changed or eliminated.)

Your verdict will be for the buyer if you find that the goods were not merchantable at the time of [tender of delivery / delivery], the buyer gave the seller notice within a reasonable time, and as a result of the nonmerchantability, the buyer sustained damages *(and if you also find that the implied warranty of merchantability was not changed or eliminated).

Your verdict will be for the seller if you find that the goods were merchantable at the time of [tender of delivery / delivery], or that the buyer did not give the seller notice within a reasonable time, or that the buyer did not sustain damages *(or if you find that the implied warranty of merchantability was changed or eliminated).

Note on Use

*The sentence and phrases in parentheses should not be read to the jury if change or elimination of the implied warranty of merchantability is not an issue in the case.

Comment

MCL 440.2314.

On the requirement of notice, see MCL 440.2607(3). See also *Eaton Corp v Magnavox Co*, 581 F Supp 1514, 1534 (ED Mich SD 1984).

A buyer is limited to a UCC cause of action and has no action for negligence or products liability if the buyer seeks recovery for economic loss caused by a defective product purchased for commercial

purposes. *Neibarger v Universal Cooperatives, Inc*, 439 Mich 512; 486 NW2d 612 (1992); *McGhee v General Motors Corp*, 98 Mich App 495; 296 NW2d 286 (1980).

History

M Civ JI 140.45 was added January 1987.

M Civ JI 140.51 Contract Action—UCC: Warranty of Title (Ownership)

In every contract for the sale of goods the law implies a warranty that at the time for delivery the seller will own the goods outright, free of all other claims, or that the seller will have the right to transfer complete ownership of the goods to the buyer.

This warranty can be changed or eliminated by specific language. This warranty is also changed or eliminated if the buyer knows or has reason to know that the seller does not own the goods outright, or is selling only a limited interest which the seller or someone else may have in the goods.

Comment

MCL 440.2312.

The specific language required to exclude the implied warranty of title must be "very precise and unambiguous." *Jones v Linebaugh*, 34 Mich App 305, 309; 191 NW2d 142, 144 (1971).

History

M Civ JI 140.51 was added January 1987.

M Civ JI 140.52 Contract Action—UCC: Warranty of Title (Encumbrances)

In every contract for the sale of goods, the law implies a warranty that the goods will be delivered free from all security interests, liens, or other encumbrances the buyer did not know about at the time the contract was made.

Note on Use

This instruction does not cover the warranty against patent or trademark infringement. See MCL 440.2312(3).

Comment

MCL 440.2312.

The Committee has found no reported Michigan cases resolving the issue of whether the warranty against encumbrances can be eliminated or modified by specific contract language.

History

M Civ JI 140.52 was added January 1987.

M Civ JI 140.53 Contract Action—UCC: Warranty of Title (Ownership and Encumbrances—Burden of Proof)

The buyer has the burden of proving:

(a) that at the time for delivery [the seller did not own the goods outright, free of all other claims / the seller did not have the right to transfer complete ownership of the goods to the buyer / the goods were encumbered by a security interest or other lien that the buyer did not know about at the time the contract was made], and

(b) that, within a reasonable time of learning this, the buyer notified the seller.

*(The seller has the burden of proving that this warranty was changed or eliminated.)

Your verdict will be for the buyer if you find that at the time for delivery [the seller did not own the goods outright, free of all other claims / the seller did not have the right to transfer complete ownership of the goods to the buyer / the goods were encumbered] and that, within a reasonable time of learning this, the buyer notified the seller; unless you find that [*the warranty was changed or eliminated / or / the buyer had actual knowledge of the encumbrance at the time the contract was made].

Your verdict will be for the seller if you find that at the time for delivery [the seller did own the goods outright, free of all other claims / the seller did have the right to transfer complete ownership of the goods to the buyer / the goods were not encumbered] or that the buyer did not notify the seller, or

*(the warranty was changed or eliminated, or)

†(the buyer had actual knowledge of the encumbrance at the time the contract was made.)

Note on Use

*This language should be read only in a warranty of title— ownership case.

†This language should be read only in a warranty of title—encumbrances case.

Comment

MCL 440.2312.

On the requirement of notice, see *Jones v Linebaugh*, 34 Mich App 305, 310–311; 191 NW2d 142, 145 (1971), and the UCC Official Comment at MCL 440.2312.

History

M Civ JI 140.53 was added January 1987.

Chapter 141: Contract Damages—UCC

Introduction 731

M Civ JI 141.01 Contract Damages—UCC: Seller's Breach by Delivery of Nonconforming Goods Which the Buyer Accepts—Buyer's Damages 732

M Civ JI 141.02 Contract Damages—UCC: Seller's Breach by Failure to Deliver/Repudiation/ Delivery of Nonconforming Goods Rejected/Acceptance Rightfully Revoked—Buyer's Damages ... 734

M Civ JI 141.11 Contract Damages—UCC: Buyer's Breach by Nonpayment after Acceptance— Seller's Action for Price 736

M Civ JI 141.12 Contract Damages—UCC: Buyer's Breach by Nonpayment—Goods Identified to the Contract—No Resale— Seller's Action for Price 737

M Civ JI 141.13 Contract Damages—UCC: Buyer's Breach by Nonpayment—Lost or Damaged Goods—Seller's Action for Price 738

M Civ JI 141.14 Contract Damages—UCC: Buyer's Breach by Nonacceptance or Repudiation— Seller Resells— Seller's Damages 739

M Civ JI 141.15 Contract Damages—UCC: Buyer's Breach by Nonacceptance or Repudiation— Seller's Damages 740

Introduction

Equitable and Other Alternative Buyer and Seller Remedies

The following instructions apply to cases wherein the aggrieved party seeks damages. However, under the Uniform Commercial Code, remedies can be cumulative for aggrieved sellers and buyers of goods. Legal remedies such as replevin (i.e., claim and delivery) under MCL 440.2711 and reclamation under MCL 440.2702 are not included in this chapter. In appropriate cases, the jury must be instructed as to any additional legal remedies.

Equitable remedies such as specific performance under MCL 440.2711 and cancellation (rescission) under MCL 440.2703 are not included in this chapter because they are not tried to a jury.

History

This Introduction was added February 1987.

M Civ JI 141.01 Contract Damages—UCC: Seller's Breach by Delivery of Nonconforming Goods Which the Buyer Accepts—Buyer's Damages

If you find that the seller has breached the contract, you must compute the buyer's damages as follows:

(a) First, you must determine the value of the goods at the time and place of acceptance—their actual value.

(b) Second, you must determine the value the goods would have had at the time and place of acceptance if they had conformed to the requirements of the contract.

(c) Then you must subtract the actual value of the goods from the value the goods would have had if they had conformed to the contract.

(d) *(You must add to this amount any of the following damages you find the buyer had:

(i) any reasonable expenses incident to the seller's delay or other breach such as [*specify expenses that are claimed and in issue*],

(ii) other losses that you find resulted from the seller's breach, such as [*insert consequential damages that are claimed and in issue*], if you find that the seller at the time of contracting had reason to know of them, and the buyer could not reasonably have prevented them,

(iii) any injury to person or property proximately resulting from any breach of warranty.)

Note on Use

*Delete any of these subsections that are not an issue in the law-suit.

This instruction applies only to buyers who accepted and did not effectively revoke the acceptance. If there is a fact question as to acceptance or effective revocation after acceptance, this instruction must be modified and both this instruction and M Civ JI 141.02 should be given. MCL 440.2608(1).

If the buyer claims damages in the ordinary course of events in an amount other than the difference between the value of the goods accepted and their value as warranted, and if there is sufficient evidence that the buyer's measure of damages is reasonable, sections a, b, and c of this instruction should be replaced by an appropriate description of the alternate reasonable measure of damages. MCL 440.2714(1).

Form of verdict M Civ JI 241.01 may be used with this instruction.

Comment

MCL 440.2714, .2715. The usual measure of damages under MCL 440.2714(2) is the difference between the value of goods accepted and their value as warranted, unless special circumstances require a different measure. *S C Gray v Ford Motor Co*, 92 Mich App 789; 286 NW2d 34 (1979).

Consequential damages under MCL 440.2714 are discussed in *Martel v Duffy-Mott Corp*, 15 Mich App 67; 166 NW2d 541 (1968).

Other reasonable expenses under subsection d.1 of this instruction may include an award of actual attorney's fees. *Cady v Dick Loehr's Inc*, 100 Mich App 543; 299 NW2d 69 (1980).

History

M Civ JI 141.01 was added February 1987.

M Civ JI 141.02 Contract Damages—UCC: Seller's Breach by Failure to Deliver/Repudiation/Delivery of Nonconforming Goods Rejected/Acceptance Rightfully Revoked—Buyer's Damages

If you find that the seller breached the contract by [failing to make delivery of the goods called for in the contract / repudiating [his / her / its] obligations under the contract / delivering nonconforming goods which the buyer rejected or for which the buyer rightfully revoked [his / her / its] acceptance] you must compute the buyer's damages as follows:

(a) First you must determine certain amounts:

(i) [the cost of substitute goods the buyer purchased / the market price of substitute goods at the time the buyer learned of the breach], and

(ii) the amount the buyer paid to the seller, and

(iii) the contract price, and

(iv) the expenses the buyer saved as a result of the breach.

(b) After you have determined these amounts, you must add the [cost to the buyer of purchasing substitute goods / market price of substitute goods at the time the buyer learned of the breach] to the amount the buyer paid to the seller. From this amount you must subtract the contract price, and you must also subtract the expenses the buyer saved as a result of the seller's breach.

(c) *(You must add to this amount any of the following damages that you find the buyer had:

(i) expenses reasonably incurred in [inspection / receipt / transportation / care / custody] of goods the buyer rightfully rejected, and

(ii) commercially reasonable [charges / expenses / commissions] incurred by the buyer in connection with the purchase of substitute goods, and

(iii) other losses that you find resulted from the seller's breach, such as [*insert consequential damages that are claimed and in issue*], if you find that the seller at the time of contracting had reason to know of them, and the buyer could not reasonably have prevented them by the purchase of substitute goods or otherwise, and

(iv) any injury to person or property proximately resulting from any breach of warranty, and

(v) any other reasonable expenses incident to the seller's delay or other breach, such as [*insert those expenses that are claimed and in issue*].)

Note on Use

*Delete any of these subsections that are not an issue in the lawsuit. Form of verdict M Civ JI 241.02 may be used with this instruction.

Comment

MCL 440.2711–.2713, .2715.

History

M Civ JI 141.02 was added February 1987.

M Civ JI 141.11 Contract Damages—UCC: Buyer's Breach by Nonpayment after Acceptance—Seller's Action for Price

If you find that the buyer breached the contract by failing to pay for the goods after the buyer had accepted them, or after the buyer wrongfully revoked the acceptance, you must award the seller the price due under the contract together with any commercially reasonable [charges / expenses / commissions] the seller had because of the buyer's breach.

Comment

MCL 440.2709, .2710. See also *Haken v Scheffler*, 24 Mich App 196; 180 NW2d 206 (1970).

History

M Civ JI 141.11 was added February 1987.

M Civ JI 141.12 Contract Damages—UCC: Buyer's Breach by Nonpayment—Goods Identified to the Contract—No Resale— Seller's Action for Price

If you find that the buyer breached the contract by failing to pay the price as it became due after the goods were identified to the contract, and that [the seller made reasonable efforts to sell the goods at a reasonable price and was unable to do so / circumstances indicate that the seller would not have been able to sell the goods at a reasonable price], then you must award the seller the price due under the contract.

You must add to this amount any of the following damages you find the seller had:

(a) *(any commercially reasonable [charges / expenses / commissions] the seller incurred after the buyer's breach in stopping delivery, and in the [transportation / care / custody] of goods, and in connection with return or efforts to resell the goods) and

(b) *(any other commercially reasonable [charges / expenses / commissions] resulting from the buyer's breach.)

Note on Use

*Delete section a or b if not an issue in the lawsuit.

Comment

MCL 440.2709, .2710.

History

M Civ JI 141.12 was added February 1987.

M Civ JI 141.13 Contract Damages—UCC: Buyer's Breach by Nonpayment—Lost or Damaged Goods—Seller's Action for Price

If you find that the buyer must pay for [lost / damaged] goods, you must award the seller the price due under the contract.

You must add to this amount any of the following damages you find the seller had:

(a) *(any commercially reasonable [charges / expenses / commissions] the seller incurred after the buyer's breach in stopping delivery, and in the [transportation / care / custody] of goods, and in connection with return or efforts to resell the goods) and

(b) *(any other commercially reasonable [charges / expenses / commissions] resulting from the buyer's breach.)

Note on Use

*Delete section a or b if not an issue in the lawsuit.

Comment

MCL 440.2709, .2710.

History

M Civ JI 141.13 was added February 1987.

M Civ JI 141.14 Contract Damages—UCC: Buyer's Breach by Nonacceptance or Repudiation—Seller Resells— Seller's Damages

If you find that the buyer breached the contract by [wrongfully rejecting the goods / wrongfully revoking the acceptance / failing to pay [on / or / before] delivery / repudiating [his / her / its] obligations under the contract], and that the seller's resale was in good faith and commercially reasonable, you must compute the seller's damages as follows:

(a) You must determine the unpaid contract price, and you must also determine the price at which the seller resold the goods.

(b) Then you must subtract the resale price from the unpaid contract price. From this amount you must then subtract any expenses the seller saved as a result of the buyer's breach.

(c) *(You must add to this amount any of the following damages you find the seller had:

(i) any commercially reasonable [charges / expenses / commissions] the seller incurred after the buyer's breach in stopping delivery, and in the [transportation / care / custody] of goods, and in connection with the return or resale of the goods, and

(ii) any other commercially reasonable [charges / expenses / commissions] resulting from the buyer's breach.)

Note on Use

*Delete either or both of these subsections if not an issue in the lawsuit.

Form of verdict M Civ JI 241.14 may be used with this instruction.

Comment

MCL 440.2706, .2703.

For the availability of damages under MCL 440.2708(2) where the seller has resold, see Comment, M Civ JI 141.15.

History

M Civ JI 141.14 was added February 1987.

M Civ JI 141.15 Contract Damages—UCC: Buyer's Breach by Nonacceptance or Repudiation—Seller's Damages

If you find that the buyer breached the contract by [wrongfully rejecting the goods / wrongfully revoking the acceptance / failing to pay [on / or / before] delivery / repudiating [his / her / its] obligations under the contract], you must compute the seller's damages as follows:

(a) First, you must determine the unpaid contract price.

(b) Second, you must also determine the market price of the goods at the time and place where the goods were to be tendered to the buyer.

(c) Then you must subtract the market price from the unpaid contract price. From this amount you must then subtract any expenses the seller saved as a result of the buyer's breach.

(d) *(You must add to this amount any of the following damages you find the seller had:

(i) any commercially reasonable [charges / expenses / commissions] the seller incurred after the buyer's breach in stopping delivery, and in the [transportation / care / custody] of goods, and in connection with the return or resale of the goods.

(ii) any other commercially reasonable [charges / expenses / commissions] resulting from the buyer's breach.)

If you find that the damages you have computed will not put the seller in as good a position as the seller would have been in if the buyer had performed, then you must determine the seller's damages in a different way:

(e) First you must determine the profit, including reasonable overhead, the seller would have made if the buyer had performed.

(f) From this lost profit figure, you must then subtract [any payments the buyer made to the seller / and / the seller's proceeds from any resale].

(g) You must add to this amount any of the following damages you find the seller had:

(i) any commercially reasonable [charges / expenses / commissions] which the seller incurred after the buyer's breach in stopping delivery, and in the [transportation / care / custody] of goods, and in connection with the return or resale of the goods.

(ii) any other commercially reasonable [charges / expenses / commissions] resulting from the buyer's breach,

(iii) any costs reasonably incurred as a result of the buyer's breach.

Note on Use

*Delete either or both of these subsections if not an issue in the lawsuit.

Form of verdict M Civ JI 241.15 may be used with this instruction.

Comment

MCL 440.2708.

MCL 440.2708(2) by its terms contemplates application to the lost-volume seller who resold the unit to another at the same price.

The applicability of MCL 440.2708(2) seems fairly well settled in cases involving a specialty item with no reasonably accessible market. *Detroit Power Screwdriver v Ladney*, 25 Mich App 478; 181 NW2d 828 (1970).

History

M Civ JI 141.15 was added February 1987.

Chapter 142: Contracts

M Civ JI 142.10 Offer—Defined 745
M Civ JI 142.11 Duration of Offer 746
M Civ JI 142.12 Revocation of Offer 747
M Civ JI 142.13 Acceptance 748
M Civ JI 142.14 Time of Acceptance 749
M Civ JI 142.15 Counteroffer 750
M Civ JI 142.16 Consideration 751
M Civ JI 142.17 Adequacy of Consideration 752
M Civ JI 142.18 Need Not Be in Writing 753
M Civ JI 142.19 Modification 754
M Civ JI 142.20 Breach of Contract/Substantial Performance 756
M Civ JI 142.21 Time of Performance 757
M Civ JI 142.22 Conditions Precedent 758
M Civ JI 142.30 Introduction to Damages 759
M Civ JI 142.31 Contract Damages: Benefit of Bargain 760
M Civ JI 142.32 Lost Profits 761
M Civ JI 142.33 Reliance Damages 762
M Civ JI 142.34 Consequential Damages 763
M Civ JI 142.35 Mitigation 764
M Civ JI 142.40 Duress 765
M Civ JI 142.41 Waiver 766
M Civ JI 142.42 Impracticability 767
M Civ JI 142.43 Frustration of Purpose 768
M Civ JI 142.50 Introduction 769
M Civ JI 142.51 Must Consider All Parts of Contract 770
M Civ JI 142.52 Effect of Incorporated Documents 771
M Civ JI 142.53 Words Given Ordinary Meaning 772
M Civ JI 142.54 Custom and Usage of Trade 773
M Civ JI 142.55 Conduct of Parties 774

M Civ JI 142.01 Introduction and Burden of Proof

This case involves a claim by [*name of party*] that [*name of party being sued on contract*] breached a contract. A contract is a legally enforceable agreement to do or not to do something.

[*Name of party*] has the burden of proof on the following:

(a) That there was a contract between [him/her/it] and [*name of party being sued on contract*];

(b) That [*name of party being sued on contract*] breached the contract; and

(c) That [*name of party*] suffered damages as a result of the breach.

*In this case, the parties do not dispute [that there was a contract between them / that a contract between them was breached.]

If you find after considering all the evidence that [*name of party*] has proved these elements, then your verdict should be for [*name of party*]. However, if [*name of party*] fails to prove any one of these elements, your verdict should be for [*name of party being sued on contract*].

This case also involves a counterclaim by [*name of party bringing counterclaim*] that [*name of party against whom counterclaim is brought*] breached a contract. With respect to the counterclaim, [*name of party bringing counterclaim*] has the burden of proving that:

**(a) That there was a contract between [him / her / it] and [*name of party against whom counterclaim is brought*];

(b) That [*name of party against whom counterclaim is brought*] breached the contract; and

(c) That [*name of party bringing counterclaim*] suffered damages as a result of the breach.

The [*name of party being sued on contract / name of party against whom counterclaim is brought*] has the burden of proving the defense of [*describe defense*].

Note on Use

* To be used on those occasions when there is no question that a contract existed or that it was breached.

** This sentence should be deleted if the counterclaim arises out of the same contract alleged by the party bringing the original breach of contract claim.

This instruction must be modified to reflect matters that are admitted or otherwise not at issue.

Comment

McInerney v Detroit Trust Co, 279 Mich 42 (1937).

History

M Civ JI 142.01 was added March 2005.

M Civ JI 142.10 Offer—Defined

In order for there to be a contract, there must be an offer by one party, an acceptance of the offer by the other party, and consideration for the offer and acceptance. Mere discussions and negotiations are not a substitute for the formal requirements of a contract. I will now define those terms for you.

An offer to make a contract is a proposal to enter into a bargain, communicated by words or conduct, that would reasonably lead the person to whom the proposal is made to believe that the proposal is intended to create a contract. No particular form of an offer is required, although the essential terms of the contract must be reasonably clear, definite and certain.

Comment

Eerdmans v Maki, 226 Mich App 360 (1997); *Consolidated Properties, Inc v Henry Ford Trade School Alumni Ass'n*, 7 Mich App 383 (1967); *Rood v General Dynamics Corp*, 444 Mich 107 (1993); *Kirchoff v Morris*, 282 Mich 90 (1937).

History

M Civ JI 142.10 was added March 2005.

M Civ JI 142.11 Duration of Offer

Unless the person making the offer specifies when the offer expires, an offer remains open for a reasonable time, unless revoked earlier. What constitutes a reasonable period is for you to decide and must be determined from the particular circumstances of the case and from any conditions declared in the terms of the offer.

Comment

Burton v Ladd, 211 Mich 382 (1920); *CE Tackels, Inc v Fantin*, 341 Mich 119 (1954).

History

M Civ JI 142.11 was added March 2005.

M Civ JI 142.12 Revocation of Offer

An offer may be revoked by the person who made it. It may be revoked for any reason or no reason. It does not need to be in writing. To be effective, the revocation must be communicated to the other party before the offer is accepted.

Comment

Board of Control of Eastern Michigan University v Burgess, 45 Mich App 183 (1973); *Kutsche v Ford*, 222 Mich 442 (1923).

History

M Civ JI 142.12 was added March 2005.

M Civ JI 142.13 Acceptance

Acceptance is a statement or conduct by a person receiving an offer that would reasonably lead the person who made the offer to believe that the material terms of the offer have been agreed to [although an offer may require a specific form of acceptance]. A response that changes, adds to, or qualifies the material terms of the offer is not an acceptance. A material term is one that goes to the essence of the agreement.

Comment

Ludowici-Celadon Co v McKinley, 307 Mich 149 (1943); *Pakideh v Franklin Commercial Mortgage Group*, 213 Mich App 636 (1995); *Rood v General Dynamics Corp*, 444 Mich 107 (1993); *Harper Building Co v Kaplan*, 332 Mich 651 (1952).

History

M Civ JI 142.13 was added March 2005.

M Civ JI 142.14 Time of Acceptance

An acceptance becomes effective when it is communicated to the person who made the offer. An offer that has been revoked or is no longer open cannot be accepted.

Comment

Kutsche v Ford, 222 Mich 442 (1923); *Pakideh v Franklin Commercial Mortgage Group*, 213 Mich App 636 (1995).

History

M Civ JI 142.14 was added March 2005.

M Civ JI 142.15 Counteroffer

If a response changes, adds to or qualifies one or more of the material terms of the offer, it is not an acceptance but rather a counteroffer. A counteroffer is a new offer by the party making that proposal. The new offer must in turn be agreed to by the party who made the original offer for there to be an acceptance. A counteroffer may be accepted or rejected like any other offer. A material term is one that goes to the essence of the agreement.

Comment

Harper Building Co v Kaplan, 332 Mich 651 (1952).

History

M Civ JI 142.15 was added March 2005.

M Civ JI 142.16 Consideration

A contract must be supported by consideration. Consideration is something of value given in exchange for the promise. However, an act done in the past cannot be consideration for a later contract. Doing or promising to do what one is already obligated to do is not consideration. The consideration does not need to be expressed in writing.

Comment

DeCamp v Scofield, 75 Mich 449 (1889); *Kirchoff v Morris*, 282 Mich 90 (1937); *Higgins v Monroe Evening News*, 404 Mich 1 (1978); *Yerkovich v AAA*, 461 Mich 732 (2000).

History

M Civ JI 142.16 was added March 2005.

M Civ JI 142.17 Adequacy of Consideration

The consideration for a promise or act does not have to be equal in value to the promise or act. It is enough if the consideration is given, in whole or in part, in exchange for the promise. If one party performed any act at the request of the other party, no matter how small or nominal, then there was valuable consideration to support the contract, provided that the party performed such act in good faith.

Comment

Harris v Chain Store Realty Bond & Mortgage Co, 329 Mich 136 (1950); *Levitz v Capitol Savings & Loan Co*, 267 Mich 92 (1934).

History

M Civ JI 142.17 was added March 2005.

M Civ JI 142.18 Need Not Be in Writing

There is no requirement that a contract be in writing, that it be dated, or that it be signed by either party. It can be entirely oral, or it can be partly oral and partly in writing. In this case it is alleged by [*name of party*] that the contract was [in writing / oral].

Note on Use

This instruction may need to be omitted or modified if there is a statute of frauds issue.

Comment

Pangburn v Sifford, 216 Mich 153 (1921).

History

M Civ JI 142.18 was added March 2005.

M Civ JI 142.19 Modification

The parties to a contract can agree to modify a contract by changing one or more of its terms while continuing to be bound by the rest of the contract. Whether the contract was modified by the parties depends on their intent as shown by their words, whether written or oral, or their conduct. In this case, the parties agree that they entered into a contract.

[*Name of party*] claims that after this contract was made, the parties agreed to change the terms of the original contract. To find that the terms of the original contract were changed, you must decide that there is clear and convincing evidence that:

(a) there was a mutual agreement to modify or waive the terms of the original contract, and

(b) unless the agreement to modify or waive the contract was in writing signed by [*name of party being sued on contract*], that [*name of party*] gave consideration in exchange for the modification and that [*name of party being sued on contract*] agreed to the change in the terms of the original contract.

If you decide this was shown by clear and convincing evidence, then the parties changed their original contract and they are bound by the contract as modified.

Otherwise, the parties did not change their original contract.

* The fact there was a written modification and/or anti-waiver clause in the original contract does not bar the parties from modifying or waiving those clauses. [*Name of party claiming there was an amendment*] must prove by clear and convincing evidence that the parties intended, as shown by their words or conduct, to modify or waive the modification and/or anti-waiver clause as well.

Note on Use

This instruction should be accompanied by M Civ JI 8.01, Meaning of Burden of Proof, which defines clear and convincing evidence. The names of the parties may require a change depending upon who relies on the modification.

* Use if applicable.

Comment

Quality Products & Concepts Co v Nagel Precision, Inc, 469 Mich 362 (2003). MCL 566.1 provides:

> An agreement hereafter made to change or modify, or to discharge in whole or in part, any contract, obligation, or lease, or any mortgage or other security interest in

personal or real property, shall not be invalid because of the absence of consideration: Provided, That the agreement changing, modifying, or discharging such contract, obligation, lease, mortgage or security interest shall not be valid or binding unless it shall be in writing and signed by the party against whom it is sought to enforce the change, modification, or discharge.

History

M Civ JI 142.19 was added March 2005.

M Civ JI 142.20 Breach of Contract/Substantial Performance

Each party to a contract has a duty to perform his or her obligations under the contract. A contract is breached or broken when a party does not substantially perform what the party promised to do in the contract. When I say that [*name of party being sued on contract*] must have "substantially performed" the contract or that "substantial performance" of the contract is required, I mean that, although there may have been some deviations or omissions from the performance called for by the language of the contract, [*name of party*] received the important and essential benefits for which the contract was made. The extent of nonperformance is to be viewed in light of the full performance promised. If the defect or uncompleted performance is of such extent and nature that there has not been practical fulfillment of the terms of the contract, then there has not been substantial performance. A party who substantially performs may be required to pay as damages the costs of remedying any defects in performance.

Comment

Gordon v Great Lakes Bowling Corp, 18 Mich App 358 (1969); *P & M Construction Co v Hammond Ventures, Inc*, 3 Mich App 306 (1966).

History

M Civ JI 142.20 was added March 2005.

M Civ JI 142.21 Time of Performance

The parties dispute whether [*name of party being sued on contract*] performed in a timely manner. When a contract does not express a time for its performance, the law implies that it shall be performed within a reasonable period of time. What is a reasonable time is a question for you to decide based on the evidence, bearing in mind the subject matter of the contract and the surrounding circumstances.

Comment

Duke v Miller, 355 Mich 540 (1959); *Walter Toebbe & Co v Dept of State Hwy*, 144 Mich App 21 (1985).

History

M Civ JI 142.21 was added March 2005.

M Civ JI 142.22 Conditions Precedent

[*Name of party being sued on contract*] claims that [*name of party*] and [he / she / it] agreed that [*name of party being sued on contract*] did not have to perform [his / her / its] part of the contract unless [*insert condition precedent*]. This requirement is called a condition precedent. A condition precedent is a fact or event that the parties intend must take place before there is a right to performance. [*Name of party*] denies that this condition was part of the contract.

Whether a provision in a contract is a condition precedent which excuses performance depends on the intent of the parties. The parties' intent is to be ascertained from a fair and reasonable construction of the language used in light of the surrounding circumstances when they executed the contract.

If you find that this condition was part of the contract, you must decide whether the event occurred. If you decide that the condition occurred, then [*name of party being sued on contract*] was required to perform its part of the contract. [*Name of party*] has the burden of proof that the condition precedent occurred.

If you decide the condition was not part of the contract, then [*name of party being sued on contract*] was required to perform [his / her / its] part of the contract.

Comment

Reed v Citizens Ins Co, 198 Mich App 443 (1993); *Koski v Allstate Ins*, 456 Mich 439 (1998); *MacDonald v Perry*, 342 Mich 578 (1955); *Knox v Knox*, 337 Mich 109 (1953).

History

M Civ JI 142.22 was added March 2005.

M Civ JI 142.30 Introduction to Damages

If you find that [*name of party being sued on contract*] is liable to [*name of party*] for breach of contract, then you must determine the amount of money, if any, to award to [*name of party*] as contract damages. The following instructions tell you how to do that. If you find that [*name of party being sued on contract*] is not liable, then you do not need to consider the subject of damages.

[*Name of party*] must prove by a preponderance of the evidence the amount of any damages to be awarded. However, [*name of party*] is not required to prove its damages with mathematical precision because it is not always possible that a party can prove the exact amount of its damages. Therefore, it is necessary only that [*name of party*] prove its damages to a reasonable certainty or a reasonable probability. However, you may not award damages on the basis of guess, speculation or conjecture.

Comment

Joerger v Gordon Food Services, 224 Mich App 167 (1997); *Fera v Village Plaza*, 396 Mich 639 (1976).

History

M Civ JI 142.30 was added March 2005.

M Civ JI 142.31 Contract Damages: Benefit of Bargain

Contract damages are intended to give the party the benefit of the party's bargain by awarding him a sum of money that will, to the extent possible, put [him / her / it] in as good a position as [he / she / it] would have been in had the contract been fully performed. The injured party should receive those damages naturally arising from the breach. [*Name of party*] cannot recover a greater amount as damages than [he / she / it] could have gained by the full performance of the contract.

Comment

Jim-Bob, Inc v Mehling, 178 Mich App 71 (1989); *Lawrence v Will Darrah & Assoc*, 445 Mich 1 (1994); *Earl Dubey & Sons, Inc v Macomb Concrete Corp*, 81 Mich App 662 (1978); *Tross v HE Clark Co*, 274 Mich 263 (1936); *Dierickx v Vulcan Indus*, 10 Mich App 67 (1968).

History

M Civ JI 142.31 was added March 2005.

M Civ JI 142.32 Lost Profits

Damages for breach of contract may include lost profits. Loss of profits may be recovered for a breach of contract if,

(a) It is reasonably probable that the profits would have been earned except for the breach,

(b) The amount of loss can be shown with a reasonable degree of certainty, and

(c) There is a reliable basis in the evidence for computing the loss of profits.

Loss of profits is measured by net profits, not gross profits.

Note on Use

Lost profits are a type of benefit of the bargain damages.

Comment

Kolton v Nassar, 358 Mich 154 (1959); *The Vogue v Shopping Centers, Inc*, 402 Mich 546 (1978); *Joerger v Gordon Food Serv*, 224 Mich App 167 (1997); *Fera v Village Plaza*, 396 Mich 639 (1976); *Getman v Mathews*, 125 Mich App 245 (1983).

History

M Civ JI 142.32 was added March 2005.

M Civ JI 142.33 Reliance Damages

If you do not award damages to [*name of party*] that would put [him / her / it] in as good as a position had the contract been performed, you may still award damages that put [him / her / it] in the same position as if the contract had never been made. Your award should compensate [*name of party*] for any losses [he / she / it] incurred because of reliance on [*name of party being sued on contract*] to perform the contract.

You may not award both types of damages if the result would be to put [*name of party*] in a better position than [he / she / it] would have been in had the contract been performed.

Comment

Holton v Monarch Motor Car Co, 202 Mich 271 (1918); *Earl Dubey & Sons, Inc v Macomb Concrete Corp*, 81 Mich App 662 (1978).

History

M Civ JI 142.33 was added March 2005.

M Civ JI 142.34 Consequential Damages

In addition to any award for damages naturally arising from the breach, you also may include amounts to compensate [*name of party*] for consequential damages. Consequential damages are those additional damages that were contemplated by both parties at the time they made the contract.

Comment

Huler v Nassar, 322 Mich 1 (1948); *Dierickx v Vulcan Indus*, 10 Mich App 67 (1968)

Lawrence v Will Darrah & Assoc, 445 Mich 1 (1994).

History

M Civ JI 142.34 was added March 2005.

M Civ JI 142.35 Mitigation

In fixing the amount of damages, you should not include any loss that [*name of party*] could have prevented by exercising reasonable care and diligence when [he / she / it] learned or should have learned of the breach. The burden is on [*name of party being sued on contract*] to prove that [*name of party*] failed to minimize [his / her / its] damages and that the damages should be reduced by a particular amount as a result.

Comment

Ambassador Steel Co v Ewald Steel Co, 33 Mich App 495 (1971).

History

M Civ JI 142.35 was added March 2005.

M Civ JI 142.40 Duress

[*Name of party being sued on contract*] claims that the agreement upon which [*name of party*] relies is void because the [he / she] was under duress at the time [his / her] promise was made. A person whose agreement to a contract was brought about by duress is not bound by that agreement. [*Name of party being sued on contract*] must establish that [he / she] was illegally compelled or coerced to act out of fear of serious injury to [his / her] person, reputation, or fortune.

Comment

Enzymes of America, Inc v Deloitte, Haskins & Sells, 207 Mich App 28 (1994), rev'd on other grds, 450 Mich 889 (1995); *Apfelblat v Nat'l Bank Wyandotte-Taylor*, 158 Mich App 258 (1987).

History

M Civ JI 142.40 was added March 2005.

M Civ JI 142.41 Waiver

[*Name of party being sued on contract*] claims that [his / her / its] failure to execute the promise was excused because [*name of party*] waived [his / her / its] performance. To excuse nonperformance, [*name of party being sued on contract*] must prove that [*name of party*] voluntarily and knowingly gave up [his / her / its] right to insist on performance of [*insert performance obligation*]. In other words, [*name of party*] must have known that [he / she / it] had the right to insist on the completion of [*insert performance obligation*] by [*name of party being sued on contract*], but nevertheless agreed to give up this right. A waiver may be expressly stated or it may be implied by acts or conduct, indicating an intent not to enforce the contractual right such that a reasonable person would think that performance was no longer required. A waiver of a substantial right requires consideration.

Comment

Fitzgerald v Hubert Herman, Inc, 23 Mich App 716 (1970); *Babcock v Public Bank*, 366 Mich 124 (1962).

History

M Civ JI 142.41 was added March 2005.

M Civ JI 142.42 Impracticability

In this case, [*name of party being sued on contract*] has asserted the defense that [his / her / its] [partial / full] performance of the contract was rendered impracticable. A party is excused from his failure to perform a contract if performance became impracticable after the contract was made. To be excused, [he / she / it] must show that the performance became impracticable owing to some extreme or unreasonable difficulty, expense, injury or loss involved. You should determine whether there was an unanticipated circumstance that made performance of the promise vitally different from what should reasonably have been within the contemplation of both parties when they entered into the contract. Those circumstances may be of such an extent as to abrogate the entire contract, or may relate only to a portion of the contract. Performance is excused only to the extent the circumstances encountered make performance impracticable. The extent to which performance is excused is for you to decide.

Comment

Bissell v LW Edison Co, 9 Mich App 276 (1967).

History

M Civ JI 142.42 was added March 2005.

M Civ JI 142.43 Frustration of Purpose

Sometimes, if the main purpose of a contract is frustrated or destroyed, a party may not enforce the contract against the other party; that is, the party may not make the other perform what the contract required, or make the other pay money damages for failing to do what the contract required.

In this case, [*name of party being sued on contract*] claims that the main purpose of the contract in this case was frustrated or destroyed because [*state the facts / circumstances that allegedly frustrated the defendant's purpose*]. [*Name of party*] denies this.

[*Name of party being sued on contract*]'s failure to perform is excused if it is more likely true than not true that:

(1) the contract was at least partially executory, by that I mean the contract had not yet been fully performed.

(2) [*Name of party being sued on contract*]'s purpose in making the contract must have been known to both parties when the contract was made, and

(3) this purpose must have been basically frustrated by an event not reasonably foreseeable at the time the contract was made, the occurrence of which has not been due to the fault of [*name of party being sued on contract*] and the risk of which was not assumed by [him / her / it].

If you decide that each of these things are more likely true than not true, then [*name of party being sued on contract*] is excused for failing to keep [his / her / its] promise and you must return a verdict for [him / her / it].

Otherwise, [*name of party being sued on contract*] is not excused [for this reason].

Comment

Molnar v Molnar, 110 Mich App 622 (1981).

History

M Civ JI 142.43 was added March 2005.

M Civ JI 142.50 Introduction

[*Name of party*] has the burden to prove what the parties intended the contract to mean. The contract is to be interpreted so as to give effect to the parties' intentions. You cannot make for the parties a different contract than the parties made for themselves. It is the intent expressed or apparent in the writing that controls.

Comment

Zurich Ins Co v CCR & Co, 226 Mich App 599 (1997); *Old Kent Bank v Sobcak*, 243 Mich App 57 (2000).

History

M Civ JI 142.50 was added March 2005.

M Civ JI 142.51 Must Consider All Parts of Contract

The written agreement, along with all attachments thereto, is to be considered in determining the existence or nature of the contractual duties owed by [*name of party being sued on contract*] to [*name of party*]. In determining the parties' intentions under the written contract, you should consider the agreement as a whole, including all of its parts and attachments.

Comment

Interstate Construction Co v USF&G, 207 Mich 265 (1919); *McIntosh v Groomes*, 227 Mich 215 (1924).

History

M Civ JI 142.51 was added March 2005.

M Civ JI 142.52 Effect of Incorporated Documents

A contract can be made of several different documents if the parties intended that their agreement would include the various documents together. If you find that the parties entered into a contract that refers to other existing document[s] in such a manner as to establish that they intended to make the terms and conditions of that other document[s] part of their contract, you should interpret that incorporated document[s] as part of the contract between the parties according to the rules I have given you for interpreting contracts.

Comment

Forge v Smith, 458 Mich 198 (1998).

History

M Civ JI 142.52 was added March 2005.

M Civ JI 142.53 Words Given Ordinary Meaning

You should interpret the words of the contract by giving them their ordinary and common meaning.

Comment

Wilkie v Auto Owners, 245 Mich App 521 (2001) rev'd on other grds 469 Mich 41 (2003).

History

M Civ JI 142.53 was added March 2005.

M Civ JI 142.54 Custom and Usage of Trade

The customs and usages of the trade may be shown to establish a point on which the contract is ambiguous. To show the existence of a custom or usage of the trade, a party must prove that the custom was well established and was generally followed in the trade at the time the contract was made. It must also be shown that [*name of party against whom it is being asserted*] knew of the usage and had reason to know that [*name of other party*] assented to the words of the contract in accordance with it, or that, if [*name of party against whom it is being asserted*] did not know of the usage, an ordinary person in that [*name of party against whom it is being asserted*]'s position would have known of it.

Note on Use

This instruction should be given only if the contract is ambiguous.

Comment

Schroeder v Terra Energy Ltd, 223 Mich App 176 (1997); *Independence Twp v Reliance Bldg Co*, 175 Mich App 48 (1989).

History

M Civ JI 142.54 was added March 2005.

M Civ JI 142.55 Conduct of Parties

You may consider the conduct of the parties after they entered into the contract and before they discovered that they disagreed with one another, as evidence of their agreed intent. It is up to you to decide what the conduct of the parties was, whether the conduct is reasonably related to the terms in question, and whether it reveals what they intended by the contract.

Note on Use

This instruction should be given only if the contract is ambiguous.

Comment

Schroeder v Terra Energy Ltd, 223 Mich App 176 (1997); *L & S Bearing Co v Morton Bearing Co*, 355 Mich 219 (1959); *Detroit Greyhound Employees Federal Credit Union v Aetna Life Ins Co*, 381 Mich 683 (1969); *McIntosh v Groomes*, 227 Mich 215 (1924).

History

M Civ JI 142.55 was added March 2005.

Chapters 170–180: Probate

Introduction

In 1998, the Michigan legislature enacted the Estates and Protected Individuals Code (EPIC), a comprehensive revision of probate and estate planning law. The act took effect on April 1, 2000. The transition rules are reproduced below for the convenience of bench and bar.

> Sec. 8101. (1) This act takes effect April 1, 2000.
>
> (2) Except as provided elsewhere in this act, on this act's effective date, all of the following apply:
>
> (a) The act applies to a governing instrument executed by a decedent dying after that date.
>
> (b) The act applies to a proceeding in court pending on that date or commenced after that date regardless of the time of the decedent's death except to the extent that in the opinion of the court the former procedure should be made applicable in a particular case in the interest of justice or because of the infeasibility of applying this act's procedure.
>
> (c) A fiduciary, including a person administering the estate of a minor or incompetent, holding an appointment on that date continues to hold the appointment, but has only the powers conferred by this act and is subject to the duties imposed with respect to an event occurring or action taken after that date.
>
> (d) This act does not impair an accrued right or an action taken before that date in a proceeding. If a right is acquired, extinguished, or barred upon the expiration of a prescribed period of time that commences to run by the provision of a statute before this act's effective date, the provision remains in force with respect to that right.
>
> (e) A rule of construction or presumption provided in this act applies to a governing instrument executed before that date unless there is a clear indication of a contrary intent.

MCL 700.8101.

Chapter 170: Will Contests

M Civ JI 170.01 Will Contests: Defining Legal Names of Parties and Counsel 778

M Civ JI 170.02 Will Contests: Will/Codicil—Definition 779

M Civ JI 170.03 Will Contests: Holographic Will—Definition 780

M Civ JI 170.04 Will Contests: Cautionary Instruction as to Decedent's Right to Leave Property by a Will 781

M Civ JI 170.05 Will Contests: Letter, Deed, Bill of Sale, Contract as a Will 782

M Civ JI 170.08 Will Contests: Will—Writings Intended as Wills 784

M Civ JI 170.11 Will Contests: Will Signed by Another for Decedent 786

M Civ JI 170.12 Will Contests: Decedent Signing Will by Mark 787

M Civ JI 170.13 Will Contests: Requirements for Witnessing Will 788

M Civ JI 170.15A Will Contests: Proving Execution of Self-Proved Wills 789

M Civ JI 170.15B Will Contests: Proving Execution of Will That Is Not Self-Proved 790

M Civ JI 170.16 Will Contests: Proving Execution of Will Where Witnesses Cannot Be Found [*Instruction Deleted*] 791

M Civ JI 170.17A Will Contests: Execution—Witness Not Remembering or Denying Contents of Witnessing Clause (Self-Proved Will) 792

M Civ JI 170.17B Will Contests: Execution—Witness Not Remembering or Denying Contents of Witnessing Clause (Will That Is Not Self-Proved) 793

M Civ JI 170.21 Will Contests: Lost, Destroyed or Otherwise Unavailable Will 794

M Civ JI 170.31 Will Contests: Revocation of Will by Physical Means 795

M Civ JI 170.32 Will Contests: Revocation—Presumption from Failure to Produce Original Will Retained by Decedent 797

M Civ JI 170.33 Will Contests: Revocation—Presumption from Failure to Produce Executed Duplicate Will Retained by Decedent 798

M Civ JI 170.34 Will Contests: Conditional Revocation of Will (Dependent Relative Revocation) ... 799

M Civ JI 170.41 Will Contests: Mental Capacity—Definition 800

M Civ JI 170.42 Will Contests: Mental Capacity—Will Made before or after Adjudication of Incompetency, after Commitment or While under Guardianship or Conservatorship 801

M Civ JI 170.43 Will Contests: Insane Delusion—Definition 802

M Civ JI 170.44 Will Contests: Undue Influence—Definition; Burden of Proof 803

M Civ JI 170.45 Will Contests: Existence of Presumption of Undue Influence—Burden of Proof [*Instruction Deleted*] 805

M Civ JI 170.46 Will Contests: Fraud in Procurement of Will 807
M Civ JI 170.51 Will Contests: Burden of Proof..... 808

M Civ JI 170.01 Will Contests: Defining Legal Names of Parties and Counsel

This case is a will contest. The person who presents the document, claiming it is the valid will of [*name of decedent*], the decedent, is called the proponent. The term "decedent" is used to refer to the person who is deceased. The proponent is [*state name and indicate where seated*]. The attorney for the proponent is [*state attorney's name and indicate where seated*]. The person who contests the document, claiming it is not the valid will of [*name of decedent*], the decedent, is called the contestant. The contestant is [*state the contestant's name and indicate where seated*]. The attorney for the contestant is [*state attorney's name and indicate where seated*]. [*If any other persons are seated at the counsel table, identify them and describe their function*].

Note on Use

In will contest cases, this instruction should be substituted for M Civ JI 1.02.

History

M Civ JI 170.01 was added January 1984.

M Civ JI 170.02 Will Contests: Will/Codicil—Definition

A will is a document executed in the manner required by law in which a person directs the disposition of [his / her] property after death.

*(A codicil is a supplement or an addition to a will executed in the manner required by law that may revoke, change, or add to a will.)

"Executed in the manner required by law" means that the decedent must sign the [will / codicil] and it must be witnessed by at least two persons. The proponent has the burden of proving that the [will / codicil] was executed in the manner required by law.

Note on Use

*This sentence should be read only if applicable.

If the will is a testamentary instrument that merely appoints a personal representative or other fiduciary, revokes a prior will, or limits the persons who will be entitled to receive the assets of an intestate estate, this instruction may have to be modified.

If execution requirements of a foreign jurisdiction that differ from Michigan requirements apply, see MCL 700.2506.

Comment

MCL 700.1108(b), .2502(1), (3). See also *Appeal of Jameson*, 1 Mich 99 (1848); *Byrne v Hume*, 84 Mich 185; 47 NW 679 (1890).

The burden of proving execution is on the proponent. MCL 700.3407(1)(b); *In re McIntyre*, 355 Mich 238; 94 NW2d 208 (1959).

History

M Civ JI 170.02 was added January 1984. Amended March 2001.

M Civ JI 170.03 Will Contests: Holographic Will—Definition

The law recognizes what is known as a holographic will. A document in which a person directs the disposition of [his / her] property after death is valid as a holographic will if—

(a) it is dated, and

(b) it was signed by the decedent, and

(c) the material provisions are in the handwriting of the decedent.

The proponent has the burden of proving that the document is a holographic will.

Comment

The holographic will provision (MCL 700.2502(2)) of the Estates and Protected Individuals Code (EPIC) applies to testamentary instruments that are not properly witnessed. The EPIC provision departs from prior law in that the testator's signature no longer needs to be at the end of a holographic will. This relaxed requirement applies to holographic wills executed prior to the effective date of EPIC (April 1, 2000) if the testator died after the effective date. MCL 700.8101(1)(a). See also *In re Sutherby Estate*, 110 Mich App 175; 312 NW2d 200 (1981), in which the court upheld a holographic will executed before the effective date of the predecessor statute, the Revised Probate Code.

History

M Civ JI 170.03 was added January 1984. Amended March 2001.

M Civ JI 170.04 Will Contests: Cautionary Instruction as to Decedent's Right to Leave Property by a Will

*(The law does not require property to be willed to heirs or relatives.) The law allows everyone who is not [mentally incapacitated / under undue influence / [*name other condition*]] in making a will free to leave [his / her] property as [he / she] chooses. The court and jury have no right to substitute their judgment for the judgment of the person making the will or as to the wisdom or justice of the provisions of the will.

Note on Use

*This sentence should be read when applicable.

Comment

This instruction contains cautions as to the rights of a person in the making of his will. These cautions are believed necessary to prevent the often mistaken belief of most jurors that the decedent cannot disinherit heirs and other relatives by his or her will and to prevent the jurors from improperly trying to substitute their judgment for the judgment of the maker of the will. See *In re Allen's Estate*, 230 Mich 584; 203 NW 479 (1925).

The testator has a right to dispose of his property as he sees fit. *In re Kramer's Estate*, 324 Mich 626; 37 NW2d 564 (1949). The law does not require property to be disposed among the testator's heirs. *In re Fay's Estate*, 197 Mich 675; 164 NW 523 (1917). It concerns no one what a person's reasons were in his distribution by will. *Brown v Blesch*, 270 Mich 576; 259 NW 331 (1935). The jury has no right to substitute its judgment for the judgment of the testator. *In re Hannan's Estate*, 315 Mich 102; 23 NW2d 222 (1946). The jury has no right to consider that the testator did an apparent injustice in his will. *In re Livingston's Estate*, 295 Mich 637; 295 NW 343 (1940). While the testator's blood relations are the natural objects of his bounty, such bounty is not limited by blood relationship, and his blood relations have no natural or inherent right to his property. *Spratt v Spratt*, 76 Mich 384; 43 NW 627 (1889).

History

M Civ JI 170.04 was added January 1984.

M Civ JI 170.05 Will Contests: Letter, Deed, Bill of Sale, Contract as a Will

A [document / part of a document] can be a will if—

(a) the decedent intended that the [document / part of a document] be [his / her] will, and

(b) the [document / part of a document] transfers property after the decedent's death and not during the decedent's lifetime.

In determining the decedent's intent, you must consider the contents of the document and the surrounding facts and circumstances.

The proponent has the burden of proving that the decedent intended the [document / part of a document] to be [his / her] will and to transfer [his / her] property after death.

Note on Use

This instruction is intended for cases in which there is no dispute that the document or part of a document has been executed in the manner required by law but the document is in a form not usual for a will and the issue for the jury is whether the disposition is testamentary in nature and so intended. *In re Merritt's Estate*, 286 Mich 83; 281 NW 546 (1938).

For cases in which a document or writing upon a document is not executed in the manner required by law and clear and convincing evidence of intent is required (MCL 700.2503), see M Civ JI 170.08 Will Contests: Will—Writings Intended as Wills.

Comment

MCL 700.1108(b), .2502(3).

Whether a document or part of a document is testamentary in nature depends on its wording. If it is executed with the formalities of a will and provides for disposition of property only after death, it is a will. *Merritt's Estate* (letter). See also *Geisel v Burg*, 283 Mich 73; 276 NW 904 (1937) (certificate of deposit; no proof of intent). If the instrument transfers a present interest in property during the decedent's lifetime, though possession or enjoyment of the property does not take place until a future time and after the death of the decedent, it is not a will. *Ireland v Lester*, 298 Mich 154; 298 NW 488 (1941) (surviving partner buy-out contract); *In re Lloyd's Estate*, 256 Mich 305; 239 NW 390 (1931) (bill of sale); *Darnell v Smith*, 238 Mich 33; 213 NW 59 (1927) (will with deed provision); *Cook v Sadler*, 214 Mich 582; 183 NW 82 (1921) (deed).

If the instrument contains will provisions and deed or other conveyance provisions, the will provisions may be admitted to probate as a will. *Merritt's Estate*.

There is no election of remedies if an instrument is first sued on as being a deed and later offered for probate as a will. *In re Broffee's Estate*, 206 Mich 107; 172 NW 541 (1919).

In determining whether an instrument is a will, if the intention of the decedent is expressed on the instrument in plain and unmistakable language, the language must govern, and there is no jury question. If the language is unclear as to testamentary disposition, there is a jury question, and extrinsic evidence showing the facts and circumstances of the making of the instrument may be introduced. *Lloyd's Estate*.

History

M Civ JI 170.05 was added January 1984.

M Civ JI 170.08 Will Contests: Will—Writings Intended as Wills

In order to be a valid [will / [partial / complete] revocation of a will / [addition to / alteration of] a will / [partial / complete] revival of a formerly revoked [will / portion of a will]], a document or writing added upon a document that directs the disposition of the decedent's property after death must have been executed in the manner required by law.

*If the document or writing added upon a document was not executed in the manner required by law, it is treated as if it were executed in the manner required by law if the proponent establishes by clear and convincing evidence that the decedent intended the document or writing to constitute [a will / a partial or complete revocation of a will / an addition to or alteration of a will / a partial or complete revival of [a formerly revoked will / a formerly revoked portion of the will]]. In determining the decedent's intent, you must consider the contents of the [document / writing] and the surrounding facts and circumstances.

[*Name of party offering the document or writing*] has the burden of proving by clear and convincing evidence that the decedent intended the document or writing to constitute [[his / her] will / a partial or complete revocation of [his / her] will / an addition to or alteration of [his / her] will / a partial or complete revival of [a formerly revoked will / a formerly revoked portion of [his / her] will]].

Note on Use

This instruction should be preceded by the definition of clear and convincing evidence in M Civ JI 8.01 Meaning of Burden of Proof, and by the definition of a will and execution requirements in M Civ JI 170.02 Will Contests: Will/Codicil—Definition.

Comment

MCL 700.2503.

Section 2503 of the Estates and Protected Individuals Code (EPIC) makes a substantial departure from prior law by allowing any document or writing on a document to be admitted to probate to the extent the testator intended it to be his or her will, a partial or complete revocation of a will, an addition to or an alteration of a will, or a partial or complete revival of a formerly revoked will or revoked portion of a will. For effective date provisions of EPIC, see MCL 700.8101 reproduced in the Introduction to this chapter.

EPIC §2503 is identical in its essential language to §2-503 of the Uniform Probate Code (UPC) (1990). The comment to §2-503 of the UPC states that the intent of the provision is "to excuse a harmless error in complying with the formal requirements for executing or revoking a will." However, the UPC comment urges that courts at the trial and appellate level police with rigor the clear and convincing evidentiary standard and "[t]he larger the departure from Section 2-502 formality, the harder it will be to satisfy the court that the instrument reflects the testator's intent." The UPC comment indicates that

provisions like §2-503 have been in effect in common-law jurisdictions in Australia (South Australia) and Canada (Manitoba).

History

M Civ JI 170.08 was added March 2001.

M Civ JI 170.11 Will Contests: Will Signed by Another for Decedent

If the decedent directed another person to sign [his / her] will and that other person signed the decedent's name in the decedent's conscious presence, then the will is considered to be signed by the decedent in the manner required by law.

Comment

MCL 700.2502(1)(b).

MCL 700.2502(1)(b) requires the "conscious presence" of the testator when the will is signed for him or her by another, whereas the prior statute (MCL 700.122(1)) specified only "presence." However, it is unlikely that this addition represents a change in law because Michigan cases have long construed "presence" liberally, focusing more on the testator's consciousness of what was going on rather than physical proximity or actual viewing. *In re Lane's Estate*, 265 Mich 539; 251 NW 590 (1933); *Bradford v Vinton*, 59 Mich 139; 26 NW 401 (1886). The "conscious presence test" is discussed in the comment to §2-502 of the Uniform Probate Code.

History

M Civ JI 170.11 was added January 1984. Amended March 2001.

M Civ JI 170.12 Will Contests: Decedent Signing Will by Mark

If the decedent makes a cross or mark as [his / her] signature, then the will is signed in the manner required by law.

Comment

In re McIntyre Estate, 355 Mich 238; 94 NW2d 208 (1959).

History

M Civ JI 170.12 was added January 1984.

M Civ JI 170.13 Will Contests: Requirements for Witnessing Will

A will is witnessed in the manner required by law if [each witness / at least two witnesses] signed the document within a reasonable time after [he / she] did any one of the following:

(a) saw the decedent sign the document, or

(b) heard the decedent say or otherwise acknowledge that the signature on the document was [his / her] signature, or

(c) heard the decedent say or otherwise acknowledge that the document was [his / her] will.

It is not necessary that each witness be a witness to the same act of the decedent as just described to you.

The witnesses are not required to sign the document at the same time.

Comment

MCL 700.2502(1)(c).

Section 2502(1)(c) of the Estates and Protected Individuals Code (EPIC) departs from prior law by permitting each witness to sign "within a reasonable time" after seeing the testator sign the will or acknowledge the signature or will as his or her own. The new language derives from §2-502 of the Uniform Probate Code (UPC) (1990) and the UPC comment explains: "There is, however, no requirement that the witnesses sign before the testator's death; in a given case, the reasonable-time requirement could be satisfied even if the witnesses sign after the testator's death." Michigan case law under the predecessor statute (MCL 700.122(1)) held that witnesses could not sign after the testator's death. *In re Estate of Mikeska*, 140 Mich App 116; 362 NW2d 906 (1985).

For effective date provisions of EPIC, see MCL 700.8101 reproduced in the Introduction to this chapter.

History

M Civ JI 170.13 was added January 1984. Amended March 2001.

M Civ JI 170.15A Will Contests: Proving Execution of Self-Proved Wills

The law in this state recognizes what is known as a "self-proved" will. In the case of a self-proved will, the proponent is not required to prove that the will was signed by the decedent and two witnesses. Because this is a self-proved will, you may conclude that the will was witnessed in the manner required by law even without the testimony of either of the witnesses to the will, but you should consider all of the evidence in determining whether the will was witnessed in the manner required by law.

*(If the contestant proves that there was fraud or forgery affecting the acknowledgment or a sworn statement, then the will is not executed in the manner required by law.)

Note on Use

*The sentence in parentheses should be read to the jury if fraud or forgery affecting the acknowledgment or a sworn statement is an issue in the case. If this sentence is used, additional instructions on the meaning of fraud will need to be given.

Comment

MCL 700.3406(2).

The new statute on proof of execution of self-proved wills, MCL 700.3406(2), creates a conclusive presumption that the signature requirements for execution have been met and a rebuttable presumption that the other requirements of execution have been met. Subsection (2) states:

If a will is self-proved, compliance with signature requirements for execution is conclusively presumed and other requirements of execution are presumed subject to rebuttal without the testimony of any witness upon filing the will and the acknowledgment and sworn statements annexed or attached to the will, unless there is proof of fraud or forgery affecting the acknowledgment or a sworn statement.

History

M Civ JI 170.15A was added March 2001.

M Civ JI 170.15B Will Contests: Proving Execution of Will That Is Not Self-Proved

You may find that the will was executed in the manner required by law based upon any of the following:

(a) the testimony of one of the witnesses who signed the will; or

(b) the testimony of any person who did not actually sign the will as a witness but has personal knowledge of the signing of the will by the decedent and by the witnesses; or

(c) any other evidence.

*(In this case, the testimony of at least one of the witnesses who signed the will is required if at least one of them is competent, able to testify, and within the state.)

Note on Use

*If the will is attested, the sentence in parentheses should be read to the jury. If the will is not attested, this sentence should not be read.

Comment

MCL 700.3406(1).

This instruction has been formulated to prevent the jurors from erroneously concluding that the testimony of both witnesses is necessary to prove the execution of the will.

History

M Civ JI 170.15B was added March 2001 to replace M Civ JI 170.15.

M Civ JI 170.16 Will Contests: Proving Execution of Will Where Witnesses Cannot Be Found [*Instruction Deleted*]

Note on Use

See M Civ JI 170.15A Will Contests: Proving Execution of Self-Proved Wills and M Civ JI 170.15B Will Contests: Proving Execution of Will That Is Not Self-Proved.

History

M Civ JI 170.16 was added January 1984. Deleted March 2001.

M Civ JI 170.17A Will Contests: Execution—Witness Not Remembering or Denying Contents of Witnessing Clause (Self-Proved Will)

There is near the end of the document presented as the will of the decedent a clause that reads as follows: [*Read the acknowledgment clause exactly as it appears in the will.*]

You may conclude that the will was witnessed in the manner required by law even though the [witness / witnesses] may have stated—

(a) *(that the will was not properly witnessed, or)

(b) *(that [he does / she does / they do] not remember what [he / she / they] signed, or)

(c) *(that [he denies / she denies / they deny] what [he / she / they] signed.)

Note on Use

*The court should choose from subsections a–c those that are applicable to the case.

This instruction should be preceded by M Civ JI 170.15A Will Contests: Proving Execution of Self-Proved Wills.

Comment

MCL 700.3406(2). *In re Dettling Estate*, 351 Mich 335; 88 NW2d 252 (1958).

History

M Civ JI 170.17A was added March 2001.

M Civ JI 170.17B Will Contests: Execution—Witness Not Remembering or Denying Contents of Witnessing Clause (Will That Is Not Self-Proved)

There is near the end of the document presented as the will of the decedent a clause that reads as follows: [*Read the attestation clause exactly as it appears in the will.*]

If you find from the evidence that the [witness / witnesses] signed the will, you may conclude that the will was witnessed in the manner required by law even though the [witness / witnesses] may have stated —

(a) *(that the will was not properly witnessed, or)

(b) *(that [he does / she does / they do] not remember what [he / she / they] signed, or)

(c) *(that [he denies / she denies / they deny] what [he / she / they] signed.)

Note on Use

*The court should choose from subsections a–c those that are applicable to the case.

This instruction should be preceded by M Civ JI 170.15B Will Contests: Proving Execution of Will That Is Not Self-Proved.

Comment

MCL 700.3406(1). *In re Dettling Estate*, 351 Mich 335; 88 NW2d 252 (1958).

History

M Civ JI 170.17B was added March 2001 to replace M Civ JI 170.14.

M Civ JI 170.21 Will Contests: Lost, Destroyed or Otherwise Unavailable Will

The proponent of a [lost / destroyed / otherwise unavailable] will has the burden of proving:

(a) that the will was in existence;

(b) that it was executed in the manner required by law;

(c) all or part of the contents of the will;

(d) *(that the [lost / destroyed / otherwise unavailable] will revoked the previous [will / wills].

Note on Use

*Subsection d must be used in any case where a prior will is presented for probate.

This instruction should be preceded by the appropriate instruction or instructions on execution of a will.

Comment

MCL 700.3402. See also *In re Francis Estate*, 349 Mich 339; 84 NW2d 782 (1957).

The mandate of the predecessor statute (§149 of the Revised Probate Code) that a "lost, destroyed or suppressed" will could not be admitted to probate unless its execution and contents were established by at least two reputable witnesses is not continued in MCL 700.3402, which also replaces the word "suppressed" with "otherwise unavailable."

History

M Civ JI 170.21 was added January 1984. Amended March 2001.

M Civ JI 170.31 Will Contests: Revocation of Will by Physical Means

A [will / part of a will] may be revoked by being [burned / torn / cancelled / obliterated / destroyed] by [a decedent / another person in decedent's conscious presence and by [his / her] direction] with the intent and for the purpose of revoking [the will / any part of the will].

*(Cancelling can include a striking out, as drawing one or more lines through, crossing out or otherwise marking out.)

*(Obliteration can include a blotting out and erasing or a smudging.)

*(There is no requirement as to what amount or in what manner the [cancellation / obliteration] is accomplished as long as it is done with the decedent's intention of revoking [the will / any part of the will].)

*(A [burn / or / tear / or / cancellation] can be a revocation even if it does not touch any of the words on the will.)

The contestant has the burden of proving that [the will / a part of the will] was revoked by being [burned / torn / cancelled / obliterated / destroyed] by [the decedent / another person in the decedent's conscious presence and by [his / her] direction] with the intent and for the purpose of revoking [the will / any part of the will].

Note on Use

*These paragraphs should be read to the jury only if they are applicable to the case.

The definitions of "cancelling" and "obliteration" are not intended to be exclusive.

Comment

MCL 700.2507(1)(b).

Revocation can be as to the whole will or to a part of the will. MCL 700.2507(1)(b); *In re Fox's Estate*, 192 Mich 699; 159 NW 332 (1916).

Cancellation includes a striking out, such as the drawing of one or more lines through, or the crossing out of, the will provisions. Obliteration includes a blotting out, an erasure, a smudging, a total lining out of the will provision. Anno: Effect of testator's attempted physical alteration of will after execution, 62 ALR 1367, p 1383. It does not matter whether the cancellation is done by pencil or pen. *Fox's Estate*. One line as well as many could be a cancellation. Id.; *In re Houghten's Estate*, 310 Mich 613; 17 NW2d 774 (1945). Cancellation can also include cutting out of the testator and witnesses signatures. Anno: Effect of testator's attempted physical alteration of will after execution, 24 ALR2d 514, §10.

The new Michigan statute adds the following provision not found in the predecessor statute: "A burning, tearing, or canceling is a revocatory act on the will, whether or not the burn, tear, or cancellation touches any of the words on the will." MCL 700.2507(1)(b). See the comment to §2-507 of the Uniform Probate Code from which this sentence derives.

The new statute requires the "conscious presence" of the testator when another person performs the act of revocation for the testator, whereas the prior statute (MCL 700.124(1)) used the word "presence." "Conscious presence" focuses more on the testator's consciousness of what is going on rather than physical proximity or actual viewing. See Michigan cases in the Comment to M Civ JI 170.11 Will Contests: Will Signed by Another for Decedent.

History

M Civ JI 170.31 was added January 1984. Amended March 2001.

M Civ JI 170.32 Will Contests: Revocation—Presumption from Failure to Produce Original Will Retained by Decedent

A will that is known to have existed and to have been in the decedent's custody during [his / her] lifetime and which cannot be found at [his / her] death raises a presumption that such will was destroyed by the decedent with the intention of revoking it.

In determining whether this presumption has been overcome, you may take into consideration all the surrounding circumstances which would tend to show that there was no intent to revoke, including what the decedent said.

Note on Use

This instruction should be preceded by M Civ JI 170.31 Will Contests: Revocation of Will by Physical Means.

Comment

Where the will cannot be found at the death of the testator and especially where the will is not traced out of possession of the testator, the presumption of revocation can be met by declarations of the testator, and whether or not the presumption is rebutted is a question of fact. *In re Taylor's Estate*, 323 Mich 101; 34 NW2d 474 (1948); *In re Estate of Thomas*, 274 Mich 10; 263 NW 891 (1935); *In re Keene's Estate*, 189 Mich 97; 155 NW 514 (1915); *In re Bradley's Estate*, 215 Mich 72; 183 NW 897 (1921); *In re Smith Estate*, 145 Mich App 634; 378 NW2d 555 (1985).

History

M Civ JI 170.32 was added January 1984.

M Civ JI 170.33 Will Contests: Revocation—Presumption from Failure to Produce Executed Duplicate Will Retained by Decedent

If there have been executed duplicate wills made by the decedent but only one copy had been retained by [him / her], the failure to find the will in the custody of the decedent at the time of [his / her] death, even though a duplicate executed copy is found elsewhere, raises a presumption that decedent destroyed the will with the intention of revoking it.

In determining whether this presumption has been overcome, you may take into consideration all the surrounding circumstances which would tend to show that there was no intent to revoke, including what the decedent said.

Note on Use

This instruction should be preceded by M Civ JI 170.31 Will Contests: Revocation of Will by Physical Means.

Comment

Where a duplicate executed copy of the will left in the testator's possession could not be found after his death, there is a presumption that he destroyed the will with the intention of revoking it. *In re Walsh's Estate*, 196 Mich 42; 163 NW 70 (1917).

History

M Civ JI 170.33 was added January 1984.

M Civ JI 170.34 Will Contests: Conditional Revocation of Will (Dependent Relative Revocation)

If [the decedent / a person in the decedent's presence by [his / her] direction] [burned / tore / cancelled / obliterated / destroyed] the [will / part of the will] with the intention of making a substitute [will / part of the will] thereafter, and if the substitute [will / part of the will] is not made or is not valid for any reason, then you may find that the original [will / part of the will] that was [burned / torn / cancelled / obliterated / destroyed] is valid.

However, you may also find that the decedent intended to revoke the original [will / part of the will] absolutely whether or not the substitute [will / part of the will] would be valid.

Note on Use

This instruction should be preceded by M Civ JI 170.31 Will Contests: Revocation of Will by Physical Means.

Comment

In re Bonkowski's Estate, 266 Mich 112; 253 NW 235 (1934); *In re Houghten's Estate*, 310 Mich 613; 17 NW2d 774 (1945); *In re McKay Estate*, 347 Mich 153; 79 NW2d 597 (1956); Revocation of Wills (pt II): Dependent Relative Revocation, St B Mich Sec Prob & Tr L Newsletter, Mar 1962.

History

M Civ JI 170.34 was added January 1984.

M Civ JI 170.41 Will Contests: Mental Capacity—Definition

A decedent had sufficient mental capacity to make a will if at the time [he / she] made the document [he / she]

(a) had the ability to understand that [he / she] was providing for the disposition of [his / her] property after [his / her] death, and

(b) had the ability to know the nature and extent of [his / her] property, and

(c) knew the natural objects of [his / her] bounty, and

(d) had the ability to understand in a reasonable manner the general nature and effect of [his / her] act in signing the will.

The contestant has the burden of proving that at the time the decedent made the document [he / she] did not have sufficient mental capacity to make a will.

Comment

The statutory presumption of mental competency of the decedent to make a will, MCL 600.2152, has been construed to place on the contestant the burden of proving by a preponderance of the evidence that the decedent lacked testamentary capacity. *In re Hallitt's Estate*, 324 Mich 654; 37 NW2d 662 (1949); *In re Paul's Estate*, 289 Mich 452; 286 NW 680 (1939).

An early case referred to blood relations as the natural objects of one's bounty, *Spratt v Spratt*, 76 Mich 384; 43 NW 627 (1889), while more recent cases refer to "relatives." *In re Sprenger's Estate*, 337 Mich 514 (1953); *In re Walker's Estate*, 270 Mich 33 (1935).

MCL 700.2501 was amended effective April 1, 2010. The prior provision only stated that an individual be of sound mind. The amended statute draws a distinction between an ability to know or understand in subsections (2)(A),(B), and (D) and actual knowledge in subsection (2)(C).

History

M Civ JI 170.41 was added January 1984. Amended June 2010.

M Civ JI 170.42 Will Contests: Mental Capacity—Will Made before or after Adjudication of Incompetency, after Commitment or While under Guardianship or Conservatorship

The fact that a decedent was [adjudged mentally ill / adjudged mentally incompetent / committed to a mental hospital / under guardianship / under conservatorship / adjudged a legally incapacitated person] before or after the will was made does not of itself imply lack of mental capacity at the time the will was made. However, such fact may be considered together with all the other evidence in determining whether the decedent had sufficient mental capacity to make a will.

Note on Use

This instruction assumes that the adjudication as recited in the instruction has been properly admitted into evidence.

Comment

The fact that the testator was declared incompetent and committed to an institution after he executed the will in question does not of itself prove that he lacked sufficient mental powers to execute the will. See *In re Nickel's Estate*, 321 Mich 519; 32 NW2d 733 (1948).

The fact that a guardian of the person or of the estate was appointed for the testator does not of itself necessarily imply that he would not be sufficiently competent to make a will. See, e.g., *In re Paquin's Estate*, 328 Mich 293; 43 NW2d 858 (1950) (guardian of the person and of the estate was appointed after the testator executed the will in question); *In re Vallender's Estate*, 310 Mich 359; 17 NW2d 213 (1945) (guardian of the person and of the estate was appointed before the testator executed the will in question).

See also *In re Merritt's Estate*, 286 Mich 83; 281 NW 546 (1938); *In re Cummins' Estate*, 271 Mich 215; 259 NW 894 (1935) (guardian of the estate was appointed before testatrix executed the will in question).

History

M Civ JI 170.42 was added January 1984.

M Civ JI 170.43 Will Contests: Insane Delusion—Definition

An insane delusion exists when a person persistently believes supposed facts which have no real existence and so believes such supposed facts against all evidence and probabilities and without any foundation or reason for the belief, and conducts [himself / herself] as if such facts actually existed.

It is not an insane delusion if the decedent capriciously or arbitrarily disliked [contestant / [other]] or harbored unjust suspicions or prejudices against [contestant / [other]].

It is not an insane delusion if the decedent had mistaken beliefs, unjust suspicions, arbitrary dislikes or prejudices as long as there were facts upon which the decedent may have based [his / her] belief, regardless of what little evidential force such facts may possess. While on consideration of those facts the belief may seem illogical or without foundation, a decedent cannot be said to suffer from an insane delusion simply because [he / she] has not reasoned correctly.

However, if the decedent was suffering from an insane delusion at the time [he / she] made the will, and if that insane delusion influenced the decedent in disposing of the property in the manner [he / she] did, then the will is not valid.

The contestant has the burden of proving that decedent was suffering from an insane delusion at the time [he / she] made the will.

Comment

Lack of mental capacity to make a will and an insane delusion affecting the making of a will are different and require separate instructions. Where there is evidence of a delusion by the decedent, it is mandatory to instruct the jury in regard to the delusion; otherwise the jury may mistakenly conclude that a person subject to delusions was incompetent to make a will. *In re Powers Estate*, 375 Mich 150; 134 NW2d 148 (1965).

This instruction was adapted from approved instructions on insane delusion in *In re Bolger's Estate*, 226 Mich 545; 198 NW 404 (1924), and *In re Johnson's Estate*, 308 Mich 366; 13 NW2d 852 (1944).

See also *Rivard v Rivard*, 109 Mich 98; 66 NW 681 (1896); *In re Rockett's Estate*, 191 Mich 499; 158 NW 12 (1916).

History

M Civ JI 170.43 was added January 1984.

M Civ JI 170.44 Will Contests: Undue Influence—Definition; Burden of Proof

The contestant has the burden of proving by a preponderance of the evidence that there was undue influence exerted on the decedent in the making of the will.

Undue influence is influence which is so great that it overpowers the decedent's free will and prevents [him / her] from doing as [he / she] pleases with [his / her] property.

To be "undue," the influence exerted upon the decedent must be of such a degree that it overpowered the decedent's free choice and caused [him / her] to act against [his / her] own free will and to act in accordance with the will of the [person / persons] who influenced [him / her].

The influence exerted may be by [force / threats / flattery / persuasion / fraud / misrepresentation / physical coercion / moral coercion / (other)]. A will which results from undue influence is a will which the decedent would not otherwise have made. It disposes of the decedent's property in a manner different from the disposition the decedent would have made had [he / she] been free of such influence.

The word "undue" must be emphasized, because the decedent may be influenced in the disposition of [his / her] property by specific and direct influences without such influences becoming undue. This is true even though the will would not have been made but for such influence. It is not improper for a [spouse / child / parent / relative / friend / housekeeper / (other)] to—

a. *([advise / persuade / argue / flatter / solicit / entreat / implore],)

b. (appeal to the decedent's [hopes / fears / prejudices / sense of justice / sense of duty / sense of gratitude / sense of pity],)

c. *(appeal to ties of [friendship / affection / kinship],)

d. *([(other)],)

provided the decedent's power to resist such influence is not overcome and [his / her] capacity to finally act in accordance with [his / her] own free will is not overpowered. A will which results must be the free will and purpose of the decedent and not that of [another person / other persons].

Mere existence of the opportunity, motive or even the ability to control the free will of the decedent is not sufficient to establish that the decedent's will is the result of undue influence.

If you find that [*name*] exerted undue influence, then your verdict will be against the will. If you find that [*name*] did not exert undue influence, then your verdict will be in favor of the will.

Note on Use

*The Court should choose among subsections a-d those which are applicable to the case.

This instruction should be accompanied by M Civ JI 8.01, Meaning of Burden of Proof.

Comment

In re Estate of Karmey, 468 Mich 68; 658 NW2d 796 (2003); Widmayer v Leonard, 422 Mich 280; 373 NW2d 538 (1985); Kar v Hogan, 399 Mich 529; 251 NW2d 77 (1976); *In re Willey Estate*, 9 Mich App 245; 156 NW2d 631 (1967); *In re Langlois Estate*, 361 Mich 646; 106 NW2d 132 (1960); *In re Paquin's Estate, 328 Mich 293; 43 NW2d 858 (1950); In re Balk's Estate*, 298 Mich 303; 298 NW 779 (1941); *In re Kramer's Estate*, 324 Mich 626; 37 NW2d 564 (1949); *In re Reed's Estate*, 273 Mich 334; 263 NW 76 (1935); *In re Curtis Estate*, 197 Mich 473; 163 NW 944 (1917); *Nelson v Wiggins*, 172 Mich 191; 137 NW 623 (1912).

History

M Civ JI 170.44 was added January 1984. Amended December 2003; October 2014.

M Civ JI 170.45 Will Contests: Existence of Presumption of Undue Influence—Burden of Proof [*Instruction Deleted*]

The Committee deleted M Civ JI 170.45, but it is continuing to review the issue of the presumption of undue influence and how the jury is to be instructed, if at all, when that presumption has not been rebutted.

> ~~To establish that the decedent made the will as a result of undue influence, the contestant has the burden of proving all three of the following propositions:~~
>
> ~~That [name] had a fiduciary relationship with the decedent.~~
>
> ~~That [name] (or a person or interest he represented) benefited from the will, and~~
>
> ~~That by reason of the fiduciary relationship [name] had an opportunity to influence the decedent in giving that benefit.~~
>
> ~~Your verdict will be against the will if you find that all three propositions have been proven. Otherwise, your verdict will be in favor of the will.~~
>
> ~~A "fiduciary relationship" is one of inequality where a person places complete trust in another person regarding the subject matter, and the trusted person controls the subject of the relationship by reason of knowledge, resources, power, or moral authority~~.

Note on Use

~~In cases involving the presumption of undue influence, this instruction is applicable only where two conditions coexist: 1) the putative fiduciary has not introduced evidence to "meet" or "rebut" the presumption, i.e, the fiduciary hasn't introduced evidence tending to show that the bequest was not made as a result of undue influence, and 2) there is an issue of fact whether one or more of the three components of the presumption of undue influence exists, MRE 301; *Widmayer v Leonard*, 422 Mich 280; 373 NW2d 538 (1985).~~

~~Where evidence has been introduced to meet the presumption, and in cases that do not involve the presumption of undue influence, the applicable undue influence instruction is M Civ JI 170.44 - Will Contests: Undue Influence - Burden of Proof.~~

~~A presumption casts on the opposing party only the obligation to come forward with evidence opposing the presumption, and if that is done, the effect of the presumption disappears, other than to prevent a directed verdict against the party having the benefit of the presumption, and the burden of proof remains with the person claiming undue influence. MRE 301; *Widmayer, supra*. If there is no genuine dispute that all elements of the presumption exist, and there is no evidence opposing the presumption, the party having the benefit of the presumption is entitled to a directed verdict. MRE 301; *Widmayer, supra*.~~

~~Often there will be no triable dispute on one or more of the elements of the presumption, in which case the court should not submit that element to the jury for decision. Typically, for example, there will~~

~~be no dispute that the putative fiduciary benefited from the will. While it is said generally that the existence of a confidential relationship is a question of fact, *In re Kanable Estate*, 47 Mich App 299; 209 NW2d 452 (1973), there are a number of relationships which are fiduciary as a matter of law, e.g., principal-agent, guardian-ward, trustee-beneficiary, attorney-client, physician-patient, clergy-penitent, accountant-client, stockbroker-customer. Unless there is a dispute that the named relationship exists, it will be deemed a fiduciary relationship as a matter of law. See, *In re Estate of Karmey*, 468 Mich 68,74 fn 2,3; 658 NW2d 796 (2003). For that reason the definition in the instruction does not attempt to encompass all of them. A marriage relationship does not create a presumption of undue influence. *In re Estate of Karmey*.~~

~~The instruction uses the term "fiduciary relationship" instead of "confidential or fiduciary relationship" on the conclusion that the terms "fiduciary relationship" and "confidential or fiduciary relationship" have identical meanings. See, *In re Estate of Karmey*.~~

~~This instruction should be accompanied by M Civ JI 8.01, Meaning of Burden of Proof.~~

Comment

~~*In re Estate of Karmey*; *Widmayer*; *Kar v Hogan*, 399 Mich 529; 251 NW2d 77 (1976). See also *In re Cox Estate*, 383 Mich 108; 174 NW2d 558 (1970) (fiduciary relationship of attorney and clergyman); *In re Vollbrecht Estate*, 26 Mich App 430; 182 NW2d 609 (1970) (substantial benefit derived by charitable foundation wherein testatrix's attorney and her accountant were also trustees of foundation); *In re Spillette Estate*, 352 Mich 12; 88 NW2d 300 (1958); *In re Haskell's Estate*, 283 Mich 513; 278 NW 668 (1938) (will in favor of attorney upheld where testatrix obtained independent advice; presumption of undue influence rebutted); *In re Eldred's Estate*, 234 Mich 131; 203 NW 870 (1926) (doctor); *In re Hartlerode's Estate*, 183 Mich 51; 148 NW 774 (1914) (clergyman).~~

History

M Civ JI 170.45 was added January 1984. Amended March 1990, December 8, 2003. Deleted October 2014.

M Civ JI 170.46 Will Contests: Fraud in Procurement of Will

A will is not valid if it was made as a result of fraud. Fraud exists if—

(a) there was a misrepresentation of [a material fact / material facts] to the decedent, and

(b) the decedent relied on and was influenced by that misrepresentation in disposing of [his / her] property by will.

The contestant has the burden of proving that there was fraud in the making of the will.

Comment

In re Spillette Estate, 352 Mich 12; 88 NW2d 300 (1958); *In re Hannan's Estate*, 315 Mich 102; 23 NW2d 222 (1946); *In re Barth's Estate*, 298 Mich 388; 299 NW 118 (1941).

History

M Civ JI 170.46 was added January 1984.

M Civ JI 170.51 Will Contests: Burden of Proof

The proponent has the burden of proving—

(a) *(that the will is a holographic will as defined by law;)

(b) *(that the [will / codicil] was signed by [the decedent / another person at decedent's direction and in [his / her] conscious presence];)

(c) *(that the [will / codicil] was witnessed in the manner required by law;)

(d) *(that the document was intended by the decedent to be [his / her] will and transferred [his / her] property after death and not during [his / her] lifetime;)

(e) *(by clear and convincing evidence that the decedent intended the document or writing to constitute [a will / a partial or complete revocation of a will / an addition to or alteration of a will / a partial or complete revival of [a formerly revoked will / a formerly revoked portion of the will]].)

On the other hand, the contestant has the burden of proving—

(a) *(that the will was the result of undue influence;)

(b) *(that the decedent did not have the mental capacity to make a will;)

(c) *(that the will was the result of an insane delusion;)

(d) *(that the will was revoked by [the decedent / another person at the direction of and in the conscious presence of the decedent];)

(e) *(that the will was procured as a result of fraud.)

Your verdict will be that the will is valid if you find all of the following:

(a) *(it is a holographic will as defined by law;)

(b) *(it was signed by [the decedent / another person at decedent's direction and in [his / her] conscious presence];)

(c) *(it was witnessed in the manner required by law;)

(d) *(the document was intended by the decedent to be [his / her] will and to transfer [his / her] property after death and not during [his / her] lifetime;)

(e) *(the proponent has proved by clear and convincing evidence that the decedent intended the document or writing to constitute [a will / a partial or complete revocation of a will / an addition to or alteration of a will / a partial

or complete revival of [a formerly revoked will / a formerly revoked portion of the will]];)

(f) *(it was not the result of undue influence;)

(g) *(the decedent did have the mental capacity to make a will;)

(h) *(it was not the result of an insane delusion;)

(i) *(it was not revoked by [the decedent / another person in the conscious presence of and at the direction of the decedent];)

(j) *(it was not procured as the result of fraud.)

Your verdict will be that the will is not valid if you find one or more of the following:

(a) *(it is not a holographic will as defined by law;)

(b) *(it was not signed by [the decedent / another person at the direction of and in the conscious presence of the decedent];)

(c) *(it was not witnessed in the manner required by law;)

(d) *(the document was not intended by the decedent to be [his / her] will and to transfer [his / her] property after death and not during [his / her] lifetime;)

(e) *(the proponent has not proved by clear and convincing evidence that the decedent intended the document or writing to constitute [a will / a partial or complete revocation of a will / an addition to or alteration of a will / a partial or complete revival of [a formerly revoked will / a formerly revoked portion of the will]];)

(f) *(it was the result of undue influence;)

(g) *(the decedent did not have the mental capacity to make a will;)

(h) *(it was the result of an insane delusion;)

(i) *(it was revoked by [the decedent / another person in the conscious presence of and at the direction of the decedent];)

(j) *(it was procured as the result of fraud.)

Note on Use

*The court should select from the alphabetical listings only those matters that are issues in the case.

The instruction may have to be modified if partial invalidation of a will, such as partial revocation, is an issue.

This instruction must be modified where a lost, destroyed, or otherwise unavailable will is involved. For guidance, see M Civ JI 220.05.

Comment

MCL 700.3407(b), (c) specifies the issues on which the contestant or proponent has the burden of proof.

History

M Civ JI 170.51 was added January 1984. Amended March 2001.

Chapter 171: Mental Illness

M Civ JI 171.01 Mental Illness: Involuntary Treatment—Defining Legal Names of Parties and Counsel 812

M Civ JI 171.02 Mental Illness: Involuntary Treatment—Elements and Burden of Proof 813

M Civ JI 171.01 Mental Illness: Involuntary Treatment—Defining Legal Names of Parties and Counsel

This case involves a petition to determine whether [*name of respondent*] is a person requiring treatment as defined by the Michigan Mental Health Code.

The person who brings the petition is called the petitioner. The petitioner is [*state name and indicate where seated*]. The attorney for the petitioner is [*state attorney's name and indicate where seated*]. The individual who is alleged to be a person requiring treatment is called the respondent. The respondent is [*state respondent's name and indicate where seated*]. A respondent is one who responds to a petition. The attorney for the respondent is [*state attorney's name and indicate where seated*]. [*If any other persons are at the counsel table, identify them and describe their function*.]

Note on Use

In hearings for involuntary hospitalization, involuntary treatment or for discharge, this instruction should be substituted for M Civ JI 1.02.

In the case of a hearing on a petition for discharge, this instruction must be modified to show that the alleged person requiring treatment is the petitioner.

History

M Civ JI 171.01 was added May 1984.

M Civ JI 171.02 Mental Illness: Involuntary Treatment—Elements and Burden of Proof

Two requirements must be met for you to find that an individual is a person requiring treatment.

First, the person must be mentally ill. Mentally ill means that the person suffers from a substantial disorder of thought or mood which significantly impairs [his / her] judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life.

However, mental illness is not the only requirement.

The second requirement is that the person, as a result of that mental illness, is subject to one or more of the following conditions:

(a) the person can reasonably be expected within the near future to intentionally or unintentionally seriously physically injure [himself / herself] or another person and has engaged in an act or acts or made significant threats that substantially support this expectation, or

(b) the person is unable to attend to those of [his / her] basic physical needs such as food, clothing or shelter, which must be attended to in order for the person to avoid serious harm in the near future; and the person has demonstrated that inability by failing to attend to those basic physical needs, or

(c) the person's judgment is so impaired that [he / she] is unable to understand [his / her] need for treatment and the person's continued behavior as a result of mental illness can reasonably be expected, on the basis of competent clinical opinion, to result in significant physical harm to [himself / herself] or others, or

(d) the person's understanding of the need for treatment is impaired to the point that:

(i) [he /she] is unlikely to participate in treatment voluntarily, and

(ii) [he / she] is currently noncompliant with treatment that has been recommended by a mental health professional and that has been determined to be necessary to prevent a relapse or harmful deterioration of [his/ her] condition, and

(iii) [his / her] noncompliance with treatment has been a factor in [his / her] placement in a psychiatric hospital, prison, or jail at least 2 times within the last 48 months or whose noncompliance with treatment has been a factor in [his / her] committing 1 or more acts, attempts, or threats of serious violent behavior within the last 48 months.

An individual who meets both requirements is considered to be "a person requiring treatment."

The petitioner has the burden of proving by clear and convincing evidence that the respondent is a person requiring treatment.

If you find that the petitioner has met [his / her] burden of proving that the respondent is a person requiring treatment, your verdict will be:

"We find that the respondent is a person requiring treatment."

If you find that the petitioner has not met [his / her] burden of proving that the respondent is a person requiring treatment, your verdict will be:

"We do not find that the respondent is a person requiring treatment."

Note on Use

In the case of a hearing on a petition for discharge, this instruction must be modified to show that the alleged person requiring treatment is the petitioner.

If there is evidence of senility, epilepsy, alcoholism or drug dependence, to determine if this instruction should be given, see §401(2) of the Mental Health Code, MCL 330.1401(2).

This instruction should be preceded by the definition of clear and convincing evidence in M Civ JI 8.01.

Comment

See MCL 330.1401 for the definition of "person requiring treatment," and MCL 330.1400(g) for the definition of "mental illness."

This instruction is designed for use in any of four types of hearings under the Mental Health Code. See MCL 330.1452.

The first type of hearing is initiated by a petition or application to the probate court for involuntary mental health treatment of a person. The hospitalization portion of an initial order may not exceed 60 days, and alternative treatment or combination of alternative treatment and hospitalization may not exceed 90 days. MCL 330.1472a(1). The person may not be retained beyond the expiration of the initial order without a further hearing.

The second hearing involves a petition by the hospital director or alternative treatment supervisor that asserts that the person continues to be a person requiring treatment and requests further hospitalization for a period of not more than 90 days, alternative treatment, or a combination of them for a period of not more than one year. MCL 330.1472a(2). The person may not be retained beyond the expiration of the second order without a third hearing. At the third hearing, the court may issue a continuing order of hospitalization for not more than one year, a continuing order of alternative treatment

for not more than one year, or a continuing order of combined hospitalization and alternative treatment for not more than one year but the hospitalization portion of a combined order may not exceed 90 days. MCL 330.1472a(3). Succeeding continuing orders for involuntary mental health treatment may not exceed one year. MCL 330.1472a(4).

After a continuing (one-year) order of involuntary mental health treatment, the hospital director or alternative treatment program supervisor must review the person's status and report it to the court and notify the person, his or her attorney, his or her guardian, or a person designated by the individual, as well as other enumerated persons every six months. MCL 330.1482, and .1483. If the report concludes that the person continues to require treatment, the person is entitled to challenge it in a hearing on a petition for discharge. MCL 330.1484.

In each of these hearings, the person is entitled to have the question whether he or she requires treatment heard by a jury. MCL 330.1458; *In re Wagstaff*, 93 Mich App 755; 287 NW2d 339 (1979). In each type of hearing, it must be shown that the person is a "person requiring treatment" as that term is defined in the statute. MCL 330.1401. The standard of "person requiring treatment" applies equally to continuing orders and the initial order. *People ex rel Book v Hooker*, 83 Mich App 495; 268 NW2d 698 (1978). The burden is on the petitioner (or the hospital director in the case of a petition for discharge) to meet this standard by clear and convincing evidence. MCL 330.1465; *Addington v Texas*, 441 US 418; 99 S Ct 1804; 60 L Ed 2d 323 (1979).

Once the jury determines that the person is a "person requiring treatment," the judge determines the appropriate treatment, and the person has no right to have the jury determine appropriate treatment or hospitalization. *In re Portus*, 142 Mich App 799; 371 NW2d 871 (1985).

History

Added May 1984. Amended June 2000, July 2012.

Chapter 172: Guardians and Conservators

M Civ JI 172.01 Appointment of Guardian or Conservator or Termination of Guardianship or Conservatorship: Defining Legal Names of Parties and Counsel 817

M Civ JI 172.02 Appointment of Guardian of an Adult 818

M Civ JI 172.03 Termination of Guardianship of an Adult 819

M Civ JI 172.11 Appointment of Conservator of an Adult 820

M Civ JI 172.12 Termination of Conservatorship of an Adult 821

M Civ JI 172.01 Appointment of Guardian or Conservator or Termination of Guardianship or Conservatorship: Defining Legal Names of Parties and Counsel

This is a proceeding to determine whether [a [guardian / conservator] should be appointed for [*name of respondent*] / *a [guardianship / conservatorship] should be ended for [*name of incapacitated individual / name of protected person*]].

The person seeking [the appointment of a [guardian / conservator] / *to end the [guardianship / conservatorship]] is called the petitioner. The petitioner is [*state name and indicate where seated*]. The attorney for the petitioner is [*state attorney's name and indicate where seated*]. The person [who is alleged to be the person requiring a [guardian / conservator] / *who does not agree that the [guardianship / conservatorship] should end] is called the respondent. The respondent is [*state respondent's name and indicate where seated*]. A respondent is one who responds to a petition. The attorney for the respondent is [*state attorney's name and indicate where seated*]. [*If any other persons are at the counsel table, identify them and describe their function*.]

Note on Use

In a hearing for the appointment of a guardian or conservator or in a hearing for the termination of a guardianship or conservatorship, this instruction should be substituted for M Civ JI 1.02.

*If the hearing is for termination of the guardianship or conservatorship, the alternatives preceded by the asterisks should be used.

History

M Civ JI 172.01 was added January 1985. Amended June 2000.

M Civ JI 172.02 Appointment of Guardian of an Adult

A guardian may be appointed by the court for [*name of respondent*] if the petitioner proves by clear and convincing evidence that:

(a) [*name of respondent*] is an incapacitated person and

(b) a guardian is necessary as a means of providing continuing care and supervision of [*name of respondent*].

An incapacitated person is someone who is impaired by reason of [mental illness / mental deficiency / physical illness or disability / chronic use of drugs / chronic intoxication / [*other cause*]]; to the extent that [he / she] lacks sufficient understanding or capacity to make or communicate informed decisions.

The court will furnish a Special Verdict Form to assist you in your duties. Your answers to the questions in the Special Verdict Form will assist the court in making its final disposition in this case.

Note on Use

This instruction is not to be used for the appointment of a guardian of a minor (see MCL 700.5204 et seq.) or the appointment of a guardian of a developmentally disabled person (see MCL 330.1600 et seq.).

This instruction should be preceded by the definition of clear and convincing evidence in M Civ JI 8.01.

Comment

MCL 700.1105(a), .5303, .5304, .5306.

Mental illness is defined in MCL 330.1400(g).

1998 PA 386, the Estates and Protected Individuals Code (EPIC), changed the term "legally incapacitated person" in prior law (MCL 700.8) to "incapacitated individual" and altered the definition by deleting the words "concerning his or her person" from the phrase "… to the extent of lacking sufficient understanding or capacity to make or communicate informed decisions." MCL 700.1105(a).

History

M Civ JI 172.02 was added January 1985. Amended January 1990, June 2000.

M Civ JI 172.03 Termination of Guardianship of an Adult

The guardianship of [*name of incapacitated individual*] will be terminated by the court unless the respondent shows by clear and convincing evidence that [*name of incapacitated individual*] continues to be an incapacitated person and that a guardian continues to be necessary as a means of providing continuing care and supervision of [*name of incapacitated individual*].

An incapacitated person is someone who is impaired by reason of [mental illness / mental deficiency / physical illness or disability / chronic use of drugs / chronic intoxication / [*other cause*]] to the extent that [he / she] lacks sufficient understanding or capacity to make or communicate informed decisions.

The court will furnish a Special Verdict Form to assist you in your duties. Your answers to the questions in the Special Verdict Form will assist the court in making its final disposition in this case.

Note on Use

This instruction is not to be used for the termination of a guardianship of a minor (see MCL 700.5204 et seq.) or the termination of a guardianship of a developmentally disabled person (see MCL 330.1600 et seq.).

This instruction should be preceded by the definition of clear and convincing evidence in M Civ JI 8.01.

Comment

MCL 700.5310. Mental illness is defined in MCL 330.1400(g).

History

M Civ JI 172.03 was added January 1985. Amended January 1990, June 2000.

M Civ JI 172.11 Appointment of Conservator of an Adult

A conservator may be appointed by the court if the petitioner proves by clear and convincing evidence that:

(a) by reason of [mental illness / mental deficiency / physical illness or disability / chronic use of drugs / chronic intoxication / confinement / detention by a foreign power / disappearance / [*other*]],

(b) [*name of respondent*] is unable to manage [his / her] property and business affairs effectively, and

(c)

(i) [*name of respondent*] has property that will be wasted or dissipated unless proper management is provided, or

(ii) money is needed for the support, care, and welfare of [*name of respondent*] or those entitled to be supported by [*name of respondent*] and that protection is necessary or desirable to obtain or provide money.

The court will furnish a Special Verdict Form to assist you in your duties. Your answers to the questions in the Special Verdict Form will assist the court in making its final disposition in this case.

Note on Use

This instruction should be preceded by the definition of clear and convincing evidence in M Civ JI 8.01.

This instruction should not be used for the appointment of a conservator for a minor's estate and affairs under MCL 700.5401(2).

Comment

MCL 700.5401(3), .5406.

Mental illness is defined in MCL 330.1400(g). Mental incompetency is discussed in *In re Swisher's Estate*, 324 Mich 643; 37 NW2d 657 (1949) and cases cited therein.

History

M Civ JI 172.11 was added January 1985. Amended June 2000.

M Civ JI 172.12 Termination of Conservatorship of an Adult

The conservatorship of [*name of protected person*] will be terminated by the court unless the respondent proves by clear and convincing evidence that:

(a) by reason of [mental illness / mental deficiency / physical illness or disability / chronic use of drugs / chronic intoxication / confinement / detention by a foreign power / disappearance / [*other*]],

(b) [*name of protected person*] is unable to manage [his / her] property and business affairs effectively.

The court will furnish a Special Verdict Form to assist you in your duties. Your answers to the questions in the Special Verdict Form will assist the court in making its final disposition in this case.

Note on Use

This instruction should be preceded by the definition of clear and convincing evidence in M Civ JI 8.01. On the applicability of the clear and convincing standard for termination of conservatorships established before April 1, 2000, see MCL 700.8101(2)(b).

This instruction should not be used for the termination of a conservatorship for a minor's estate and affairs. See MCL 700.5401(2).

Comment

MCL 700.5431.

Mental illness is defined in MCL 330.1400(g). Mental incompetency is discussed in *In re Swisher's Estate*, 324 Mich 643; 37 NW2d 657 (1949) and cases cited therein.

History

M Civ JI 172.12 was added January 1985. Amended June 2000.

Chapter 173: Bank Accounts

M Civ JI 173.01 Determination of Title to Bank Accounts—Defining Legal Names of Parties and Counsel 823

M Civ JI 173.02 Determination of Title to Bank Account..... 824

M Civ JI 173.01 Determination of Title to Bank Accounts—Defining Legal Names of Parties and Counsel

This is a proceeding to determine the ownership of (a) certain [bank account(s) / credit union account(s) / savings and loan association account(s) / [*other*]].

The person seeking to obtain ownership of the [account / accounts] is called the petitioner. The petitioner is [*state name and indicate where seated*]. The attorney for the petitioner is [*state attorney's name and indicate where seated*]. The person who claims to be the owner in opposition to the petitioner is called the respondent. The respondent is [*state respondent's name and indicate where seated*]. A respondent is one who responds to a petition. The attorney for the respondent is [*state attorney's name and indicate where seated*]. [*If any other persons are at the counsel table, identify them and describe their function*].

Note on Use

In a hearing to determine title to bank, credit union and savings and loan accounts, this instruction should be substituted for M Civ JI 1.02.

History

M Civ JI 173.01 was added October 1985.

M Civ JI 173.02 Determination of Title to Bank Account

The law provides that when a [bank account / credit union account / savings and loan association account / [*other*]] is in the name of more than one person, providing for payment to either person or to the surviving person, the balance of the money in the account upon the death of either person belongs to and becomes the property of the survivor.

However, the account does not become the property of the survivor if:

(a) [*name of decedent*] did not intend the account to become the property of the survivor, or

(b) when *the* account was opened, [*name of decedent*] did not have the mental capacity to know or understand that the account would become the property of the survivor, or

(c) [the account was opened / the survivor's name was added to the account] as a result of fraud, or

(d) [the account was opened / the survivor's name was added to the account] as a result of undue influence.

The petitioner has the burden of proving that [[*name of decedent*] did not intend the account to become the property of the survivor / [*name of decedent*] did not have the mental capacity to know or understand that the account would become the property of the survivor / the account was opened as a result of fraud / the survivor's name was added to the account as a result of fraud / the account was opened as a result of undue influence / the survivor's name was added to the account as a result of undue influence].

Note on Use

This instruction must be modified in cases where proof by clear and convincing evidence is required. See MCL 490.58 (credit union accounts). The definition of clear and convincing evidence is found in M Civ JI 8.01.

The Michigan statute on savings and loan joint accounts makes the opening of such account "conclusive evidence" of the intent of the deceased to vest title in the survivor. In such a case, subsections a and b of this instruction would not be applicable.

This instruction should be accompanied by M Civ JI 170.46, which defines "fraud," or M Civ JI 170.44, which defines "undue influence," if they are applicable. However, those instructions should be modified to substitute a reference to bank, credit union or savings and loan accounts whenever those instructions refer to a will.

Comment

Joint bank accounts are subject to statutory regulation. See MCL 487.703, (bank and trust companies); MCL 490.52, .56 (credit unions); MCL 487.711 et seq. (statutory joint accounts).

See also *Bannasch v Bartholomew*, 350 Mich 546; 87 NW2d 78 (1957); *Senauit v Barr*, 53 Mich App 525; 220 NW2d 81 (1974); *Snow v National Bank of Ludington*, 16 Mich App 595; 168 NW2d 482 (1969).

An action brought after the death of a joint tenant to recover monies in a joint bank account may be brought at law or by a suit in equity for an accounting. *Mineau v Boisclair*, 323 Mich 64; 34 NW2d 556 (1948). Where the suit is in equity, there is no right to a jury trial. *Jacques v Jacques*, 352 Mich 127; 89 NW2d 451 (1958).

History

M Civ JI 173.02 was added October 1985.

Chapter 174: Felonious and Intentional Killing

M Civ JI 174.01 Felonious and Intentional Killing—Defining Legal Names of Parties and Counsel . 827
M Civ JI 174.02 Felonious and Intentional Killing—Definition 829
M Civ JI 174.03 Felonious and Intentional Killing: Aiding and Abetting—Definition 831
M Civ JI 174.11 Felonious and Intentional Killing: Self-Defense—Definition 833
M Civ JI 174.12 Felonious and Intentional Killing: Defense of Others—Definition 835
M Civ JI 174.13 Felonious and Intentional Killing: Legal Insanity—Definition 836
M Civ JI 174.14 Felonious and Intentional Killing: Accident—Definition..... 837

M Civ JI 174.01 Felonious and Intentional Killing—Defining Legal Names of Parties and Counsel

This is a proceeding to determine whether [*name of respondent*] did or did not [feloniously and intentionally kill / aid and abet in the felonious and intentional killing of] [*name of decedent*]], and whether [*name of respondent*] is or is not entitled to:

(a) *(receive any benefits under the last will and testament of [*name of decedent*])

(b) *(receive or inherit any benefit or property by reason of the death of [*name of decedent*])

(c) *(succeed to the full and complete ownership of [a joint bank account / joint bank accounts] owned jointly between [*name of decedent*] and [*name of respondent*])

(d) *(succeed to the full and complete ownership of the real estate owned jointly between [*name of decedent*] and [*name of respondent*])

(e) *(succeed to the full and complete ownership of [stock certificates / bonds / debentures / [*other*]] owned jointly between [*name of decedent*] and [*name of respondent*])

(f) *(receive any benefit, payment or proceeds of any kind as the beneficiary or the person designated to receive such payment on [a policy / policies] of life insurance)

(g) *(receive any benefit, payment or proceeds of any kind by reason of an agreement or contract [*describe agreement or contract in simple terms*] where [*name of respondent*] was to be paid or receive benefits at the death of [*name of decedent*])

(h) *(acquire, receive or benefit from any property of any kind because of the death of [*name of decedent*])

(i) *(receive a disposition or appointment of property / or / exercise any power of appointment] made by [*name of decedent*] in [*describe governing instrument*])

(j) *(serve as [personal representative/ trustee/ other fiduciary or representative capacity] as nominated by [*name of decendent*] in [*describe governing instrument*])

The person who claims that [*name of respondent*] is not entitled to the benefit or property is called the petitioner. The term "decedent" is used to refer to the person who is deceased. The petitioner is [*state name and title, e.g., personal representative of*

estate, and indicate where seated]. The attorney for the petitioner is [*state name and indicate where seated*]. The person who claims to be entitled to the benefit or property is called the respondent. A respondent is one who responds to a petition. The respondent is [*state name and indicate where seated*]. The attorney for the respondent is [*state name and indicate where seated*]. [*If any other persons are seated at the counsel table, identify them and describe their function*].

Note on Use

*The Court should choose among subsections a through j those that are applicable to the case.

The term "fiduciary" is defined in MCL 700.1104(e).

In felonious and intentional killing cases, this instruction should be substituted for M Civ JI 1.02.

Comment

See MCL 700.2803. The current statute, enacted as part of the Estates and Protected Individuals Code that took effect April 1, 2000, adds a provision that a felonious and intentional killing revokes certain revocable provisions made by a decedent in a governing instrument regarding the killer: a) disposition or appointment of property; b) provision conferring a general or nongeneral power of appointment; and c) nomination or appointment to serve in a fiduciary or representative capacity. MCL 700.2803(2)(a).

The predecessor statute explicitly precluded sharing in proceeds of a wrongful death action (MCL 700.251(4)). The current statute does not name wrongful death proceeds, but under the residual provision (MCL 700.2803(5)) the killer is precluded from any wrongful acquisition of property or interest. Also, prior to the enactment of the predecessor statute, the courts applied the common law principle that a person may not benefit from his or her own wrong. *Garwols v Bankers Trust Co*, 251 Mich 420; 232 NW 239 (1930).

History

M Civ JI 174.01 was added February 1986. Amended December 1, 2002.

M Civ JI 174.02 Felonious and Intentional Killing—Definition

A person commits a felonious and intentional killing if [he / she]:

(a) death or in great and serious bodily injury, or

(b) commits an act that causes the death of another and commits the act intending that it result in knowingly creates a situation that has a very high risk of death with the knowledge that it would probably cause death or great and serious bodily injury and commits the act that causes the death of another.

However, the killing is not felonious if the person committing the act has a valid defense, such as:

(a) *(self-defense. [*Insert M Civ JI 174.11 Felonious and Intentional Killing: Self-defense—Definition*])

(b) *(defense of another. [*Insert M Civ JI 174.12 Felonious and Intentional Killing: Defense of Others—Definition*])

(c) *(legal insanity. [*Insert M Civ JI 174.13 Felonious and Intentional Killing: Legal Insanity—Definition*])

(d) *(accident. [*Insert M Civ JI 174.14 Felonious and Intentional Killing: Accident—Definition*])

(e) *(other defense).

The petitioner has the burden of proving that the respondent feloniously and intentionally killed [*name of decedent*].

The respondent has the burden of proving the defense of [self-defense / defense of others / legal insanity / accident / (*other defense*)].

Note on Use

*The court should select the defense or defenses that are applicable.

This instruction should be preceded by an instruction on the preponderance of the evidence standard as stated in M Civ JI 8.01 Meaning of Burden of Proof.

Comment

See MCL 700.2803. Under both the current statute, MCL 700.2803(6) enacted as part of the Estates and Protected Individuals Code that took effect April 1, 2000, and its predecessor, MCL 700.251(6), a final judgment of conviction conclusively establishes a felonious and intentional killing, but

in the absence of a conviction the determination of whether there has been a felonious and intentional killing is made using a preponderance of evidence standard. In *Metropolitan Life Ins Co v Reist*, 167 Mich App 112; 421 NW2d 592 (1988) decided under the predecessor statute (MCL 700.251), the appellate court decided that summary disposition was improper where there were genuine issues of material fact about motive, opportunity and credibility of the wife who claimed her husband's death was accidental. Cases decided under common law prior to the enactment of the predecessor statute include *Goldsmith v Pearce*, 345 Mich 146; 75 NW2d 810 (1956); *Budwit v Herr*, 339 Mich 265; 63 NW2d 841 (1954); and *Garwols v Bankers Trust Co*, 251 Mich 420; 232 NW 239 (1930).

See *People v Dykhouse*, 418 Mich 488, 495; 345 NW2d 150 (1984) for a discussion of first and second-degree murder. See also the Commentary to CJI2d 16.5 Second-degree Murder.

History

M Civ JI 174.02 was added February 1986. Amended December 1, 2002.

M Civ JI 174.03 Felonious and Intentional Killing: Aiding and Abetting—Definition

*[In this case it has already been determined that [*name of killer*] feloniously and intentionally killed [*name of decedent*], and you must determine whether [*name of respondent*) aided and abetted in that killing. / In this case you must determine whether there was a felonious and intentional killing and whether [*name of respondent*] aided and abetted in that felonious and intentional killing.]

(a) To aid and abet means to encourage or assist. Aiding and abetting includes all forms of assistance rendered to the one who actually caused the death, and it includes all words or deeds that may support, encourage or incite the act of causing the death. It does not matter how much assistance or encouragement is given, so long as it has the effect of inducing the death of the deceased.

(b) **(Aiding and abetting also includes being present or available to render assistance if necessary, although the person's mere presence at the scene, in and of itself, is not sufficient to make a person an aider and abettor.)

(c) The aider and abettor must possess the following intent or know that the one who caused the death possessed the following intent:

(i) to kill, or
(ii) to cause great and serious bodily injury, or
(iii) to create a situation that has a very high risk of death or great and serious bodily injury with the knowledge that it would probably cause death or great and serious bodily injury.

The petitioner has the burden of proving that [respondent aided and abetted in the killing of [*name of decedent*] / [*name of decedent*] was feloniously and intentionally killed and the respondent aided and abetted in the killing].

Note on Use

*If there has been a final judgment of conviction of the killer, the first sentence in brackets should be used. If there has not been a final judgment of conviction of the killer, the second sentence in brackets should be used, and this instruction should be preceded by M Civ JI 174.02 Felonious and Intentional Killing—Definition. MCL 700.2803(6).

**This section should be used only if applicable.

This instruction should be preceded by an instruction on the preponderance of the evidence standard as stated in M Civ JI 8.01 Meaning of Burden of Proof. See Comment to M Civ JI 174.02 Felonious and Intentional Killing—Definition.

Comment

See MCL 700.2803. While the current statute does not use the words "aids and abets the killing" as did the predecessor statute (MCL 700.251), use of the phrase "criminally accountable" in MCL 700.2803(6) is intended to include both a direct perpetrator as well as an accomplice or co-conspirator. See the comment to Section 2-803 of the Uniform Probate Code (UPC) (1990). (MCL 700.2803(6) is taken from UPC 2-803(g). Also, under Michigan criminal law the distinction between principal and accessory is eliminated. MCL 767.39.

See, *People v Palmer*, 392 Mich 370; 220 NW2d 393 (1974) (aid and abet defined); *People v Simmons*, 134 Mich App 779; 352 NW2d 275 (1984) (required mens rea). See also the Commentary to CJI2d 8.1 Aiding and Abetting, CJI2d 8.4 Inducement, and CJI2d 8.5 Mere Presence Insufficient.

History

M Civ JI 174.03 was added February 1986. Amended December 1, 2002.

M Civ JI 174.11 Felonious and Intentional Killing: Self-Defense—Definition

The killing was in self-defense if, at the time of the act, all of the following existed:

(a) [*Name of respondent*] honestly and reasonably believed that [he / she] was in danger of being killed or receiving serious bodily harm.

(b) Respondent honestly and reasonably believed that the use of force was immediately necessary to defend [himself / herself] from this danger.

(c) Respondent used only the amount of force that appeared to [him / her] necessary at the time to defend [himself / herself] from this danger.

Although [he / she] may have been mistaken as to the extent of the actual danger, [he / she] is to be judged by the circumstances as they appeared to [him / her] at the time of the act.

*(The law requires a person to avoid using deadly force if [he / she] can safely do so. The respondent was required to retreat if it appeared to [him / her] safe to do so. However, the respondent was not required to retreat if it did not appear to [him / her] safe to do so.)

*(The respondent was not required to retreat if [*name of decedent*] [assaulted the respondent in the respondent's own home / forcibly entered the home of the respondent].)

*(A person who begins an assault upon another [with deadly force / with a dangerous or deadly weapon] cannot claim the right of self-defense. However, if [he / she] has withdrawn from the fight in good faith and clearly informed the other person of [his / her] desire for peace and an end to the fight, and the other person continues the assault or resumes it at a later time, the respondent has the same rights of self-defense as any other person and is justified in using force to save [himself / herself] from imminent bodily harm.)

*(A person who [assaults another with fists or a nondeadly weapon / insults another with words / trespasses upon another's property / attempts to take another's property in a nonviolent manner] does not lose [his / her] right of self-defense by such actions and, if assaulted with a deadly weapon, may lawfully act in self-defense.)

Note on Use

*These paragraphs should be used only if applicable to the facts of the case.

This instruction should be inserted in the second section a of M Civ JI 174.02 if applicable.

Comment

See *People v Heflin* (*People v Landrum*), 434 Mich 482, 502-503; 456 NW2d 10 (1990). See also the Commentary to CJI2d 7.15 Use of Deadly Force in Self-Defense; CJI2d 7.16 Duty to Retreat to Avoid Using Deadly Force; CJI2d 7.17 No Duty to Retreat While in Own Dwelling; CJI2d 7.18 Deadly Aggressor-Withdrawal; and CJI2d 7.19 Nondeadly Aggressor Assaulted with Deadly Force.

History

M Civ JI 174.11 was added February 1986. Amended December 1, 2002.

M Civ JI 174.12 Felonious and Intentional Killing: Defense of Others—Definition

A killing is in defense of another if, at the time of the act, all of the following existed:

(a) [*Name of respondent*] honestly and reasonably believed that [*name of person defended*] was in danger of being killed or of receiving serious bodily harm.

(b) Respondent honestly and reasonably believed that the use of force was immediately necessary to defend [*name of person defended*] from this danger.

(c) Respondent used only the amount of force that appeared to [him / her] necessary at the time to defend [*name of person defended*] from this danger.

Although [he / she] may have been mistaken as to the extent of the actual danger, [he / she] is to be judged by the circumstances as they appeared to [him / her] at the time of the act.

Note on Use

This instruction should be inserted in the second section b of M Civ JI 174.02 if applicable.

Comment

See *People v Heflin (People v Landrum),* 434 Mich 482, 502-503; 456 NW2d 10 (1990). See also the Commentary to CJI2d 7.21 Defense of Others-Deadly Force and CJI2d 7.15 Use of Deadly Force in Self-Defense.

History

M Civ JI 174.12 was added February 1986. Amended December 1, 2002.

M Civ JI 174.13 Felonious and Intentional Killing: Legal Insanity—Definition

[*Name of respondent*] has a valid defense if, at the time [he / she] caused the death of [*name of decedent*] [he / she] was legally insane.

[*Name of respondent*] was legally insane if, as a result of [mental illness / and / or / mental retardation], [he / she] lacked substantial capacity either to appreciate the nature and quality or the wrongfulness of [his / her] conduct or to conform [his / her] conduct to the requirements of law.

However, [*name of respondent*] was legally sane if:

(a) [he / she] was not mentally ill or mentally retarded, or

(b) despite [mental illness / and / or / mental retardation], [*name of respondent*] possessed substantial capacity both to appreciate the nature and quality and the wrongfulness of [his / her] conduct and to conform [his / her] conduct to the requirements of law.

*("Mental illness" means a substantial disorder of thought or mood that significantly impairs a person's judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life.)

*("Mental retardation" means significantly subaverage general intellectual functioning that originates during the developmental period and is associated with impairment in adaptive behavior.)

*(If [*name of respondent*] was under the influence of voluntarily consumed or injected alcohol or controlled substances at the time of the alleged killing, [he / she] is not considered to have been legally insane solely because of being under the influence of the alcohol or controlled substances.)

Note on Use

*The court should select the paragraphs that are applicable to the case. This instruction should be inserted in section c of M Civ JI 174.02 if applicable.

Comment

See MCL 768.21a. (legal insanity); MCL 330.1400(g) (mental illness); MCL 330.2001a(6) (mental retardation). See also the Commentary to CJI2d 7.11 Legal Insanity; Mental Illness; Mental Retardation; Burden of Proof.

History

M Civ JI 174.13 was added February 1986. Amended December 1, 2002.

M Civ JI 174.14 Felonious and Intentional Killing: Accident—Definition

An accident is anything that happens that is not anticipated, not foreseen and not expected, and takes place without design or intention.

Note on Use

This instruction should be inserted in section d of M Civ JI 174.02 if applicable.

Comment

See *Guerdon Industries, Inc v Fidelity & Casualty Co of New York*, 371 Mich 12; 123 NW2d 143 (1963); *Brant v Citizens Mutual Automobile Insurance Co*, 4 Mich App 596; 145 NW2d 410 (1966).

History

M Civ JI 174.14 was added February 1986. Amended December 1, 2002.

Chapter 175: Pretermitted Heirs

M Civ JI 175.01 Pretermitted Heirs—Defining Legal Names of Parties and Counsel 839

M Civ JI 175.02 Omission of Child or Issue of Deceased Child in Will As a Result of Mistake or Accident 840

M Civ JI 175.11 Omission of Spouse in Will As a Result of Oversight or Mistake 841

M Civ JI 175.12 Omission of Spouse in Will Made Prior to Marriage Where There Are Transfers Made in Lieu of Will Provision 842

M Civ JI 175.01 Pretermitted Heirs—Defining Legal Names of Parties and Counsel

Caution: The instructions in this chapter should be used only for estates of decedents dying before April 1, 2000, the effective date of the Estates and Protected Individuals Code (EPIC). MCL 700.8101(a), (2)(a). See the instructions in chapter 178 for estates of decedents dying on or after April 1, 2000.

This is a proceeding to determine whether [*name of child / name of other issue / name of husband / name of wife*] is entitled to the same share of [*name of decedent*]'s estate that [he / she] would have received if [*name of decedent*] died without a will.

The person seeking the share of the decedent [*name of decedent*]'s estate is called the petitioner. The petitioner is [*state name and indicate where seated*]. The attorney for the petitioner is [*state attorney's name and indicate where seated*]. The person who claims that [*name of child / name of other issue / name of husband / name of wife*] is not entitled to the same share of [*name of decedent*]'s estate that [he / she] would have received if [*name of decedent*] died without a will is called the respondent. The respondent is [*state respondent's name and indicate where seated*]. A respondent is one who responds to a petition. The attorney for the respondent is [*state attorney's name and indicate where seated*]. [*If any other persons are at the counsel table, identify them and describe their function*].

Note on Use

Caution: This instruction should be used only for estates of decedents dying before April 1, 2000, the effective date of the Estates and Protected Individuals Code (EPIC). MCL 700.8101(1), (2)(a). See the instructions in chapter 178 for estates of decedents dying on or after April 1, 2000.

In pretermitted heirs cases for estates of decedents dying before April 1, 2000, this instruction should be substituted for M Civ JI 1.02.

History

M Civ JI 175.01 was added February 1986.

M Civ JI 175.02 Omission of Child or Issue of Deceased Child in Will As a Result of Mistake or Accident

Caution: The instructions in this chapter should be used only for estates of decedents dying before April 1, 2000, the effective date of the Estates and Protected Individuals Code (EPIC). MCL 700.8101(a), (2)(a). See the instructions in chapter 178 for estates of decedents dying on or after April 1, 2000.

The law provides that if a decedent fails to provide in [his / her] will for any of [his / her] [children / [**other issue*]], and if it appears that the omission was not intentional, but was made as a result of a mistake or accident, the [child / [**other issue*]] is entitled to the same share of the decedent's estate that [he / she] would have received if the decedent died without a will.

The petitioner has the burden of proving that the omission of [*name of child / *name of other issue*] from the will of [*name of decedent*] was not intentional, but was as a result of a mistake or accident.

You must determine whether the omission was intentional or whether it was made as a result of a mistake or accident. In making this determination, you may consider the provisions of the will and all of the surrounding circumstances.

Note on Use

Caution: This instruction should be used only for estates of decedents dying before April 1, 2000, the effective date of the Estates and Protected Individuals Code (EPIC). MCL 700.8101(1), (2)(a). See the instructions in chapter 178 for estates of decedents dying on or after April 1, 2000.

*When this instruction is used, if the omitted person is the issue of a deceased child, the appropriate relationship (i.e., grandchild, great-grandchild) should be inserted.

Comment

See MCL 700.127(2).

See *In Re Estate of Stebbins*, 94 Mich 304; 54 NW 159 (1892); *Bachinski v Bachinski's Estate*, 152 Mich 693; 116 NW 556 (1908). *O'Neall v Her*, 254 Mich 631; 236 NW 890 (1931); *In re Potts' Estate*, 304 Mich 47; 7 NW2d 217 (1942); and *In re Karch's Estate*, 311 Mich 158; 18 NW2d 410 (1945).

History

M Civ JI 175.02 was added February 1986.

M Civ JI 175.11 Omission of Spouse in Will As a Result of Oversight or Mistake

Caution: The instructions in this chapter should be used only for estates of decedents dying before April 1, 2000, the effective date of the Estates and Protected Individuals Code (EPIC). MCL 700.8101(a), (2)(a). See the instructions in chapter 178 for estates of decedents dying on or after April 1, 2000.

The law provides that if a decedent fails to provide in [his / her] will for [his wife / her husband], and if it appears that the omission was as a result of oversight or mistake, [his wife / her husband] is entitled to the same share of the decedent's estate that [he / she] would have received if the decedent died without a will.

The petitioner has the burden of proving that the omission of [*name of wife / name of husband*] from the will of [*name of decedent*] was as a result of oversight or mistake.

You must determine whether the omission was as a result of oversight or mistake. In making this determination you may consider the provisions of the will and all of the surrounding circumstances.

Note on Use

Caution: This instruction should be used only for estates of decedents dying before April 1, 2000, the effective date of the Estates and Protected Individuals Code (EPIC). MCL 700.8101(1), (2)(a). See the instructions in chapter 178 for estates of decedents dying on or after April 1, 2000.

Comment

See MCL 700.126(2).

History

M Civ JI 175.11 was added February 1986.

M Civ JI 175.12 Omission of Spouse in Will Made Prior to Marriage Where There Are Transfers Made in Lieu of Will Provision

The law provides that if a decedent fails to provide for [his wife / her husband] to whom [he / she] was married after the execution of decedent's will, the [wife / husband] shall receive the same share of the decedent's estate that [he / she] would have received if the decedent died without a will, unless the decedent provided for [his wife / her husband] by transfers of property that were outside the will, which the decedent intended to be instead of provisions for [his wife / her husband] in [his / her] will.

The petitioner has the burden of proving that [*name of decedent*] failed to provide for [*name of spouse*] by transfer of property outside the will, or that [*name of decedent*] did not intend [that transfer / those transfers] to be instead of provisions in [his / her] will.

You must determine whether the decedent provided for [his / her] spouse by transfer of property outside the will and whether decedent intended [that transfer / those transfers] to be instead of provisions in [his / her] will. In making this determination, you may take into consideration all of the surrounding circumstances.

Note on Use

Caution: This instruction should be used only for estates of decedents dying before April 1, 2000, the effective date of the Estates and Protected Individuals Code (EPIC). MCL 700.8101(1), (2)(a). See the instructions in chapter 178 for estates of decedents dying on or after April 1, 2000.

For estates of decedents dying before April 1, 2000, this instruction should not be used if the court determines from the will itself that the omission of the spouse was intentional. MCL 700.126(1).

Comment

See MCL 700.126(1).

See *In re Cole Estate*, 120 Mich App 539; 328 NW2d 76 (1982).

History

M Civ JI 175.12 was added February 1986.

Chapter 176: Claims for Services Rendered

M Civ JI 176.01 Claim for Services Rendered—Defining Legal Names of Parties and Counsel 844
M Civ JI 176.02 Claim for Services Rendered 845

M Civ JI 176.01 Claim for Services Rendered—Defining Legal Names of Parties and Counsel

This case involves a claim against the estate of a deceased person. The person who is making a claim against the estate is called the claimant. The claimant is [*state name and indicate where seated*]. The attorney for the claimant is [*state attorney's name and indicate where seated*]. The person who contests the claim, saying that it is not a valid claim against the estate of [*name of decedent*], is called the contestant. The contestant is [*state contestant's name and indicate where seated*]. The attorney for the contestant is [*state attorney's name and indicate where seated*]. [*If any other persons are seated at the counsel table, identify them and describe their function*].

Note on Use

In claim cases, this instruction should be substituted for M Civ JI 1.02.

History

M Civ JI 176.01 was added February 1987.

M Civ JI 176.02 Claim for Services Rendered

You are to determine if the claimant has a valid claim against the estate of [*name of decedent*] for services performed. The claimant has the burden of proving each of the following:

(a) that [he / she] performed services beneficial to [*name of decedent*] or at the request of [*name of decedent*], and

(b) that [he / she] performed these services expecting to be paid, and

(c) that [*name of decedent*] accepted the benefits of these services expecting to pay the claimant.

*([If you find that / Since] the claimant and [*name of decedent*] were related by [blood / marriage], you may infer that neither the claimant nor [*name of decedent*] expected payment to be made for the services. However, you should weigh all of the evidence in determining whether the claimant and [*name of decedent*] expected payment to be made.)

†A. If you find that the claimant has proved [his / her] claim, then you must determine the reasonable value of the services. The claimant has the burden of proving the reasonable value of the services.

‡B. If you find that the claimant has proved [his / her] claim, then you must determine whether [*name of decedent*] intended to have the claimant paid after death from [his / her] estate. If you determine that [*name of decedent*] did intend to have the claimant paid after death, then you must determine the reasonable value of the claimant's services. The claimant has the burden of proving that [*name of decedent*] intended to have the claimant paid after death and the burden of proving the reasonable value of the services. If you determine that [*name of decedent*] did not intend to have the claimant paid after death out of [his / her] estate, then you must determine what services the claimant performed between [*date 6 years prior to death*] and [*date of death*], and then determine the reasonable value of the services performed during that period.

Note on Use

*If the claimant and the decedent are related by blood or marriage, or if this is an issue in the case, this paragraph should be used.

†Paragraph A is to be used in cases where it is not disputed that the services were wholly performed within six years preceding the decedent's death or where it is not disputed that the decedent intended to have the claimant paid after death out of his or her estate.

‡Paragraph B is to be used in all other cases.

Comment

For cases on the inference of services rendered gratuitously when blood relations are involved, see *Pupaza v Laity*, 268 Mich 250, 252; 256 NW 328 (1934); *In re Jorgenson's Estate*, 321 Mich 594, 598; 32 NW2d 902 (1948). See also *Widmayer v Leonard*, 422 Mich 280; 373 NW2d 538 (1985).

For the elements of a claim, see *In re Wigent's Estate*, 189 Mich 507, 512; 155 NW 577 (1915); *In re Pierson's Estate*, 282 Mich 411, 415; 276 NW 498 (1937); *In re Estate of Donley*, 3 Mich App 458, 461; 142 NW2d 898 (1966).

Regarding reasonable value, see *In re Parks' Estate*, 326 Mich 169, 174; 39 NW2d 925 (1949); *In re Mazurkiewicz's Estate*, 328 Mich 120, 124; 43 NW2d 86 (1950).

Regarding the limitation on period of recovery, see *Pupaza v Laity*, 268 Mich at 253–254; 256 NW at 329; *Lafrinere v Campbell's Estate*, 343 Mich 639, 644; 73 NW2d 295 (1955).

History

M Civ JI 176.02 was added February 1987.

Chapter 178: Pretermitted Heirs (EPIC)

Introduction 848

M Civ JI 178.01 Pretermitted Heirs: Defining Legal Names of Parties and Counsel (EPIC) 850

M Civ JI 178.02 Pretermitted Child: Will Executed Prior to Birth or Adoption of Child Omitted from Will (EPIC) 851

M Civ JI 178.03 Pretermitted Child: Omission of Living Child from Will Because of Mistaken Belief Child Is Dead (EPIC) 854

M Civ JI 178.12 Pretermitted Spouse: Will Executed Prior to Marriage (EPIC) 856

Introduction

The instructions in this chapter are to be used for estates of decedents dying on or after April 1, 2000. MCL 700.8101(1), (2)(a), (d). For decedents who died before April 1, 2000, the pretermitted heirs provisions of the Revised Probate Code are applicable, and the instructions in Chapter 175 must be used.

MCL 700.2302(1)(a)–(b), (4) set forth the share of a decedent's estate allotted to a pretermitted child:

> Sec. 2302. (1) …
>
> (a) If the testator had no child living when he or she executed the will, an omitted after-born or after-adopted child receives a share in the estate equal in value to that which the child would have received had the testator died intestate, unless the will devised all or substantially all of the estate to the other parent of the omitted child and that other parent survives the testator and is entitled to take under the will.
>
> (b) If the testator had 1 or more children living when he or she executed the will, and the will devised property or an interest in property to 1 or more of the then-living children, an omitted after-born or after-adopted child is entitled to share in the testator's estate subject to all of the following:
>
> (i) The portion of the testator's estate in which the omitted after-born or after-adopted child is entitled to share is limited to devises made to the testator's then-living children under the will.
>
> (ii) The omitted after-born or after-adopted child is entitled to receive the share of the testator's estate, as limited in subparagraph (i), that the child would have received had the testator included all omitted after-born and after-adopted children with the children to whom devises were made under the will and had given an equal share of the estate to each child.
>
> (iii) To the extent feasible, the interest granted an omitted after-born or after-adopted child under this section must be of the same character, whether equitable or legal, present or future, as that devised to the testator's then-living children under the will.
>
> (iv) In satisfying a share provided by this subdivision, devises to the testator's children who were living when the will was executed abate ratably. In abating the devises of the then-living children, the court shall preserve to the maximum extent possible the character of the testamentary plan adopted by the testator.
>
> …
>
> (4) In satisfying a share provided by subsection (1)(a), devises made by the will abate under section 3902.

MCL 700.2301(1)(a)–(c), (3) set forth the share of a decedent's estate allotted to a pretermitted spouse:

> Sec. 2301. (1) Except as provided in subsection (2), if a testator's surviving spouse marries the testator after the testator executes his or her will, the surviving spouse is entitled to receive, as an intestate share, not less than the value of the share of the estate the surviving spouse would have received if the testator had died intestate as to that portion of the testator's estate, if any, that is not any of the following:
>
> (a) Property devised to a child of the testator who was born before the testator married the surviving spouse and who is not the surviving spouse's child.
>
> (b) Property devised to a descendant of a child described in subdivision (a).
>
> (c) Property that passes under section 2603 or 2604 to a child described in subdivision (a) or to a descendant of such a child.
>
> …
>
> (3) In satisfying the share provided by this section, devises made by the will to the testator's surviving spouse, if any, are applied first, and other devises, other than a devise to a child of the testator who was born before the testator married the surviving spouse and who is not the surviving spouse's child or a devise or substitute gift under section 2603 or 2604 to a descendant of such a child, abate as provided in section 3902."

M Civ JI 178.01 Pretermitted Heirs: Defining Legal Names of Parties and Counsel (EPIC)

This is a proceeding to determine whether [*name of child / name of surviving spouse*] is entitled to a certain share of [*name of decedent*]'s estate.

The person seeking the share of the decedent [*name of decedent*]'s estate is called the petitioner. The petitioner is [*state name and indicate where seated*]. The attorney for the petitioner is [*state attorney's name and indicate where seated*]. The person who claims that [*name of child / name of surviving spouse*] is not entitled to the share of [*name of decedent*]'s estate is called the respondent. The respondent is [*state respondent's name and indicate where seated*]. A respondent is one who responds to a petition. The attorney for the respondent is [*state attorney's name and indicate where seated*]. [*If any other persons are at the counsel table, identify them and describe their function*].

Note on Use

In pretermitted heirs cases in which the provisions of the Estates and Protected Individuals Code (EPIC) apply, this instruction should be substituted for M Civ JI 1.02.

If the estate is the petitioner on a petition for determination of heirs, this instruction, the remaining pretermitted heirs instructions, and verdict forms must be modified.

History

M Civ JI 178.01 was added April 1, 2002.

M Civ JI 178.02 Pretermitted Child: Will Executed Prior to Birth or Adoption of Child Omitted from Will (EPIC)

The law provides that a child who was born or adopted after the parent executed [his / her] will and who was omitted from the will is entitled to a certain share of the deceased parent's estate. However, the child is not entitled to a share of decedent's estate if:

*(a) it appears from the will that the omission of the child was intentional, (or))

*(b) decedent provided for the child by transfer of property outside the will and intended the transfer to substitute for provision for the child in [his / her] will.)

In this case, the share of [*name of decedent*]'s estate that [*name of child*] would receive is [*describe share child would be entitled to under MCL 700.2302(1)(a) or (b)*].

The respondent has the burden of proving (either of) the following:

*(a) The will expresses an intention of [*name of decedent*] to omit [*name of child*] from the will, (or))

*(b) [*Name of decedent*] **(provided for [*name of child*] by transfer of property outside the will, and) intended that the transfer of property outside the will substitute for provision for [*name of child*] in [his / her] will.)

You must determine whether respondent has met [his / her] burden of proof.

The Court will furnish a Special Verdict Form to assist you in your duties. Your answers to the questions in the Special Verdict Form will provide the basis on which this case will be resolved.

Note on Use

*The Court should delete either subsection if it is not an issue in the case. Subsection a. should be deleted if the will is unambiguous and there is no issue for the jury. See *Hankey v French*, 281 Mich 454; 275 NW 206 (1937); *Carpenter v Snow*, 117 Mich 489; 76 NW 78 (1898).

**If the parties do not dispute the transfer or transfers of property outside the will, the Court should delete this first part of subsection b.

Decedent's intent to substitute transfers outside the will may be shown by his or her statements or reasonably inferred from the amount of the transfer or other evidence. MCL 700.2302(2)(b).

The provision of EPIC that sets forth the share of the estate allotted to a pretermitted child is reproduced in the Introduction to this chapter.

The child claiming under MCL 700.2302 must show that he or she is a child of the testator, that he or she was born or adopted after the will was executed, and that the will failed to provide for him or her. If any of these present issues of fact, this instruction must be modified.

MCL 700.2302 is taken almost verbatim from the 1990 version of the Uniform Probate Code (UPC) §2-302. The UPC comment explains that the moving party has the burden of proof on the elements of subsections (b)(1) and (b)(2) (numbered (2)(a) and (2)(b) in the Michigan statute).

Comment

MCL 700.2302.

Under EPIC there are two grounds that disqualify an after-born or after-adopted child omitted from the will from claiming pretermitted status: (1) that it appears from the will that the omission was intentional; and (2) that the testator made other provisions for the child meant to substitute for provision in the will. Prior law contained only the first of the two grounds. MCL 700.127(1).

Under prior law, any of a testator's children (and issue of a deceased child) not provided for in the will could claim pretermitted status if the omission was due to mistake or accident. MCL 700.127(2). EPIC eliminates these claims and allows a child living when the will was executed to claim pretermitted status only if the testator's sole reason for omitting the child was a belief that the child was dead. See M Civ JI 178.03 Pretermitted Child: Omission of Living Child from Will Because of Mistaken Belief Child is Dead (EPIC). EPIC also eliminated the special provision in prior law for a child who was the offspring of nonconsensual sex. MCL 700.127(3).

EPIC retains the provision of prior law precluding an omitted after-born or after-adopted child from claiming pretermitted status if "[i]t appears from the will that the omission was intentional." MCL 700.2302(2)(a). Prior law expressed this provision as "unless it is apparent from the will that it was the testator's intention not to make a provision for the child." MCL 700.127(1). In Carpenter, the court construed a substantially identical earlier statute and held that the trial court should have considered only the will on the issue whether the decedent intended to omit the after-born child and erred in considering extraneous testimony. See also *Hankey*. However, in some cases, courts have permitted extrinsic evidence to construe an ambiguity in a will. See *In re Estate of Kremlick*, 417 Mich 237; 331 NW2d 228 (1983); Anno: Admissibility of Extrinsic Evidence to Show Testator's Intention as to Omission of Provision for Child, 88 ALR2d 616 (1963).

Like prior law, under EPIC only a child omitted from the will can claim pretermitted status. Two pre-EPIC cases have addressed the meaning of omitted. In one case, the court held that an after-adopted child was not omitted from the will where testator provided for the child in a contingent devise that failed because the contingency did not occur. *In re McPeak Estate*, 210 Mich App 410; 534 NW2d 140 (1995) (rejecting an argument that the child was omitted because the will provided for the child as a stepchild, but not as an adopted child). In another case, the court held that a child named in a will but given a mere memento was not precluded from claiming that the testator omitted to provide for her. *In re Estate of Stebbins*, 94 Mich 304; 54 NW 159 (1892).

History

M Civ JI 178.02 was added April 1, 2002.

M Civ JI 178.03 Pretermitted Child: Omission of Living Child from Will Because of Mistaken Belief Child Is Dead (EPIC)

The law provides that if at the time a decedent executed [his / her] will, [he / she] omitted from the will any of [his / her] living children solely because [he / she] mistakenly believed that the child was dead, that child is entitled to a certain share of the deceased parent's estate.

In this case, the share of [*name of decedent*]'s estate that [*name of child*] would receive is [*describe share child would be entitled to under MCL 700.2302(1)(a) or (b)*].

The petitioner has the burden of proving that:

(a) at the time [*name of decedent*] executed [his / her] will, [he / she] believed that [*name of child*] was dead, and

(b) the sole reason that [*name of decedent*] omitted [*name of child*] from the will was the mistaken belief that [*name of child*] was dead.

You must determine whether petitioner has met [his / her] burden of proof.

The Court will furnish a Special Verdict Form to assist you in your duties. Your answers to the questions in the Special Verdict Form will provide the basis on which this case will be resolved.

Note on Use

The statute setting forth the share of a pretermitted child is reproduced in the Introduction to this chapter.

Comment

See MCL 700.2302(3).

Under section 2302(3) of EPIC, a child living at the time the will was executed can claim pretermitted status only if the testator mistakenly believed that the child was dead and that was testator's sole reason for omitting the child. The mistaken belief must be the sole reason, and not one of several reasons, for the exclusion.

Under prior law, any child, issue of deceased child, or child born out of wedlock omitted from a testator's will could claim pretermitted status if the omission was not intentional but was made by mistake or accident. MCL 700.127(2). Except for a mistaken belief that a child is dead, EPIC eliminated mistake or accident as a grounds for claiming pretermitted status. EPIC also changes prior law by providing only for claims by a child, and not claims by issue of a deceased child. The definition of child in EPIC specifically excludes grandchild. MCL 700.1103(f).

Prior case law under section 127(2) of the Revised Probate Code held that decedent's intent and whether the omission was by mistake or accident are issues for the jury (*In re Estate of Stebbins*, 94 Mich 304; 54 NW 159 (1892)), and that the omitted child or issue of deceased child has the burden of proof on these issues (*In re Potts' Estate*, 304 Mich 47; 7 NW2d 217 (1942); *Brown v Blesch*, 270 Mich 576; 259 NW 331 (1935); *In re Estate of Stebbins*). The cases also held that the fact-finder is not limited to the will, but can consider extrinsic evidence on these issues. *O'Neall v Her*, 254 Mich 631; 236 NW 890 (1931); *Bachinski v Bachinski's Estate*, 152 Mich 693; 116 NW 556 (1908).

One pre-EPIC case decided that children were not omitted from a will where the will included a specific bequest for each child to be funded from a life policy even though the testator failed to make the estate the policy beneficiary. *In re Estate of Norwood*, 178 Mich App 345; 443 NW2d 798 (1989).

History

M Civ JI 178.03 was added April 1, 2002.

M Civ JI 178.12 Pretermitted Spouse: Will Executed Prior to Marriage (EPIC)

The law provides that a surviving spouse who married [her husband / his wife] after the [husband / wife] executed [his / her] will is entitled to a certain share of the deceased [husband / wife]'s estate. However, the surviving spouse is not entitled to this share of decedent's estate if:

*(a) the will was made in contemplation of the marriage, (or))

*(b) the will expresses decedent's intention that it is to be effective despite a marriage after the will is made, (or))

*(c) the decedent provided for [his wife / her husband] by transfer of property outside the will and intended the transfer to substitute for provision for [his wife / her husband] in [his / her] will.)

In this case, the share of [*name of decedent*]'s estate that [*name of surviving spouse*] would receive is the same share as [she / he] would have received if [her husband / his wife] died without a will **(except that [she / he] may not receive any part of the estate held in trust for the benefit of, or set aside by or passing under the will to [*name(s) of decedent's child / children born prior to the decedent's marriage to the surviving spouse but not the surviving spouse's child/children, or name(s) of descendant of decedent's child / children*]).

The respondent has the burden of proving (any of) the following:

*(a) the will was made in contemplation of the marriage, (or))

*(b) the will expresses an intention of [*name of decedent*] that it is to be effective despite a marriage after the will is made, (or))

*(c) [*name of decedent*] ***(provided for [*name of surviving spouse*] by transfer of property outside the will, and) intended that the transfer of property outside the will substitute for provision for [his wife / her husband] in [his / her] will.)

You must determine whether respondent has met [his / her] burden of proof.

The Court will furnish a Special Verdict Form to assist you in your duties. Your answers to the questions in the Special Verdict Form will provide the basis on which this case will be resolved.

Note on Use

*The Court should delete any subsection that is not an issue in the case. Subsection b. should be deleted if the will is not ambiguous and there is no issue for the jury.

** This phrase should be read to the jury if there is part of the estate that the surviving spouse is not eligible to share. See MCL 700.2301(1)(a)–(c). The provision of EPIC that sets forth the share of the estate allotted to a pretermitted spouse is reproduced in the Introduction to this chapter.

***If the parties do not dispute the transfer or transfers of property outside the will, the Court should delete this first part of subsection c.

The will or other evidence may be used to show that the will was made in contemplation of the marriage; decedent's intent to substitute transfers outside the will may be shown by his or her statements or reasonably inferred from the amount of the transfer or other evidence. MCL 700.2301(2)(a), (c).

EPIC states one of the grounds for denying pretermitted spouse status as: "The will expresses the intention that it is to be effective notwithstanding a subsequent marriage." MCL 700.2301(2)(b). For cases construing a similar provision in prior law, see the comment to M Civ JI 178.02 Pretermitted Child: Will Executed Prior to Birth or Adoption of Child Omitted from Will (EPIC).

The spouse claiming under MCL 700.2301 must show that he or she is the surviving spouse and that he or she married the testator after the will was executed. If either of these present issues of fact, this instruction must be modified.

MCL 700.2301 is taken almost verbatim from the 1990 version of the Uniform Probate Code (UPC) §2-301. The UPC comment explains that the moving party has the burden of proof on the exceptions contained in subsections (a)(1), (2), and (3) (numbered (2) (a), (b), and (c) in the Michigan statute).

Comment

MCL 700.2301.

The pretermitted spouse section of EPIC departs substantially from prior law. First, EPIC discards the requirement that to claim pretermitted status, the surviving spouse needs to be omitted from the will altogether. Second, under EPIC, only a spouse who married the testator after the will was executed may claim as a pretermitted spouse. Prior law permitted any surviving spouse to make a claim if his or her omission from the will was based on "oversight or mistake." Third, EPIC eliminates "oversight or mistake" as specific grounds for a claim as a pretermitted spouse.

Under prior law, where decedent's will made prior to marriage to the surviving spouse made a bequest to her as "a friend," the spouse did not meet the statutory definition of an "omitted spouse" for whom the "testator fails to provide by will" even though decedent may not have contemplated the marriage when the will was made. *In re Estate of Herbach*, 230 Mich App 276, 284, 287; 583 NW2d 541 (1998). The EPIC revision changes this result. Under EPIC, a surviving spouse who married the testator after the will was executed may claim a share as a pretermitted spouse even if he or she receives some bequest in the will unless it appears from the will or other evidence that the will was made in contemplation of the marriage, or the will indicates it is to be effective despite a subsequent marriage, or transfers outside the will are intended to substitute for a testamentary provision.

Two pre-EPIC cases involved transfers outside the will to surviving spouses: *In re Cole Estate*, 120 Mich App 539; 328 NW2d 76 (1982), and *Noble v McNerney*, 165 Mich App 586; 419 NW2d 424 (1988). In both cases, the appellate court affirmed trial court findings that the decedent did not intend any of the transfers to substitute for a testamentary disposition for the spouse. The Michigan Court of Appeals also held in Cole that a widow's right to elect a statutory share under MCL 700.282(1) (now MCL 700.2201) did not waive her right to claim a share of the estate as a pretermitted spouse.

History

M Civ JI 178.12 was added April 1, 2002. Amended July 2012.

Chapter 179: Trust Contests

Introduction 860
M Civ JI 179.01 Trust Contests: Defining Legal Names of Parties and Counsel 861
M Civ JI 179.02 Trust Contests: Definitions 862
M Civ JI 179.03 Trust Contests: Creation of a Trust 863
M Civ JI 179.04 Trust Contests: Sufficient Mental Capacity—Definition 864
M Civ JI 179.05 Trust Contests: Intention to Create a Trust 865
M Civ JI 179.06 Trust Contests: Trust Need Not Be in Writing 866
M Civ JI 179.07 Trust Contests: Cautionary Instruction as to Settlor's Right to Leave Property by a Trust 867
M Civ JI 179.10 Trust Contests: Undue Influence—Definition—Burden of Proof 868
M Civ JI 179.12 Trust Contests: Fraud in Procurement of Trust 870
M Civ JI 179.15 Trust Contests: Revocation or amendment of Trust 871
M Civ JI 179.20 Trust Contests: Burden of Proof 872
M Civ JI 179.25 Trust Contests: Existence of Presumption of Undue Influence—Burden of Proof [*Instruction Deleted*] 873

Introduction

In 2009, the Michigan Legislature enacted the Michigan Trust Code. The act took effect on April 1, 2010.

M Civ JI 179.01 Trust Contests: Defining Legal Names of Parties and Counsel

This case is a trust contest. The term settlor is used to refer to the person who created the trust. The person who claims a valid trust exists is called the proponent. The proponent is [*state name and indicate where seated*]. The attorney for the proponent is [*state attorney's name and indicate where seated*]. The person who contests the validity of the trust is called the contestant. The contestant is [*state the contestant's name and indicate where seated*]. The attorney for the contestant is [*state attorney's name and indicate where seated*]. [*If any other persons are seated at the counsel table, identify them and describe their function.*]

Note on Use

This instruction should be substituted for M Civ JI 1.02.

Comment

This instruction is substantially similar to M Civ JI 170.01

History

M Civ JI 179.01 was added June 2011.

M Civ JI 179.02 Trust Contests: Definitions

A trust is a fiduciary relationship with respect to property. The person with title to the property has certain duties to hold and deal with the property for the benefit of another person. The person who has the duties is called the trustee.

Comment

MCL 700.1107(n). *MacKenzie v Union Guardian Trust*, 262 Mich 563 (1933). Restatement Trusts, 2d, § 2.

History

M Civ JI 179.02 was added June 2011.

M Civ JI 179.03 Trust Contests: Creation of a Trust

A trust is created only if all of the following apply:

(a) the settlor had capacity to create a trust, and

(b) the settlor indicated an intention to create the trust, and

(c) [the trust beneficiary can be ascertained now or in the future / the trust is either a charitable trust or a trust for a noncharitable purpose or for the care of an animal], and

(d) the trustee has duties to perform, and

(e) the same person is not the sole trustee and sole beneficiary of all beneficial interests.

Note on Use

Use only the portion of the bracketed language that applies.

Comment

MCL 700.7402; Restatement Trusts, 3rd, §69; Restatement Trusts, 2d, §341.

History

M Civ JI 179.03 was added June 2011.

M Civ JI 179.04 Trust Contests: Sufficient Mental Capacity—Definition

A settlor had sufficient mental capacity to [create / amend / revoke] a trust if at the time [he / she] did so [he / she]:

(a) had the ability to understand that [he / she] was providing for the disposition of [his / her] property, and

(b) had the ability to know the nature and extent of [his / her] property, and

(c) knew who [his / her] closest family members were, in other words, those who would be logical recipients of [his / her] estate, and

(d) had the ability to understand in a reasonable manner the general nature and effect of [his / her] act in [creating / amending / revoking] the trust.

The contestant has the burden of proving by a preponderance of the evidence that at the time the settlor [created / amended / revoked] the trust [he / she] did not have sufficient mental capacity to do so.

Note on Use

Preponderance of the evidence is defined in M Civ JI 8.01.

Comment

MCL 700.7601, 700.2501. Restatement Property, 3rd, §8.1

History

M Civ JI 179.04 was added June 2011.

M Civ JI 179.05 Trust Contests: Intention to Create a Trust

(1) A trust may be created by any of the following:

(a) A transfer of property to another person as trustee during the settlor's lifetime or by will or other disposition taking effect upon the settlor's death.

(b) A declaration by the owner of property that the owner holds identifiable property as trustee.

(c) An exercise of a power of appointment in favor of a trustee.

(d) A promise by one person to another person, whose rights under the promise are to be held in trust for a third person.

(2) The instrument establishing the terms of a trust may be valid even if the property or an interest in property is not transferred to the trustee or made subject to the terms of the trust at the same time the instrument is signed.

Comment

MCL 700.7401.

History

M Civ JI 179.05 was added June 2011.

M Civ JI 179.06 Trust Contests: Trust Need Not Be in Writing

A trust need not be in writing to be valid, however, an oral trust and its terms may be established only by clear and convincing evidence.

Note on Use

Clear and convincing evidence is defined in M Civ JI 8.01.

Comment

MCL 700.7407

History

M Civ JI 179.06 was added June 2011.

M Civ JI 179.07 Trust Contests: Cautionary Instruction as to Settlor's Right to Leave Property by a Trust

*(The law does not require property to be given to heirs or relatives, including a settlor's spouse.) The law allows everyone who [has sufficient mental capacity / is not under undue influence / name other condition] to create a trust and dispose of the trust property as [he / she] chooses. The court and jury have no right to substitute their judgment for the judgment of the person making the trust or as to the wisdom or justice of the provisions of the trust.

Note on Use

*This sentence should be read when applicable.

Comment

This instruction is virtually identical to M Civ JI 170.04

This instruction contains cautions as to the rights of a person in the making of his or her trust. These cautions are believed necessary to prevent the often mistaken belief of most jurors that the decedent cannot disinherit heirs and other relatives by his or her trust and to prevent the jurors from improperly trying to substitute their judgment for the judgment of the maker of the trust. See *In re Allen's Estate*, 230 Mich 584 (1925).

The testator has a right to dispose of his or her property as he or she sees fit. *In re Kramer's Estate*, 324 Mich 626 (1949). The law does not require property to be disposed among the testator's heirs. *In re Fay's Estate*, 197 Mich 675 (1917). It concerns no one what a person's reasons were in his or her distribution by will. *Brown v Blesch*, 270 Mich 576 (1935). The jury has no right to substitute its judgment for the judgment of the testator. *In re Hannan's Estate*, 315 Mich 102 (1946). The jury has no right to consider that the testator did an apparent injustice in his or her will. *In re Livingston's Estate*, 295 Mich 637 (1940). While the testator's blood relations are the natural objects of his or her bounty, such bounty is not limited by blood relationship, and his or her blood relations have no natural or inherent right to his or her property. *Spratt v Spratt*, 76 Mich 384 (1889).

History

M Civ JI 179.07 was added June 2011.

M Civ JI 179.10 Trust Contests: Undue Influence—Definition—Burden of Proof

The contestant has the burden of proving by a preponderance of the evidence that there was undue influence exerted on the settlor in the [creation / amendment / revocation] of the trust.

Undue influence is influence that is so great that it overpowers the settlor's free will and prevents [him / her] from doing as [he / she] pleases with [his / her] property.

To be "undue," the influence exerted upon the settlor must be of such a degree that it overpowered the settlor's free choice and caused [him / her] to act against [his / her] own free will and to act in accordance with the will of the [person / persons] who influenced [him / her].

The influence exerted may be by [force / threats / flattery / persuasion / fraud / misrepresentation / physical coercion / moral coercion / (*other*)]. Action that results from undue influence is action that the settlor would not otherwise have taken. It disposes of the trust property in a manner different from the disposition the settlor would have made had [he / she] been free of such influence.

The word "undue" must be emphasized, because the settlor may be influenced in the disposition of the trust property by specific and direct influences without such influences becoming undue. This is true even though the trust would not have been made but for such influence. It is not improper for a [spouse / child / parent / relative / friend / housekeeper / (*other*)] to—

(1) *([advise / persuade / argue / flatter / solicit / entreat / implore],)

(2) *(appeal to the decedent's [hopes / fears / prejudices / sense of justice / sense of duty / sense of gratitude / sense of pity],

(3) *(appeal to ties of [friendship / affection / kinship],)

(4) *([(other)],)

provided the settlor's power to resist such influence is not overcome and [his / her] capacity to finally act in accordance with [his / her] own free will is not overpowered. A trust that results must be the free will and purpose of the settlor and not that of [another person / other persons].

Mere existence of the opportunity, motive or even the ability to control the free will of the settlor is not sufficient to establish that [creation / amendment / revocation] of the trust is the result of undue influence.

If you find that [*name*] exerted undue influence, then your verdict will be against the trust. If you find that [*name*] did not exert undue influence, then your verdict will be in favor of the trust.

Note on Use

*The Court should choose among subsections (1)–(4) those which are applicable to the case.

This instruction should be accompanied by M Civ JI 8.01, Definition of Burden of Proof.

Comment

This instruction is virtually identical to M Civ JI 170.44.

In re Estate of Karmey, 468 Mich 68; 658 NW2d 796 (2003); Widmayer v Leonard, 422 Mich 280; 373 NW2d 538 (1985); Kar v Hogan, 399 Mich 529; 251 NW2d 77 (1976); In re Willey Estate, 9 Mich App 245; 156 NW2d 631 (1967); In re Langlois Estate, 361 Mich 646; 106 NW2d 132 (1960); In re Paquin's Estate, 328 Mich 293; 43 NW2d 858 (1950); In re Balk's Estate, 298 Mich 303; 298 NW 779 (1941); In re Kramer's Estate, 324 Mich 626; 37 NW2d 564 (1949); In re Reed's Estate, 273 Mich 334; 263 NW 76 (1935); In re Curtis Estate, 197 Mich 473; 163 NW 944 (1917); Nelson v Wiggins, 172 Mich 191; 137 NW 623 (1912).

History

M Civ JI 179.10 was added June 2011. Amended October 2014.

M Civ JI 179.12 Trust Contests: Fraud in Procurement of Trust

A trust is not valid to the extent it was [created / amended] as a result of fraud. Fraud exists if—

(a) there was a misrepresentation of [a material fact / material facts] to the settlor, and

(b) the settlor relied on and was influenced by that misrepresentation in disposing of [his / her] property by trust.

The contestant has the burden of proving that there was fraud in the making of the trust.

Comment

This instruction is virtually identical to M Civ JI 170.46

In re Spillette Estate, 352 Mich 12 (1958); *In re Hannan's Estate*, 315 Mich 102 (1946); *In re Barth's Esta*te, 298 Mich 388 (1941).

History

M Civ JI 179.12 was added June 2011.

M Civ JI 179.15 Trust Contests: Revocation or amendment of Trust

If the settlor has sufficient mental capacity, [he / she] may revoke or amend a revocable trust by substantially complying with a method provided in the terms of the trust.

If the terms of the trust do not provide a method or the method provided in the trust is not expressly made exclusive:

(a) A written trust may be [revoked / amended] by a separate writing manifesting clear and convincing evidence of the settlor's intent to revoke or amend the trust.

(b) If the trust is an oral trust, the trust may be [revoked / amended] by any method manifesting clear and convincing evidence of the settlor's intent.

Note on Use

Clear and convincing evidence is defined in M Civ JI 8.01.

Comment

MCL 700.7602(3); MCL 700.7601.

With two exceptions, unless the terms of a trust expressly provide that the trust is irrevocable, the settlor may revoke or amend the trust if the trust was executed or restated on or after April 1, 2010. MCL 700.7602(1).

History

M Civ JI 179.15 was added June 2011.

M Civ JI 179.20 Trust Contests: Burden of Proof

The proponent has the burden of proving—

(a) that the settlor had capacity to [create / amend / revoke] a trust,

(b) that the settlor indicated an intention to [create / amend / revoke] the trust,

(c) that [the trust beneficiary can be ascertained now or in the future / the trust is either a charitable trust or a trust for a noncharitable purpose or for the care of an animal],

(d) that the trustee had duties to perform, and

(e) that the same person was not the sole trustee and sole beneficiary of all beneficial interests.

On the other hand, the contestant has the burden of proving—

(a) that the settlor did not have sufficient mental capacity to [create / amend / revoke] a trust,

(b) that the trust was [created / amended / revoked] as the result of undue influence, or

(c) that the trust was [created / amended / revoked] as a result of fraud.

Note on Use

The court should select from the alphabetical listings only those matters that are issues in the case. Use only the portion of the bracketed language that applies.

The instruction may have to be modified if partial invalidation of a trust, such as partial revocation, is an issue.

History

M Civ JI 179.20 was added June 2011.

M Civ JI 179.25 Trust Contests: Existence of Presumption of Undue Influence—Burden of Proof [*Instruction Deleted*]

The Committee deleted M Civ JI 179.25, but it is continuing to review the issue of the presumption of undue influence and how the jury is to be instructed, if at all, when that presumption has not been rebutted.

~~To establish that the settlor [created / amended / revoked] the trust as a result of undue influence, the contestant has the burden of proving all three of the following propositions:~~

~~1. that [*name*] had a fiduciary relationship with the settlor,~~

~~2. that [*name*] (or a person or interest he represented) benefited from the [creation / amendment / revocation] of the trust, and~~

~~3. that by reason of the fiduciary relationship [*name*] had an opportunity to influence the settlor in giving that benefit.~~

~~If you find that all three propositions have been proven, then the settlor's action is invalid as a result of undue influence. Otherwise, the settlor's action is not invalid as a result of undue influence.~~

~~A "fiduciary relationship" is one of inequality where a person places complete trust in another person regarding the subject matter, and the trusted person controls the subject of the relationship by reason of knowledge, resources, power, or moral authority.~~

Note on Use

In cases involving the presumption of undue influence, this instruction is applicable only where two conditions coexist: 1) the putative fiduciary has not introduced evidence to "meet" or "rebut" the presumption, i.e, the fiduciary hasn't introduced evidence tending to show that the bequest was not made as a result of undue influence, and 2) there is an issue of fact whether one or more of the three components of the presumption of undue influence exists, MRE 301; *Widmayer v Leonard*, 422 Mich 280 (1985).

Where evidence has been introduced to meet the presumption, and in cases that do not involve the presumption of undue influence, the applicable undue influence instruction is M Civ JI 179.10 Trust Contests: Undue Influence—Definition.

A presumption casts on the opposing party only the obligation to come forward with evidence opposing the presumption, and if that is done, the effect of the presumption disappears, other than to prevent a directed verdict against the party having the benefit of the presumption, and the burden of proof remains with the person claiming undue influence. MRE 301; *Widmayer, supra*. If there is no genuine

dispute that all elements of the presumption exist, and there is no evidence opposing the presumption, the party having the benefit of the presumption is entitled to a directed verdict. MRE 301; *Widmayer, supra*.

Often there will be no triable dispute on one or more of the elements of the presumption, in which case the court should not submit that element to the jury for decision. Typically, for example, there will be no dispute that the putative fiduciary benefited from the will. While it is said generally that the existence of a confidential relationship is a question of fact, *In re Kanable Estate*, 47 Mich App 299 (1973), there are a number of relationships which are fiduciary as a matter of law, e.g., principal-agent, guardian-ward, trustee-beneficiary, attorney-client, physician-patient, clergy-penitent, accountant-client, stockbroker-customer. Unless there is a dispute that the named relationship exists, it will be deemed a fiduciary relationship as a matter of law. See, *In re Estate of Karmey*, 468 Mich 68,74 fn 2,3 (2003). For that reason the definition in the instruction does not attempt to encompass all of them. A marriage relationship does not create a presumption of undue influence. *In re Estate of Karmey*.

The instruction uses the term "fiduciary relationship" instead of "confidential or fiduciary relationship" on the conclusion that the terms "fiduciary relationship" and "confidential or fiduciary relationship" have identical meanings. See, *In re Estate of Karmey*.

This instruction should be accompanied by M Civ JI 8.01, Definition of Burden of Proof.

Comment

This instruction is substantially similar to M Civ JI 170.45.

In re Estate of Karmey; Widmayer; Kar v Hogan, 399 Mich 529 (1976). See also *In re Cox Estate*, 383 Mich 108 (1970) (fiduciary relationship of attorney and clergyman); *In re Vollbrecht Estate*, 26 Mich App 430 (1970) (substantial benefit derived by charitable foundation wherein testatrix's attorney and her accountant were also trustees of foundation); *In re Spillette Estate*, 352 Mich 12 (1958); *In re Haskell's Estate*, 283 Mich 513 (1938) (will in favor of attorney upheld where testatrix obtained independent advice; presumption of undue influence rebutted); *In re Eldred's Estate*, 234 Mich 131 (1926) (doctor); *In re Hartlerode's Estate*, 183 Mich 51 (1914) (clergyman).

History

M Civ JI 179.25 was added June 2011. Deleted October 2014.

Chapter 180: Attorney Fees

M Civ JI 180.01 Attorney Fees—Defining Legal Names of Parties and Counsel 876
M Civ JI 180.02 Attorney Fees—Explanation of Statute 877
M Civ JI 180.03 Attorney Fees—Reasonable Value of Legal Services 878

M Civ JI 180.01 Attorney Fees—Defining Legal Names of Parties and Counsel

This is a proceeding to resolve a dispute over a legal fee. The person requesting legal fees is called the petitioner. The petitioner is [*state name and indicate where seated*]. The attorney for the petitioner is [*state attorney's name and indicate where seated*]. The person who objects to the requested legal fee is called the objector. The objector is [*state name and indicate where seated*]. The attorney for the objector is [*state attorney's name and indicate where seated*]. [*If any other persons are at the counsel table, identify them and describe their function*].

Note on Use

In attorney fee contest cases, this instruction should be substituted for M Civ JI 1.02.

History

M Civ JI 180.01 was added October 1986.

M Civ JI 180.02 Attorney Fees—Explanation of Statute

The law provides that a [*title of fiduciary*] may employ [an attorney / a law firm] to perform necessary legal services on behalf of the estate and that the [attorney / law firm] shall receive reasonable compensation for the legal services.

The petitioner must show that:

(a) the [attorney / law firm] performed necessary legal services on behalf of the estate, and

(b) the amount requested is reasonable.

*(In this case the only issue is whether [*select a or b above*].)

Note on Use

*This sentence should be read when there is only one issue.

Comment

An attorney may be employed by a personal representative under a will or a trustee and shall receive reasonable compensation. MCL 700.3715(w) (personal representatives), and MCL 700.7817(w) (trustees). See also MCR 5.313, Compensation of Attorneys.

Cases on the issue of whether services were performed on behalf of the estate include *In re Baldwin's Estate*, 311 Mich 288; 18 NW2d 827 (1945); *Marx v McMorran*, 136 Mich 406; 99 NW 396 (1904) (attorney fees allowed); and *In re Davis' Estate*, 312 Mich 258; 20 NW2d 181 (1945) (attorney fees disallowed).

History

M Civ JI 180.02 was added October 1986.

M Civ JI 180.03 Attorney Fees—Reasonable Value of Legal Services

Attorney fees can vary according to many factors. No one factor is controlling. In determining reasonable value of the legal services, you should consider the following:

(a) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly.

(b) The fee customarily charged in the locality for similar legal services.

(c) The experience, reputation, and ability of the [attorney / attorneys] performing the services.

(d) The benefit of the services to the estate.

(e) *(The amount involved and the results obtained. The attorney should not be deprived of reasonable compensation if the result obtained was not what the client sought. If the attorney properly rendered services, [he / she] should be reasonably compensated.)

(f) *(The nature and length of the professional relationship with [*name of client*].)

(g) *(The time limitations imposed by [*name of client*] or by the circumstances.)

(h) *(The likelihood, if apparent to [*name of client*], that the acceptance of the particular employment would preclude other employment by the attorney.)

(i) *(Any fee agreement between the attorney and [*name of client*].)

(j) *(The expenses that have been incurred by the attorney.)

(k) *(The adverse or uncooperative attitude of the [creditors / beneficiaries / others].)

(l) *(Any extensive litigation involving the estate.)

(m) *([*other factors*].)

Your verdict is to be in the amount of the total attorney fee. †(The court will deduct from your verdict any amount that has already been paid.)

Note on Use

*These sections are to be used only if applicable.

†This sentence should be read only if applicable.

Comment

In re Estate of Weaver, 119 Mich App 796; 327 NW2d 366 (1982); *In re Weiss' Estate*, 315 Mich 276; 24 NW2d 123 (1946); *In re Ruel's Estate*, 308 Mich 692; 14 NW2d 541 (1944); *Becht v Miller*, 279 Mich 629; 273 NW 294 (1937); see also Code of Professional Responsibility DR 2-106(B).

Michigan cases that discuss specific factors used to determine reasonable value of legal services include:

a. Result obtained not as desired: *Crary v Goldsmith*, 322 Mich 418; 34 NW2d 28 (1948); *Babbitt v Bumpus*, 73 Mich 331; 41 NW 417 (1889).

b. Expenses incurred: *Crawley v Schick*, 48 Mich App 728; 211 NW2d 217 (1973); *Crary*; *Reichert v Metropolitan Trust Co*, 266 Mich 322; 253 NW 313 (1934).

c. Benefit of services to the estate: *Crawley; Reichert.*

d. Adverse or uncooperative attitude of interested parties: *In re Finn's Estate*, 281 Mich 478; 275 NW 215 (1937).

e. Extensive litigation: *In re Svitojus' Estate*, 307 Mich 491; 12 NW2d 324 (1943); *McGraw v Township of Lake*, 266 Mich 38; 253 NW 207 (1934).

History

M Civ JI 180.03 was added October 1986.

Chapters 190–241: Forms of Verdicts, Volume 2

M Civ JI 190.01 Form of Verdict: Dram Shop—Sale to Minor 882

M Civ JI 190.02 Form of Verdict: Dram Shop—Sale to Visibly Intoxicated Person 888

M Civ JI 195.01 Form of Verdict: Paternity [*Form of Verdict Deleted*] 893

M Civ JI 196.01 Form of Verdict: Landlord-Tenant—Rent Action 894

M Civ JI 196.02 Form of Verdict: Landlord-Tenant--Termination Action 895

M Civ JI 197.01 Form of Verdict: Child Protection Proceeding [*Form of Verdict Deleted*] 896

M Civ JI 208.01 Form of Verdict: Libel 897

M Civ JI 220.01 Form of Verdict: Will Contests 900

M Civ JI 220.05 Form of Verdict: Will Contests—Lost, Destroyed or Otherwise Unavailable Will 902

M Civ JI 221.01 Form of Verdict: Mental Illness--Involuntary Treatment 903

M Civ JI 222.01 Form of Verdict: Appointment of Guardian of Adult 904

M Civ JI 222.02 Form of Verdict: Termination of Guardianship of Adult 905

M Civ JI 222.11 form of Verdict: Appointment of Conservator of Adult 906

M Civ JI 222.12 Form of Verdict: Termination of Conservatorship of Adult 907

M Civ JI 223.01 Form of Verdict: Determination of Title to Bank Accounts 908

M Civ JI 224.01 Form of Verdict: Felonious and Intentional Killing 909

M Civ JI 225.02 Form of Verdict: Omission of Child or Issue of Deceased Child in Will As a Result of Mistake or Accident 910

M Civ JI 225.11 Form of Verdict: Omission of Spouse in Will As a Result of Oversight or Mistake 911

M Civ JI 225.12 Form of Verdict: Omission of Spouse in Will Made Prior to Marriage Where There Are Transfers Made in Lieu of Will Provision 912

M Civ JI 226.01 Form of Verdict: Claim for Services Rendered 913

M Civ JI 228.02 Form of Verdict: Pretermitted Child: Will Executed Prior to Birth or Adoption of Child Omitted from Will (EPIC) 915

M Civ JI 228.03 Form of Verdict: Pretermitted Child: Omission of Living Child from Will Because of Mistaken Belief Child is Dead (EPIC) 916

M Civ JI 228.12 Form of Verdict: Pretermitted Spouse: Will Executed Prior to Marriage (EPIC) 917

M Civ JI 230.01 Form of Verdict: Attorney Fees 918

M Civ JI 241.01 Form of Verdict: Contract Damages—UCC: Seller's Breach by Delivery of Nonconforming Goods Which the Buyer Accepts 919

M Civ JI 241.02 Form of Verdict: Contract Damages—UCC: Seller's Breach by Failure to Deliver/Repudiation/Delivery of Nonconforming Goods Rejected 921

M Civ JI 241.14 Form of Verdict: Contract Damages—UCC: Buyer's Breach by Nonacceptance or Repudiation—Seller Resells—Seller's Damages 923

M Civ JI 241.15 Form of Verdict: Contract Damages--UCC: Buyer's Breach by Nonacceptance or Repudiation--Seller's Damages 925

M Civ JI 190.01 Form of Verdict: Dram Shop—Sale to Minor

We, the jury, answer the questions submitted as follows:

QUESTION NO. 1: Was the plaintiff [injured / damaged] by [*name of minor*]?

Answer: ____ (*yes or no*)

If your answer is "no," do not answer any further questions.

If your answer is "yes," go on to QUESTION NO. 2.

QUESTION NO. 2: Did [*name of defendant / name of agent / name of employee*] *(directly) [sell / give / furnish] alcoholic liquor to [*name of minor*]?

Answer: ____ (*yes or no*)

If your answer is "no," do not answer any further questions.

If your answer is "yes," go on to QUESTION NO. 3.

QUESTION NO. 3: Was [*name of minor*] under the age of 21 years at the time of the [sale / giving / furnishing]?

Answer: ____ (*yes or no*)

If your answer is "yes" or "no," go on to QUESTION NO. 4.

QUESTION NO. 4: Was the [selling / giving / furnishing] of alcoholic liquor to [*name of minor*] a proximate cause of plaintiff's [injury / damage]?

Answer: ____ (*yes or no*)

If your answer is "no," do not answer any further questions.

If your answer is "yes," go on to QUESTION NO. 5.

QUESTION NO. 5: Did the plaintiff [purchase / give / furnish] alcoholic liquor [for / to] [*name of minor*]?

Answer: ____ (*yes or no*)

If your answer is "yes," do not answer any further questions.

If your answer is "no," go on to QUESTION NO. 6.

QUESTION NO. 6: Did [*name of defendant / name of agent / name of employee*] demand and was [he / she] shown [a Michigan driver's license / an official state personal identification card] that appeared to be genuine and showed that [*name of minor*] was 21 years of age or older?

Answer: ____ (yes or no)

If your answer is "yes," go on to QUESTION NO. 7.

If your answer is "no," go on to QUESTION NO. 8.

QUESTION NO. 7: Was [*name of minor*] visibly intoxicated at the time of the [selling / giving / furnishing] of alcoholic liquor to [him / her]?

Answer: ____ (*yes or no*)

If your answer to QUESTION NO. 3 is "yes," and your answer to QUESTION NO. 6 is "yes," and your answer to QUESTION NO. 7 is "no," do not answer any further questions.

If your answer to QUESTION NO. 7 is "yes," go on to QUESTION NO. 8.

ALLOCATION OF FAULT

**NOTE: If you decided that more than one of the parties was at fault and their fault caused or contributed to the plaintiff's [injury / damage], then answer QUESTION NO. 8.

QUESTION NO. 8: Using 100 percent as the total, and for each party you decided was at fault, consider the nature of the conduct and the extent to which the party's conduct caused or contributed to the plaintiff's [injury / damage] and enter that party's percentage of fault:

Answer:	Defendant [*name of minor*]	____ percent
	Defendant [*name of licensee*]	____ percent
	Plaintiff [*name of plaintiff*]	____ percent
(The total must equal 100 percent)	TOTAL	100 percent

ECONOMIC DAMAGES

QUESTION NO. 9: If you find that the plaintiff has sustained damages for [*describe past economic damages claimed by the plaintiff such as lost wages, medical expenses, etc.*], give the total amount of damages to the present date.

Answer: $_____.____

QUESTION NO. 10: If you find that the plaintiff will incur costs for medical or other health care in the future, give the total amount for each year in which the plaintiff will incur costs.

Answer:

$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]

$_____._____ for [*year*]
$_____._____ for [*year*]
$_____._____ for [*year*]
$_____._____ for [*year*]
$_____._____ for [*year*]
$_____._____ for [*year*]
$_____._____ for [*year*]
$_____._____ for [*year*]
$_____._____ for [*year*]
$_____._____ for [*year*]
$_____._____ for [*year*]
$_____._____ for [*year*]
$_____._____ for [*year*]
$_____._____ for [*year*]
$_____._____ for [*year*]

QUESTION NO. 11: If you find that the plaintiff will sustain damages for [lost wages or earnings / or / lost earning capacity / and / [*describe other economic loss claimed by the plaintiff*]] in the future, give the total amount for each year in which the plaintiff will sustain damages.

Answer:

$_____._____ for [*year*]
$_____._____ for [*year*]
$_____._____ for [*year*]
$_____._____ for [*year*]
$_____._____ for [*year*]
$_____._____ for [*year*]
$_____._____ for [*year*]
$_____._____ for [*year*]
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$_____._____ for [*year*]
$_____._____ for [*year*]
$_____._____ for [*year*]
$_____._____ for [*year*]
$_____._____ for [*year*]
$_____._____ for [*year*]

NONECONOMIC DAMAGES

***NOTE: If you determined in QUESTION NO. 8 that the plaintiff was more than 50 percent at fault, then do not answer any further questions. If you determined in

QUESTION NO. 8 that the plaintiff was 50 percent or less at fault, then go on to QUESTION NO. 12.

QUESTION NO. 12: If you find that the plaintiff has sustained damages for [*describe past noneconomic damages claimed by the plaintiff such as M Civ JI 50.02 Pain and Suffering, Etc., M Civ JI 50.03 Disability and Disfigurement, and M Civ JI 50.04 Aggravation of Preexisting Ailment or Condition*], give the total amount of damages to the present date.

Answer: $_____.____

QUESTION NO. 13: If you find that the plaintiff will sustain damages for [*describe future noneconomic damages claimed by the plaintiff*] in the future, give the total amount for each year in which the plaintiff will sustain damages.

Answer:

$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]

Signed,

_____ _____
Foreperson Date

Note on Use

*If there is an issue whether the retail licensee directly sold, gave, or furnished alcoholic liquor to the minor, the word “directly” should be read to the jury. See the Comment below.

**QUESTION NO. 8 may have to be modified if fault of a named nonparty is an issue in the case. MCL 600.6304. MCL 600.6304, requiring an allocation of fault, was adopted by 1986 PA 178 and made applicable to personal injury actions arising on or after October 1, 1986. 1986 PA 178, §2. It was amended by 1995 PA 248 to apply also to property damage actions and to require allocation of fault between certain named nonparties as well as parties. The 1995 amendments apply to cases filed on or after March 28, 1996. 1995 PA 248, §3.

***This note should not be read to the jury if the case was filed before March 28, 1996. 1995 PA 161, §3. The prohibition against noneconomic damages if the plaintiff is over 50 percent at fault applicable to all actions based on tort or other legal theory seeking damages for personal injury, property damage, or wrongful death is found in MCL 600.2959, added by 1995 PA 161.

Where there are multiple plaintiffs or defendants, the appropriate questions should be asked separately as to each one.

A separate Special Verdict sheet should be furnished to the jury for each plaintiff and each defendant.

Omit any questions that are not an issue.

This verdict form should not be used if the plaintiff is over 60 years of age. See MCL 600.6311.

This form of verdict is appropriate in a case in which the evidence would allow an award of damages for a 20-year period in the future. The form must be modified by the court to add or delete lines in Questions No. 10, 11, and 13 in cases in which the evidence supports an award of damages for a period longer or shorter than 20 years.

The jury should be instructed to complete the verdict form for the plaintiff's case against the defendant minor first because if the jury finds in favor of the defendant minor on any of the complete defenses, the licensee defendant has the benefit of those defenses and the jury will not have to complete this verdict form. For a discussion of defenses, see the Comment.

Comment

"Unlawful sale" to a minor may be interpreted with reference to subsection (2) of MCL 436.1801, which says that a retail licensee shall not directly sell, give, or furnish alcoholic liquor to a minor. (The pre-1986 statute prohibited indirect as well as direct sales to minors.) If indirect sale means a situation where a licensee sells to a buyer who then furnishes the liquor to a minor, the licensee may not be liable under the present statute if the minor became intoxicated and injured someone. This may represent a departure from case law that recognizes the potential liability of a licensee who knew or had reason to know that the purchase of liquor was being made for the minor who ultimately caused the injury. *Maldonado v Claud's, Inc*, 347 Mich 395; 79 NW2d 847 (1956); *Meyer v State Line Super Mart, Inc*, 1 Mich App 562; 137 NW2d 299 (1965); *Verdusco v Miller*, 138 Mich App 702; 360 NW2d 281 (1984).

Actions against retail licensees are subject to the revised judicature act (MCL 436.1801(11)) including the section requiring specific findings as to types of damages (MCL 600.6305) and the section requiring an allocation of fault among parties and named nonparties (MCL 600.6304). See also *Weiss v*

Hodge, 223 Mich App 620; 567 NW2d 468 (1997), lv den, 457 Mich 886; 586 NW2d 231 (1998); *Brown v Swartz Creek Memorial Post 3720—Veterans of Foreign Wars, Inc*, 214 Mich App 15; 542 NW2d 588 (1995) (allocation of fault provision applicable to all parties including licensee). See also the prohibition against noneconomic damages if the plaintiff is over 50 percent at fault, MCL 600.2959, added by 1995 PA 161.

All defenses of the minor or alleged visibly intoxicated person are available to the licensee. MCL 436.1801(7). Plaintiff's comparative negligence is a defense available to the licensee. *Lyman v Bavar Co*, 136 Mich App 407; 356 NW2d 28 (1984). A 1986 amendment to MCL 436.1801(7) deleted the word "factual" from "all defenses." The most probable and significant impact of the change was to allow the licensee to assert the no-fault threshold defenses so, if the cause of action against the alleged visibly intoxicated person or minor is a no-fault action and the jury finds that the injury does not meet the statutory threshold, then a verdict may not be returned against the dram shop defendant.

History

M Civ JI 190.01 was added May 1988. Amended November 1989, January 2001.

M Civ JI 190.02 Form of Verdict: Dram Shop—Sale to Visibly Intoxicated Person

We, the jury, answer the questions submitted as follows:

QUESTION NO. 1: Was the plaintiff [injured / damaged] by [*name of visibly intoxicated person*]?

Answer: ____ (*yes or no*)

If your answer is "no," do not answer any further questions.

If your answer is "yes," go on to QUESTION NO. 2.

QUESTION NO. 2: Did [*name of defendant / name of agent / name of employee*] [sell / give / furnish] alcoholic liquor to [*name of alleged visibly intoxicated person*] at a time when [he / she] was visibly intoxicated?

Answer: ____ (yes or no)

If your answer is "no," do not answer any further questions.

If your answer is "yes," go on to QUESTION NO. 3.

QUESTION NO. 3: Was the [selling / giving / furnishing] of alcoholic liquor a proximate cause of plaintiff's [injuries / damages]?

Answer: ____ (yes or no)

If your answer is "no," do not answer any further questions.

If your answer is "yes," go on to QUESTION NO. 4.

QUESTION NO. 4: Did plaintiff actively contribute to the intoxication of [*name of visibly intoxicated person*]?

Answer: ____ (yes or no)

If your answer is "yes," do not answer any further questions.

If your answer is "no," go on to QUESTION NO. 5.

ALLOCATION OF FAULT

*NOTE: If you decided that more than one of the parties was at fault and their fault caused or contributed to the plaintiff's [injury / damage], then answer QUESTION NO. 5.

QUESTION NO. 5: Using 100 percent as the total, and for each party you decided was at fault, consider the nature of the conduct and the extent to which the party's conduct caused or contributed to the plaintiff's [injury /damage] and enter that party's percentage of fault:

Answer:	Defendant [*name of visibly intoxicated person*]		____ percent
	Defendant [*name of licensee*]		____ percent
	Plaintiff [*name of plaintiff*]		____ percent
(The total must equal 100 percent)		TOTAL	100 percent

ECONOMIC DAMAGES

QUESTION NO. 6: If you find that the plaintiff has sustained damages for [*describe past economic damages claimed by the plaintiff such as lost wages, medical expenses, etc.*], give the total amount of damages to the present date.

Answer: $_____.____

QUESTION NO. 7: If you find that the plaintiff will incur costs for medical or other health care in the future, give the total amount for each year in which the plaintiff will incur costs.

Answer:

$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]

QUESTION NO. 8: If you find that the plaintiff will sustain damages for [lost wages or earnings / or / lost earning capacity / and / [*describe other economic loss claimed by the plaintiff*]] in the future, give the total amount for each year in which the plaintiff will sustain damages.

Answer:

$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]

$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]

NONECONOMIC DAMAGES

**NOTE: If you determined in QUESTION NO. 5 that the plaintiff was more than 50 percent at fault, then do not answer any further questions. If you determined in QUESTION NO. 5 that the plaintiff was 50 percent or less at fault, then go on to QUESTION NO. 9.

QUESTION NO. 9: If you find that the plaintiff has sustained damages for [*describe past noneconomic damages claimed by the plaintiff such as M Civ JI 50.02 Pain and Suffering, Etc., M Civ JI 50.03 Disability and Disfigurement, and M Civ JI 50.04 Aggravation of Preexisting Ailment or Condition*], give the total amount of damages to the present date.

Answer: $_____.____

QUESTION NO. 10: If you find that the plaintiff will sustain damages for [*describe future noneconomic damages claimed by the plaintiff*] in the future, give the total amount for each year in which the plaintiff will sustain damages.

Answer:

$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]

$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]

Signed,

_____ _____
Foreperson Date

Note on Use

*QUESTION NO. 5 may have to be modified if fault of a named nonparty is an issue in the case. MCL 600.6304.MCL 600.6304, requiring an allocation of fault, was adopted by 1986 PA 178 and made applicable to personal injury actions arising on or after October 1, 1986. 1986 PA 178, §2. It was amended by 1995 PA 248 to apply also to property damage actions and to require allocation of fault between certain named nonparties as well as parties. The 1995 amendments apply to cases filed on or after March 28, 1996. 1995 PA 248, §3.

**This note should not be read to the jury if the case was filed before March 28, 1996. 1995 PA 161, §3. The prohibition against noneconomic damages if the plaintiff is over 50 percent at fault applicable to all actions based on tort or other legal theory seeking damages for personal injury, property damage, or wrongful death is found in MCL 600.2959, added by 1995 PA 161.

Where there are multiple plaintiffs or defendants, the appropriate questions should be asked separately as to each one.

A separate Special Verdict sheet should be furnished to the jury for each plaintiff and each defendant.

Omit any questions that are not an issue.

This verdict form should not be used if the plaintiff is over 60 years of age. See MCL 600.6311

This form of verdict is appropriate in a case in which the evidence would allow an award of damages for a 20-year period in the future. The form must be modified by the court to add or delete lines in Questions No. 7, 8, and 10 in cases where the evidence supports an award of damages for a period longer or shorter than 20 years.

The jury should be instructed to complete the verdict form for the plaintiff's case against the defendant alleged visibly intoxicated person first because if the jury finds in favor of that defendant on

any of the complete defenses, the licensee defendant has the benefit of those defenses and the jury will not have to complete this verdict form. For a discussion of defenses, see the Comment.

Comment

Actions against retail licensees are subject to the revised judicature act (MCL 436.1801(11)) including the section requiring specific findings as to types of damages (MCL 600.6305) and the section requiring an allocation of fault among parties and named nonparties (MCL 600.6304). See also *Weiss v Hodge*, 223 Mich App 620; 567 NW2d 468 (1997), lv den, 457 Mich 886; 586 NW2d 231 (1998); *Brown v Swartz Creek Memorial Post 3720—Veterans of Foreign Wars, Inc*, 214 Mich App 15; 542 NW2d 588 (1995) (allocation of fault provision applicable to all parties including licensee). See also the prohibition against noneconomic damages if the plaintiff is over 50 percent at fault, MCL 600.2959, added by 1995 PA 161.

All defenses of the minor or alleged visibly intoxicated person are available to the licensee. MCL 436.1801(7). Plaintiff's comparative negligence is a defense available to the licensee. *Lyman v Bavar Co*, 136 Mich App 407; 356 NW2d 28 (1984). A 1986 amendment to MCL 436.1801(7) deleted the word "factual" from "all defenses." The most probable and significant impact of the change was to allow the licensee to assert the no-fault threshold defenses so, if the cause of action against the alleged visibly intoxicated person or minor is a no-fault action and the jury finds that the injury does not meet the statutory threshold, then a verdict may not be returned against the dram shop defendant.

History

M Civ JI 190.02 was added May 1988. Amended November 1989, January 2001.

M Civ JI 195.01 Form of Verdict: Paternity [*Form of Verdict Deleted*]

Comment

The right to a jury trial in paternity actions found in MCL 722.715 was deleted by 1998 PA 113.

History

M Civ JI 195.01 was added March 1, 1981.

Deleted May 2000.

M Civ JI 196.01 Form of Verdict: Landlord-Tenant—Rent Action

Your verdict can be returned in one of the following forms. You may return only one verdict. We, the jury, find in favor of the landlord in the full amount of rent claimed. We, the jury, find in favor of the landlord, but find that some of the rent [should be excused / has been paid / is a retaliatory increase]. We determine that the amount of rent which should be paid by the tenant is $_____.____. We, the jury, find in favor of the tenant.

History

M Civ JI 196.01 was added April 1, 1981.

M Civ JI 196.02 Form of Verdict: Landlord-Tenant--Termination Action

Your verdict can be returned in one of the following forms:

We, the jury, find in favor of the landlord. We, the jury, find in favor of the tenant.

History

M Civ JI 196.02 was added April 1, 1981.

M Civ JI 197.01 Form of Verdict: Child Protection Proceeding [*Form of Verdict Deleted*]

History

M Civ JI 197.01 was added June 1998.

This verdict form was deleted in March 2005 as part of the revision of Chapter 97. The current verdict forms are found at M Civ JI 97.60 and 97.61.

M Civ JI 208.01 Form of Verdict: Libel

We, the jury, make the following answers to the questions submitted by the Court:

QUESTION NO. 1: Did the defendant make the statement *(of fact) complained of to a third person by [printing / writing / signs / pictures / words / gestures]?

Answer: ____ (*yes or no*)

If your answer is "no," do not answer any further questions.

QUESTION NO. 2: Was the statement false in some material respect?

Answer: ____ (*yes or no*)

If your answer is "no," do not answer any further questions.

QUESTION NO. 3: Did the statement have a tendency to harm the plaintiff's reputation?

Answer: ____ (yes or no)

If your answer is "no," do not answer any further questions.

QUESTION NO. 4: Did the plaintiff prove by clear and convincing evidence that the statement was of and concerning [him / her]?

Answer: ____ (yes or no)

If your answer is "no," do not answer any further questions.

QUESTION NO. 5: Did the plaintiff prove by clear and convincing evidence that the defendant had knowledge that the statement was false or that the defendant acted with reckless disregard as to whether the statement was false?

Answer: ____ (yes or no)

If your answer is "no," do not answer any further questions.

ALTERNATIVE QUESTION NO. 4: Was the statement of and concerning the plaintiff?

Answer: ____ (yes or no)

If your answer is "no," do not answer any further questions.

ALTERNATIVE QUESTION NO. 5: Did the defendant have knowledge that the statement was false or did the defendant act with reckless disregard as to whether the statement was false?

Answer: ____ (yes or no)

If your answer is "no," do not answer any further questions.

QUESTION NO. 6: Did the plaintiff suffer some damage as a result of the statement?

Answer: ____ (yes or no)

If your answer is "no," do not answer any further questions.

QUESTION NO. 7: What is the total amount of plaintiff's actual damages?

Answer: $_____.____ (actual damages)

If your answer is "0" actual damages, do not answer any further questions.

QUESTION NO. 8: Did the defendant publish the statements complained of with bad faith or ill will?

Answer: ____ (*yes or no*)

If your answer is "no," do not answer any further questions.

QUESTION NO. 9: Before starting this lawsuit, did the plaintiff give notice to the defendant to publish a retraction and allow the defendant a reasonable time to do so?

Answer: ____ (yes or no)

If your answer is "no," do not answer any further questions.

QUESTION NO. 10: Did the defendant incur some incremental or increased injury to [his / her] feelings that was not compensated for in your award of actual damages?

Answer: ____ (yes or no)

If your answer is "no," do not answer any further questions.

QUESTION NO. 11: Was this incremental or increased injury to feelings attributable to the sense of indignation and outrage experienced by the plaintiff caused by the defendant's bad faith or ill will?

Answer: ____ (*yes or no*)

If your answer is "no," do not answer any further questions.

QUESTION NO. 12: What is the total amount of plaintiff's exemplary damages for this incremental or increased injury to [his / her] feelings?

Answer: $_____.____ (*exemplary damages*)

Signed,

_____ _____

Foreperson Date

Note on Use

*The words in parentheses should be used if the alleged defamatory statement is one of pure fact. They should not be used if the alleged defamatory statement involves opinion. *Milkovich v Lorain Journal Co*, 497 US 1; 110 S Ct 2695; 111 L Ed 2d 1 (1990); Restatement (Second) of Torts §566, at 170–171.

Questions No. 4 and 5 should be used if the case involves a constitutional privilege. See M Civ JI 118.06. Alternative questions No. 4 and 5 should be used if the case involves a common-law qualified privilege. See M Civ JI 118.07.

In a private plaintiff case, this verdict form may be used as a model, with the substitution of the negligence standard (see M Civ JI 118.08) in Alternative **QUESTION NO. 5** and other appropriate modifications on the issue of damages (see MCL 600.2911(2)and MCL 600.2911(7)). Section 7 was added by 1988 PA 396 and made applicable to causes of action arising on or after January 1, 1989 (1988 PA 396, § 2.).

In cases involving defamation per se of a private individual, compare *Gertz v Robert Welch, Inc*, 418 US 323, 324; 94 S Ct 2997; 41 L Ed 2d 789 (1974) ("For the reasons set forth below, we hold that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth"), with *Burden v Elias Bros Big Boy Restaurants*, 240 Mich App 723; 613 NW2d 378 (2000), and its interpretation of MCL 600.2911, regarding whether questions six and seven are appropriate or need to be deleted, and whether questions 10-12 should be revised to include a provision for actual damages.

History

M Civ JI 208.01 was added February 1986.

M Civ JI 220.01 Form of Verdict: Will Contests

We, the jury, make the following answers to the questions submitted by the Court:

*QUESTION NO. 1: Is the will a holographic will as defined by law?

Answer: ____ (*yes or no*)

*QUESTION NO. 2: Was the [will / codicil] signed by [the decedent / another person at decedent's direction and in [his / her] conscious presence]?

Answer: ____ (*yes or no*)

*QUESTION NO. 3: Was the [will / codicil] witnessed in the manner required by law?

Answer: ____ (*yes or no*)

*QUESTION NO. 4: Was the document intended by the decedent to be [his / her] will and transfer [his / her] property after death and not during [his / her] lifetime?

Answer: ____ (*yes or no*)

*QUESTION NO. 5: Has it been shown by clear and convincing evidence that the decedent intended the document or writing to constitute [a will / a partial or complete revocation of a will / an addition to or alteration of a will / a partial or complete revival of [a formerly revoked will / a formerly revoked portion of the will]]?

Answer: ____ (*yes or no*)

*QUESTION NO. 6: Was the will the result of undue influence?

Answer: ____ (*yes or no*)

*QUESTION NO. 7: Did the decedent have the mental capacity to make a will?

Answer: ____ (*yes or no*)

*QUESTION NO. 8: Was the will the result of an insane delusion?

Answer: ____ (*yes or no*)

*QUESTION NO. 9: Was the will revoked by [the decedent / another person in the conscious presence of and at the direction of the decedent]?

Answer: ____ (*yes or no*)

*QUESTION NO. 10: Was the will procured as the result of fraud?

Answer: ____ (*yes or no*)

Signed,

_____ _____
Foreperson Date

Note on Use

*The Court should select the questions that are applicable to the case.

See also M Civ JI 170.21 Will Contests: Lost, Destroyed or Otherwise Unavailable Will; M Civ JI 220.05 Form of Verdict: Will Contests—Lost, Destroyed or Otherwise Unavailable Will.

Comment

The Court may question jurors and correct errors of form where the intent of the jurors is ascertainable. *In re Sorter's Estate*, 314 Mich 488; 22 NW2d 767 (1946).

History

M Civ JI 220.01 was added January 1984. Amended March 2001.

M Civ JI 220.05 Form of Verdict: Will Contests—Lost, Destroyed or Otherwise Unavailable Will

We, the jury, make the following answers to the questions submitted by the Court:

QUESTION NO. 1: Was the purported will ever in existence?

Answer: ____ (*yes or no*)

If your answer is "no," do not answer any further questions.

QUESTION NO. 2: Was the will executed in the manner required by law?

Answer: ____ (*yes or no*)

If your answer is "no," do not answer any further questions.

QUESTION NO. 3: Did the decedent revoke this will prior to [his / her] death?

Answer: ____ (*yes or no*)

If your answer is "yes," do not answer any further questions.

QUESTION NO. 4: What were the contents of the will?

Answer: ____ (*a or b*)

a. We find that the copy of the will in evidence is identical to the original will.

b. We find the contents of the original will to be as follows:
_____
_____
_____

Signed,

_____ _____
Foreperson Date

History

M Civ JI 220.05 was added January 1984.

M Civ JI 221.01 Form of Verdict: Mental Illness--Involuntary Treatment

We, the jury, make the following answers to the questions submitted by the Court:

QUESTION NO. 1: Is [*name of respondent*] mentally ill?

Answer: ____ (*yes or no*)

If your answer is "no," do not answer any further questions.

QUESTION NO. 2: As a result of that mental illness, is [*name of respondent*] subject to one or more of the three conditions on which I have instructed you?

Answer: ____ (yes or no)

If your answer is "yes," your verdict is, "We find that the respondent is a person requiring treatment."

If your answer is "no," your verdict is, "We find that the respondent is not a person requiring treatment."

Signed,

_____ _____

Foreperson Date

Note on Use

In the case of a hearing on a petition for discharge, insert the name of petitioner in both questions.

The judge may wish to give the jury a copy of M Civ JI 171.02, Mental Illness: Involuntary Treatment—Elements and Burden of Proof, to aid them in completing the verdict form.

History

M Civ JI 221.01 was added March 1995.

M Civ JI 222.01 Form of Verdict: Appointment of Guardian of Adult

We, the jury, make the following answers to the questions submitted by the Court:

QUESTION NO. 1: Is [*name of respondent*] an incapacitated person?

Answer: ____ (*yes or no*)

If your answer is "no," do not answer any further questions.

QUESTION NO. 2: Is a guardian necessary as a means of providing continuing care and supervision of [*name of respondent*]?

Answer: ____ (yes or no)

Signed,

_____ _____

Foreperson Date

Comment

The court may appoint a guardian with limited powers if it is found by clear and convincing evidence that the incapacitated individual lacks the capacity to do some, but not all, of the tasks necessary to care for himself or herself. MCL 700.5306(3). Only if it is found by clear and convincing evidence that the individual is "totally without capacity to care for himself or herself," may the judge appoint a full guardian, but in doing so the judge "shall specify that finding of fact" in the order. MCL 700.5306(4).

History

M Civ JI 222.01 was added January 1985. Amended January 1990, June 2000.

M Civ JI 222.02 Form of Verdict: Termination of Guardianship of Adult

We, the jury, make the following answers to the questions submitted by the Court:

QUESTION NO. 1: Does [*name of incapacitated individual*] continue to be an incapacitated person?

Answer: ____ (*yes or no*)

If your answer is "no," do not answer any further questions.

QUESTION NO. 2: Does a guardian continue to be necessary as a means of providing continuing care and supervision of [*name of incapacitated individual*]?

Answer: ____ (*yes or no*)

Signed,

_____ _____

Foreperson Date

Comment

MCL 700.5310.

History

M Civ JI 222.02 was added January 1985. Amended January 1990, June 2000.

M Civ JI 222.11 form of Verdict: Appointment of Conservator of Adult

We, the jury, make the following answers to the questions submitted by the Court:

QUESTION NO. 1: Is [*name of respondent*] [mentally ill / mentally deficient / physically ill or disabled / a chronic user of drugs / chronically intoxicated / confined / detained by a foreign power / disappeared / [other]] ?

Answer: ____ (yes or no)

If your answer is "no," do not answer any further questions.

QUESTION NO. 2: Due to [*insert alleged malady or situation*] is [*name of respondent*] unable to manage [his / her] property and business affairs effectively?

Answer: ____ (*yes or no*)

If your answer is "no," do not answer any further questions.

*QUESTION NO. 3: Will [*name of respondent*]'s property be wasted or dissipated unless proper management is provided?

Answer: ____ (*yes or no*)

*QUESTION NO. 4: Is money needed for the support, care, and welfare of [*name of respondent*] or those entitled to be supported by [him / her] and is protection necessary or desirable to obtain or provide money?

Answer: ____ (*yes or no*)

Signed,

_____ _____

Foreperson Date

Note on Use

*The court should select Questions No. 3, 4, or both, whichever are applicable to the case.

History

M Civ JI 222.11 was added January 1985. Amended June 2000.

M Civ JI 222.12 Form of Verdict: Termination of Conservatorship of Adult

We, the jury, make the following answers to the questions submitted by the Court:

QUESTION NO. 1: Is [*name of protected person*] [mentally ill / mentally deficient / physically ill or disabled / a chronic user of drugs / chronically intoxicated / confined / detained by a foreign power / disappeared / [*other*]]?

Answer: ____ (*yes or no*)

If your answer is "no," do not answer any further questions.

QUESTION NO. 2: Due to [*insert alleged malady or situation*] is [*name of protected person*] unable to manage [his / her] property and business affairs effectively?

Answer: ____ (*yes or no*)

Signed,

_____ _____

Foreperson Date

History

M Civ JI 222.12 was added January 1985. Amended June 2000.

M Civ JI 223.01 Form of Verdict: Determination of Title to Bank Accounts

We, the jury, make the following answers to the questions submitted by the Court:

*QUESTION NO. 1: Did [*name of decedent*] intend the account to become the property of the survivor?

Answer: ____ (*yes or no*)

*QUESTION NO. 2: When the account was opened, did [*name of decedent*] have the mental capacity to know or understand that the account would become the property of the survivor?

Answer: ____ (*yes or no*)

*QUESTION NO. 3: Was [the account opened / the survivor's name added to the account] as a result of fraud?

Answer: ____ (*yes or no*)

*QUESTION NO. 4: Was [the account opened / the survivor's name added to the account] as a result of undue influence?

Answer: ____ (*yes or no*)

Signed,

_____ _____

Foreperson Date

Note on Use

*The court should select the questions that are applicable to the case.

History

M Civ JI 223.01 was added October 1985.

M Civ JI 224.01 Form of Verdict: Felonious and Intentional Killing

We, the jury, make the following answers to the questions submitted by the Court:

*QUESTION NO. 1: Did [*name of respondent*] feloniously and intentionally kill [*name of decedent*]?

Answer: _____(*yes or no*)

*QUESTION NO. 2: Did [*name of respondent*] aid and abet in the felonious and intentional killing of [*name of decedent*]?

Answer: _____(*yes or no*)

Signed,

_____ _____

Foreperson Date

Note on Use

*The court should select the question or questions that are applicable to the case.

History

M Civ JI 224.01 was added February 1986.

M Civ JI 225.02 Form of Verdict: Omission of Child or Issue of Deceased Child in Will As a Result of Mistake or Accident

Caution: The forms of verdict in this chapter should be used only for estates of decedents dying before April 1, 2000, the effective date of the Estates and Protected Individuals Code (EPIC). MCL 700.8101(1), (2)(a). See the forms of verdicts in chapter 228 for estates of decedents dying on or after April 1, 2000.

We, the jury, make the following answers to the questions submitted by the Court:

QUESTION NO. 1: Was the omission of [*name*] from the will of [*name of decedent*] intentional?

Answer: ____ (*yes or no*)

If your answer is "yes," do not answer any further questions.

QUESTION NO. 2: Was the omission as a result of mistake or accident?

Answer: ____ (*yes or no*)

Note on Use

Caution: This form of verdict should be used only for estates of decedents dying before April 1, 2000, the effective date of the Estates and Protected Individuals Code (EPIC). MCL 700.8101(1),(2)(a). See the forms of verdicts in chapter 228 for estates of decedents dying on or after April 1, 2000.

History

M Civ JI 225.02 was added February 1986.

M Civ JI 225.11 Form of Verdict: Omission of Spouse in Will As a Result of Oversight or Mistake

Caution: The forms of verdict in this chapter should be used only for estates of decedents dying before April 1, 2000, the effective date of the Estates and Protected Individuals Code (EPIC). MCL 700.8101(1), (2)(a). See the forms of verdicts in chapter 228 for estates of decedents dying on or after April 1, 2000.

We, the jury, make the following answer to the question submitted by the Court:

QUESTION NO. 1: Was the omission of [*name of wife / name of husband*] from the will of [*name of decedent*] as a result of oversight or mistake?

Answer: ____ (*yes or no*)

Note on Use

Caution: This form of verdict should be used only for estates of decedents dying before April 1, 2000, the effective date of the Estates and Protected Individuals Code (EPIC). MCL 700.8101(1),(2)(a). See the forms of verdicts in chapter 228 for estates of decedents dying on or after April 1, 2000.

History

M Civ JI 225.11 was added February 1986.

M Civ JI 225.12 Form of Verdict: Omission of Spouse in Will Made Prior to Marriage Where There Are Transfers Made in Lieu of Will Provision

Caution: The forms of verdict in this chapter should be used only for estates of decedents dying before April 1, 2000, the effective date of the Estates and Protected Individuals Code (EPIC). MCL 700.8101(1), (2)(a). See the forms of verdicts in chapter 228 for estates of decedents dying on or after April 1, 2000.

We, the jury, make the following answers to the questions submitted by the Court:

QUESTION NO. 1: Did [*name of decedent*] provide for [*name of wife / name of husband*] by transfers of property outside the will?

Answer: ____ (*yes or no*)

If your answer is "no," do not answer any further questions.

QUESTION NO. 2: Did [*name of decedent*] intend [that transfer / those transfers] to be instead of provisions in [his / her] will?

Answer: ____ (*yes or no*)

Note on Use

Caution: This form of verdict should be used only for estates of decedents dying before April 1, 2000, the effective date of the Estates and Protected Individuals Code (EPIC).MCL 700.8101(1),(2)(a). See the forms of verdicts in chapter 228 for estates of decedents dying on or after April 1, 2000.

History

M Civ JI 225.12 was added February 1986

M Civ JI 226.01 Form of Verdict: Claim for Services Rendered

We, the jury, make the following answers to the questions submitted by the Court:

QUESTION NO. 1: Did the claimant perform services beneficial to [*name of decedent*], or at the request of [*name of decedent*]?

Answer: ____ (*yes or no*)

If your answer is "no," do not answer any further questions.

QUESTION NO. 2: Did the claimant perform these services expecting to be paid?

Answer: ____ (yes or no)

If your answer is "no," do not answer any further questions.

QUESTION NO. 3: Did [*name of decedent*] accept the benefits of these services, expecting to pay the claimant?

Answer: ____ (*yes or no*)

If your answer is "no," do not answer any further questions.

*PART A

QUESTION NO. A4: What is the reasonable value of the services?

Answer: $_____.____

*PART B

QUESTION NO. B4: Did [*name of decedent*] intend to have the claimant paid after death from [his / her] estate?

Answer: ____ (*yes or no*)

QUESTION NO. B5: If your answer to Question No. B4 is "yes," then state the reasonable value of the claimant's services:

$_____.____

QUESTION NO. B6: If your answer to Question No. B4 is "no," then state the reasonable value of the services performed by the claimant between [*date 6 years prior to death*] and [*date of death*].

$_____.____

Note on Use

*The Court must select part A or part B to submit to the jury.

History

M Civ JI 226.01 was added February 1987.

M Civ JI 228.02 Form of Verdict: Pretermitted Child: Will Executed Prior to Birth or Adoption of Child Omitted from Will (EPIC)

We, the jury, make the following answers to the questions submitted by the Court:

QUESTION NO. 1: Does the will express an intention of [*name of decedent*] to omit [*name of child*] from the will?

Answer: ____ (*yes or no*)

QUESTION NO. 2: Did [*name of decedent*] provide for [*name of child*] by transfer of property outside the will?

Answer: ____ (*yes or no*)

If your answer is "no," do not answer QUESTION NO. 3.

QUESTION NO. 3: Did [*name of decedent*] intend that the transfer of property outside the will substitute for provision for [*name of child*] in [his / her] will?

Answer: ____ (*yes or no*)

Note on Use

*The Court should delete any question that is not an issue in the case.

History

M Civ JI 228.02 was added April 1, 2002.

M Civ JI 228.03 Form of Verdict: Pretermitted Child: Omission of Living Child from Will Because of Mistaken Belief Child is Dead (EPIC)

We, the jury, make the following answers to the questions submitted by the Court:

QUESTION NO. 1: At the time [*name of decedent*] executed [his / her] will, did [he / she] believe that [*name of child*] was dead?

Answer: ____ (*yes or no*)

If your answer is "no," do not answer QUESTION NO. 2.

QUESTION NO. 2: Was the mistaken belief that [*name of child*] was dead the sole reason that [*name of decedent*] omitted [*name of child*] from the will?

Answer: ____ (*yes or no*)

History

M Civ JI 228.03 was added April 1, 2002.

M Civ JI 228.12 Form of Verdict: Pretermitted Spouse: Will Executed Prior to Marriage (EPIC)

We, the jury, make the following answers to the questions submitted by the Court:

QUESTION NO. 1: Was [*name of decedent*]'s will made in contemplation of [his / her] marriage to [*name of surviving spouse*]?

Answer: ____ (*yes or no*)

QUESTION NO. 2: Does [*name of decedent*]'s will express [his / her] intention that it is to be effective despite a marriage after the will is made?

Answer: ____ (*yes or no*)

QUESTION NO. 3: Did [*name of decedent*] provide for [*name of surviving spouse*] by transfer of property outside the will?

Answer: ____ (*yes or no*)

If your answer is "no," do not answer QUESTION NO. 4.

QUESTION NO. 4: Did [*name of decedent*] intend that the transfer of property outside the will substitute for provision for [his wife / her husband] in [his / her] will?

Answer: ____ (*yes or no*)

Note on Use

*The Court should delete any question that is not an issue in the case.

History

M Civ JI 228.12 was added April 1, 2002.

M Civ JI 230.01 Form of Verdict: Attorney Fees

We, the jury, make the following answers to the questions submitted by the Court:

QUESTION NO. 1: Did the petitioner perform necessary legal services in behalf of the estate?

Answer: ____ (*yes or no*)

If your answer is "no," do not answer any further questions.

QUESTION NO. 2: What is the reasonable value of the legal services performed?

Answer: $_____.____ (*set forth the total dollar amount*)

*Please note that the Court will deduct from your verdict any amount that has already been paid.

Note on Use

*Delete this sentence if it is not applicable to the case.

History

M Civ JI 230.01 was added October 1986.

M Civ JI 241.01 Form of Verdict: Contract Damages—UCC: Seller's Breach by Delivery of Nonconforming Goods Which the Buyer Accepts

We, the jury, make the following answers to the questions submitted by the Court:

QUESTION NO. 1: Was there [a contract / an enforceable contract] for the sale of goods between the buyer and the seller?

Answer: ____ (*yes or no*)

If your answer is "no," do not answer any further questions.

QUESTION NO. 2: Were the goods which the buyer accepted nonconforming?

Answer: ____ (yes or no)

If your answer is "no," do not answer any further questions.

QUESTION NO. 3: Did the buyer notify the seller of the nonconformity within a reasonable time after the buyer discovered or should have discovered the nonconformity?

Answer: ____ (yes or no)

If your answer is "no," do not answer any further questions.

If your answer is "yes," make the following determinations:

The value the goods would have had if they had conformed to the contract:	$_____.____
SUBTRACT The value of the goods at the time and place of acceptance, their actual value:	$_____.____
Subtotal for QUESTION NO. 3	$_____.____

QUESTION NO. 4: Did the buyer incur any reasonable expenses incident to the seller's delay or other breach?

Answer: ____ (*yes or no*)

If your answer is "yes," state the amount:

$_____.____

QUESTION NO. 5: Did the buyer incur any other losses resulting from the general or particular requirements or needs which the seller had reason to know about at the time of contracting, and which the buyer could not reasonably have prevented?

Answer: ____ (*yes or no*)

If your answer is "yes," state the amount:

$_____.____

QUESTION NO. 6: Did the buyer sustain an injury to person or property as a proximate result of any breach of warranty?

Answer: ____ (*yes or no*)

If your answer is "yes," state the amount:

$_____.____

ADD the amounts in the answers to Questions No. 4 through No. 6 to the subtotal in QUESTION NO. 3.

These are the buyer's TOTAL DAMAGES: $_____.____

History

M Civ JI 241.01 was added February 1987.

M Civ JI 241.02 Form of Verdict: Contract Damages—UCC: Seller's Breach by Failure to Deliver/Repudiation/Delivery of Nonconforming Goods Rejected

We, the jury, make the following answers to the questions submitted by the Court:

QUESTION NO. 1: Was there [a contract / an enforceable contract] for the sale of goods between the buyer and the seller?

Answer: ____ (*yes or no*)

If your answer is "no," do not answer any further questions.

QUESTION NO. 2: Did the seller breach the contract?

Answer: ____ (*yes or no*)

If your answer is "no," do not answer any further questions.

If your answer is "yes," make the following determinations:

1.	[Cost of substitute goods the buyer purchased / The market price of substitute goods at the time the buyer learned of the breach]:	$_____.____
2.	The amount the buyer paid to the seller:	$_____.____
ADD 1 and 2. This is subtotal A:		$_____.____
3.	The contract price:	$_____.____
4.	The expenses the buyer saved:	$_____.____
ADD 3 and 4. This is subtotal B:		$_____.____

SUBTRACT subtotal B from subtotal A.

Subtotal A	$_____.____
minus	
Subtotal B	$_____.____
This is subtotal C:	$_____.____

QUESTION NO. 3: Did the buyer reasonably incur expenses in [inspection / receipt / transportation / care / custody] of goods the buyer rightfully rejected?

Answer: ____ (*yes or no*)

If your answer is "yes," state the amount: $_____.____

QUESTION NO. 4: Did the buyer incur commercially reasonable [charges / expenses / commissions] in connection with the purchase of substitute goods?

Answer: ____ (yes or no)

If your answer is "yes," state the amount: $_____.____

QUESTION NO. 5: Did the buyer incur other losses resulting from general or particular requirements or needs which the seller had reason to know at the time of contracting and which the buyer could not reasonably have prevented by the purchase of substitute goods or otherwise?

Answer: ____ (yes or no)

If your answer is "yes," state the amount: $_____.____

QUESTION NO. 6: Did the buyer sustain an injury to person or property as a proximate result of any breach of warranty?

Answer: ____ (yes or no)

If your answer is "yes," state the amount: $_____.____

QUESTION NO. 7: Did the buyer sustain any other reasonable expenses incident to the seller's delay or other breach?

Answer: ____ (yes or no)

If your answer is "yes," state the amount: $_____.____

ADD the amount in the answers to Questions No. 3 through No. 7 to the amount in QUESTION NO. 2, subtotal C.

These are the buyer's TOTAL DAMAGES: $_____.____

History

M Civ JI 241.02 was added February 1987.

M Civ JI 241.14 Form of Verdict: Contract Damages—UCC: Buyer's Breach by Nonacceptance or Repudiation—Seller Resells—Seller's Damages

We, the jury, make the following answers to the questions submitted by the Court:

QUESTION NO. 1: Was there [a contract / an enforceable contract] for the sale of goods between the buyer and the seller?

Answer: ____ (*yes or no*)

If your answer is "no," do not answer any further questions.

QUESTION NO. 2: Did the buyer breach the contract?

Answer: ____ (yes or no)

If your answer is "no," do not answer any further questions.

QUESTION NO. 3: Was the seller's resale in good faith and commercially reasonable?

Answer: ____ (yes or no)

If your answer is "no," do not answer any further questions.

If your answer is "yes," make the following determinations:

Unpaid contract price:	$_____.____
SUBTRACT from this the resale price:	$_____.____
Subtotal A:	$_____.____
SUBTRACT from subtotal A expenses the seller saved, if any:	$_____.____
Subtotal B:	$_____.____

QUESTION NO. 4: Did the seller incur any commercially reasonable [charges / expenses / commissions] after the buyer's breach in stopping delivery, or in [transportation / care / custody] of goods, or in connection with the return or resale of goods, or otherwise resulting from the buyer's breach?

Answer: ____ (yes or no)

If your answer is "yes," state the amount: $_____.____

ADD the amount from QUESTION NO. 4 to subtotal B from QUESTION NO. 3.

Amount from QUESTION NO. 4:	$_____.____
Subtotal B from QUESTION NO. 3:	$_____.____
These are the seller's TOTAL DAMAGES:	$_____.____

History

M Civ JI 241.14 was added February 1987.

M Civ JI 241.15 Form of Verdict: Contract Damages--UCC: Buyer's Breach by Nonacceptance or Repudiation--Seller's Damages

We, the jury, make the following answers to the questions submitted by the Court:

QUESTION NO. 1: Was there [a contract / an enforceable contract] for the sale of goods between the buyer and the seller?

Answer: ____ (*yes or no*)

If your answer is "no," do not answer any further questions.

QUESTION NO. 2: Did the buyer breach the contract?

Answer: ____ (yes or no)

If your answer is "no," do not answer any further questions.

If your answer is "yes," make the following determinations:

Unpaid contract price:	$_____.____
SUBTRACT from this the market price:	$_____.____
Subtotal A:	$_____.____
SUBTRACT from subtotal A expenses the seller saved, if any:	$_____.____
Subtotal B:	$_____.____

QUESTION NO. 3: Did the seller incur any commercially reasonable [charges / expenses / commissions] after the buyer's breach in stopping delivery, or in [transportation / care / custody] of goods, or in connection with the return or resale of goods, or otherwise resulting from the buyer's breach?

Answer: ____ (yes or no)

If your answer is "yes," state the amount: $_____.____

ADD the amount from QUESTION NO. 3 to subtotal B from QUESTION NO. 2: $_____.____

These are the seller's damages, unless you determine that these damages will not put the seller in as good a position as [he / she / it] would have been in if the buyer performed. If [his / her / its] position is as good, do not answer any further questions.

If [his / her / its] position is not as good, then make the following determinations.

NUMBER I: State the amount of profit, including reasonable overhead, which the seller would have made if the buyer had performed: $_____.____

NUMBER II:

ADD	a.	the amount of payments the buyer made to the seller, if any:	$_____.____
		to	
	b.	the seller's proceeds from resale, if any:	$_____.____
		Total for NUMBER II:	$_____.____

SUBTRACT the total for NUMBER II
from the amount in NUMBER I.

This is subtotal X: $_____.____

QUESTION NO. 4: Did the seller incur any commercially reasonable [charges / expenses / commissions] after the buyer's breach in stopping delivery, or in [transportation / care / custody] of goods, or in connection with the return or resale of goods, or otherwise resulting from the buyer's breach?

Answer: ____ (*yes or no*)

If your answer is "yes," state the amount: $_____.____

QUESTION NO. 5: Did the seller have costs reasonably incurred as a result of the buyer's breach?

Answer: ____ (yes or no)

If your answer is "yes," state the amount: $_____.____

ADD the amounts from Questions No. 4 and 5 to subtotal X.

These are the seller's TOTAL DAMAGES: $_____.____

History

M Civ JI 241.15 was added February 1987.