

**FROM THE COMMITTEE ON
MODEL CIVIL JURY INSTRUCTIONS**

The Committee has adopted the following amended model civil jury instructions effective January 23, 2020. It has also deleted one instruction.

ADOPTED

The Committee on Model Civil Jury Instructions has amended numerous instructions designed to make uniform to the extent possible the jury instructions that discuss the burden of proof. In order to facilitate review of the amended instructions, the amended instructions have been temporarily grouped into several categories. The categories are General, Commercial, Products Liability/Malpractice/No-Fault, Other Tort, Probate, Landlord-Tenant, and Employment/ Discrimination Instructions. The Committee has also deleted one outdated burden of proof instruction.

General Instructions

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

[INSTRUCTION DELETED]

Comment

This instruction was deleted because it applied solely to lawsuits filed on or before March 28, 1996, when the 1996 Tort Reform legislation took effect.

History

M Civ JI 16.02 is a revision of SJI 21.02. Amended September 1980. Deleted January 2020.

M Civ JI 16.02A Burden of Proof in Negligence Cases

The plaintiff has the burden of proving:

- 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.

** 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 den, 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.

This instruction was renumbered to replace M Civ JI 16.02, which was deleted in January 2020 because it only applied to cases filed on or before March 28, 1996.

History

M Civ JI 16.08 was added June 1997. Amended March 1999. Amended January 2020.

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 the defendant has proved [that / any one of those] affirmative defense(s).

Note on Use

This instruction is to be given if accord and satisfaction, release, 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. Amended January 2020.

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 proving:

- (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 damages]
- (c) that the negligence of the defendant was a proximate cause of the [injuries / damages] to the plaintiff

Your verdict will be for the plaintiff on [his / her] claim, 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.

† (The defendant has the burden of proving 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 proving 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].

As to the defendant's counterclaim, [he / she] has the burden of proving:

- (a) that the plaintiff was negligent in one or more of the ways claimed by the defendant as stated to you in these instructions
- (b) that the defendant [was injured / sustained damages]
- (c) that the negligence of the plaintiff was a proximate cause of the [injuries / damages] to the defendant

Your verdict will be for the defendant on [his / her] counterclaim if the defendant has proved all of those elements. Your verdict will be for the plaintiff if the defendant has failed to prove any one of those elements.

† (The plaintiff has the burden of proving 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.)

‡ (The plaintiff has the burden of proving that [name of nonparty] was negligent, and that the negligence of [name of nonparty] was a proximate cause of the [injuries / damages] to the defendant.)

† (If your verdict is for the defendant, then you must determine the percentage of fault for each party or nonparty whose negligence was a proximate cause of defendant'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 defendant's [injuries / damages].

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.

† (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].

Comment

The 2013 amendment changed “proximate contributing cause” to “proximate cause” in two places. The new paragraphs addressing the defendant's burden of proof are taken from M Civ JI 16.08, now M Civ JI 16.02A.

History

M Civ JI 16.05 is a revision of SJI 21.04. Amended September 1980. Amended May 2013. Amended January 2020.

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.

[*Name of third-party plaintiff*] has the burden of proving:

- a. 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
- b. 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 proving 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 tortfeasors:

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. Amended January 2020.

Commercial Instructions

M Civ JI 112.10 Franchise Investment Law—Burden of Proof

Plaintiff has the burden of proving:

(1) that in connection with the filing, offer, sale, or purchase of any franchise, the defendant:

(a) employed any device, scheme, or artifice to defraud; or

(b) made any untrue statement of a material fact or failed to state a material fact that was necessary to prevent the statements that were made from being misleading under the circumstances; or

(c) engaged in any act, practice, or course of business that operated as a fraud or deceit upon any person; and

(2) that the plaintiff justifiably relied on the alleged misrepresentation or omission; and

(3) that the plaintiff suffered 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.

History

Added July 2017. Amended January 2020.

M Civ JI 113.07 Bona Fide Error—Definition

Defendant claims that, if there was a violation of the Consumer Protection Act, it was a bona fide error, which will limit the amount of recovery. If you find a violation of the act to have occurred, you will decide if this defense has been established.

To establish this defense, the defendant has the burden of proving:

(a) that the violation occurred because of a good faith error on the part of the defendant; and

(b) that defendant maintained procedures reasonably adapted to avoid this error.

If you find that defendant has proved both of those elements, then you must find that the violation was a bona fide error. If both of those elements were not proved, the violation is not a bona fide error.

Note on Use

This instruction should be given if bona fide error is pled.

Comment

The bona fide error defense, limiting recovery to actual damages, is set forth at MCL 445.911(6). See *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 593 NW2d 595 (1999), and *Temborius v Slatkin*, 157 Mich App 587, 403 NW2d 821 (1986).

History

M Civ JI 113.07 was added July 2012. Amended January 2020.

M Civ JI 113.09 Unfair, Unconscionable, or Deceptive Methods, Acts, or Practices—Burden of Proof

Plaintiff has the burden of proving:

- (a) that defendant engaged in trade or commerce;
- (b) that defendant committed one or more of the prohibited methods, acts, or practices alleged by plaintiff; and
- (c) that plaintiff suffered a loss as a result of defendant's violation of the act.

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

When the particular statutory provision the plaintiff is proceeding under includes an element of fraud, the Court should include an instruction defining that element. *Brownlow v McCall Enterprises*, 315 Mich App 103 (2016).

History

M Civ JI 113.09 was added July 2012. Amended January 2020.

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:

- (a) that plaintiff had a contract with [*name of other party to contract*] at the time of the claimed interference.
- (b) that defendant knew of the contract at that time.
- (c) that defendant intentionally interfered with the contract.
- (d) that defendant improperly interfered with the contract.
- (e) that defendant's conduct caused [*name of breaching party*] to breach the contract.
- (f) that plaintiff was damaged as a result of defendant's conduct.

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 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 Torts, 2d, § 766 comment i, pp 11–12.

History

M Civ JI 125.01 was added March 1993. Amended January 2020.

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:

- (a) that plaintiff had a business relationship or expectancy with [*name of third party*] at the time of the claimed interference.
- (b) that the business relationship or expectancy had a reasonable likelihood of future economic benefit for plaintiff.
- (c) that defendant knew of the business relationship or expectancy at the time of the claimed interference.
- (d) that defendant intentionally interfered with the business relationship or expectancy.
- (e) that defendant improperly interfered with the business relationship or expectancy.
- (f) that defendant's conduct caused [*name of third party*] to disrupt or terminate the business relationship or expectancy.
- (g) that plaintiff was damaged as a result of defendant's conduct.

Your verdict will be for the plaintiff if you find that the plaintiff has proved all of those elements.

Your verdict will be for the defendant if you find that the plaintiff has failed to prove any one of those 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. Amended January 2020.

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 by clear and convincing evidence:

(a) that defendant made a representation of [a material fact / material facts].

(b) that the representation was false when it was made.

(c) that 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) that defendant made the representation with the intent that plaintiff rely on it.

(e) that plaintiff relied on the representation.

(f) that plaintiff was damaged as a result of [his / her / its] reliance.

Your verdict will be for the plaintiff if the plaintiff has proved all of those elements by clear and convincing evidence.

Your verdict will be for the defendant if the plaintiff has failed to prove any one of those 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 8.01.

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 (CA 6, 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. Amended January 2020.

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 by clear and convincing evidence:

- (a) that defendant failed to disclose [a material fact / material facts] about [*insert subject matter of the claim*].
- (b) that defendant had actual knowledge of the [fact / facts].
- (c) that defendant's failure to disclose the [fact / facts] caused plaintiff to have a false impression.
- (d) that when defendant failed to disclose the [fact / facts], defendant knew the failure would create a false impression.
- (e) that when defendant failed to disclose the [fact / facts], defendant intended that plaintiff rely on the resulting false impression.
- (f) that plaintiff relied on the false impression.
- (g) that plaintiff was damaged as a result of [his / her / its] reliance.

Your verdict will be for the plaintiff if the plaintiff has proved all of those elements by clear and convincing evidence.

Your verdict will be for the defendant if the plaintiff has failed to prove any one of those 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 8.01.

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 (CA 6, 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. Amended January 2020.

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 by clear and convincing evidence:

- (a) that defendant promised ~~that~~ [*describe promise alleged by plaintiff*].
- (b) that at the time defendant made the promise, [he / she / it] did not intend to keep it.
- (c) that defendant made the promise with the intent that plaintiff rely on it.
- (d) that plaintiff relied on the promise.
- (e) that plaintiff was damaged as a result of [his / her / its] reliance.

Your verdict will be for the plaintiff if the plaintiff has proved all of those elements by clear and convincing evidence.

Your verdict will be for the defendant if the plaintiff has failed to prove any one of those 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 8.01.

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 (CA 6, 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. Amended January 2020.

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:

- (a) that defendant made a representation of [a material fact / material facts].
- (b) that the representation was made in connection with the making of a contract between plaintiff and defendant.
- (c) that the representation was false when it was made.
- (d) that plaintiff would not have entered into the contract if defendant had not made the representation.
- (e) that plaintiff had a loss as a result of entering into the contract.

(f) that plaintiff's loss benefited the defendant.

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

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. Amended January 2020.

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:

(a) that the defendant made a promise to [the plaintiff / *[*name of other person*]] that was clear and definite.

(b) that 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) that the plaintiff did [take / refrain from] some action in reliance on the promise.

(d) that the plaintiff was damaged as a result of [his / her / its] reliance.

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 failed to prove any one of those 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 n 6. 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 its performance is 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. Amended January 2020.

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

The buyer has the burden of proving:

- (a) that the seller made an express warranty, and
- (b) that the goods did not conform to the warranty at the time of sale or within the time period covered by the warranty, and
- (c) that 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) that 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 those elements.

Your verdict will be for the seller if you find that the buyer failed to prove any one of those 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, 1977).

History

M Civ JI 140.42 was added January 1987. Amended January 2020.

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

The buyer has the burden of proving:

- (a) that at the time of [tender of delivery / delivery], the goods were not merchantable, and
- (b) that 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) that 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 the buyer has proved all of those elements.

Your verdict will be for the seller if the buyer has failed to prove any one of those elements *(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, 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. Amended January 2020.

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 the buyer has proved all of those elements.

Your verdict will be for the seller if the buyer has failed to prove any one of those elements, 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. Amended January 2020.

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 proving:

- (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.]

Your verdict will be for [*name of party*] if [*name of party*] has proved all of those elements. Your verdict will be for [*name of party being sued on contract*] if [*name of party*] has failed to prove any one of those elements.

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:

- ** (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. Amended January 2020.

Products Liability/Malpractice/No-Fault Instructions

M Civ JI 25.12 Express Warranty—Burden of Proof

The plaintiff has the burden of proving:

- (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 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

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. Amended January 2020.

M Civ JI 25.22 Implied Warranty—Burden of Proof

The plaintiff has the burden of proving:

(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 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

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, January 2020.

M Civ JI 25.32 Negligent Production—Burden of Proof

The plaintiff has the burden of proving:

- (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 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.

† (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. Amended January 2020.

M Civ JI 30.03 Burden of Proof

The plaintiff has the burden of proving:

- (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 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

M Civ JI 30.03 was added February 1, 1981. Amended January 2020.

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 proving:

- (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 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 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), recon den, 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); *Settington v Pontiac General Hospital*, 223 Mich App 594; 568 NW2d 93 (1997).

History

M Civ JI 30.30 was added August 2000. Amended January 2020.

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 proving:

- (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.

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. Amended January 2020.

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 proving 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 den, 421 Mich 862 (1985); *Nash v Detroit Automobile Inter-Insurance Exchange*, 120 Mich App 568; 327 NW2d 521 (1982), lv den, 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. Amended January 2020.

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 proving:

- (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 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.)

†(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, January 2020.

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 proving:

(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 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.)

†(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, January 2020.

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 proving:

- (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 the plaintiff has proved all of those elements, then (subject to the rule of comparative negligence, which I will explain) the 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 the plaintiff has proved all of those elements, 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 proving 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, July 2017, January 2020.

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:

- (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 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

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. Amended January 2020.

Other Tort Instructions

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

The plaintiff has the burden of proving:

- (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(6)) 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(6). 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, January 2020.

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

The plaintiff has the burden of proving:

- (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(6). See Introduction to this chapter, part IV.

Subsection (1) 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, January 2020.

M Civ JI 80.02 Dog Bite Statute—Burden of Proof

The plaintiff has the burden of proving:

- (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 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 February 1981. Amended September 2006, January 2020.

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

Plaintiff has the burden of proving:

- (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. Amended January 2020.

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

Plaintiff has the burden of proving:

- (a) that defendant intentionally 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.

Comment

Doe v Henry Ford Health System, 308 Mich App 592 (2014)(holding that the disclosure of private facts must be intentionally done).

History

Added July 2012. Amended May 2016, January 2020.

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:

- (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. Amended January 2020.

M Civ JI 115.20 Assault—Burden of Proof

Plaintiff has the burden of proving:

- (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

Your verdict will be for plaintiff if the plaintiff has proved all of those elements (and the defendant has failed to prove the defense of [*describe defense*]). Your verdict will be for the defendant if the plaintiff has failed to prove any one of those elements.

History

M Civ JI 115.20 was added September 1982. Amended January 2020.

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].

Your verdict will be for plaintiff if the plaintiff has proved all of those elements (and

the defendant has failed to prove the defense of [*describe defense*]). Your verdict will be for the defendant if the plaintiff has failed to prove any one of those elements.

History

M Civ JI 115.21 was added September 1982. Amended January 2020.

M Civ JI 116.20 False Arrest—Burden of Proof

Plaintiff has the burden of proving:

- (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

Your verdict will be for plaintiff if the plaintiff has proved all of those elements (and the defendant has failed to prove the defense of [*describe defense*]). Your verdict will be for the defendant if the plaintiff has failed to prove any one of those elements.

History

M Civ JI 116.20 was added September 1982. Amended January 2020.

M Civ JI 116.21 False Imprisonment—Burden of Proof

Plaintiff has the burden of proving:

- (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

Your verdict will be for plaintiff if the plaintiff has proved all of those elements (and the defendant has failed to prove the defense of [*describe defense*]). Your verdict will be for the defendant if the plaintiff has failed to prove any one of those elements.

History

M Civ JI 116.21 was added September 1982. Amended January 2020.

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

Plaintiff has the burden of proving:

(a) that defendant caused or continued a prosecution against the plaintiff.

(b) that the proceeding was terminated in favor of the plaintiff.

(c) that defendant initiated or continued the proceeding without probable cause.

(d) that 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*].)

Your verdict will be for plaintiff if the plaintiff has proved all of those elements (and the defendant has failed to prove the defense of [*describe defense*]). Your verdict will be for the defendant if the plaintiff has failed to prove any one of those elements.

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 2002, January 2020.

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

Plaintiff has the burden of proving:

- (a) that defendant [instituted / continued / procured] a civil proceeding against the plaintiff.
- (b) that the proceeding was terminated in favor of the plaintiff.
- (c) that defendant brought or continued the proceeding without probable cause.
- (d) that 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) that plaintiff sustained special injury resulting in damages.

Your verdict will be for plaintiff if the plaintiff has proved all of those elements (and the defendant has failed to prove the defense of [*describe defense*]). Your verdict will be for the defendant if the plaintiff has failed to prove any one of those elements.

History

M Civ JI 117.21 was added September 1982. Amended January 2020.

M Civ JI 118.05 Libel, Slander—Burden of Proof

Plaintiff has the burden of proving:

- (a) that defendant made the statement *(of fact) complained of to a third person by [printing / writing / signs / pictures / words / gestures], and
- (b) † that (the statement was of and concerning the plaintiff, and)
- (c) that the statement was false in some material respect, and the statement had a tendency to harm the plaintiff's reputation, and
- (d) ‡ that (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 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

*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 Torts, 2d, § 566, pp 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 den, 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 den, 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, January 2020.

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:

- (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. Amended January 2020.

Probate Instructions

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

The contestant has the burden of proving 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, January 2020.

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 the proponent has proved all of those elements (and the contestant has failed to prove the defense of [describe defense].

Your verdict will be that the will is not valid the proponent has failed to prove any one of those elements (or if you find that the contestant has proved the defense of [describe defense].

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, January 2020.

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.

The petitioner has the burden of proving:

- (a) that [*name of decedent*] did not intend the account to become the property of the survivor, or
- (b) that 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) that [the account was opened / the survivor's name was added to the account] as a result of fraud, or
- (d) that [the account was opened / 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); *Senait 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. Amended January 2020.

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:

- (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. Amended January 2020.

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

The contestant has the burden of proving 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, January 2020.

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.

Your verdict will be that the trust is valid if the proponent has proved all of those elements (and the contestant has failed to prove the defense of [describe defense]).

Your verdict will be that the trust is not valid if the proponent has failed to prove any one of those elements (or if you find that the contestant has proved the defense of [describe defense]).

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. Amended January 2020.

Landlord-Tenant Instructions

M Civ JI 100.02 Rent Action: Burden of Proof

The landlord has the burden of proving:

- (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 proving:

- (a) that **(the landlord knew or should have known of the [need for repairs / condition complained of] or the landlord's actions excused notice); and
- (b) that 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 met [his / her] burden of proof, and you find that the tenant has not met [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 met [his / her] burden of proof, your verdict should be for the tenant.

If you find that the landlord has met [his / her] burden of proof, and you find that the tenant has met [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 8.01 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. Amended January 2020.

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

The landlord has the burden of proving 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 proving 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 8.01 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. The defense of retaliatory eviction is not applicable where the landlord is seeking repossession of premises upon the expiration of the term of a fixed lease. *Frenchtown Villa v Meadors*, 117 Mich App 683; 324 NW2d 133 (1982).

History

M Civ JI 101.04 was added April 1, 1981. Amended January 2020.

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

The landlord has the burden of proving 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 proving 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 8.01 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. The defense of retaliatory eviction is not applicable where the landlord is seeking repossession of premises upon the expiration of the term of a fixed lease. *Frenchtown Villa v Meadors*, 117 Mich App 683; 324 NW2d 133 (1982).

History

M Civ JI 101.05 was added April 1, 1981. Amended January 2020.

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

The landlord has the burden of proving 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 met [his / her] burden of proof on this claim, then the landlord has the burden of proving 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 met [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 8.01 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. The defense of retaliatory eviction is not applicable where the landlord is seeking repossession of

premises upon the expiration of the term of a fixed lease. *Frenchtown Villa v Meadors*, 117 Mich App 683; 324 NW2d 133 (1982).

History

M Civ JI 101.06 was added April 1, 1981. Amended January 2020.

Employment/Discrimination Instructions

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

Plaintiff has the burden of proving:

(a) that defendant [discharged / failed to hire / failed to promote / failed to train / harassed / [other]] the plaintiff, and

(b) 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 plaintiff if the plaintiff has proved both of those elements.

Your verdict will be for the defendant if the plaintiff has failed to prove both of those elements.

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. Amended January 2020.

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

Plaintiff has the burden of proving:

(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.

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

MCL 37.2701. *Barrett v Kirtland Com College*, 245 Mich App 306 (2002).

History

Added July 2012. Amended January 2020.

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:

(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 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

MCL 37.2202(1)(a); MCL 37.2103(i); *Chambers v Tretco, Inc*, 463 Mich 297 (2000); *Haynie v Michigan*, 468 Mich 302 (2003); *Champion v Nationwide Security*, 450 Mich 702 (1996).

History

Added June 2006. Amended January 2020.

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:

(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 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

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. Amended January 2020.

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:

(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 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

Radtke v Everett, 442 Mich. 368 (1993); *Chambers v Trettco, Inc*, 463 Mich 297 (2000).

History

Added June 2006. Amended January 2020.

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

Plaintiff has the burden of proving:

(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 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

MCL 37.1202

History

Added September 2005. Amended January 2020.

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

Plaintiff has the burden of proving:

(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 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

MCL 37.1202

History

Added September 2005. Amended January 2020.

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

Plaintiff has the burden of proving:

(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 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.

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 the defendant if the 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. Amended January 2020.

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

Plaintiff has the burden of proving:

(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.

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

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. Amended January 2020.

M Civ JI 106.29 Public Accommodation—Burden of Proof

Plaintiff has the burden of proving:

(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) hat (he/she) suffered 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.

Note on Use

Particular subparagraphs may be deleted based on the facts of the case.

History

Added September 2005. Amended January 2020.

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

Plaintiff has the burden of proving:

(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.

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

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. Amended January 2020.

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

Plaintiff has the burden of proving:

(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.

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

Particular subparagraphs may be deleted based on the facts of the case.

Comment

MCL 37.1402

History

Added September 2005. Amended January 2020.

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

Plaintiff has the burden of proving:

- (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.

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

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. Amended January 2020.

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

Plaintiff has the burden of proving:

- (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 the plaintiff has proved all of those 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, January 2020.

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

Plaintiff has the burden of proving:

- (a) that [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. Amended January 2020.

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

Plaintiff has the burden of proving:

(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.

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

MCL 37.2701. *Barrett v Kirtland Com College*, 245 Mich App 306 (2002).

History

Added July 2012. Amended January 2020.

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:

(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 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

Diamond v Witherspoon, 265 Mich App 673 (2005).

History

Added December 2008. Amended January 2020.

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

The plaintiff has the burden of proving:

(a) that *(an employment relationship existed between plaintiff and defendant.)

(b) that the employment relationship could not be terminated unless defendant had good or just cause.

(c) that plaintiff's employment was terminated by the defendant.

(d) † that plaintiff was performing the duties of [his / her] employment up to the time of termination.

(e) that 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 the plaintiff has proved each of those elements, and 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 the plaintiff has failed to prove any one of those elements, or if 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 den, 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. Amended January 2020.

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

Plaintiff has the burden of proving:

- (a) * that (an employment relationship existed between plaintiff and defendant.)
- (b) that the employment relationship could not be terminated unless defendant was dissatisfied with [plaintiff / or / plaintiff's work].
- (c) that plaintiff's employment was terminated by the defendant.
- (d) that defendant was not dissatisfied with [plaintiff / or / plaintiff's work].
- (e) that 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 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

*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. Amended January 2020.

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

Plaintiff has the burden of proving:

- (a) * that (an employment relationship existed between plaintiff and defendant.)
- (b) that the employment relationship could only be terminated in accordance with [*describe special conditions or performance standards*].
- (c) that plaintiff's employment was terminated by the defendant.
- (d) that the termination of employment was not in accordance with [*describe special conditions or performance standards*].
- (e) that plaintiff suffered economic damages as a result of the termination.

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

*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. Amended January 2020.

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

Plaintiff has the burden of proving:

- (a) * that (an employment relationship existed between plaintiff and defendant.)
- (b) that the employment relationship could only be terminated in accordance with [*describe procedural terms or conditions*].
- (c) that plaintiff's employment was terminated by the defendant.
- (d) that the termination of employment was not in accordance with [*describe procedural terms or conditions*].
- (e) that plaintiff suffered economic damages as a result of the termination.

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

*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 den, 418 Mich 899 (1983).

History

M Civ JI 110.13 was added December 1990. Amended January 2020.

The Michigan Supreme Court has delegated to the Committee on Model Civil Jury Instructions the authority to propose and adopt Model Civil Jury Instructions. MCR 2.512(D). In drafting Model Civil Jury Instructions, it is not the committee's function to create new law or anticipate rulings of the Michigan Supreme Court or Court of Appeals on substantive law. The committee's responsibility is to produce instructions that are supported by existing law.

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